

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
LOCAL UNION 1667, WCCME, AFSCME, AFL-CIO
and
VERNON COUNTY (VERNON MANOR)

Case 111
No. 57270
MA-10573

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appearing on behalf of the Union.

Klos, Flynn & Papenfuss, Chtd., by **Attorney Jerome J. Klos**, 800 Lynne Tower Building, 318 Main Street, P.O. Box 487, LaCrosse, Wisconsin 54602-0487, appearing on behalf of the County.

ARBITRATION AWARD

Local Union 1667, WCCME, AFSCME, AFL-CIO, hereinafter Union, and Vernon County (Vernon Manor), hereinafter County or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the County concurred in, the appointment of a Commission staff arbitrator to resolve a pending grievance. On February 23, 1999, the undersigned was so appointed. An arbitration hearing was held in Viroqua, Wisconsin, on May 12, 1999. The hearing was not transcribed. The record was closed on June 22, 1999, upon receipt of post-hearing written argument.

ISSUE

The parties stipulated to the following statement of the issue:

Does the County's "Policy & Procedure Attendance Policy for all Vernon Manor Employees" violate the collective bargaining agreement between the parties?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

**ARTICLE II
Management's Rights**

2.01 Subject to the provisions of this Contract and applicable law, the County possesses the right to operate the Manor and all management rights repose in it. These rights include, but are not necessarily limited to, the following:

- A. To direct all operations of the Vernon Manor;
- B. To establish reasonable work rules and schedule work;
- C. To hire, promote, transfer, schedule and assign employees to positions within the Vernon Manor.
- D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
- E. To relieve employees from their duties because of lack of work or other justifiable economic reasons;
- F. To maintain efficiency of Vernon Manor operations.
- G. To take reasonable action necessary to carry out the functions of the Vernon Manor in situations of emergency;
- H. To take whatever action is necessary to comply with State or Federal law;
- I. To introduce methods or facilities which are new or exist elsewhere;
- J. To change existing methods or facilities;

K. To determine the kinds and amounts of services to be performed as pertains to Vernon Manor operations; and the number and kinds of classifications to perform such services;

L. To contract out for goods; and

M. To determine the methods, means, and personnel by which Vernon Manor operations are to be conducted.

...

ARTICLE V Work Schedule

...

5.10 Employees are expected to be at work on time. If an employee is five or more minutes late, the employee shall forfeit actual time tardy. Repeated tardiness may result in appropriate discipline.

...

ARTICLE VIII Sick Leave

8.01 A regular full-time employee shall be entitled to accumulate a total of not to exceed ninety-six (96) days of sick leave at the rate of one (1) day per month, with days already accumulated to be incorporated in the ninety-six (96) days. A regular part-time employee shall accumulate sick leave at the rate of eight (8) hours for each one hundred and seventy-three (173) hours worked.

8.02 All employees shall receive full pay at the regular rate for the number of hours he/she would have worked when a sick day is taken. All employees shall receive one-half (1/2) day's pay for each one-half (1/2) day taken as sick leave, at the regular rate.

8.03 In order to qualify for such sick leave, an employee must report to his/her department that he/she is sick, not later than one (1) hour before the earliest time for which he/she is scheduled to report to work, except when said employee is taken ill after he/she starts his/her day's work. Each sick employee is subject to check to verify the alleged sickness by a County representative.

Any employee, who, after a proper hearing, if found to have violated any sick leave regulation is subject to discipline or discharge to be determined by the department head and designated committee, subject to the grievance procedure.

8.04 If any employee is sick for more than three (3) days, the employee may be requested to present his/her department head a certificate of illness signed by a licensed physician or chiropractor. All sick leave forms to be furnished by the Employer and must be executed and returned by the employee upon returning to work.

8.05 An employee, when requested, shall have the option of using not to exceed two (2) days per year of employee's existing accumulated sick leave as authorized personal leave provided the time of usage has prior written authorization of the Administrator.

...

BACKGROUND

Effective October 1, 1998, the County published the following "Policy & Procedure Attendance Policy for all Vernon Manor Employees":

ATTENDANCE AND PUNCTUALITY

Being at work when scheduled and being on time for your work period is an essential responsibility of each employee. Your acceptance of this responsibility is an indicator of your desire and willingness to perform your job. When you do not work your scheduled work time or are not at the proper place when the work period starts, you put an unfair load of work on your co-workers which may effect (sic) the quality of care we provide to our residents. Therefore, attendance and punctuality are of great concern to Vernon Manor.

I. DEFINITION OF OCCURRENCES

A. Unscheduled Absence

Failure to report for work as scheduled, without prior approval for scheduled time away from work is considered an unscheduled absence. Calling in the day you intend to be absent is an example of an unscheduled absence. Only absences for consecutive sick days with a physician excuse, will be counted as one absence per incident. All others will be charged as they occur!

B. Notification of Unscheduled Absence

You are required to notify your supervisor, the supervisor on duty, or their designee before your start time. Do not leave a message of your absence with other staff persons unless so designed. Except in an emergency situation, **you** must make the call, not a friend or family member. Failure to call in according to the following guidelines:

- a. First shift: at least one hour before scheduled start time
- b. Second shift: at least one hour before scheduled start time
- c. Third shift: at least one hour before scheduled start time

is considered unacceptable and may result in disciplinary action. You must call in for **each** day, unless you are hospitalized or have provided a physician's statement setting out the duration of your absence.

C. Tardy

Reporting to work more than five minutes after the start time is considered a tardiness. Five instances of tardiness shall be considered as one absence occurrence. You may not make up your tardiness by extending your work time past your normal shift end time. Tardiness of more than one hour is considered an unscheduled absence.

II. PROCEDURE GUIDELINES

A. each (sic) supervisor or department head will maintain records on each staff member under their responsibility. The attendance and tardy record will be updated to reflect the most current attendance information. This record will be reviewed on a regular basis by the appropriate supervisor or department head.

B. The supervisor and or department head will document each conversation with employees concerning attendance. The documentation should be filed in the employee history file.

C. After each occurrence of absence, the supervisor or department head shall discuss the absence and the employee's current absence record.

D. The following guideline will be used when administrating disciplinary action under these practices:

Step 1: Three occurrences within 12 months –
Documented counseling and advising employee of status of disciplinary action.

- Step 2: Four occurrences within 12 months –
Documented Verbal Warning
- Step 3: Five occurrences within 12 months –
Documented counseling and advising employee of status of disciplinary action.
- Step 4: Six occurrences within 12 months –
Documented written warning.
- Step 5: Seven occurrences within 12 months –
Documented second written warning.
- Step 6: Eight occurrences within 12 months –
Documented counseling and advising employee of status of disciplinary action.
- Step 7: Nine occurrences within 12 months –
Documented Final Warning – One day suspension without pay.
- Step 8: Ten occurrences within 12 months –
Documented termination of employment

E. New Employees – Probationary Period

- Step 1: One occurrence within probationary period –
Documented counseling and advising employee of status of disciplinary action
- Step 2: Two occurrences within probationary period –
Documented written warning
- Step 3: Three occurrences within probationary period –
Termination

F. This facility will comply with the provisions of the Americans with Disability Act, the Federal and/or State Family Medical Leave Act, and those absences permitted by the facility's employee handbook or other appropriate statute or regulation.

III. MEDICAL VERIFICATION

You may be required to provide medical documentation of your inability to work. If you are experiencing excessive absences due to illness, you may wish to take a leave of absence or resign until you are able to work consistently to avoid disciplinary action becoming a part of your work record.

IV. NO CALL – NO SHOW

Failure to notify your supervisor that you will be absent may jeopardize your continued employment. One day of no call-no show will result in an unscheduled absence. Two consecutive no call-no shows, will result in immediate termination of employment.

V. TRADES

You may make arrangements with another employee to work your scheduled work period. This can only occur with the prior approval of your supervisor and must not result in overtime hours. Failure to obtain this prior approval will result in an unexcused absence. Employees who abuse this privilege may forfeit the right to use this benefit.

VI. RECORDKEEPING

A. The attached form will be used to document each employees record for absences and tardy incidents.

B. Absenteeism is documented on a continuous 12 month cycle beginning with the first absence occurrence after this policy's effective date.

C. Previous years absence occurrences will be removed at the rate of (1) per month for each month in the new year that the employee is absence free.

VII COMMENTS

A. Vernon Manor reserves the right to terminate, amend, interpret, or modify this policy at any time.

On September 28, 1998, the Union filed a Union grievance alleging that the Employer's unilateral implementation and enforcement of an attendance policy violated several provisions of the parties' collective bargaining agreement, including Article VIII. The

grievance was denied at all steps and, thereafter, submitted to arbitration. At hearing, the Employer agreed to delay implementation of any disciplinary action associated with the attendance policy until the arbitrator reached her decision.

POSITIONS OF THE PARTIES

Union

The testimony of County Personnel Director Beth Hemmersbach regarding the attendance policies of other nursing homes consists of unsubstantiated hearsay and, thus, cannot be credited. Additionally, policies of other nursing homes are irrelevant.

At issue is the Union's allegation that the County's attendance policy violates the parties' collective bargaining agreement. By grieving the attendance policy prior to its implementation date, the Union has reserved its right to challenge the policy. The fact that the Union did not formally object to the policy at the in-service meeting in which the County presented the policy to employees does not waive the Union's right to grieve the attendance policy.

The County's attendance policy places employees in the untenable position of being disciplined for use of sick leave, regardless of whether or not the employee is legitimately sick. As arbitrators have previously concluded, this type of attendance policy is unenforceable because it disciplines employees for bona fide sick leave use and, thus, deprives employees of the sick leave benefit that has been bargained by the parties. (Cites omitted)

Many of the provisions of the attendance policy are inconsistent with contract language. For example, Section 8.03 of the collective bargaining agreement requires only one hour notice when calling in sick, yet the County's attendance policy states "calling in the day you intend to be absent is an example of an unexcused absence." The contract requires a doctor's statement after 3 days, yet the County's attendance policy states "Only absences for consecutive sick days with a physician's excuse will be counted as one absence."

Inasmuch as the County's attendance policy deprives employees of sick leave benefits that have been bargained by the parties and is inconsistent with specific contract language, it is not a reasonable policy. Under Article 2, Subsection B, the County can only "establish reasonable work rules."

By establishing an unreasonable attendance policy, the County has violated the parties' collective bargaining agreement. The grievance should be sustained; the County should be ordered to eliminate the attendance policy; and any discipline resulting from the implementation of the policy should be removed from the employee's files and any disciplined employee should be made whole.

County

In recent years, the County was unable to properly staff Vernon Manor due to the fact that call-ins due to claimed illness precluded reliable scheduling. An inability to properly staff Vernon Manor not only frustrates management, but also reduces care for patients and increases the workload of reporting staff. The Union's grievances regarding staffing shortages is recognition of this problem.

Management has the responsibility to provide adequate staffing. Employees have a responsibility to report to work when scheduled and on time.

Section 2.01 of the parties' collective bargaining agreement reserves to management the right to establish reasonable work rules and to determine the methods, means and personnel by which Manor operations are to be conducted. The attendance policy established by management is consistent with these management rights.

Prior to establishing this policy, management reviewed similar policies, some of which were more stringent than the one adopted by the County. Prior to the implementation date of October 1, 1998, the County held in-service sessions in which management fully explained the policy and received employee input.

The establishment and enforcement of the attendance policy is within management's rights. The County has not violated the collective bargaining agreement and the grievance should be dismissed.

DISCUSSION

As the County argues, Article II, Management Rights, of the parties' collective bargaining agreement provides the County with various rights to manage the operations of the Vernon Manor, including the right to establish reasonable work rules. However, as is expressly stated in Article II, these management rights are "subject to the provisions of this Contract." A work rule, or policy, that violates a provision of the parties' collective bargaining agreement is not reasonable.

The "Policy & Procedure Attendance Policy for all Vernon Manor Employees" that was unilaterally adopted by the County is a "no-fault" policy. As such, it permits the County to impose discipline for sick leave usage without any evaluation of the circumstances surrounding the usage.

As set forth in Article II, Section 2.01(D) of the parties' collective bargaining agreement, the County must have just cause to discipline an employee. A "just cause" standard imposes upon an employer the obligation to establish that an employee has been engaged in misconduct.

Article VIII, Sections 8.01 and 8.02, provide employees with a contractual right to accumulate sick leave and to receive full pay at their regular rate of pay for the number of hours he/she would have worked when a sick day is taken. Thus, employees with accrued sick leave have a contractual right to use sick leave.

It is not misconduct to exercise a contractual right. Accordingly, use of sick leave, per se, is not misconduct. Rather, misconduct occurs when an employe abuses sick leave.

The County's attendance policy disciplines employes for the use of sick leave, without regard to whether or not there has been an abuse of sick leave. Since only the latter conduct is subject to discipline, the County's attendance policy contravenes the just cause requirements of Article II, Section 2.01(D) of the parties' collective bargaining agreement.

To be sure, the County has a legitimate interest in ensuring that employes report to work as scheduled. However, by unilaterally imposing a system that disciplines for the use of sick leave, rather than the abuse of sick leave, the County has violated the parties' collective bargaining agreement.

Regardless of whether or not the County's attendance policy is consistent with policies of other employers, the County's policy, as written, is not reasonable because it violates the parties' collective bargaining agreement. Given this violation, neither the establishment, nor the enforcement of the "Policy & Procedure Attendance Policy for all Vernon Manor Employees," is within management's rights.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The County's "Policy & Procedure Attendance Policy for all Vernon Manor Employees" violates the collective bargaining agreement between the parties.

2. The County's "Policy & Procedure Attendance Policy for all Vernon Manor Employees" may not be enforced against employes that are covered by the parties' collective bargaining agreement.

Dated at Madison, Wisconsin, this 30th day of June, 1999.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator