

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ROLLING HILLS EMPLOYEES, LOCAL 1947,
AFSCME, AFL-CIO

and

MONROE COUNTY

Case 132
No. 54267
MA-9609

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Sparta, Wisconsin 54656, appeared on behalf of the Union.

Mr. Kenneth Kittleson, Personnel Director, Monroe County, Monroe County Courthouse, P.O. Box 202, Sparta, Wisconsin 54656-0202, appeared on behalf of the County.

ARBITRATION AWARD

On July 5, 1996, the Wisconsin Employment Relations Commission received a joint request from the Rolling Hills Employees, Local 1947, AFSCME, and Monroe County seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a dispute between the parties. The undersigned was so designated, and a hearing was conducted on October 29, 1996 in Sparta, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were submitted and exchanged by February 26, 1997.

This dispute involves the discharge of employee Amy Owens.

BACKGROUND AND FACTS

Amy Owens, the grievant, was employed as a Dietary Aide in the kitchen of the Rolling Hills Nursing Home. Ms. Owens was originally hired as a part-time employe and subsequently became full-time. She worked in the kitchen for all but a two-month period from her date of hire in May of 1992 to the date of her discharge, March 28, 1996.

Prior to the date of her discharge, Ms. Owens had been disciplined on a number of occasions. On February 14, 1994, she was given a verbal warning relative to her work attendance. On April 13, 1994, Ms. Owens was given a written warning relative to her attendance. Later in 1994, Ms. Owens was given a three-day suspension for her attendance. She grieved the suspension, and it was reduced to 1 1/2 days. The settlement of Ms. Owens' grievance was a part of the resolution of a larger dispute between the Union and the Employer relative to the Employer's overall attendance policy. A number of grievances were resolved, and

the policy was somewhat modified.

On July 18, 1995, Ms. Owens was given a verbal warning relative to her attendance.

On January 11, 1996, Ms. Owens was given the following letter, which accompanied a three-day suspension:

Dear Amy:

This will confirm our discussion in my office in the presence of Diane Miller, Terry Frick, Carol Slawson, and Doug Sullivan on January 10, 1996.

This letter is a written warning to confirm a three day suspension for reporting to work and working under the impairment of intoxicants mixed with prescription medication, on January 7, 1996, day shift.

As outlined by your department head, the suspension without pay entails January 15, 16 and 17 of this year. I have restored the pay for January 7 hours not worked, even though a measure of sick leave abuse is involved, as a good faith move so the actual penalty doesn't exceed three days pay. You are at step #3 in the disciplinary process.

If you receive a discipline during the 365 days beginning today, your employment with Rolling Hills will be terminated. Please govern your actions accordingly.

Sincerely,

Gene Schwarze /s/
Gene Schwarze, NHA
Administrator

Ms. Owens suffered a shoulder injury while working in the kitchen in May, 1995. The injury resulted in her missing one month of work, and was treated as a Worker's Compensation injury. Ms. Owens returned to work in mid-June, 1995, and was put on light duty. She returned to regular status in July, 1995.

Ms. Owens suffered a reoccurrence of her injury in October of 1995. The same shoulder was reinjured, resulting in approximately five to six weeks of therapy ending in late November,

1995. There was no lost time resulting from this second injury.

There was a second reoccurrence (third injury) in February, 1996. Owens missed one week of work and thereafter returned to light duty. She was on light duty as of the date of her discharge and was receiving therapy in LaCrosse, Wisconsin. On March 18, 1996, she saw her doctor, for a follow-up exam in connection with her injury. She was given a return to work status report indicating that she was to participate in a work-hardening program, that her condition was improved, that she was to see a consultant (K. Boland, a psychologist) and that she was released to perform light duty. It was Owens' testimony that she was experiencing considerable anxiety over her injury.

Owens' testified that she talked to Diane Miller, the Dietitian and Department Head. According to Owens, they discussed her work status, and Owens indicated to Miller that she was going to see a psychologist. According to Owens, Miller indicated approval.

On March 22, 1996, Ms. Owens reported to work. She was scheduled for therapy in LaCrosse at 9:00 a.m. and left her work site at 8:00 a.m. to keep her appointment. During the course of her therapy, she was told that if the work-hardening program did not help, it was the "last stop". Owens understood that to mean that she would no longer be able to perform her job if the work-hardening program failed. Following therapy, Ms. Owens returned to work shortly before 12:00 Noon. It was her testimony that she was upset, that she sat and looked out the window, and began to cry. Ms. Owens shares an office with her immediate supervisor, Terry Frick. The two worked independently in the same office for approximately 15 to 20 minutes. It was Frick's testimony that he was not aware that Ms. Owens was upset or crying. It was Ms. Owens' testimony that she has a difficult time talking to Frick, that he ignores her, and/or is dismissive. At approximately 12:25-12:30 Frick left for lunch.

Shortly after Frick left, Agnes Schmitz, a co-worker of Owens who regularly works as a lead worker, came into the room. Schmitz but was not in lead worker status as of 12:15 p.m. that day. Schmitz believed she had the authority to grant sick leave or vacation, if appropriate, in the absence of a supervisor. She had previously exercised that authority, on a number of occasions. Schmitz had previously allowed Owens to go home to care for a suddenly ill child. She had also sent a co-worker home on sick leave while Frick was on break. No discipline ensued from either of these occurrences. Neither Schmitz nor either of the employees involved were advised that their actions were in any way inappropriate.

Schmitz testified that she observed Owens crying and that Owens indicated that she "had to get out of here". Schmitz testified that she said, "Okay, you can go. Fill out a slip." According to Schmitz, Owens did fill out a vacation slip, and left it on Frick's desk. It was her testimony that Owens was visibly upset, and was shaking. Schmitz indicated that she knew that Frick was eating his lunch in the adjoining dining room. Vacation requests require one day advance notice. Schmitz indicated that she advised Owens to use vacation because Owens had no sick leave left.

It was Frick's testimony that he and Owens worked together for at least 20 minutes. He indicated that he was not aware that she was upset. It was his testimony that this incident occurred within minutes of his leaving, and that normally he would be paged in such an event. He was aware of Owens medical treatment, but not aware of her referral for psychological help.

It was Ms. Owens' testimony that she was distressed and upset upon her return to work. She indicated that she sat in the office, alongside Frick, but with her back to him for 15 to 20 minutes. She indicates that she stared out the window, and tried to clear her head. She testified that Agnes (Schmitz) came in and asked what was going on. Owens explained the work-hardening program and the fact that it was her last stop. She explained that she could not handle it anymore with everyone doing her job, and asked if she could leave. Schmitz told her to fill out a slip and that she could leave. She filled out a slip, left it on Frick's desk, and left.

Schmitz and Owens' accounts of the events of that afternoon are essentially identical.

It was Owens' testimony that from March 23 through March 28 she was not at work, but rather was participating in a work-hardening program. On March 28, she came to work to pick up her check. Her check was not there and she was called to a meeting with Gene Schwartze. During the course of that meeting, she was terminated. She filed a grievance which was denied by memo dated April 16, 1996. That memo, set forth below, summarizes the March 28th meeting as follows:

DATE: April 16, 1996

TO: Amy Owens
Carol Slawson, Local 1947 President

FROM: Gene Schwarze
Rolling Hills Administrator

REGARDING: Grievance 96-5

The Grievant was terminated March 28, 1996 for just cause following fair hearing and due process, namely abandoning her duties and leaving the premises without conferring with, or obtaining permission from her Supervisor on March 22.

On the latter described date, Amy was working in the kitchen and her Supervisor was present and visible. She abruptly told another employee that she "had to get out of here." and left.

During the fair hearing and due process interview on March 28, Amy was asked to explain her actions. She indicated that she (1) never thought about Terry, her Supervisor or about talking to him, and (2) was fixated on what her Physical Therapist had told her in her last work-hardening session. Neither will suffice for abandoning her job.

While the action on March 22, 1996 would stand alone for just cause, Amy's situation is made more dramatic by a written warning and a non-paid suspension she was given in January, 1996 which brought her at the time to step #3 of the four-step progressive disciplinary procedure, and a caution, written and verbal, at the time that any further disciplinary action would mean termination.

The demand in the grievance - forgiveness and expungement - is unreasonable and unjustified, and is the equivalent of asking for a gift.

This grievance is denied in full.

Gene Schwartze /s/

ISSUE

The parties stipulated the following issue:

Did the County violate the collective bargaining agreement when it terminated the grievant's employment on March 28, 1996? If so, what is the appropriate remedy?

The parties request that I retain jurisdiction over this matter for purposes of resolving any dispute over remedy, if a remedy is ordered.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 3 - MANAGEMENT RIGHTS

The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to, the following:

...

D. To suspend, discharge and take other disciplinary action against employees for just cause;

...

ARTICLE 4 - GRIEVANCE PROCEDURE

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Section 6. The County and Union representatives shall attempt to select a mutually agreeable arbitrator from the Wisconsin Employment Relations Commission (WERC). If a mutually agreed selection cannot be achieved, the WERC shall appoint an arbitrator. The arbitrator shall make his/her findings known in writing simultaneously to the County Personnel Director and the Union, within ten (10) days 1/ after his/her final decision, and this decision shall be final and binding on both parties. Disputes or differences regarding bargainable issues are expressly not subject to arbitration of any kind, notwithstanding any other provisions herein contained. The arbitrator shall have no right to amend, nullify, modify, ignore, or add to the provisions of the Agreement. His/her authority shall be limited to the extent that he/she should only consider and decide the particular issue or issues presented to him/her in writing by the Employer or the Union, and his/her interpretation of the meaning or application of the language of the Agreement. The party filing the grievance with the Wisconsin Employment Relations Commission shall be responsible for initial payment of the filing fee. The losing party shall assume the cost of the filing fee and reimburse the filing party, if appropriate, within thirty (30) days of receipt of the arbitrator's decision.

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ARTICLE 22 - GENERAL PROVISIONS

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1/ Both parties to this dispute waived application of the ten-day provision.

Section 5. The County shall not discipline or discharge an employee except for just cause. Any employee discharged and later through proper hearing is found innocent of the charges, said employee shall return to his/her former job with the County paying said employee all wages and benefits he/she would have earned had he/she been working, less any compensation received from Unemployment Compensation or other sources during the period of discharge.

. . .

POSITIONS OF THE PARTIES

It is the position of the Union that Ms. Owens became distraught at the prospect that she might be unable to return to work. She felt she had to leave, asked the lead worker if she was permitted to leave, and was advised that if she filled out a vacation request form, she could leave. Both Owens and Schmitz testified that Owens filled out a vacation request slip and placed it on the supervisor's desk. This was done outside Mr. Frick's presence. He was in a different room and neither present nor visible. The Union contends that Owens was working on light duty, and that her absence did not place an undue hardship upon her co-workers, the Employer, or the residents. The Union acknowledges the County's contention that Schmitz was not being paid as a lead worker on March 22, and therefore had no authority to make any such decision. The Union contends that Schmitz testified that she is recognized as an authority figure in the kitchen in the absence of the immediate supervisor, and Dietitian. The Union notes that Schmitz has approved leave for other employees when Frick was at work, and those other employees were not disciplined.

On cross-examination, the County asked Ms. Schmitz why she allowed Owens to leave, and Schmitz responded, "If you had seen her, you would have let her leave, too." It is the Union's view that Owens acted in good faith. She did not abandon her position, rather, she went to Schmitz, who Owens recognized as a lead worker, and requested to leave work. Schmitz directed Owens to fill out a vacation request form and she did so. Owens did that which she was asked.

Owens testified that she gave a copy of the return to work document to Diane Miller on March 18, 1996. Owens further testified that she advised Miller that she had been referred to Dr. Boland, for emotional problems. The Union contends that the management of Rolling Hills owed Owens assistance with her emotional problem, rather than firing her for them.

The County contends that the grievant abandoned her duties and left the work site without conferring with, or obtaining permission from her supervisor on March 22, 1996. The employer contends that the grievant had a long and distinguished disciplinary record with the Employer;

most recently serving a three-day suspension for reporting to work and working under the influence of intoxicants and prescription medication, just two months prior to her termination. At that time, the grievant received written warning that any additional discipline in the ensuing year would result in the termination of her employment.

It is the Employer's contention that when the grievant indicated "I've got to get out of here", before hastily exiting the workplace on March 22, 1996, both she and her co-worker Agnes Schmitz, who was not in lead worker status at the time, knew that the supervisor, Terry Frick, was in close proximity in the next room, and was available for consultation. It is the Employer's view that Schmitz testified that she was aware that emergency vacation requests had to be submitted the prior calendar day, and also testified that she had never granted a vacation request while working in a lead worker capacity. The Employer contends that the attendance procedures were clear to departmental employees, and that all employees understood the need to report to their supervisor before leaving the premises.

The Employer notes that the work release provided that the grievant work light duty "until March 25, 1996, and then off for work-hardening period". In the view of the Employer, the grievant abandoned her job on March 22, and did not notify the Employer of her absence on March 23, March 24 or March 25, 1996, although released to work by her physician and scheduled to work by her supervisor.

DISCUSSION

There is a significant dispute of fact surrounding this proceeding. The parties dispute whether Owens was scheduled to work from March 23 through March 27. The Employer contends that she was scheduled to work. The Employer called two witnesses, Frick and Schwartze, neither of whom testified as to whether or not Owens was scheduled to work in the days following her hasty departure. It is the Union's contention that she was not scheduled to work March 23 through 27. Ms. Owens testified that she was "pulled from the job for work-hardening". She made reference to March 22 to 28. The return to work - status report indicates "return to work until 3/25 then off for work-hardening". Neither the discharge letter nor the summary of the grievance meeting make reference to the days following May 22.

What seems clear to me is that when Owens returned to work on March 22, she was upset. This was the third injury to the same shoulder and she had just been told that her employment was threatened. Her state of mind was such that she had been referred to a psychologist. All testimony supports the conclusion that Frick was unaware of Owen's distress.

Ms. Schmitz entered the room shortly after Frick left. She testified that she was confronted by a problem. Owens was an emotional mess. Schmitz believed that she was placed in a position where she had to act, and did so. She allowed Owens to go home, despite the fact the woman had no sick leave. It is questionable as to whether Schmitz had the actual authority to

authorize Owens to leave. Certainly Schmitz was aware that she was not in lead worker status. While it is questionable whether Schmitz possessed the actual authority, it appears from the circumstances surrounding this matter that in the minds of Schmitz and Owens, she possessed the apparent authority.

Frick was available, and Schmitz and Owens knew that fact. It appears that Schmitz should have asked Frick and did not. Schmitz felt a need to act. It was her testimony, which I credit, that she had sent a sick employe home before while Frick was on break, with no adverse consequence. I regard this as a gray area. However, Schmitz did tell Owens she could go home.

I believe the Employer was on notice that it was dealing with a woman (Owens) who was experiencing emotional difficulty. Her prior three day suspension involved a drug and alcohol incident. The woman had been subjected to repeated injuries and was undergoing medical, physical, and psychological treatment. Owens had confided her referral to a psychologist to Diane Miller. I do not attribute her comments to Miller immediately to Frick or Schwarze, but I do attribute them to the Employer for purposes of the discharge. Where the Employer has made a decision to discharge, I believe it incumbent upon Miller to come forward, as a part of the Employer's ongoing investigation into the existence of just cause, and to indicate that Owens was in sufficient psychological distress to require treatment.

From Ms. Owens' perspective, she was an emotionally distraught employe who had a distant relationship with Frick. She was closer to Schmitz. Her prior experience suggested that Schmitz had the authority to send her home. Schmitz had previously sent her home to care for an ill child. It is unclear from the record as to whether or not Frick had been on site when Schmitz released her to attend to her (Owen's) child. But it was Schmitz' unrebutted testimony that she had released another employe to go home while Frick was on break. I believe that the workplace norm allowed Schmitz, when working as a Lead Worker, the authority to exercise her judgment in sending an employe home where she regarded the circumstances warrant.

Schmitz was not in Lead Worker status. While that is relevant here, it more reflects upon Schmitz' behavior than Owens'. Schmitz was not disciplined for authorizing Owens' departure.

I am uncertain as to whether Owens was scheduled to work March 23 through March 27. The County first raised the matter in its post-hearing brief. The only testimony in the record on this matter is that of Owens who indicates that she was pulled from her job for work hardening. I credit that testimony.

Ms. Owens had been put through a series of progressive disciplines. I believe that they were sufficient in number and kind to put Owens fairly on notice that she was in disciplinary trouble. However, she did ask a "lead worker" to leave, and was given the okay. She did so in circumstances that were sufficiently ambiguous that I do not regard her request as inappropriate.

Owens approached an employe who appeared to have the authority to allow her to go home. I do not believe that her behavior in so doing is disciplinable. I recognize the fact that this is an employe who has witnessed a significant amount of prior discipline. I understand that she has been warned that future disciplinable behavior will result in her discharge. However, the behavior that leads to the discharge must itself be disciplinable behavior. I do not believe the Employer has established that to be the fact in this proceeding.

AWARD

The grievance is sustained.

REMEDY

The Employer is directed to reinstate Amy Owens and to make her whole, consistent with Article 22, for any wage and/or benefit losses she has incurred as a result of this discharge. The Employer is directed to expunge Owens file of reference to this matter.

JURISDICTION

I will retain jurisdiction in this matter for purposes of resolving any dispute which may arise with respect to the remedy.

Dated at Madison, Wisconsin, this 5th day of May, 1997.

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