BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ST. FRANCIS HOME EMPLOYEES,
LOCAL UNION NO. 1760-A, AFSCME, AFL-CIO

and

ST. FRANCIS HOME, INC.

Case 16
No. 56844
A-5717

(Tammy Buck Discharge Grievance)

Appearances:

Mr. James Mattson, Staff Representative, AFSCME, Council 40, appeared on behalf of the Union.

Mr. William Sample, Consultant, Labor Relations Consultants, Inc., appeared on behalf of the Employer.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the Employer, respectively, 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 the undersigned to decide a grievance. A hearing, which was not transcribed, was held on November 11, 1998, in Superior, Wisconsin. After the hearing the parties filed briefs and reply briefs, whereupon the record was closed on January 26, 1999. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. Having reviewed the record and arguments in this case, the undersigned finds the following issue appropriate for purposes of deciding this dispute:

Did the Employer discharge the grievant for just cause? If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

The parties' 1996-1999 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 10 – WORK DAY – WORK WEEK

. . .

Section 6. All called-in employees are required to work the position called-in for. The least senior employee on duty will be required to stay for overtime at the discretion of the Supervisor if all alternatives are exhausted and no replacement has been found. On a case by case basis this may be rotated, with union agreement, with the understanding that the employer will not be left without adequate staff under any circumstances.

. . .

ARTICLE 16 – DISCIPLINE

Section 1. The parties recognize the authority of the Employer to discipline, discharge or take other appropriate disciplinary action against employees for just cause.

Section 2. The following shall be the sequence of disciplinary action:

a). Oral reprimand;
b). Written reprimand;
c). Written reprimand with a one day suspension as scheduled by the Employer, which may be waived by the Employer;
d). Written reprimand with a one week suspension as scheduled by the Employer;
e). Discharge.

The above sequence of disciplinary action shall not apply in cases where the infraction is considered just cause for immediate suspension or discharge.

> The following lists some of the common infractions and their disciplinary actions. In general, any conduct which exhibits disregard for the goals of St. Francis Home, Inc. or the health and well-being of its residents, may be grounds for immediate dismissal. **This list does not contain, of course, all actions that may call for disciplinary measures, but it is intended to be a guide, helping you to avoid activities that are opposed to the goals of St. Francis Home, Inc.** (Emphasis in original).
>
> Infractions for which you may be dismissed immediately include, but are not limited to:
>
> 1. Failure to obey legitimate directions from a person in authority.
>
> . . .

BACKGROUND

St. Francis Home, Inc., operates two separate nursing homes in Superior, Wisconsin: St. Francis Home in the Park and St. Francis Home-South. St. Francis Home in the Park (hereinafter Park) is a conventional nursing home and St. Francis Home-South (hereinafter South), a specialty facility which provides care to Alzheimer – Dementia and developmentally disabled residents. Both facilities are licensed by the State of Wisconsin. Both homes are covered under the same collective bargaining agreement with the Union.

In early 1997, St. Francis Home-South repeatedly failed to pass state inspection and was cited for substandard quality of care. The Home had to pay substantial civil fines as a consequence. These matters were subsequently reported in various newspapers including the *Milwaukee Journal Sentinel*.

In May, 1997, the Home's owner responded to the foregoing by replacing the top management at St. Francis Home-South.

When the new administration took over at South, one of the matters which it addressed was South's staffing level. One of the deficiencies which South was cited for was non-compliance with minimum staffing requirements.

The Employer uses overtime to maintain minimum staffing levels and ensure that vacant positions are filled. The Employer initially attempts to fill vacancies via volunteers. This type of overtime, known as voluntary overtime, is just that; employes have a choice whether to work it. If the Employer cannot fill a vacancy with a volunteer or some other replacement employe, the Employer requires the least senior employe on duty to stay over and

work overtime. This type of overtime, known as mandatory overtime, is just that; employes do not have a choice whether to work it. (Note: An exception to this at Park will be noted later). Mandatory overtime is specifically authorized by the labor agreement. The record indicates that the parties have negotiated a series of agreements dealing with the pay employes receive for working mandatory overtime and when employes can be mandated to work it. The details of those agreements are not pertinent here. The Employer uses mandatory overtime only as a last resort and attempts to rotate it among employes so that a single person does not have to work an inordinate amount of same. Historically, workers on the day shift are mandated to stay over into the night shift more than workers on the night shift are mandated to stay over into the day shift.

The record indicates that under South's prior administration, employes who were selected for mandatory overtime and who refused to work it (i.e. the mandatory overtime) received a written warning for same. That was the extent of the discipline they received for refusing to work mandatory overtime. South's new management team decided to change this because of perceived employe abuse. Specifically, South's new management team decided that henceforth when employes were directed to work mandatory overtime, they had to work it; if they refused to do so, they could be fired. After management made this decision, South's new Director of Nursing, Pat Willie, issued the following memo notifying staff of same:

> **To: All Staff**
> **From: Pat Willie**
> **Re: Refusal of Mandatory Overtime**
> **July 8, 1997**
>
> **According to the contract, Article 10, section 5, (sic) Mandatory Overtime is <u>not optional</u>! Effective this date, refusal can result in termination. At supervisor discretion a refusal may be acceptable for that instance. However, continued refusal may not be and may be subject to termination. The home has a responsibility to have, at the very least, minimum staffing to meet the needs of the residents.**
>
> **I am also aware that you have other commitments, but arrangements can be made in advance for the time you may be required to stay. I'm hiring staff as the appropriate applications come in. We also need to send a positive message to the community, especially now that we have been cleared of our deficiencies by the state. With every-one continuing to work together and patience we can get over this hurdle also.**
>
> **To provide better coverage for the PM shift, any-one interested in 12 hour shifts (7 am - 7 pm or 7 pm – 7 am) please contact the cottage secretary. Overtime would be paid for the 4 extra hours worked.**

Thanks,

Pat /s/
Pat Willie, DON

This memo put South's employes on notice that henceforth if they refused to work mandatory overtime when they were directed to do so, they could be terminated. The memo referenced above was discussed at several labor-management meetings in 1997. It was also discussed at a labor-management meeting on July 30, 1998. At the meeting just referenced, South's management representatives reiterated that when someone is directed to work mandatory overtime, they have to either work the mandatory overtime or find a co-worker who will work it for them (i.e. find their own replacement). One of the people who attended the July 30, 1998 labor-management meeting was Tammy Buck.

The record indicates that mandatory overtime is handled differently at South than it is at Park. At South, as was just noted, employes who are directed to work mandatory overtime cannot reject it. At Park, employes who are directed to work mandatory overtime can apparently reject it once.

FACTS

Grievant Tammy Buck was hired as a CNA in August, 1995 and was employed in that capacity at St. Francis Home-South until her discharge on August 4, 1998. Her discipline is the subject of this case. She was discharged for refusing to work mandatory overtime.

Prior to the instance involved herein, Buck had been directed just once to work mandatory overtime. That instance occurred in April, 1998. She worked that mandatory overtime as directed.

For most of her employment, Buck worked the night shift. In May, 1998, Buck began working days. In July, 1998, Buck worked a substantial amount of voluntary overtime (namely, 78 hours). Sometimes when she worked voluntary overtime, Buck worked two consecutive shifts. On Thursday, July 30, 1998 1/ Buck worked a regular eight-hour shift.

1/ All dates hereinafter refer to 1998.

On Friday, July 31, Buck took a sick day due to a toothache. Saturday, August 1 and Sunday, August 2 were her scheduled days off. She worked a regular eight-hour shift on Monday, August 3.

On Tuesday, August 4, the Employer decided that one more employe needed to be added to that day's 3:15 to 11:15 p.m. shift to maintain a minimum staffing level. Specifically, the Employer decided that it needed nine employes on that shift and just eight employes were available. Thus, it was short one employe. Unit Secretary Priscilla Strang initially went through the voluntary overtime list, but she could not get anyone to work voluntary overtime. Since no volunteers were available, the Employer decided that someone from the day shift would have to be mandated to work through the second shift as well (i.e. another eight hours). Buck's name was next on the mandatory overtime list, so she was selected to work the mandatory overtime.

That day about 11 a.m., Nurse Manager Missy Stouffer went to Buck and told her that after she finished her day shift, she would be required to stay and work through the end of the second shift. Stouffer also told Buck that the reason she (Buck) was being directed to stay over and work the second shift as mandatory overtime was because it was her turn to do so. Upon hearing this, Buck told Stouffer that she was too tired (to do so) and would not stay over. Stouffer responded by telling Buck that if she (Buck) would not stay, then she had to get someone else to work the mandatory overtime in her place.

Shortly thereafter, Strang happened to see Buck in the hallway. Strang testified that Buck told her that she was not going to stay for the mandatory overtime and that she was not going to play the game. Buck denied making this statement. Strang later told Stouffer that Buck had told her she was not going to work mandatory overtime.

Buck testified that after being directed by Stouffer to work the mandatory overtime, she asked several of her co-workers if they would be willing to work the mandated second shift for her. No one volunteered to do so.

About 1 p.m., Stouffer told Buck again that she was being directed to work the second shift as mandatory overtime. In response, Buck told Stouffer again that she was too tired to stay over and would not work the mandated overtime. Stouffer then asked Buck if she had gotten anyone to work the second shift as her replacement and Buck replied in the negative.

Stouffer then contacted Director of Nursing Pat Willie and told her that it was Buck's turn to work the mandatory overtime and that Buck was refusing to do it (i.e. work the mandatory overtime).

About 2:30 p.m., Willie called the local union vice-president at South, Deb Maeder, and told her to come to her (Willie's) office for a meeting. Willie told Maeder in this phone call that it was Buck's turn to work mandatory overtime and that Buck was refusing to work it. Willie told Maeder to talk to Buck about it and advise her that if she did not work the mandatory overtime, she (Buck) could be fired.

Maeder then went and found Buck and told her about Willie's phone call. Maeder told Buck that unless she stayed over and worked the mandatory overtime, she was going to be fired. Buck responded that she was too tired to stay over.

Maeder and Buck then went and found local union president Cathy Moniasque. Maeder told Moniasque that Buck had been mandated to stay and work the next shift as overtime, and that Buck was not going to do it. Moniasque responded to this by telling Maeder and Buck that if Buck did not stay over, the Employer would fire her.

Moniasque, Maeder and Buck then went into Willie's office for a meeting with Willie. Buck understood going into this meeting that she could be fired for not working mandatory overtime. When this meeting started, Willie had a document entitled "Progressive Disciplinary Record" partially completed and sitting on her desk. This meeting lasted about 15 minutes. Buck did little talking at this meeting. Moniasque did most of the talking for the Union.

At this meeting, Willie told Buck that she had to stay over and work the second shift as mandatory overtime. Buck replied that she would not do so because she was too tired. Buck said this in a matter-of-fact fashion and did not elaborate any further. Specifically, she did not say she was exhausted, that it would be unsafe for her to stay over, that she had a toothache, or that she had child care obligations at home. Buck was not loud, belligerent or confrontational during the meeting. Willie testified that Buck did not appear to her to be exhausted.

Also during the course of this meeting, Moniasque proposed a number of alternatives to Willie which did not involve firing Buck. She first noted that the Employer's mandatory overtime policy was different at Park than at South. Specifically, she noted that when an employe at Park is mandated to work overtime, they can reject it once. Moniasque proposed that Park's more lenient policy toward rejecting mandatory overtime be applied at South. Willie rejected this proposal. In doing so, she noted that mandatory overtime at South had been discussed just one week earlier at a labor management meeting, and that management representatives had reiterated at that time that when a person was mandated to work overtime at South, they either had to work it or find their own replacement. Next, Moniasque proposed that Buck, who had previously received two warnings for absenteeism, receive another written warning and a one-day suspension. Willie responded that in her view, that proposed discipline

was inappropriate because what Buck had just done constituted insubordination. Next, Moniasque proposed that an LPN be mandated for the overtime rather than a CNA. Willie responded that in her view, an LPN was not needed on the second shift.

Willie testified that at the end of the meeting, she decided to fire Buck for insubordination for refusing to work the mandatory overtime. She then handed Buck the document entitled "Progressive Disciplinary Record" which was sitting on her desk. Willie testified that the reason she had this document partially completed at the start of the meeting was that it was her regular standard operating procedure for such a meeting.

The record indicates that since the Employer posted its July 8, 1997 memo regarding mandatory overtime, three employes other than Buck have (initially) refused to work mandatory overtime. In each instance, Willie met with the employe who was refusing to work mandatory overtime and told them that they either had to work the mandatory overtime or find a replacement, and that if they did not, they would be fired. Afterwards, two of the employes changed their minds and worked the mandatory overtime. The other employe found a replacement to work it (i.e. the mandatory overtime) for them. Thus, in all three instances prior to Buck where the employe (initially) refused to work mandatory overtime, the employe either ultimately worked the mandatory overtime as directed or found a replacement to work it for them. Willie testified that in all three instances, she threw away the disciplinary notice which she had prepared in advance.

Willie also testified that had Buck either worked the mandatory overtime as directed or found her own replacement to work it for her, she (Buck) would not have been fired.

The record indicates that after Buck refused to work the mandatory overtime and was fired, another employe was mandated to work the overtime. That employe performed the mandatory overtime as directed.

POSITIONS OF THE PARTIES

Union

The Union's position is that the Employer did not have just cause to discharge the grievant. It makes the following arguments to support this contention.

First, the Union argues that Buck was not insubordinate because she was not confrontational or antagonistic toward management when she refused to stay over. She knew the seriousness of what she was doing and the possible consequences. The Union also notes that she tried, albeit unsuccessfully, to get a replacement to work the second shift for her. In the Union's view, these facts establish that she was not trying to be insubordinate when she refused to work the mandatory overtime.

The Union argues in the alternative that even if Buck's refusal to work the mandatory overtime was insubordination, there are mitigating circumstances here which should excuse her actions. The first was her physical condition on the day in question. The Union notes in this regard that the grievant clearly told management representatives that she was too tired to work an additional eight hour shift. According to the Union, her testimony establishes that Buck was physically unable to stay and work another eight hour shift. The Union submits that employes in a nursing home must be physically able to provide proper care for the residents. Said another way, they certainly should not put the residents in jeopardy by working when they are physically exhausted. The Union avers that on the day in question, the grievant's physical fatigue and exhaustion prevented her from providing quality care for another eight hours. In the Union's view, the grievant acted very responsibly and exercised good judgment by knowing her physical limits and declining to work an additional shift.

Another mitigating circumstance cited by the Union is the fact that the grievant often worked overtime (albeit voluntary overtime). As the Union sees it, this establishes that the grievant is not prone to avoiding working extra hours. The Union characterizes it as ironic that the grievant was fired for refusing to work overtime when she worked many hours of overtime (albeit not the overtime hours which the Employer wanted her to work on August 4, 1998).

Third, the Union notes that mandatory overtime is handled differently at Park than at South. Specifically, it avers that Park employes are allowed one opportunity to refuse mandatory overtime, while South employes are not allowed to refuse any mandatory overtime. The Union contends that since these different mandatory overtime standards exist at the two Homes, the Employer is not applying a uniform standard. According to the Union, this establishes that the grievant was treated unfairly by the Employer and was subjected to disparate treatment.

Finally, the Union argues that by discharging the grievant, the Employer did not follow progressive discipline as it should have. It notes in this regard that prior to the incident involved here, the grievant had only received two written warnings. The Union implies that if discipline was warranted here, it should have been less than a discharge. The Union views discharge in this case as harsh, unreasonable and excessive. The Union submits that where employers fail to follow progressive discipline and impose excessive discipline, arbitrators have not hesitated to overturn the discipline imposed. It asks the arbitrator to do likewise here. The Union therefore asks that the grievance be sustained, the discharge overturned, and Buck made whole for lost wages and benefits.

Employer

The Employer's position is that it had just cause to discharge the grievant. It makes the following arguments to support this contention.

First, the Employer contends that Buck was insubordinate on August 4, 1998 when she refused directives from two supervisors to work mandatory overtime. According to the Employer, two supervisors gave Buck a legitimate work order to work mandatory overtime which she should have followed. The Employer notes that Article 10, Section 6 specifically gives it the right to have employes work mandatory overtime. The Employer avers that the grievant was aware of same, and was even told by the union's president and vice-president that she had to work mandatory overtime and if she did not, she would be fired.

Next, the Employer argues that none of the Union's defenses have merit. With regard to the defense that Willie had her mind made up to discharge Buck before the meeting started since she already had the disciplinary paperwork completed, the Employer notes that that was Willie's standard operating procedure for disciplinary meetings. It also notes that Willie testified that had Buck changed her mind at that meeting and decided to work the mandatory overtime, then she would have thrown the (disciplinary) notice away and Buck would not have been fired. With regard to the defense that Buck worked a lot of voluntary overtime, the Employer acknowledges same but asserts it is irrelevant because the overtime involved here was mandatory overtime, not voluntary overtime. With regard to the defense that the grievant was tired/physically exhausted, the Employer acknowledges that the grievant was no doubt tired at the end of her shift on the day in question. The Employer opines that most employes are tired after completing an eight-hour shift. The Employer submits however that if all an employe had to do to get out of mandatory overtime was simply say they were too tired to work it (as Buck did), that would effectively eliminate the Employer's ability to require employes to work mandatory overtime. The Employer also calls the arbitrator's attention to the fact that the grievant was off work for three straight days (Friday, Saturday and Sunday) just one work day before she was directed to work the mandatory overtime in question. With regard to the defense that mandatory overtime is handled differently at Park than at South, the Employer believes this argument misses the mark because only South's policy is in issue here. The Employer stresses that it is treating all South employes uniformly regarding mandatory overtime. With regard to the defense that an LPN should have been mandated rather than a CNA, the Employer initially notes that determining the level of staffing is a management right. Aside from that, the Employer submits that on the day in question, there were already more LPNs working that day than the staffing level dictated. That being so, the Employer avers that what was needed that day was a CNA, not an LPN.

Finally, with regard to the level of discipline which was imposed, the Employer believes that discharge was appropriate under the circumstances for the following reasons. First, it cites Article 16, Section 2, subsection 1 for the premise that that language makes failing to obey a supervisor's legitimate directive a cardinal offense warranting immediate discharge. Second, it notes that discharge is a common penalty for insubordination. It cites several arbitration awards wherein arbitrators have upheld discharges for insubordination. It submits that the arbitration cases cited by the Union which are contrary (i.e. where the arbitrators overturned discipline for insubordination) are all factually distinguishable from the instant case. Third, the Employer argues that the Union failed to show that the level of discipline which the Employer imposed here (i.e. discharge) was discriminatory or constituted disparate treatment. It asserts that the other three instances where employes (initially) refused to work mandatory overtime can be distinguished from Buck's case on the grounds that in those three cases, the employes ultimately either worked the mandatory overtime or got their own replacement. The Employer therefore contends that the grievance should be denied and the discipline upheld.

DISCUSSION

Article 16, Section 1 of the parties' labor agreement contains what is commonly known as a "just cause" provision. It provides that the Employer will not discipline an employe without just cause. What happened here is that the grievant was discharged by the Employer. Given this disciplinary action, the obvious question to be answered here is whether the Employer had just cause for doing so.

As is normally the case, the term "just cause" is not defined in the parties' labor agreement. While the term is undefined, a widely understood and applied analytical framework has been developed over the years through the common law of labor arbitration. That analytical framework consists of two basic questions: the first is whether the employer proved the employe's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was justified under all the relevant facts and circumstances.

As just noted, the first part of a just cause analysis requires that the Employer prove the grievant's misconduct. In the context of this case, there are four separate sub-parts to making this call: 1) did the grievant do what she is charged with doing (i.e. refusing to work mandatory overtime on August 4, 1998); 2) assuming she did, did she understand the directive she was given; 3) assuming she did, did she understand the consequences for failure to obey and 4) assuming she did, does the grievant have any valid defenses for her conduct. In the discussion which follows, these points will be addressed in the order just listed.

The first point referenced above is not in issue. There is no question that the grievant refused to work mandatory overtime on August 4, 1998. On that date, two supervisors (Stouffer and Willie) directed her to stay over and work the next shift as mandatory overtime, and she told both of them that she would not do so. Although Buck did not specifically say "I refuse to work mandatory overtime", that was what she meant her words to mean and that was how both Stouffer and Willie interpreted them. That being so, it is held that Buck did what she is charged with doing (i.e. refusing to work mandatory overtime on August 4, 1998.)

The second point referenced above is also not in issue. In some cases, there is a question about whether the employe understood the work order they were given. That is not the case here. What happened here is that both Stouffer and Willie told Buck in plain and understandable terms that she was to stay over one more shift and work mandatory overtime. Buck understood that. Moreover, she acknowledged that the two supervisors did not ask her if she wanted to stay over; rather, both directed her to do so. Buck therefore understood that she was being directed to work mandatory overtime, not asked if she would work voluntary overtime.

In some disciplinary cases, there is also a question about whether the work directive which was given was a legitimate managerial directive. Here, though, that is not the case. The reason is this: Article 10, Section 6 specifically gives the Employer the contractual right to have employes work mandatory overtime if needed. Since two supervisors gave the grievant a legitimate directive that she was to stay over for mandatory overtime, that is what she was to do. It is a cardinal rule in the workplace that employes are to obey supervisory orders and do what they are told regardless of whether or not they agree with it. 2/ The reason for this is obvious; there can hardly be a more serious challenge to supervisory authority, and

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2/ There are certain exceptions to this rule but none are applicable here.

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hence the Employer's ability to direct the work force, than the refusal to obey a supervisory order. Thus, the proper course of action is for employes to obey orders they believe are improper and obtain redress through the grievance procedure. Under this "obey now-grieve later" principle, the grievant should have obeyed management's directive to work the mandatory overtime. Had she done so, she could have later tested the validity of the Employer's order via the grievance procedure. However, by refusing outright to obey management's directive, the grievant invited disciplinary action.

Attention is now turned to the third point referenced above (namely, whether the grievant understood the consequences of failing to obey management's directive to work

mandatory overtime). The following record evidence convinces me that she understood the consequences. To begin with, all bargaining unit employes were put on notice by Willie's July 8, 1997 memo that refusing to work mandatory overtime could henceforth result in termination. Second, on July 30, 1998, Buck attended a labor-management meeting where the memo just referenced was discussed. At that meeting, management representatives reiterated that when someone is directed to work mandatory overtime, they either have to work the mandatory overtime or find their own replacement to work it (i.e. the mandatory overtime). Third, before Buck went into Willie's office for the August 4 meeting, both the local union president and vice-president told Buck in plain terms that she would be fired if she did not work the mandatory overtime as directed. Finally, during that meeting, Willie told Buck the same thing and gave her the opportunity to change her mind before discipline was imposed. Given the foregoing, it is held that Buck understood that she could be fired for not working mandatory overtime as directed.

Having so found, the focus turns to the fourth point referenced above (namely, does the grievant have any valid defenses for her conduct). The Union asserts that she does and that they (i.e. the defenses) should excuse or justify her actions.

The Union's first defense is that Buck's physical condition on the day in question prevented her from working another eight-hour shift. According to the Union, Buck was unable to stay over due to physical fatigue and exhaustion. The problem with this contention is that it is not supported by the record evidence. All the evidence shows is that on August 4, Buck told Stouffer and Willie that she would not stay over because she was too tired. Buck did not elaborate further on her physical condition. Specifically, she did not say she was exhausted or suffering from fatigue. Since Buck did not elaborate on her physical condition on August 4, there is no basis for the undersigned to do so either. That being so, the Union's physical condition defense boils down to the grievant's assertion that she was tired. The undersigned has no reason to dispute that assertion. Most people are tired after they finish working a shift. Be that as it may, I find that being tired, in and of itself, is not a sufficient basis to get out of working mandatory overtime. If it were sufficient, all an employee would have to do to get out of working mandatory overtime would be to say they were too tired to work it. Such an outcome would not be compatible with Article 10, Section 6 which, as previously noted, expressly gives the Employer the right to have employes work mandatory overtime.

The Union's second defense can be characterized as its "lots of overtime" theory. The Union notes that Buck worked many hours of overtime (albeit voluntary overtime). As the Union sees it, this establishes that Buck was not prone to avoiding working extra hours in general, just the extra hours on August 4. The flaw with this argument is that it overlooks the critical fact that the overtime involved on August 4 was mandatory overtime. Under the contract, employes have to work mandatory overtime; they do not have a choice. There are

no ifs, ands or buts about it. When an employe is mandated for overtime, they have to work it. The fact that Buck had historically worked many hours of voluntary overtime does not change this result or entitle her to an exemption.

Another Union defense is that an LPN should have been mandated to work overtime rather than a CNA. There are two problems with this contention. First, the level of staffing at the Home is a management right. Second, aside from that, the record evidence establishes that on August 4 there were already more LPNs working that day than the staffing level dictated. That being so, an LPN was simply not needed.

Another Union defense is that mandatory overtime is handled differently at Park than at South. The record indicates that at Park, employes who are directed to work mandatory overtime can apparently reject it once, whereas at South employes cannot reject it. The record does not indicate why this difference exists. Perhaps it is attributable to South's recent troubles. Whatever the reason, Park's mandatory overtime policy is more lenient than South's. The Union argues that since the two Homes have different mandatory overtime standards, the grievant was subjected to disparate treatment. This argument is obviously premised on the notion that the two Homes have to have identical mandatory overtime policies. If the grievant was a joint employe of both Homes or worked at both Homes, the undersigned could easily accept the premise that Park's mandatory overtime policy was applicable here. However, neither is the case. First, Buck was not an employe of both Homes; she was only an employe of South. Her paychecks, which are drawn on the account of "St. Francis Home South", prove this. Second, Buck always worked at South; never at Park. Given the foregoing, it is South's policies, not Park's policies, that apply to Buck. Specifically, South's mandatory overtime policy, not Park's mandatory overtime policy, applies to Buck. The record establishes that since the Willie memo was posted in July, 1997, South has been applying its mandatory overtime policy uniformly to all employes and not allowing anyone to refuse to work mandatory overtime. That being the case, Buck was not treated differently herein than any other South employe. The Union's disparate treatment argument relative to different mandatory overtime policies at Park and South is therefore rejected.

The final Union defense is an assertion that Willie decided to discipline Buck before she even heard from her. To support this contention, the Union notes that Willie had Buck's disciplinary notice partially completed and sitting on her (Willie's) desk at the start of the August 4 meeting. I agree with the Union that the fact that Willie had prepared a disciplinary notice in advance of the meeting certainly gave the outward appearance that Willie had her mind made up before the meeting started that she was going to impose discipline and had no interest in listening to Buck's version of the incident. However, Willie was not precluded from making a preliminary decision before the meeting started or thinking about what course of action she intended to take based on the facts as she knew them before the meeting started.

As a practical matter, most supervisors going into an investigatory meeting with an employe have thought about the potential courses of action before arriving at such a meeting. In this case, Willie did not give Buck the disciplinary notice at the start of the meeting or before hearing what she and the Union representatives had to say. Instead, Willie gave the disciplinary notice to Buck only after Buck had refused her directive to work mandatory overtime and she (Willie) had responded to all of Moniasque's alternatives and proposals. Moreover, Willie testified that had Buck changed her mind during this meeting and decided to work the mandatory overtime, she (Willie) would have thrown the disciplinary notice away. The undersigned has no reason to dispute her testimony in this regard because she did just that in three previous instances. In those instances, Willie had likewise prepared disciplinary notices for three employes who refused to work mandatory overtime. She threw those disciplinary notices away after the employes either changed their minds and worked the mandatory overtime or got a replacement to work it for them.

Having found none of the Union's defenses persuasive, it is held that the grievant committed misconduct by refusing to work mandatory overtime on August 4. That misconduct warranted discipline.

The second part of a just cause analysis requires that the Employer establish that the penalty imposed was appropriate under the relevant facts and circumstances. The relevant facts and circumstances which are usually considered are the notions of progressive discipline, due process protections and disparate treatment. In this case, the Employer summarily discharged the grievant. Based on the following rationale, I conclude discharge was appropriate here.

First, while Article 16, Section 2 specifies that the normal progressive disciplinary sequence is for employes to receive warnings and suspensions prior to discharge, that does not mean all discipline must follow this sequence. Some offenses are so serious that an employer does not have to follow progressive discipline. This disciplinary principle is incorporated into this labor agreement in Article 16, Section 2 wherein it provides that progressive discipline does not apply in certain situations. The first such situation listed is "failure to obey legitimate directions from a person in authority." That is exactly what the grievant did here (i.e. failed to obey a legitimate direct order from two supervisors to work mandatory overtime). Since the grievant committed an offense which Article 16, Section 2 specifically identifies as warranting summary discharge, the Employer did not have to impose progressive discipline here prior to discharge; instead, it could discharge immediately.

Second, when Willie filled out the "Progressive Disciplinary Record" for Buck, she chose to categorize Buck's actions as insubordination. The Union argues that Buck's actions were not insubordinate because Buck was not confrontational or antagonistic toward either

supervisor when she refused to stay over. I disagree. An employe can commit insubordination by either intentionally refusing to obey an order or by otherwise manifesting contempt for supervisory authority. Either one constitutes insubordination. In my view, Buck's refusal to work mandatory overtime can easily be categorized as the first type of insubordination. Employers have a legitimate and justifiable interest with preventing employes from refusing or failing to obey a management directive. Such conduct is obviously detrimental to the working environment since it undercuts the authority of supervisors.

Third, nothing in the record indicates that the grievant was subjected to disparate treatment in terms of the punishment imposed. While three other employes who (initially) refused to work mandatory overtime were not fired, there is a logical and non-discriminatory reason for this. The reason is that those employes ultimately either worked the mandatory overtime as directed or got their own replacement to work it. In contrast, Buck neither worked the mandatory overtime as directed nor got her own replacement to work it.

Finally, it cannot be overlooked that the grievant was a relatively short-term employe. In some disciplinary cases an employe's length of service with an employer serves as a mitigating factor. Here, though, it does not because the grievant's length of service with the Employer is not lengthy.

Accordingly, then, it is held that the severity of the discipline imposed here (i.e. discharge) was not excessive, disproportionate to the offense, or an abuse of management discretion but rather was reasonably related to the seriousness of the grievant's proven misconduct. The Employer therefore had just cause to discharge the grievant.

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

AWARD

That the Employer discharged the grievant for just cause. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 10th day of March, 1999.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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