BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BROWN COUNTY MENTAL HEALTH CENTER
EMPLOYEES, LOCAL 1901, AFSCME, AFL-CIO

and

BROWN COUNTY (MENTAL HEALTH CENTER)

Case 602
No. 54424
MA-9679

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. John C. Jacques, Assistant Corporation Counsel, appearing on behalf of Brown County.

ARBITRATION AWARD

The Employer and Union above are parties to a 1995-96 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Julie Bjorklund, protesting her discharge. The undersigned was appointed and held a hearing on December 4, 1996 in Green Bay, Wisconsin, where the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on February 17, 1997.

Issues:

The parties stipulated to the following:

1. Did the Employer have just cause to terminate Julie Bjorklund?

2. If not, what is the remedy?

Relevant Contractual Provisions:

> ARTICLE 26. GRIEVANCE PROCEDURE - DISCIPLINARY PROCEDURE (continued)
>
> DISMISSAL: No employee shall be discharged except for just cause. Any employee who is dismissed, except probationary, shall be given a written notice of the reasons for the action at the time of dismissal, and a copy of the notice shall be made a part of the employee's personal history record and a copy sent to the Union. Any employee who has been discharged may use the grievance procedure by giving written notice to his/her steward and his/her supervisor within ten (10) working days after dismissal. Such appeal shall go directly to arbitration. If the cause for discharge is dishonesty, intoxication on the job or drinking or use of illicit drugs on duty, and/or if an employee is convicted in the illicit sale of drugs or pushing drugs, the individual may be dismissed immediately from employment with no warning notice necessary.
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> DISCIPLINARY PROCEDURE: The progression of disciplinary action normally is, 1) oral, 2) written, 3) suspension, 4) dismissal. However, this should not be interpreted that this sequence is necessary in all cases, as the type of discipline will depend on the severity of the offense. Oral warnings shall be maintained in effect for six (6) months, written warnings for twelve (12) months and disciplinary suspensions for eighteen (18) months during which time a repetition of an offense can result in a more serious disciplinary action. In all such cases the employee shall have the right to recourse to the grievance procedure.
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> The grievance committee chairman or his designated representative shall be present during all disciplinary hearings and shall receive copies of all communications concerning disciplinary actions.

Discussion:

Only two of the essential facts in this matter are in dispute, but those are critical to the outcome. The non-controversial facts are as follows.

Grievant Julie Bjorklund worked for Brown County as a switchboard operator at the Mental Health Center, until she was discharged on May 3, 1996 for the following six stated

offenses:

> Willful and wanton disregard of the employer's interest by continued misconduct of:
>
> 1. Failure to report to work on time and at the start of her shift as scheduled for work on April 19, 1996.
>
> 2. Failure to honestly document her start time of April 19, 1996, when using a "Brown Card" for payroll purposes.
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> 3. Failure to punch in by use of the electronic time clock or manual punch clock on April 19, 1996.
>
> 4. Failure to notify her supervisor of her lateness prior to her absence for April 19, 1996.
>
> 5. Failure to honestly present the facts to her supervisor regarding her actual hours worked on April 19, 1996.
>
> 6. Failure to adhere to duly established work rules, policies, procedures and the standards of expected behavior for all employees.

It is undisputed that the grievant had four recent prior disciplinary events for similar reasons. On April 3, 1995 she received an oral warning for failure to report to work as scheduled and for failure to notify her supervisor of tardiness within fifteen minutes of the start time, related to an April 1, 1995 incident. A July 18, 1995 incident resulted in a written warning the following day, for the same two reasons. A September 17, 1995 incident of the same nature led to a one-day suspension, issued September 25. In this instance the "rule violated" on the disciplinary report referred to "repeated" failure to report and to notify, and to "deliberate" violation of the attendance work rule. And on February 13, 1996 the grievant was given a three-day suspension for the same causes, relating to a February 8 incident.

No grievance was filed with respect to any of these four incidents.

It is also undisputed that the grievant was late to work on Friday, April 19, 1996. The grievant was scheduled to work that day at the switchboard from 7:00 a.m. to 3:20 p.m., but had arranged to take the last four hours of her shift as vacation time. The grievant conceded arriving at work late and not punching in at all. The grievant also conceded not telling her supervisor, Lisa Harmann, that she had been late, testifying that she did not do so because she felt "for a couple of

minutes I didn't think it was necessary." 1/

The grievant did not punch in on April 19. On April 22, she filled out a "brown card" (a handwritten card used primarily when the time clock is not working, according to the grievant's testimony) and turned it in. But the grievant filled in as the date April 22, i.e. the date of filling out the card rather than the date the card was about. The grievant also filled in the time of 7:00 in a box marked "corrected in time" and 3:20 in a box marked "corrected out time". Supervisor Harmann signed the card on April 23. The payroll department subsequently refused to pay on the basis of this card, apparently because of the conflict between the written-in comment "no in punch" on the card and the date; the card shows a notation to the effect that the grievant had punched in on the 22nd. The grievant subsequently discovered that she had not been paid for April 19, and called the payroll office, which instructed her to fill out a fresh card.

The second card shows a "corrected in time" of 7:00, and no "corrected out time". It shows a supervisor's signature date of April 29.

The grievant testified that the reason she used the brown card was because the time clock is located in an area remote from the front door, where her switchboard is, and that she was already running late. She testified that the entry of "7:00" on both cards was an inadvertent error, and that when she admitted in the investigative interview that she had falsified a time card, this was the sense in which she meant that admission. The grievant testified that her lateness on that morning amounted to "a couple of minutes." 2/

That is not the estimate of another witness, Sharron Almstedt. Almstedt, an admissions clerk who is in the bargaining unit, testified under subpoenas from both sides. She testified that she received a call from Bjorklund "close to 7:00" 3/ in which Bjorklund asked her to open the front door and not tell anybody. 4/ Almstedt testified that she did open the front door for Bjorklund, and believes that Bjorklund showed up after at least 7:10 a.m. 5/ Almstedt added that Bjorklund had told her on the phone that she was not going to punch in, and that she was concerned about Bjorklund and believed that the reason for Bjorklund's action was that the grievant had been disciplined several times previously for lateness.

1/ Transcript, page 94.

2/ Transcript, page 85.

3/ Transcript, page 123.

4/ Transcript, page 17, and page 123.

5/ Transcript, page 124.

The grievant denied telling Almstedt that she would not punch in or asking her not to tell anyone that she was late.

It is undisputed that at least since March 9, 1993 certain employes of the Mental Health Center have been allowed to flex their hours. These employes include a number of employes at the office (eleven are listed by name in the original memorandum, including Almstedt) but do not include the switchboard operators. Testimony by several witnesses established that the switchboard operators work a fixed shift because there is no way for them to make up the time if they are late. The Employer witnesses also testified to the effect that promptness is essential in the switchboard operators because if an operator is not present, calls have to be diverted to a patient care unit, where the staff are busy with other matters, particularly at 7:00 in the morning. The record does not demonstrate any instance of a switchboard operator who had been late without being disciplined, although one switchboard operator who was late by one minute and again by four minutes within the same two-week period received two oral warnings rather than an oral followed by a written warning. The employes who are allowed to flex their time have varying amounts of "flex" allowed, according to the March 9, 1993 memo: some are allowed to start up to 55 minutes after their posted hours, others up to two hours afterwards. The memorandum, by its own terms, was "temporary and will become permanent depending on proposed changes agreed upon with the Union." The record does not show evidence that the Union specifically negotiated or agreed to this policy, and it does not appear in the collective bargaining agreement; but it also demonstrates no evidence that the Union ever objected to it. The record also shows that prior to 1993, the switchboard operators were included in a previous flex time policy, but that the 1993 memo explicitly excluded them. In addition, the record shows that while not all of the business office employes covered by the flex time policy are supervised by Lisa Harmann, all of the employes who are supervised by Harmann are covered by that policy except for the switchboard operators.

The Union contends that the flex time policy is discriminatory as it applies to the switchboard operators, and that holding the grievant strictly to a requirement of punctual attendance, while waiving that requirement for other employes supervised by the same supervisor, is a classic example of disparate treatment and therefore violates the requirements of just cause for discipline. The Union contends further that with respect to the "7:00 a.m." entry on the brown cards, the evidence supports the grievant's assertion that she had made a mistake in filling them out and admitted to the mistake, not that she had admitted deliberately falsifying the time cards. The Union notes that the first brown card was not filed until three days after the grievant had been a few minutes late, and argues that this supports its view that mere forgetfulness was involved rather than an intent to deceive. The Union contends that while the grievant was tardy and that some discipline may be appropriate, falsification has not been proven and that the inherent differences in the disciplinary system have denied the grievant the full benefit of the "just cause" requirement. The Union therefore requests that the discharge be reduced to an appropriate lesser discipline.

The County contends that the grievant deliberately falsified the brown cards, and that there is no evidence of unequal treatment, because all switchboard operators were subject to the same standard. The County argues that the evidence at the hearing demonstrated both that this was a reasonable requirement and that all of the switchboard operators knew this requirement. The County further notes that the grievant had had several previous opportunities to correct attendance work rule violations and was clearly warned that the consequence of failure to correct that pattern would be dismissal. The County requests that the grievance be denied.

I do not find that the existence of different standards for the switchboard operators and for other employes in the same work unit constitute disparate treatment in such a way as to create a standing liability for the Employer under the principles of just cause for discipline or discharge. Here, the same rules had existed since 1993, and the record shows that all of the employes involved knew the difference. The record also shows that a clear business reason existed for treating switchboard operators differently from other business office employes, and that they were aware of that difference. Finally, the Union has had several opportunities to negotiate concerning any such difference or perceived unfairness since 1993, and there is no record of any attempt by the Union to claim that the switchboard operators were being treated unfairly prior to this case.

It is possible that despite the lack of disparate treatment, the Union might have prevailed, to a degree, in this matter if all that were involved were yet another incidence of lateness by the grievant. While the grievant certainly had a pattern of lateness, and had been thoroughly warned of an escalating level of discipline, there was a significant jump from a three-day suspension to outright discharge, and outright discharge is generally considered a very severe penalty for lateness. Here, however, I cannot conclude that the grievant is innocent of the other charges levied by the County.

There is simply no reason to credit the grievant over Almstedt as to whether Almstedt was requested not to tell anyone the grievant would be late. There is no evidence in the record of any hostility between the two. Almstedt had nothing visible in this record to gain by her version of events, while the grievant had an obvious motive not to tell the truth. But in addition, the sequence of events strongly supports the County's view of the facts. The grievant admittedly called in ahead of her arrival to request that the front door be opened for her. This was unusual. It reflects a consciousness that she would be late. And the grievant had been disciplined four times previously for lateness.

In that context, I find it highly probable that the grievant's failure to punch in or to file a brown card promptly reflects not mere forgetfulness, but a hope that if she delayed filing the brown card, her "couple of minutes" might vanish from anyone's memory or concern other than her own, by the time she had to fill out the card to claim the pay. It is improbable that the grievant would not have remembered being late under these circumstances, particularly when she filled out a brown card not once but twice; the first card being rejected, she had a second opportunity to recall that she was not, in fact, at work on time that day. Finally, the grievant's

"couple of minutes" conflicts with Almstedt's testimony of an arrival time that was at least 7:10 a.m. The grievant testified that her home was ten or fifteen minutes' drive from the Mental Health Center, and Almstedt testified that it was "close to" 7:00 a.m. when the grievant called. It also appears more likely that the grievant would have called in if she knew she was going to be significantly late than if rapid driving might have made the difference between a couple of minutes late and being just barely on time.

Thus the combination of circumstances convinces me that the County has in fact established to a high degree of probability that the grievant sought to deceive the County as to her actual arrival time at work. The relatively minor offense of lateness is thus compounded by the traditionally much more serious offense of falsification of a time card. This is generally recognized as a form of dishonesty. Even though in the present instance the pressure on the grievant was great, and the financial amount represented by ten minutes' deliberate error was slight, the Agreement's Article 26 explicitly permits immediate discharge for dishonesty. I cannot find that discharge, under these circumstances and with the grievant's four previous disciplines on her record, was beyond the County's permissible discretion.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the County had just cause to discharge Julie Bjorklund.

2. That the grievance is denied.

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

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator