BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1901, AFSCME, AFL-CIO

and

BROWN COUNTY

Case 621
No. 56863
MA-10439

Appearances:

Mr. Bob Baxter, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

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

ARBITRATION AWARD

The Union and the County named above are parties to a 1997-1999 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear the grievance of William Augustine. A hearing was held on December 22, 1998, in Green Bay, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by April 14, 1999.

ISSUE

The parties ask:

Did the Employer have just cause to terminate the Grievant? If not, what is the appropriate remedy?

BACKGROUND

The Grievant is William Augustine, a certified nursing assistant, who has worked at the County's Health Care Center for 12 years. The Grievant worked on Unit 9 and was a full-time case manager with a load of eight patients. He took care of patients with Alzheimer's and dementia, and such patients can be combative and violent during the time that they are being given care for personal hygiene. The first hours of the shift are the busiest times for the nursing assistants.

When the Grievant started working at the Health Care Center in June of 1986, he received a set of documents, including personnel policies and the labor contract. He received a copy of the employee handbook in January of 1987. The handbook states that excessive absenteeism may result in dismissal. Under work rules and code of conduct, the handbook also states that excessive absenteeism and being absent five consecutive days without notice is unacceptable conduct. The Employer also sends out a yearly notice about attendance and tardiness that goes along with employees' paychecks.

Article 27 of the parties' collective bargaining agreement provides that any unjustifiable absences from work for more than five continuous work days shall be construed as voluntary termination from employment. More about that article later.

On August 2, 1994, the Grievant selected the casual leave/disability plan instead of continuing on the prior sick leave plan. The collective bargaining agreement contains a sick leave plan in Article 18 and a casual day/short term disability leave and long term disability plan in Article 19. The Grievant did not have any accrued sick leave time left by September of 1998.

If an employee is ill for less than three consecutive workdays, he or she does not need a doctor's excuse. After three days, he or she is required to provide a doctor's excuse. Under the labor contract, claims for disability benefits must be submitted to the Human Resources Department within four workdays of the initial absence. This requirement has been waived in emergencies or if someone is in the hospital.

The Grievant used short-term disability four different times since 1994. He had one instance from September 21, 1996 to October 4, 1996, using 14 calendar days of short-term disability. He used 92 calendar days from September 17, 1997 through December 17, 1997. He used 105 calendar days from February 3, 1998 to May 18, 1998. His last leave was for 33 calendar days from June 24, 1998 to July 26, 1998, although some of that was changed back to vacation starting July 10th.

Susan Gladh is a Human Resource Analyst in the County's Human Resources Department who assists with disciplinary problems and terminations. On September 15, 1998, she sent the Grievant notice that his employment was terminated. The letter states the following:

Our records indicate that your Doctor released you to work full-time effective 7/10/98 with the restrictions of no climbing or operating heavy machinery. Since that time you have been off the following dates:

August 20, 1998
August 24, 1998
August 25, 1998
August 30, 1998
September 1, 1998
September 2, 1998
September 3, 1998
September 4, 1998
September 7, 1998
September 8, 1998
September 10, 1998
September 11, 1998
September 12, 1998
September 13, 1998
September 15, 1998

Additionally you have exhausted your State and Federal Family Leave entitlement prior to the above stated dates.

In an effort to determine the reason for your continued absences, Brown County sent you to a fit for duty review with Dr. Sliwinski. Based on her recommendation, you were scheduled to see Dr. Hitch for further testing. We have been informed that you did not complete tests ordered on September 3, 1998 by Dr. Sliwinski. Dr. Hitch requested you to complete the testing on September 10, 1998. You informed Dr. Hitch that you had an appointment with Dr. Asma. Dr. Asma's office reported that you were too tired to attend the appointment.

Yesterday, September 14, 1998, your Supervisor Dawn Schaefer called you at 10:00 AM and asked you to come to the Mental Health Center to discuss this matter with her. You indicated to Ms. Schaefer that you were on standby and did not know if you could meet with her but you told her that you would call her back. You did not call her back.

Today, September 15, 1998 Dawn Schaefer called you at 8:40 AM and left a message on your answering machine to inform you that she needed to meet with you prior to 1500. Ms. Schaefer requested you to call her back with a convenient time to meet. You did not return the call.

> We have tried to work with you Bill, but you continue to be unavailable. These absences are considered to be unjustifiable.
>
> Your employment with Brown County is terminated, effective immediately.
>
> Please return your badge and keys to Melanie Kirchman by Friday, September 18, 1998. If we have not received your keys and badge by this date, the cost will be deducted from your last payroll check.

The dates in the above letter indicate dates that the Employer claimed to be unjustified absences, where the Grievant had not filled out any documents for short-term disability or given any written excuses. The absences were recorded by the scheduler at the Health Care Center, Jeannine Kumm. There was another absence – August 27th – that Gladh missed when writing the letter and this date was also considered to be an unjustifiable absence. (All dates in this Award will refer to the year 1998 unless otherwise stated.)

The Grievant had a doctor's excuse for August 27th. Gladh believed that the County did not receive a doctor's excuse for August 27th until November 10th. The Grievant had applied for a personal holiday for the date of August 20th, which was approved.

Dr. Stephen Asma is the Grievant's primary physician, having cared for him since 1993 at the Prevea Clinic. Asma testified that the Grievant had problems over the past year with dizziness, hiatal hernia, gastroesophageal reflux, thyroid, high blood pressure and atrial fibrillation. The Grievant was on a number of medications for multiple medical problems, and the main problem during 1998 was dizziness. Initially, it was not clear to the doctor what was causing the dizziness. The Grievant was taking a medication called Zantac which helps to suppress acid in the stomach and treats the esophageal reflux symptoms from his hiatal hernia. He started taking Zantac in March of 1998. Asma stated that while the drug is generally well tolerated, it can have side effects such as headache, malaise, dizziness, insomnia, vertigo, confusion, abdominal pain, liver enzyme abnormalities, rash and constipation.

Asma testified that it was not clear whether the Grievant's dizziness and confusion was caused by medication. Other physicians, such as Dr. Jane Sliwinski and Dr. Case evaluated him. On July 2nd, Case ordered a MRI scan of the brain and suggested neuropsychiatric evaluation with Dr. Hitch.

Asma saw the Grievant on May 18th when the Grievant complained of weakness and unsteadiness. Asma was not able to diagnose the source of the unsteadiness and dizziness that continued throughout the spring and summer until September 15th, when he made a connection between the medication started earlier in the year and the symptoms. Asma determined then, after the neurological evaluation and a partial neuropsychologic test that Zantac could be the culprit. Asma made a diagnosis on September 15th that the Grievant's malaise, dizziness, insomnolence and vertigo were a side effect of taking Zantac, and he told him to stop taking it

and return in three days to see if the symptoms improved. The Grievant returned on September 18th and he had improved, so he was told he could go back to work. However, by that time, the Grievant had been terminated.

Asma's records showed that he wrote an excuse for the Grievant to be off work from February 23rd through March 3rd, March 4th through March 6th with a return to work for March 9th, March 9th through the 16th with a return to work for March 17th. Asma saw the Grievant on March 20th and wrote an excuse with a return to work for March 23rd. Asma wrote a work excuse on May 5th that included April 16th until re-evaluated on April 27th. He saw the Grievant on April 27th and wrote a work excuse until re-evaluated for elbow pain that the Grievant was suffering from at that time. The Grievant was getting an orthopedic evaluation of his elbow and supposed to get a steroid injection and physical therapy.

Asma saw the Grievant on May 5th and wrote an excuse for the following week with a return to work on May 12th with no limitations. On May 18th, the doctor saw the Grievant again for dizziness and returned him to light duty work on May 19th. On May 26th, the doctor continued to leave him on light duty work until he could be re-evaluated in one week. On June 3rd, Asma wrote a return to work with light duty for the next two weeks until he was re-evaluated. He also provided a work excuse for June 1st and 2nd. On June 17th, Asma wrote a return to work for June 18th with no limitations. One of Asma's partners, Dr. Warren, saw the Grievant on August 27th and wrote an excuse with a return to work for August 28th. Asma said that his records showed an entry for September 4th and he believed the Grievant was seen on September 3rd by Dr. Hitch. On September 15th, the Grievant had a long office visit with a re-evaluation for September 18th, and Asma wrote a work excuse for those days.

Asma noted that there was an entry for July 1st that the Grievant was taken off the job for confusion, and that he was confused at times and had difficulty understanding simple instructions. Asma testified that if the Grievant were dizzy, he should not have been working.

Dr. Jane Sliwinski, an occupational medicine physician, evaluated the Grievant on May 18th and June 24th for dizziness and confusion. She wrote a report dated July 10th recommending that the Grievant return to work but avoid climbing and operating dangerous moving equipment. She also recommended that he undergo neuropsychiatric testing to assess his ability to return to work, and noted that an appointment was set up for September 3rd for that purpose. That appointment was with Dr. Hitch, and the Grievant kept that appointment but was unable to complete the testing. Sliwinski testified that the Grievant called her on September 10th saying he was getting dizzy and asked her what to do, and she suggested that he contact his doctor. She also suggested that he make sure to ask his employer what was required of him so he could get whatever was necessary from Dr. Asma.

Hitch told Sliwinski that during the middle of the test, the Grievant felt dizzy and tired and took a break, but then said he could not continue. He canceled an appointment on September 10th to finish the testing he had started on September 3rd. Another appointment was made for October for the Grievant to finish the testing. He never completed the testing,

because he was terminated by then and believed that he might not have insurance or the money to cover the testing cost. Asma read into the record portions of a letter to Sliwinski from Hitch dated September 3rd, in which Hitch described the Grievant's case as baffling, difficult to pin down, very complex, and difficult to make a conclusion based on cancellation of appointments. Asma also had in his records a July 2nd letter from Neurology Consultants written by Dr. Case, who ordered an MRI scan of the brain, which the Grievant had. Case suggested that he undergo neuropsychiatric evaluation before going back to work.

Paula Leuman is the Human Resources Coordinator in charge of short-term disability and administering the family medical leave in the Human Resources Department. She has processed requests from the Grievant for short term disability benefits. Leuman sent the Grievant a letter on July 21st explaining that he had exhausted his federal and state family and medical leave benefits, that he was expected to return to work on July 27th, that he was scheduled for testing on September 3rd and that he could call her if he had any questions. Her letter also stated that his short term disability benefits began on June 24th and concluded on July 10th. The last part of the notice stated that if he failed to return to work for reasons other than a continuation of a serious health condition, he would owe the County for insurance premiums by the County during the family and medical leave period. Leuman testified that she has received return to work slips from Asma by regular mail, from Sliwinski, and from either the Grievant directly or from the Mental Health Center.

Leuman mailed out a packet of the family medical leave documents for the Grievant on August 27th because the scheduler at the Mental Health Center asked for it. Leuman did not receive any information regarding the Grievant between August 27th and September 15th. She contacted the Grievant herself on September 2nd and reminded him that she needed doctors' excuses for the time he was off from work. She also reminded him about his September 3rd appointment. Leuman received a phone call from Sliwinski indicating that the Grievant attended the testing with Dr. Hitch but that he could not complete it due to fatigue. Leuman called the Grievant on September 8th and left a message to call her, but he did not return that call.

Jeannine Kumm is the nursing services scheduler at the Mental Health Center. She schedules all the nurses and nursing assistants and replaces employees who call in sick and keeps records of those matters. Her schedule for a four-week period from August 22nd through September 16th showed that other employees replaced the Grievant 17 times during that period of time, up to September 15th. Kumm would find replacements if the Grievant called in during her regular hours (8:00 to 4:30) for the next day. If the Grievant called before 8:00 a.m., the night house manager, Bruce Anderson would find a replacement. Employees who are calling in sick are required to call at least one hour before the start of their shifts. If they do not do so, the record shows a "no-call-no-show" entry. Kumm's records showed that the last time the Grievant worked a shift was August 29th. If Kumm receives documents, such as doctor's excuses, she stamps them with a date stamp indicating that she has received them.

Bruce Anderson is the house manager on the night shift and is a RN. He documented several calls from the Grievant between August 20th and September 15th when the Grievant called in sick or went home sick. On August 25th, Anderson recorded a no-call-no-show for the Grievant, although the Grievant had come in but got sick and left. Anderson called him at home and asked him why he had not called, and the Grievant told him that he was dizzy and nauseated and couldn't make it to a phone. Anderson asked him why he would drive if he felt

dizzy, and the Grievant told him that he was careful and would pull over if he needed to. Anderson then told him that his absence would be recorded as a no-call-no-show, since Anderson had to make the contact with him. On at least one occasion, September 8th, the Grievant told Anderson that he could not return to work without a doctor's slip.

The Grievant's regular shift was to start at 6:00 a.m., although he and another employee had made a long term trade wherein the Grievant started at 7:00 a.m. beginning in the last part of May. However, that trade arrangement was supposed to end as of August 27th, because the Nursing Supervisor, Dawn Schaefer, refused to renew the trade between the two.

On August 27th, the Grievant came in at 5:40 a.m. and called his floor from the employee lounge on the ground floor. He told an RN, Judy Everson, that he was dizzy and couldn't work. Everson told him to sit down, and she and Anderson went to see him. Everson took his blood pressure, which was 190 over 110. Anderson's entry about this incident on the log refers to the blood pressure reading as "sky high" and that he was sent home.

A similar incident had happened a few days earlier, on August 24th, when the Grievant came in at 5:45 a.m. and called Anderson from the employee lounge saying he was having dizzy spells and was going home. Anderson encouraged him to sit down for awhile to see if the dizziness would pass. Anderson stopped in the lounge within the next half hour to check on him, but he was gone.

Anderson's record's show that he talked to the Grievant almost every day between August 20th and September 15th, at least on the days that the Grievant was scheduled to work and when Anderson was also on duty.

Dawn Schaefer is the nurse manager on Units 6 and 9 and was the Grievant's supervisor. Schaefer described the Grievant's absences after July as having a disastrous effect on patients who need continuity of care, particularly patients on Unit 9 who are fragile and suffering from dementia. The staff that fills in does not know the patients well, and the patients become more difficult to handle. The fill-in staff is more at risk of being hurt by those patients. Schaefer stated that there were many mornings when the remaining staff had to work short during the Grievant's absences, and they had to cover his caseload and were frustrated and overwhelmed.

Schaefer called the Grievant on September 14th and asked him to come in to meet with Gladh at Human Resources. He told her that he just got off the phone with Asma and he didn't know if he could come in, that he was on standby and might have to call Hitch to finish his testing. He also told her that he was still having trouble with dizziness, and that he knew that it looked bad but he could not handle patients feeling that way. He told Schaefer that he would call her later that afternoon if he could come in, but he did not call back. Leuman testified that Sliwinski left her a message on September 14th, stating that the Grievant was not on a standby list for Asma on that date.

On September 15th, Schaefer called the Grievant and left a message on his answering machine to come in any time to meet with her before 3:00 p.m. She left another message at 3:05 p.m. telling him to contact the house manager immediately when he got the message. He never called that day.

On September 22nd, Schaefer received a request for short-term disability from the Grievant. She sent a note to Gladh, asking her what to do with the forms. She also received a grievance on that date regarding the Grievant's termination. Schaefer did not sign the form for short-term disability. She stated that the form was almost a month past due and these forms are usually submitted in a timely fashion for approved leave. She was not aware that the Grievant was on any approved leave. The application for short-term disability from August 24th to September 4th was dated on September 8th, and the application for disability from September 7th to September 18th was dated September 14th.

The Grievant has never been disciplined for attendance or sick leave abuse. He did not have a good understanding of the casual day/short-term disability program. He acknowledged receiving the forms for disability from the County and that he had filled them out a couple of times. The Grievant testified that he had asked Asma to get the disability forms filled out but they were never ready. He testified that he repeatedly asked the doctor for the disability forms but the documents were never ready until September 15th, when he was terminated. The Grievant could not remember who he gave the original doctors' excuses to. He started making copies of them at the doctor's office because there were some questions about them. The Grievant did not turn in a doctor's excuse for September 4th until after September 15th. He said he was not feeling well and did not want to drive much.

The Grievant received several positive employee performance appraisals until Schaefer became his supervisor. There were no negative references to his attendance record or use of sick leave during most of his appraisals. Up until 1996, his supervisor was Shirley Gruender on Unit 7. Schaefer became his supervisor sometime in 1996, and the Grievant was "shook up" when she gave him less than positive evaluations. In 1996, the Grievant wrote on his appraisal that he disagreed with Schaefer's comments on his performance. In his appraisal for 1997, his supervisor stated that his performance had been minimally acceptable. The Grievant told Schaefer that he was upset about his evaluation.

Cheryl Jahnke is President of the Union. She found out that the Grievant was terminated when he called her. There was no meeting between the Union and the Employer to discuss the termination before it took place. Jahnke testified that she knew of other instances where employees had gotten doctors' excuses in late and were not terminated.

THE PARTIES' POSITIONS

The County

The County asserts that the Grievant's sick call absences from work were unjustifiable absences from August 30th to September 15th. Unjustifiable absences of five continuous workdays subject an employee to termination under Article 27 of the labor contract. The record shows that for more than five continuous scheduled workdays, the Grievant called in sick for dizziness between August 30th and September 15th. Those absences were unjustifiable. He called in sick and/or failed to show up on 11 scheduled workdays – August 30, September 2, 3, 4, 7, 8, 10, 11, 12, 13 & 15.

The Employer's representatives left messages for the Grievant on September 14 and 15 to report for a meeting but he failed or refused to attend a proposed meeting. Leuman discussed the necessity of a work excuse, disability leave application and the neuropsych examination with the Grievant on September 2nd. The Grievant failed to complete that examination on September 3rd and on several occasions thereafter which were made available. Between September 3rd and the 15th, he called in sick every scheduled workday – eight days, more than the five necessary for termination under Article 27. His absences were unjustifiable which justified his termination and constituted just cause. It was not until September 22nd that he submitted documents requesting medical disability leave, several days after he was terminated on September 15th. It was not until November 10th that the medical excuses from work and return to work documents were submitted to the Employer.

The County submits that under these facts, the continuous failure to report to work combined with the failure to submit a physician's excuse constituted a voluntary termination from employment under Article 27 of the labor agreement. The Grievant confirmed that he knew on September 2nd that he would have to get a physician's excuse for the past and any further absences. A claim for disability due to sickness must be submitted within four days of the initial absence under Article 19 of the contract. The Grievant's work schedule between August 30th and September 15th contained more than five continuous workdays during which he was absent without submitting a doctor's certificate in a timely manner.

The County argues that even if dizziness could be construed as a justifiable medical reason for calling in sick, the Grievant's absences were excessive and constituted just cause for discharge. Excessive absences have long been recognized as just cause for discharge. When absences become unreasonable and sporadic, termination is a recognized management right

even for bona fide illnesses. Arbitrators recognize that an employee must cooperate with his employer. Arbitrator Bielarczyk construed the term "excessive absence" to mean absences after accrued sick leave benefits were exhausted. The Employer's work rules prohibit excessive absences. Attendance at work is considered an essential job requirement. The Grievant exhausted his medical leave entitlement before August 30th and failed to apply or receive short-term disability for an illness for the day-after-day absences occurring after July 10th. His absences after July 10th, with the exception of a personal holiday on August 20th, were excessive under any common sense use of the term.

The County points out that the Grievant was able to get several doctor's certificates to go on four short-term disability leaves for sicknesses between 1996 and 1998. The pattern ended when a return to work certificate with limitations was given by Dr. Sliwinski. After that, the Grievant's absences from work for claimed dizziness became excessive. The 11 continuous absences from work must be considered excessive since all contractual fringe benefits and benefits mandated under the federal and state medical leave acts had been exhausted. Once he exceeded those limits, his absences became excessive.

Further, the County argues that the Grievant's failure to comply with the short-term disability requirements in Article 19 meant his absences were unjustifiable. Leuman tried to get documentation and sent him the forms on August 27th. He did not return them within four days as required by contract and failed to respond to numerous employer contacts between August 27th and September 15th. The Grievant's belated attempt to submit the forms was not timely because he had already been terminated. The County believes that the Grievant's refusal to complete the neuropsych testing is a classic indication of malingering.

The Union did not explain why medical reports dated in August and September were not furnished to the Employer until November, and those documents should be excluded as untimely and not relevant to the termination. Just cause was present on September 15th and information submitted after that date is not relevant. The documentation provided in November shows that the Grievant was released to return to work on September 9th but he called in sick on September 10th, the very next day, saying that his doctor would not release him to come to work yet.

The County states that if the reports submitted in November were submitted in a timely manner with a doctor's certification of sickness, a short-term disability leave might have been granted as it had in the previous four leaves. The untimely physician reports dated August 27th, September 4th and September 15th show that the Grievant suffered no sickness which would excuse numerous absences from work after August 29th. All absences after that date were not excused by a valid physician certification of illness and were therefore both unjustified and excessive. His five continuous absences from September 9th through September 15th have never been excused. There is no general contractual right to retroactive submission or untimely submission of leave requests or medical excuses absent extraordinary circumstances.

The County asserts that the Grievant was given a chance to explain his absences but failed to show up for a proposed meeting. Even if he was sick and could not work, he could not have been so incapacitated to be unable to attend meetings. He was never hospitalized in this period for the claimed dizziness. He had adequate notice of meetings but failed to attend because he was too tired. The labor contract procedures in Article 26 could not be violated by the Grievant's refusal to attend meetings where he would have the opportunity to provide medical information or a valid explanation for his unexcused absences. Nothing in Article 26 limits the Employer's authority to terminate for excessive absences. The Employer tried to meet with him but he refused to return contacts to meet and refused to provide information on September 10, 14 and 15. He was given numerous notices that a disability leave of absence required medical certification.

The Union claims that the Grievant was entitled to a hearing on September 15th to face his accusers. There is no due process right to such a meeting in a situation where the Grievant failed to even respond to a proposed meeting on both September 14th and 15th. He also ignored the notice on September 10th to contact Human Resources immediately. Article 26 provides for a fair hearing before a neutral arbitrator to challenge a termination. Such grievance arbitration provisions satisfy procedural due process.

The County further asserts that attendance work rules were applied fairly to the Grievant. In the last two years, he was on paid short-term disability leave and paid vacation/casual leave almost as much as he actually worked. He had 240 calendar days on short-term disability between September 1996 and August 29, 1998. The Grievant used up his accrued sick days in 1997. The attendance policy states that regular attendance is an essential function and minimum expectation of an employee. Jahnke admitted that attendance rules have been uniformly enforced with all employees, and Rude-Pierce admitted that a medical certification is required for disability leave in every case.

The Union's challenge to a just cause termination is premised on a false factual assumption because Augustine was terminated solely because of his absences, not because of any alleged illness which may have caused the absences. Many courts have held that regular attendance is an essential element of all jobs. An employee who cannot perform because he does not show up for work may be terminated for not showing up regardless of the underlying reason for absence.

The contractual disciplinary procedure was complied with, the County asserts. Article 26 relates to procedure for discipline, not the substantive grounds for discipline. Arbitrators have recognized the employer's substantive right to require regular attendance. The requirement of progressive discipline is procedural and has no application where the employee refuses to cooperate and refuses to attend meetings offered to explain his absences. Moreover, the more specific substantive provisions of Article 27 prevail over the general procedure of Article 26. Article 26 also limits progressive discipline by noting that the type of discipline depends on the severity of the offense. While the Union is asking the arbitrator to reduce termination to a lesser discipline or to layoff contrary to the limitations in Article 26, the

arbitrator has no authority to reduce a valid discipline because of the limitation on authority set forth in Article 26. The County states that there is no contractual basis for a remedy of an unpaid leave as suggested by the Union.

The County maintains that a discharge for unjustified absences and excessive absences is proper cause or just cause under Article 1 and Article 26. There is no dispute that the Grievant was absent without any paid benefits on the dates listed in the termination letter, except for August 20th. The other 16 missed workdays were unpaid days off without a valid medical excuse. No employer need tolerate indefinite calls in sick without medical certification, and Article 19 requires that certification within four days of the initial date of the last set of absences, which was August 30th. The County claims that the Grievant's refusal to submit to the neuropsych exam was calculated to conceal his true medical fitness for work. The medical reports dated August 27, September 4 and 15 do not mention any disabling illness and would not meet the requirements of Article 19. If he was truly medically disabled, he could have received paid disability leave under Article 19 upon a valid medical certification within four days of the initial absence.

The Grievant's work history, including his attendance record, is an aggravating factor, the County states. In his last two years of employment, his performance deteriorated as being minimally acceptable. His attendance record was totally unreliable after September of 1996. Given the difficulty of replacing sick call-ins on each missed workday, the Employer had good cause to terminate the Grievant for excessive absences. The County also claims that the Grievant gave false information regarding his doctor's appointments and his ability to work.

Article 19 of the labor contract does not allow retroactive excuses for absences. The three-day requirement for medical excuse for an absence and the four-day limit for medical certification of disability are valid and have been evenly enforced. The Grievant seeks to submit retroactive excuses for unpaid absences and/or obtain a medical leave of absence or layoff. The labor contract has not been violated and the grievance should be denied, the Employer concludes.

The Union

The Union makes two arguments in support of its contention that the Employer did not have just cause to terminate the Grievant. First, the Grievant's health during the time frame in this dispute was so poor that he was not able to work. Secondly, the termination letter contains several glaring inaccuracies. The Union notes that Article 26 gives certain grounds for immediate discharge – such as dishonesty, intoxication on the job, use of illicit drugs on duty, etc. The Grievant was not accused on any such offense that warrants immediate discharge under Article 26.

The Union asserts that the evidence clearly shows that the Grievant was too sick to work. Both Asma and Sliwinski confirmed that fact. Sliwinski released him to return with certain restrictions, and no testimony offered by Sliwinski contradicts Asma. It is undisputed

that the Grievant was told by his doctor to not report to work from September 4th through the 9th. It is also undisputed that Asma was treating the Grievant on September 15th with a return to work slip issued September 18th. The Union claims that it is bewildered by the Employer's contention that the Grievant was physically able to work at this time.

While Leuman testified on behalf of the Employer, her testimony supports the Union's position. She testified about the number of times that the Grievant used the casual day and disability plan in the labor agreement, as well as the length of time he was on approved family and medical leave. Although she testified that she never received any doctor's excuses from the Grievant for the time frame from July 10th through September 15th, she does not receive all employee doctors' excuses or sick slips. She never spoke with Asma or made any written inquiry of him. She spoke only once with the Grievant and never followed up with him in writing. The Union urges that minimal weight should be given to her notes, which were not made the same day as phone conversations that took place.

The Union points out that another Employer witness, Anderson, testified that the Grievant's health was not good enough to allow him to work. He knew that on August 27th the Grievant's blood pressure was 190 over 110, and that he would not advise him to work if his blood pressure was that high. The Grievant was sent home by management on that date to protect his own health. The Union objects to Gladh's belief that the Grievant should not be excused from work on August 27th due to his high blood pressure.

There are a number of inaccuracies in the termination letter, such as the dates that the Grievant was allegedly absent without an excuse. Anderson spoke with the Grievant every day between August 20th and September 15th except when Anderson was off. He was under the wrong impression about the Grievant's starting time, which was actually 6:00 a.m. until August 28th. The Grievant contacted the Employer on August 20, 24, 25, 27, 30, September 1, 2, 4, 5, 8, 10, 11 and 15 prior to his starting time in compliance with the work rules. He was excused by his doctor from September 5th through the 9th and from September 15th through September 18th. He had a personal holiday on August 20th, he reported for work on August 24th and 25th and 27th but went home ill those days. The Union believes that it has proven that the Grievant was too sick to work and that he complied with the work rules calling in before a scheduled shift. The termination letter is not accurate.

Furthermore, the Union points out that the Grievant had 12 performance evaluations during his employment at the Mental Health Center, and the majority of them were excellent. When Schaefer became his supervisor in 1996, the Grievant was concerned that her evaluations did not reflect as positively on him. He wrote a note to dispute her evaluations, as he is not someone who takes his job lightly.

The Union also submits that the Employer violated the collective bargaining agreement by not giving the Grievant any form of progressive discipline. The Grievant's illness and subsequent unavailability to work must be viewed as one occurrence, not as separate occurrences. The Employer has agreed to follow progressive discipline except in certain

instances noted in the contract, such as dishonesty, intoxication on the job or the use of illicit drugs on duty, etc. Since the Grievant was not accused of those offenses, he should not have been summarily discharged. Article 26 of the labor agreement provides for a normal progression of disciplinary actions. In this case, the first three steps of the progressive disciplinary procedure were not followed.

The Union asserts that the Employer's reliance on Article 27 is misplaced because the Union has proven that the Grievant was not unjustifiably absent for more than five consecutive work days. The Union notes that arbitrators often find that progressive discipline is appropriate except in cases of extremely serious offenses. The Grievant has a spotless disciplinary record and glowing performance evaluations until Schaefer became his supervisor. Some consideration should be given to the past record. If the Grievant deserves some discipline, it should be in a much less severe form.

The Union states that the Grievant's due process rights were violated, as he never had an opportunity to face his accusers. He found out that he had been terminated by telephone, and there was no meeting between him and management and Union officials about the termination. The only meeting held between the Union and the Employer was to determine how the Employer managed to create an inaccurate termination letter. No step three grievance procedure meeting was ever held. Arbitrators have often refused to uphold management's action where it has failed to give an employee some measure of due process. The Employer should remember that the purpose of discipline is to correct, not to punish. The Union asks that the grievance be sustained.

IN REPLY

The County

In replying to the Union, the County states that the Grievant's continual absences constituted just cause to terminate him as set forth in the termination letter. The defense that there was an excuse for all the absences for health reasons lacks any merit. Even if he had a health excuse for absences between September 4 and 9, and September 15 and 18, there were no physician's excuses submitted for the absences for August 30, September 1, 2, 3, 10, 11, 12 and 13. There were 11 continuous workdays of unexcused absences between his last day of actual work on August 29th and September 15th. Eleven unexcused absences in a four-week period constituted excessive absences meriting discipline. Asma's testimony indicated that there were no medical excuses between August 30 and September 3 and September 9 and 15.

Even if retroactive submission of physician's excuses were allowable under the labor contract, the Grievant's four absences between August 30th and September 3rd remain unexcused as are four absences between September 10th and September 15th. County Exhibit #46 shows that the Grievant was to return to work with no limitations on September 9th. There are eight unexcused absences, clearly excessive under the labor contract and attendance policy.

The County asserts that progressive discipline under Article 26 is not applicable to a termination under Article 27 for five continuous unjustified absences. Article 27 applies to the Grievant's unjustifiable absences. It is the employee's responsibility under Article 19, Article 26, Article 27 and the work rules to submit a physician's excuse after two days of absence for health reasons. Leuman and Kumm informed the Grievant of the excused absence rules and the necessity of a physician's excuse. Schaefer tried to reach him on September 14th and 15th. He knew the attendance rules. Article 26 is designed to correct an actual work performance deficiency, and the Grievant didn't perform any work to correct. The Union ignored the requirements of Article 19 and Article 1, but the arbitrator must consider those terms.

There is no requirement that a discipline decision must be preceded by a meeting with the employee to allow him to present an explanation. While the Union claims that the Grievant was not given a chance to face his accusers, he was given three separate chances to report to the Employer to justify his absences. He refused to show up for meetings on September 10, 14 and 15. His claim that his tape machine was flipped around is meritless. Procedural due process was satisfied by one notice given by Kumm to the Grievant on September 10th. While the Union cited language in Article 26 that provides some examples of dischargeable offenses, those examples are only illustrative of serious offenses and not the only offenses meriting immediate discharge.

The County asserts that the Grievant was not summarily discharged, as alleged by the Union, but that his continuous failure to show up for work without a medical excuse was a voluntary termination. He was not terminated because of sickness or the use of sick leave/disability leave/casual leave/medical leave. He was terminated solely because of his unjustified absences from work. The County further asserts that his work record and attendance record in the last two years were aggravating factors. He also gave false information on September 10th by stating that he saw a doctor on that date, when he did not. He had health insurance coverage for October of 1998, contrary to his testimony, and he had no valid excuse for canceling his neuropsych exam in October. His whereabouts for proposed meetings on September 10th, 14th and 15th remain a mystery.

The County notes that the Union concedes the possibility that the Grievant may deserve some level of discipline. The Union also is correct in stating that progressive discipline is to give deficient employees a chance to correct work performance. Since the Grievant did not show up for work, he had no performance deficiencies to correct. The Union would have the Employer grant an indefinite unpaid leave, which conflicts with the language of Article 19. Reinstatement without back pay for unpaid leave would not correct the attendance rule infractions because the Grievant could continue to call in sick without a negative consequence.

The Union

The Union takes issue with the Employer's claims about the date that the Grievant turned in his medical excuses. The Employer asserted that some of the Grievant's medical excuses were turned in for the first time on November 10th and that they should have been

submitted when the grievance was filed on September 22nd. The Employer is correct when it states that the medical reports were not furnished by the Union until November 10th, the first day the Union had the opportunity to give copies of the excuses to the Employer. There was no meeting held with the Grievant, the Union and the Employer prior to the discharge. The Grievant testified that he tried to turn his excuses into an employee who was not in her office, and then went to the payroll department and asked that Schaefer receive them.

The Union objects to the Employer's arguments that the medical excuses for August 27th, September 4th and 15th should not be considered by the Arbitrator. The Union states that the Employer objects because those documents prove the medical necessity and justifiable reasons for the Grievant's absences. The evidence shows that the Grievant saw a doctor on September 4th, he was released to work on September 9th, and he was sick on September 10th with the same condition that plagued him for months and forced him to use his casual/disability and FMLA benefits. He notified the Employer prior to the start of the work day that he was sick and followed policy in this regard.

While the Employer claimed that the Grievant knew the consequences of not completing the neuropsychological testing on September 3rd, a review of the evidence shows that he was reminded to attend the appointment and to submit medical excuses. At no time between mid-August and mid-September was he told the consequences of not attending a neuropsych test.

The Union agrees with the Employer's citation to *Elkouri & Elkouri* regarding management showing tolerance where the equities favor the employee. The Grievant's 12 years of employment entitled him to better treatment than he received.

While the Employer claims that the Grievant failed or refused several offers from Dr. Hitch to complete his neuropsych testing, the record shows that the Grievant kept his appointment on September 3rd but became ill and was not able to complete the tests. He was placed on stand-by September 10th but there were no cancellations. The Employer claims that the Grievant should have completing the testing in October, but the record shows that his medical condition was improved and he was released to report to work on September 18th. As Dr. Asma testified, the Grievant's medical condition was the result of side effects from medication, and once the medication was corrected, the side effects vanished and there was no reason for him to take the test to verify his medical condition. The Employer's claim that the Grievant was malingering is ridiculous, because the Grievant never received any compensation during the time frame of August 27th through September 15th. Thus, he had no financial motive to not report to work.

The Union further states that the Employer's contention that the Grievant's absences from work were unexcused and excessive is false. The Employer added the number of excused disability absences to the number of alleged unpaid, unjustified absences and claimed

that the total number of missed workdays was excessive. It is inappropriate to connect approved leave with the missed workdays which are the subject of this dispute. The Union believes the medical excuses justified the Grievant's absences. Three physicians had difficulty diagnosing his medical condition, and the Employer was aware of that. The Grievant was doing the best he could to cooperate with the Employer during a time when his health was poor and he was trying to get his medical condition cleared up so he could return to work.

The Union takes issue with the contention that the Grievant received notice of meeting requests from management on September 14th and 15th. Schaefer claims she left a message on his answering machine on the 15th, but he never received it. Moreover, Leuman's testimony regarding the application of Article 19 of the collective bargaining agreement is incorrect. The Employer claims that the only excuse for not submitting a timely medical condition within four days of the initial absence is emergency hospitalization. But hospitalization is not the only reason; it is only one example.

DISCUSSION

Article 1 of the collective bargaining agreement provides, among other things, that: "The Employer shall adopt and publish reasonable rules which may be amended from time to time . . ." The County introduced its handbook (Co. Ex. #10), which describes responsibilities, rights and benefits. Section VI of the handbook issued in 1987, the first one the Grievant would have received, states among other things, that employees are expected to be on duty on scheduled workdays and that three occurrences of absence within a six-month period will ordinarily subject an employee to disciplinary action. Also of note in the 1987 handbook – in Section VII, there is a provision for "Medical Leave" that states that an employee may be granted leave without pay for medical reasons after sick leave benefits have been exhausted. The 1998 handbook states, among other things, the discipline may result from excessive absenteeism and the failure to report for scheduled work shifts for five consecutive days without notifying the Employer. The new handbook was updated to include "Family and Medical Leave" which would have replaced the "Medical Leave" section in the 1987 handbook.

The collective bargaining agreement has other articles that come into play in this case. Among them are Articles 19, 26 and 27. Article 19 is complex and has several provisions, not all of which will be repeated here. The relevant portions of Article 19 come under the heading "Short Term Disability Leave" and are as follows:

> Employees who have completed six (6) months of service shall be eligible for disability leave pay as follows:
>
> *On the job accidents or injuries of the employee – first day coverage at 75% of regular pay until the start of long-term disability coverage (doctor certificate required).

*Sickness or an off the job accident or injury of the employee – coverage after three (3) work days at 75% of regular pay until the start of long-term disability coverage (doctor certificate required).

All claims for disability benefits must be submitted to the County Human Resources Department. Claims arising out of sickness or an off the job accident or injury must be submitted within four (4) work days of the initial absence. Claims must include a statement indicating the day the employee first became disabled, the nature of the disability, and the employee's anticipated date of return. The Human Resources Department, within its discretion, may request from the employee's physician, a written certificate indicating the first day of disability, the reason for the employee's disability, and the anticipated length of such disability in the event the employee is absent for a period of more than three (3) work days. The employer agrees to waive the foregoing requirement under extraordinary circumstances (e.g. hospitalization). Upon returning to work from disability, employees will fill out any required forms, furnished by the employer, for proper recording of disability leave.

In order to qualify for disability benefits, an employee must report to the immediate supervisor or other management designated employee at least one (1) hour prior to the employee's normal start time, except in the case of an emergency. All illness or injury must be reported every day unless the definite absence time is report on the first day of occurrence. It is understood by both parties that employees are expected to notify the employer at the earliest practicable time but no less than one (1) hour prior to the employee's normal start time, if they should be absent from work due to sickness or emergency.

. . .

Employees may use banked sick days to supplement the above coverage and such days may be used only after casual days are exhausted.

BANKED SICK LEAVE

Employees employed by Brown County prior to July 1, 1994 will, upon enrollment in to the Casual Leave/Disability Plan, have sick leave accumulated "banked" in a sick leave accumulation account which may be used by the employee to supplement any 75% of regular pay benefit received for a disability. Banked sick leave may be used to make the employee whole for base pay earnings. However, no additional sick leave benefits will accrue in the banked account. Fifty percent (50%) of an employees' unused accumulated banked sick leave, up to a maximum of 90 days (maximum payout – 45 days) shall be paid upon eligibility for retirement or Social Security benefits.

. . .

The record shows that the Grievant was employed prior to July 1, 1994, that he voluntarily enrolled in the Casual Leave/Short Term Disability Plan on August 2, 1994, and accordingly had no further accumulation of sick leave and had used all of his prior banked sick leave before the summer of 1998.

The Employer is correct in stating that under Article 19, it is the employee's responsibility to submit claims for disability benefits within four workdays of the initial absence. But that begs the question – or what? Be fired? Or not receive disability pay? Article 19 also says that the Employer will waive that requirement under "extraordinary circumstances (e.g. hospitalization)." Hospitalization is only one extraordinary circumstance, but it is not the only one. The Employer is operating a health care facility and is aware that in this day of managed care, hospitalization is reserved for the truly incapacitated. People with heart bypass surgery don't stay in hospitals more than a couple of days anymore. One can easily be too sick to work but not nearly sick enough to be hospitalized. The parties have never expanded on the term "extraordinary circumstances," and it could encompass a strange situation such as that being experienced by the Grievant. He had multiple problems, multiple medications, vague symptoms, and no definitive diagnosis for several months. Is that extraordinary – or normal? One could argue that whether it is extraordinary depends on one's age and physical condition. Even if the Employer were not required to waive the four-day requirement, the contract does not say what the penalty is for falling outside of that requirement. Surely termination would be too harsh if one submitted the claim five days after the initial absence, or six days ….

The Grievant's failure to submit a claim for short-term disability within four days after each absence in strict accordance with the requirement of Article 19 is a factor to be considered in the context of the whole record and in any remedy. It is not such a strict requirement that he should lose his job for failing to follow that requirement precisely. Employees obviously should not submit stale claims and expect to receive disability benefits. But the parties do not show anywhere in their labor contract or relationship that they expect people to be terminated for failing to follow the four-day requirement for submitting disability claims.

Articles 26 and 27 are the main provisions that are cited in this case. Article 26 says the following about dismissal and disciplinary procedure:

> 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.
>
> 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.
>
> 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.

The critical portion of Article 27 regarding termination is the following:

> Any employee leaving employment except for legitimate reason such as sickness, vacation or granted personal leave, shall be considered a terminated employee. Any unjustifiable absences from work for more than five (5) continuous work days shall be construed as voluntary termination from employment. It is, however, understood that on any work day any employee unable to perform his/her duties shall advise his/her supervisor prior to the commencement of said work day, if possible.

The basic question to be addressed in this case is the following: what is an "unjustifiable absence" as stated in Article 27? It is undisputed that the Grievant was absent for more than five continuous workdays. The question is whether his absences were unjustified.

The sentence preceding the term "unjustifiable absences" in Article 27 is important, because it states that: "Any employee leaving employment except for legitimate reason such as sickness, vacation or granted personal leave, shall be considered a terminated employee." (Emphasis added.) If sickness is a legitimate reason, it is also a justifiable absence. The Employer would agree with that rationale. In fact, the Employer states that if the Grievant had properly returned doctors' excuses and filled in the form for short-term disability, he might have been granted it and he would have been paid for his absences. Then his absences would have been justifiable.

In other words, the only thing the Grievant did wrong was not get the paperwork in to the Employer in a timely manner. That cost him his job.

There are cases where immediate discharge is warranted. This is not one of them.

The language of Article 27 is clearly meant to apply to employees who abandon their jobs and do not report to the Employer. It is somewhat common in certain employment settings that some employees simply do not show up for work and do not call in. That kind of conduct is considered a voluntary quit, and Article 27 acknowledges it by putting a time limit of five continuous workdays on unjustifiable absences. The Employer does not have to continue to schedule such employees and may permanently replace them. However, Article 27 does not contemplate that employees who are sick for several days be terminated. In fact, the contract language in that article equates sickness with a legitimate reason for leaving employment. The last sentence of that article also requires an employee unable to perform his duties to advise his supervisor prior to the start of the workday if possible. The Grievant complied with that requirement. He notified his supervisor on all occasions. He showed no intent of abandoning his job. He could not be considered a voluntary quit or having abandoned his job.

The Employer rested its case on the fact that it considered the Grievant's absences unjustifiable and within the language of Article 27. However, the absences were justifiable but for the lateness of the paperwork, and this factor alone should not be used to discharge an employee who has no other disciplinary record in 12 years of employment. The Employer also points out that the Grievant had excessive absences in the last two years and that such excessive absenteeism, regardless of the cause, is an aggravating factor. It may have aggravated his supervisors enough to watch for an opportunity to fire him, but his attendance and absenteeism would have been a perfect place for progressive discipline, if the Employer were indeed concerned about it.

The Employer correctly points out that in Article 26, the list of things that might result in immediate discharges is not exhaustive, but an example of things. However, the Employer did not attempt to discharge the Grievant under Article 26, where progressive discipline would have been appropriate and probably sustained for excessive absenteeism. Instead, it appears that it waited until it could find the five continuous workdays under Article 27. Instead of dealing with the employee's health problems and attendance problems, the Employer waited for an opportunity to get rid of an employee who was considered by his supervisor, Schaefer, to be minimally acceptable in his performance under her supervision.

It is true that an employee may be discharged for excessive absenteeism even where the underlying reason for such absenteeism is valid and without question. While the County has noted that the excessive absenteeism is an aggravating factor to be considered, it does not take into consideration the fact that this is a long-term employee without a record of sick leave abuse but one who has run into a bad spell of health problems. Short-term employees with bad attendance records are given less deference than long-term employees with good

attendance and performance records. The Grievant's evaluations were positive, up until a couple of years ago when he got a different supervisor. His health problems or at least the use of short-term disability seem to coincide with that time frame. The Grievant was successful under Gruender's supervision but not under Schaefer's.

There are several pieces of evidence in the record that show that the Employer knew or should have known that the Grievant truly had health problems, but the Employer did not investigate the continuing problem of absences and lack of supporting documentation or paperwork. Significantly, one of the Employer's own RN's took the Grievant's blood pressure on August 27th, during the time frame that the Employer has claimed "unjustifiable." Anderson was present when the RN recorded the Grievant's blood pressure as 190 over 110, and Anderson described it in his log as being "sky high."

Also, Anderson talked with the Grievant almost every day during the critical period between August 20th and September 15th, and he was aware that the Grievant was sick. It was September 15th that Dr. Asma finally diagnosed the source of the Grievant's problems, the same day that he was terminated. It took that long because the doctors seeing him had looked at several things, including his blood pressure medicine, a CT scan of his head, as well as a partial neuropsychologic test (see TR. pages 50-52).

The Grievant finally turned in an application for short-term disability on September 22nd, one week after he was terminated. The Employer contends that it did not get the doctor's excuse for September 15th until November 10th. However, the Grievant had filled out the short-term disability form for August 24th through September 4th and September 7th through September 18th at least by September 22nd, when Schaefer reported that she received it in her mailbox (Co. Ex. #39). The supporting doctors' excuses were not attached to the forms for short-term disability, as required. Again, the paperwork was late and partially missing. But it was not as late as November, and it was an attempt to show that he was not abandoning his job.

The Employer has strongly objected to the fact that the Grievant did not complete the neuropsychiatric testing. But Leuman knew that he did not complete it because of fatigue. She was called by Sliwinski and told about it. Leuman also knew that the test was being conducted on September 3rd, because she called the Grievant to remind him about it. Yet the termination letter lists September 3rd as one of the dates of so-called "unjustifiable absences," again due to the lack of documentation. The Employer's own representative had actual knowledge of the reason for the absence. The supporting paperwork is a formality, and the September 3rd date should not have been considered to be an unjustifiable absence where the Employer had actual knowledge about the medical testing being conducted on that date.

Therefore, the Employer knew the reason for the Grievant's absences, and the fact that the Grievant had not produced doctor's excuses for all those absences does not mean that the Employer could have reasonably considered that the Grievant voluntarily abandoned or terminated his employment. The Employer knew that the Grievant was sick. The proper paperwork might have been missing, but that was all.

The Employer considered the absences unjustifiable without the proper paperwork, i.e., doctors' excuses, return to work forms, or applications for short-term disability. While the Grievant knew or should have known that he had to comply with the Employer's demands for the proper paperwork, it is much too harsh a penalty to discharge someone under these circumstances, particularly where the Employer knew or should have known that this employee was having quite a bad run of health problems. The Employer would certainly have known that, had it run a fair investigation of the situation.

The Union is correct when it states that there was no motive for the Grievant to be "malingering" as the Employer claimed, because he was not collecting any compensation. He was not on paid sick leave or short-term disability. What advantage would he have gained by continuing to be absent?

This Arbitrator has upheld this Employer in the past in a discharge matter where the Grievant was unresponsive to the Employer. However, in that case (Case 503, No. 49571, MA-7987), the Grievant had been warned several times about being discharged. The Employer used progressive discipline to no avail. The Grievant had ample time to rectify her absences or notify the Employer of the reason for her absences. In that case, I found that the Grievant's failure to meet with the Employer should not be held against the Employer, because the Employer was trying to give the Grievant due process and had shown some forbearance and tried to work with the Grievant. The Employer tried to accommodate the Grievant and even gave the Grievant a last chance agreement. In that case, there were also certain indications that the Grievant had abandoned her job.

In this case, the Employer has not shown that it has tried any progressive discipline, or that it has tried to give the Grievant any due process, or that it has tried to work with the Grievant. The Grievant has not given any indication of abandoning his job, unlike the above case. There has been no attempt at a true investigation or accommodation. And most significantly, unlike the above case, there has been no warning of the consequences.

I agree that the Grievant needed to respond to the Employer's requests for medical documentation, and that the Grievant needed to respond to the Employer's requests for a meeting on September 14th and 15th. In fact, the Employer makes a good point that the Grievant's excuse about his answering machine tape appears to be flimsy at best. The Grievant should bear some responsibility for his own conduct and lack of response to the Employer, because the Employer's only apparent attempt to investigate the matter was thwarted by the Grievant. Accordingly, the remedy will allow the Employer to give the

Grievant a written reprimand for the absences of 1998 as well as the Grievant's failure to respond to the Employer's requests for a meeting. This reprimand may also warn the Grievant that continued absences and/or continued failures to comply with the Employer's requests for medical documentation or meetings may result in stronger discipline, including termination.

The Grievant is entitled to reinstatement and back pay and to be otherwise made whole. The record is not quite clear on whether the Grievant would be entitled to short-term disability for the dates in late August and September where his documentation was either missing or late. The Arbitrator makes no opinion about payment for that period of time. This case is not about whether or not the Grievant should have been receiving short-term disability, but it is about whether or not the Grievant should have been discharged. I find that the discharge was not for just cause or in compliance with either Article 26 or 27 of the collective bargaining agreement. However, I will hold jurisdiction as noted below to resolve any disputes over the scope and application of the remedy.

AWARD

The grievance is granted.

The Employer did not have just cause to terminate the Grievant, William Augustine, and is ordered to immediately offer to him reinstatement to his former position or a substantially equivalent position, and to make him whole by paying to him a sum of money, including all benefits, that he would have earned from the time of his termination to the present, less any sum of money earned elsewhere.

The Employer may issue a written warning consistent with the discussion above.

The Arbitrator will hold jurisdiction until July 30, 1999, for the sole purpose of resolving any disputes over the scope and application of the remedy ordered.

Dated at Elkhorn, Wisconsin this 7th day of May, 1999.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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