BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 990, AFSCME, AFL-CIO

and

KENOSHA COUNTY

Case 185
No. 57931
MA-10783

(Judy Dumesic)

Appearances:

Mr. John P. Maglio, Staff Representative, AFSCME Council 40, AFL-CIO, P.O. Box 624, Racine, WI 53401-0624, appearing on behalf of Local 990.

Davis & Kuelthau, S.C., by **Mr. Mark Olson** and **Ms. Nancy L. Pirkey**, 111 East Kilbourn, Suite 1400, Milwaukee, WI 53202, appearing on behalf of Kenosha County.

ARBITRATION AWARD

Pursuant to the collective bargaining agreement between the parties, the undersigned was jointly selected by Local 990, AFSCME, AFL-CIO (hereinafter referred to as the Union) and Kenosha County (hereinafter referred to as the County) to hear and decide a dispute concerning the discharge of Judy Dumesic.

A pre-hearing meeting was held on October 9, 1999. Hearings were held on December 3, 1999, and January 10, 2000, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and argument as was relevant to the dispute. A stenographic record was made of the hearing and a transcript was received on January 24, 2000. The parties submitted post-hearing briefs and reply briefs. The County appended an unemployment compensation hearing examiner's decision to its reply brief and the Union submitted a written objection. The County's reply was received on May 31, 2000, whereupon the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties could not stipulate to a statement of the issues and agreed that the Arbitrator should frame the issues in his award. The Union proposes that the issues be stated as:

1. Did the Employer violate the collective bargaining agreement when it terminated the employment relationship of Judy Dumesic? If so,

2. What is the appropriate remedy?

The Union believes the issues to be:

1. Is the grievance arbitrable?

2. If the grievance is arbitrable, did the Grievant fail to abide by County Work Rule number 10 and, thus, abandon her position with the County effective March 18, 1999?

3. If a contract violation is found, what is the appropriate remedy?

The issues may be fairly stated as follows:

1. Is the grievance arbitrable? If so

2. Did the County violate the collective bargaining agreement by removing Judy Dumesic from the payroll? If so,

3. What is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE III - GRIEVANCE PROCEDURE

Section 3.1. Procedure. Any difference or misunderstanding involving the interpretation or application of this agreement or work practice which may arise between an employee or the Union covered by this agreement and the County concerning wages, hours, working conditions or other conditions of employment shall be handled and settled in accordance with the following procedure:

Step 1. Any employee who has a grievance shall first discuss with his immediate supervisor with or without the presence the of the steward at his option. If the grievance is not resolved between the employee with or without the steward and the immediate supervisor, the grievance shall be reduced to writing, in triplicate, on a form provided by the Union and the Union shall request a meeting with the department head within ten (10) working days after the supervisor's answer to the employee. If the grievance is resolved between the employee and the supervisor, the Union shall be notified of the settlement.

If the grievance is reduced to writing, a copy shall be furnished to the County's Director of Labor Relations and Personnel and to the Union's Council 40 Representative.

Step 2. The hearing shall consist of a meeting with the department head and the steward and aggrieved and/or other representatives of the Local. The department head shall give his answer in writing to the Union Representative who signed such grievance within four (4) working days of this meeting.

Step 3. In the event the grievance is not satisfactorily adjusted in Step 2, the Union may appeal the grievance to Step 3 by notifying within ten (10) days of the completion of Step 2, the Administration Committee of the County Board in writing. This appeal shall state the name of the aggrieved, the date of the grievance, the subject and the relief requested. The Administration Committee and the Union shall meet to discuss the grievance within fourteen (14) calendar days of the written appeal. If the Administration Committee fails to give its disposition of the grievance in writing to the Union within fourteen (14) calendar days after the date the parties have met to discuss the grievance, it shall be settled in favor of the grievant. The parties may mutually agree to extend the time limit at this step in accordance with Section 3.3.

Step 4. All grievances which cannot be adjusted in accord with the above procedure may be submitted for decision to an impartial arbitrator within ten (10) working days following receipt of the County's answer to Step 3 above. The arbitrator shall be selected by mutual agreement of the parties; or, if no such agreement can be reached within five (5) days after notice of appeal to arbitration, the Union or the employer may request two panels of seven (7) arbitrators each from the Federal Mediation and Conciliation Service. The arbitrator shall be selected from the panel by each party alternately striking a name from the pane until only one (1) name remains, the party desiring arbitration striking the first name. Expenses of the arbitrator shall be shared equally by the parties.

The authority of the arbitrator shall be limited to the construction and application of the terms of this Agreement and limited to the grievance referred to him for arbitration; he shall have no power or authority to add to, subtract from, alter or modify any of the terms of this Agreement. The decision of the arbitrator shall be final and binding upon the Union and the County.

Section 3.2. Time Limits - Appeal and Settlement. The parties agree to follow each of the foregoing steps in processing the grievance and if, in any step except Step 3, the County's representative fails to give his answer within the time limits therein set forth, the grievance is automatically appealed to the next step at the expiration of such time limit. Any grievance which is not appealed to the next step within the time limits provided herein shall be considered settled on the basis of the County's last answer.

Section 3.3. Extension of Time Limits. Additional days to settle or move a grievance may be extended by mutual agreement. No retroactive payments on grievances involving loss of pay shall be required of the County prior to ninety (90) calendar days before date the grievance was first presented in writing.

Section 3.4. Time Limits for Filing Grievances. Any grievance shall be presented within ten (10) working days after the date the event or occurrence or said grievance will be barred.

Section 3.5. Work Rules and Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When any employee is being disciplined or discharged, there shall be a Union representative present and a copy of the reprimand sent to the Union.

Written reprimands will remain in an employee's department personnel file for one (1) year from date of issue. After one (1) year, such reprimands will be removed to a closed file in the Personnel Department; and shall not be used in case of discipline

The foregoing procedure shall govern any claim by an employee that he has been disciplined or discharged without just cause. Should any action on the part of the County become the subject of arbitration, such described action may be affirmed, revoked, modified in any manner not inconsistent with the terms of this Agreement.

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ARTICLE VI - SENIORITY

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Section 6.6. Loss of Seniority and Termination. An employee shall lose his seniority rights for the following reasons only:

(a) If he quits.

(b) If he has been discharged for just cause.

(c) If he fails to notify the County within one (1) week of his intention upon recall from layoff and does not report for work within two (2) weeks of recall (by certified, return receipt mail).

(d) If he has been in a layoff status longer than provided for above.

(e) If he fails to return to work on the first workday following the expiration date of a leave of absence.

(f) If he retires on a voluntary or compulsory basis.

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KENOSHA COUNTY
UNIFORM WORK RULES
APPLICABLE TO ALL DEPARTMENTS

Whenever people live together or work together, whether at home or in business, their safety, efficiency, and happiness require adherence to certain rules of conduct. It is Kenosha County's intent to keep such rules to a minimum and to formulate these rules with the good of all always in mind.

While rules are necessary to provide employees with a good place to work and to permit the County to function effectively, it is the basic responsibility of every County employee to live and work in the spirit of self-discipline. However, in a government organization, as in a community, the enforcement of rules is necessary to take care of those who violate the principles of self-discipline.

It is the County's policy that each department head and supervisor administer these rules in a consistent and fair manner, with an overriding commitment

toward a **constructive and corrective discipline action rather than a punitive system.** However, any employee who fails to maintain proper standards of conduct at all times or who violates any of the following rules shall be subject to progressive disciplinary action up to and including discharge, in accordance with Report 139.

ATTENDANCE

1. Employees must be able to appear for work and to complete assigned tasks within a reasonable period of time.

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9. Employees shall not take excessive time off, with or without pay.
10. Absence of two (2) consecutive work days without notifying the appropriate department head or supervisor shall constitute a quit without notice.

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BACKGROUND

The County provides general governmental services to the people of Kenosha County in southeastern Wisconsin. The Union is the exclusive bargaining representative of certain of the County's employees, including non-supervisory workers in the Courthouse, Social Services departments and clerical workers. The Grievant, Judy Dumesic, has worked for the County since 1975. Prior to September of 1998, she was a clerical employee in the Clerk of Courts office.

In February of 1998, the Grievant went out on Accident and Sickness leave (A&S), citing severe depression, anxiety, panic attacks, fibromyalgia, fatigue and body aches. The A&S leave was extended on March 30th, citing depression and anxiety. In August of 1998, while still off work, she signed a posting for the job of Office Specialist in the Department of Human Services. Her bid was supported by a note from her psychotherapist, Paul DeFazio, saying that she needed a less stressful job. She was the senior bidder for the job and was awarded the position, subject to a medical release to return to work by September 14th. DeFazio issued a return to work slip without restrictions, so long as she would not be returning to the Clerk of Courts office. She began working her 30-day probationary period on September 14th, and worked until October 6th. On the 6th, she was walking across a parking lot at the County's Job Center and fell. She was taken by ambulance to an emergency room, where she was diagnosed with a broken right patella.

The Grievant had an operation on her knee on October 9th, and thereafter checked into the Hospitality Manor nursing home to convalesce. Since the injury occurred at work, she was placed on workers compensation leave retroactive to the 6th. She was seen by her orthopedic surgeon, Dr. James Shapiro, on November 12th, and Shapiro issued a return to work slip, stipulating sedentary duties and the use of a wheel chair. The County's Personnel Department declined to return her to work until she could function without a wheelchair, and she remained on workers compensation leave.

The Grievant's next follow-up appointment with Dr. Shapiro was scheduled for December 23rd, but she did not appear. She did have an examination on January 6, 1999, and Shapiro removed the wheelchair restriction. County Personnel Analyst Bob Riedl, who was assigned to her case, notified the Department the next day that she would be reporting on January 11th. On the 8th, Riedl visited the Grievant at Hospitality Manor and delivered a letter instructing her to report on Monday the 11th. The letter advised her that, if she did not report, she would have to cover her absence with leave time. After Riedl's visit, the Grievant contacted Union official Linda Bilski and asked her to arrange for a 30-day unpaid leave of absence. Bilski sent a memo to Department Director Judith Weseman, seeking a 30-day unpaid leave for the Grievant. Weseman replied by e-mail, pointing out that the collective bargaining agreement prohibited the use of unpaid leave if an employee had unused vacation days or casual days. Since the Grievant had five casual days and three or four weeks of vacation on the books, Weseman denied the request. She did suggest that, if the paid leave was exhausted before the Grievant returned, she could request a personal leave of absence. Weseman also agreed to accommodate the Grievant's daily physical therapy sessions by releasing her from work early each day and offered to work with the Grievant and the Union to work out whatever other accommodations she needed.

On Monday, January 11th, the Grievant called in and asked to use her five casual days to cover the week. The request was approved by Tom Buening, her immediate supervisor, who told her to call on Friday to give him a status report. Buening sent an e-mail to Riedl, advising him of the leave request and suggesting that a psychiatric review might be helpful since the Grievant's reluctance to return to work seemed to be a psychiatric issue. The next day, Riedl was contacted by the Grievant's personal attorney, who asked that the County try to arrange transportation for the Grievant to and from Hospitality Manor, since she could not drive to work. Riedl had Buening poll the employees at the Job Center, but none could accommodate this request. The attorney advised him the following day that she would be using a medical transportation service to get to and from work, and would report on January 25th. He asked that she be allowed to work a six-hour day to allow her to go to physical therapy. Riedl agreed.

In the week of January 25th, the Grievant worked six-hour days, although she used vacation time for a portion of each day:

1/25	5.0 hours worked	1 hour of vacation
1/26	4.5 hours worked	1.5 hours of vacation
1/27	2.5 hours worked	3.5 hours of vacation
1/28	4.5 hours worked	1.5 hours of vacation
1/29	4.5 hours worked	1.5 hours of vacation

On Monday, February 1st, she neither reported to work nor called in before her shift. Because she had not worked in the new job, Buening sought an agreement from the Union to extend her probationary period to March 2nd. The Union agreed, although the Grievant could not be reached and the agreement was executed without her signature.

On February 2nd, Hospitality Manor contacted Riedl, advising him that the Grievant had not been seen since the previous Friday and asked if he knew where she was. He called her home and spoke with her mother, but she said she had not seen her either. Later in the day, she left a voice mail for Buening and told him she planned to use vacation time to cover that week.

Riedl knew that the Grievant had an appointment with Dr. Shapiro on the 3rd, and he asked Lisa Alberte, a nurse the County had hired to manage the Grievant's medical case, to meet her there and get her signature on the agreement extending her probation. Alberte met the Grievant at Shapiro's office, but the Grievant refused to sign the document. Alberte instructed the Grievant to call Riedl, but he did not receive any calls.

The Grievant left a voice mail for Buening on February 8th, saying that she had slipped into a major depression and would have her caregiver contact the County. Buening told Riedl, who tried to reach the Grievant by phone to attempt to obtain documentation and determine whether she qualified for A&S benefits. Riedl called her every work day between February 10th and February 28th. He was never able to speak with her, but he left messages with her mother that the Grievant needed to submit documentation. He never received any response, although she left another voice mail message for Buening on the night of February 16th, again saying that she had depression as well as fybromyalgia and pain in her leg. She told Buening she would submit documentation. She said she would not be in to work that week, and would like to use unpaid time, but would use vacation if necessary.

Because the Grievant asked to use unpaid leave, Riedl sent her a letter on the 18th, advising her that she might qualify for State FMLA leave of up to two weeks. The letter informed her that depression could be considered a serious medical condition, and asked her to choose between using vacation time or FMLA leave. Riedl's letter advised her that FMLA Leave would cover her absence from February 9th to February 22nd, but that she would have to provide documentation. He enclosed a Certification for her doctor to complete and an address and fax number for returning the form. He received no response to the letter, nor did she return the forms.

At this same time, Weseman advised the Personnel Department that the Grievant had failed her probation period in the Department of Workforce Development. Weseman cited the fact that she had been present at work for portions of only 19 out of 105 work days since claiming the job, and had failed to provide any promised medical documentation for her continuing absence. Weseman sent her a letter dated February 24th, advising her that she would be returned to the Clerk of Courts office. However, since her psychotherapist had cautioned against returning her to that office, two days later Riedl sent her a letter advising her that he would be coordinating all aspects of her employment, including reporting absences and receiving medical reports. The letter directed her not to report these things to any other County employee, specifically not to Buening. Finally, Riedl also advised her that her paychecks would only be available through him. He also left a message to this effect with her mother.

After hours on Friday the 26th, the Grievant left a voice mail for Riedl, saying that she wanted her check mailed to her, since she could not come to the office, as she couldn't go up stairs and was claustrophobic and couldn't ride in elevators. She asked him to charge one week of absence to unpaid leave and one week to vacation. She also said she would see her doctor on March 9th and would have the various forms and documents completed and returned to him.

When Riedl got the voice mail message on March 1st, he sent the Grievant another letter:

. . .

Dear Ms. Dumesic:

This letter is in response to the voice mail message placed by you Friday, February 26. In your message, you request that your paycheck be mailed to your residence. I would like to send your check but, quite frankly, we need to clarify, specifically, by date, how it is to be divided between unpaid leave and vacation. In addition, there are several issues regarding your employment status which must be resolved:

- You must submit the appropriate paperwork regarding your medical condition;
- You need to respond to my letter of February 18 regarding the use of state FMLA;
- You need to acknowledge the letter from Ms. Weseman regarding your failure to successfully complete your probationary period with the Department of Human Services; (see attached)
- We need to discuss your potential return to Circuit Court and other placement issues; and
- We need to discuss any other issues you feel are important.

> I have tried on numerous occasions to reach you by telephone but have been unsuccessful. A meeting is the most practical and efficient way of reaching conclusions on these matters. If you are unable to walk stairs or ride an elevator I would be happy to arrange to meet on the first floor of the Administration Building. Any future contact with me must occur weekdays between 8:00 a.m. and 5:00 p.m. Voice mails outside of those hours or voice mails which do not leave a number where you can be reached are unacceptable. My telephone number is 653-2412.
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> . . .

The Grievant did not respond to Riedl's letter. On March 10th, Alberte again attended the Grievant's appointment with Dr. Shapiro. She told the Grievant to contact Riedl about the matters raised in his letter.

The voice mail message on February 26th was the Grievant's last effort to contact Riedl. On March 15th, the last of the Grievant's FMLA Leave, vacation and casual leave was used. As of the 16th, she had no leave to cover her absence. She did not call in nor did she report for work on the 16th, 17th or 18th. On the 18th, Riedl sent her a letter advising her that by failing to call in or report for two consecutive work days, she had abandoned her job and that the County viewed this as a voluntary quit:

> . . .
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> Dear Ms. Dumesic:
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> The Unified Work Rules of Kenosha County specify that: "Absence of two (2) consecutive work days without notifying the appropriate department head or supervisor shall constitute a quit without notice." Given that you have had no contact with this office since February 26, 1999, Kenosha County has no recourse but to conclude that your have terminated your employment relationship with the county.
>
> At 4:00 p.m. Monday, March 15, all of your casual time, vacation time and FMLA benefits expired, leaving no means of accounting for your absences. Therefore, by failing to report to work and neglecting to notify this office one-half hour before your scheduled starting time on March 16, 17, or 18, 1999, as stipulated in Section 12.2 (c) of the Agreement between Kenosha County and Local 990, you are considered to have abandoned your position.
>
> Your decision to terminate your employment does not come without considerable effort on the part of this and other county offices to reach you regarding your employment status. The following are points of consideration:

- You have not submitted any documentation to support your assertion that you are being treated for a medical condition;
- You have not responded to letters, authored by me, dated February 18, 1999 and February 26, 1999 which specifically requested responses from you on issues regarding your employment;
- You have not responded to repeated telephone messages left at your residence of record; and
- You have not responded to requests made by Case Manager Lisa Alberte at your doctor's appointments February 3, 1999 and March 10, 1999.

Enclosed you will find copies of your four most recent time cards which apply your benefits through their expiration, and payroll checks which compensate you for the pay periods ending February 13, 1999 and March 13, 1999. Your FMLA benefits were applied to the pay period ending February 27, 1999. Your final check compensating you for seven hours applied to the current pay period will be mailed April 1, 1999.

. . .

This letter showed that carbon copies sent to the Clerk of Courts and to Local 990 President Lynn Costello.

During the day on March 19th, Riedl found a sealed envelope had been placed on his desk. In the envelope, there was (1) a March 11th note from DeFazio's office saying the Grievant had been seen on the 11th and would be seen by Dr. Mason on March 17th; (2) a note written on a prescription pad, signed by psychiatrist Dr. Joseph Mason, saying that the Grievant was under his care for treatment of depression and could not return to work for three weeks; and (3) an undated two page, handwritten note from the Grievant telling Riedl that she was seeing DeFazio and would see Mason on the 17th. In the letter she said she would sign whatever authorizations were required, and that the FMLA forms had been submitted to her primary care physician on March 12th, and that the doctor promised to send them in. She also said she would be happy to meet with him on the first floor of the Administration Building, and appreciated his offer to accommodate her claustrophobia, as it was impossible for her to ride the elevator. She closed with the hope that the meeting could be soon. There was no postmark on the envelope. /1

1/ There was a dispute at the hearing as to whether these documents were received in the Personnel Office on March 19th or March 9th. A date stamp on the documents appears to say "March 9, 1999" while Riedl testified that he got the materials on March 19th. I conclude that the materials were received on the 19th, principally because the note attributed to Mason is dated March 17th and could not have been received on the 9th.

On March 31st, the Clerk of Courts sent a memo out advising Lynn Costello that the Grievant's job was going to be posted because of her termination. A copy of the termination letter was attached. Costello contacted Chief Steward Sue Fanning, who had been working with the Grievant. Fanning was not aware of the termination. She contacted Riedl and asked what was going on with the Grievant. Riedl said she had been terminated and Fanning asked why they had done that, knowing that she was under care for depression. Riedl told her that no A&S form had been submitted. She told him that the Union wanted the termination rescinded and he told her that if he received properly completed A&S forms, he would review them and get back to her.

Fanning contacted the Grievant and got her permission to speak with her doctors and review her personnel file. Fanning arranged for the A&S forms to be completed, and Riedl received them on April 9th. They arranged a meeting for April 19th. At that meeting, Koons and Riedl advised her that the County would not reconsider the termination and that any grievance would be untimely since grievances had to be filed within ten work days of the action being challenged. Four days later, Fanning sent an e-mail to Koons requesting a Step 1 grievance meeting. Because of Koons' pending vacation, the meeting was set for May 24th. At that meeting, Koons again advised the Union that any grievance was untimely. A written grievance was submitted on May 28th. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

At the arbitration hearing, in addition to the facts recited above, the following testimony was presented on the issue of the timeliness of the grievance:

Personnel Analyst Robert Riedl testified that he had sent a copy of the termination notice to Lynn Costello by inter-office mail and had spoken with her on the telephone on March 18th, advising her that the County was invoking Rule 10 and treating the Grievant as a voluntary quit. Riedl denied ever telling Fanning or Costello that the County would extend the time for filing a grievance. Riedl reviewed a computerized phone log showing a two minute phone call from his extension to Costello's at 1:30 p.m. on March 18th.

Chief Steward Sue Fanning testified that she had not understood the County's position to be that the termination was final, given that Riedl offered to review a completed A&S form. She said that her impression was that Costello was shocked by the termination letter on March 31st, and had not seen it before then.

Union President Lynn Costello denied ever speaking with Riedl on March 18th, and said that she never received a copy of the termination letter until March 31st. She presented a handwritten phone log she kept, showing that she had a call from a client at about the time Riedl claimed to have spoken with her and listing no calls by Riedl.

Personnel Director Brook Koons testified that the practice followed by the parties in extending time limits for grievances was to state that agreement in writing and that there was

never any agreement to extend the limits for this grievance. He said that he told the Union on April 19th that any grievance would be untimely and that he repeated this on May 24th, but that he nonetheless accepted the grievance, since he was bound to process it even if it was not timely.

On the merits of the grievance, Riedl testified that the Grievant made no effort to cooperate with his efforts to manage her case or secure leave time for her, and in fact actively avoided speaking with him or her other supervisors by calling at times outside of working hours and claiming that she couldn't come to the County's offices for meetings because she was too claustrophobic to ride the elevator. Riedl noted that she was able to make it to doctor's appointments and that her doctor's office was in the upper floor of an office building. He expressed skepticism over her claims that she was incapable of understanding the leave system or managing the paperwork required to respond to his requests for documentation, noting that she called in on February 2nd in order to avoid being a no-call, no-show for two straight days, she was capable of leaving detailed messages on how she wanted her leave time allocated to cover her absence, and repeatedly promised to provide documentation, which suggested that she knew what was required in order for her absences to be excused. Riedl also expressed the opinion that the Grievant was an expert in the operation of the A&S system, having used the benefit many times in the past, including absences where she claimed to be suffering depression. He noted that she was gone over two-thirds of the time in 1995, 1996, 1997 and 1998, using A&S benefits.

On cross-examination, Riedl said that he was not qualified to judge whether the Grievant did or did not suffer from serious depression, but that she was in any event required to document her condition if she wanted to use leave time. He agreed that he had never notified the Grievant of her leave balances at any point before her termination and had not mailed her any A&S forms or provided forms to the Union to give to her. He also agreed that the County never told the Grievant directly that she could apply for unpaid leave once her vacation and casual leave were exhausted. On re-direct examination, Riedl said that the County does not generally solicit employees to go on A&S and that it is up to the employee to request the forms.

Director of the Department of Administration Raffaelle Montemurro testified that he had monitored the Grievant's case on an on-going basis and authorized the sending of the termination letter to her. He said the Grievant's situation was a concern to the County because staffing levels were very tight and it was very expensive to have an employee out for extended period, while paying a replacement. He noted that he had been a member of the County Board for nine years prior to becoming a department head and that Rule 10 was a common provision in local industry and had been applied in other cases.

Brook Koons testified that the Unified Work Rules were applicable to every County employee and that Rule 10 had been in place for at least the 18 years he had been Director of Personnel Services. It had been applied to other employees in the past without challenge by

the Union or the employees involved and the Union had never asked to bargain over it. Koons expressed the opinion that the Grievant was very well versed in the County's A&S system and knew what was required to use the benefit. He also noted that she was quite familiar with the County's attendance rules and had been disciplined and counseled on numerous occasions in the past. He recited a five-day suspension in January of 1998 for excessive absenteeism, a one-day suspension in October of 1997, a July, 1997 counseling session and written warning, an April, 1996 counseling, a 1993 reminder of the attendance rules, a 1990 verbal warning which included instructions to speak directly with supervisors when calling in absences and a 1986 reminder of the rules. Koons testified that the Grievant may have claimed to be confused during this time period, but that she seemed able to communicate clearly on things she wanted to communicate about and was able to apply for COBRA benefits and make her payments on time after the termination. Koons expressed the opinion that this was not a just cause case and that it was instead a case of job abandonment.

On cross-examination, Koons agreed that no Union representative was present when the termination letter was issued and that the collective bargaining agreement requires the presence of a Union representative when employees are disciplined or discharged. Koons noted, however, that this was a self-termination per the rules and that there was no meeting of any type, simply the mailing of a letter. He conceded that the work rules had never been negotiated, but pointed out that the County reserved the right to make and enforce reasonable rules and that Rule 10 had been in place for many years. Koons stated that the termination was based solely on the no-call, no-show in March of 1999, and not on the Grievant's previous attendance and disciplinary records. He agreed that the October, 1999 claim was the Grievant's first use of workers compensation while with the County. Finally, Koons agreed that the County would generally apply progressive discipline to employees and that suspensions of ten and thirty days would follow a five days suspension in the progression.

On re-direct examination, Koons said that this was not a progressive discipline case, since the no-call, no-show rule specified that the result of not reporting and not calling for two days was a voluntary quit.

Sue Fanning testified that she had been the Union's point person in dealing with the Grievant's situation and had discussed her mental condition with both Buening and Weseman prior to March 18th. She said no representative of the County had ever told her that the Grievant was running out of leave time or was expected to report back to work on March 16th. Fanning agreed that employees usually secured A&S forms for themselves, but said that she believed supervisors had sent the forms to employees' homes on request.

According to Psychotherapist Paul DeFazio, the Grievant suffered from depression prior to her October, 1998 injury, and was responding to treatment, but the injury set her

back. In his opinion, buttressed by a Global Assessment of Functioning administered by a psychiatrist on his staff, the Grievant was suffering major depression and was not capable of working in March of 1999. The lower a GAF score, the more severe the psychological

malady. Her GAF score was 50, indicating possible suicidal ideation and the potential for severe impairment in performing work assignments or even in keeping a job. As of the hearing in this matter DeFazio estimated her GAF at 60, still marginal for what was needed to work effectively, but opined that the stress of the arbitration might be depressing her score. He opined that she could function productively if she was returned to work. DeFazio also said that, while treating the Grievant, she had expressed confusion over some communications from the County about information that they wanted and he told her to go through her Union. On cross-examination, DeFazio said that the Grievant's ability to organize herself during the winter of 1998-99 would have varied from day to day. He testified that the last measurement of the Grievant's GAF score was 55, in September of 1999. He also acknowledged that it was possible that he had measured her GAF score in 1996, and that it may have been 50 at that time. On re-direct examination, he opined that her GAF in 1996 would have risen to 60 or better after treatment. He also said that her current GAF would rise to 60 or above if she returned to work, after a week or so of adjustment.

Judy Dumesic testified that she was injured in a fall on October 6, 1998, and had knee surgery on October 9th. Since her home was being remodeled and wasn't safe for someone who was not mobile, she checked into the Hospitality Manor Rehabilitation Center. During this time she was suffering from depression as well as her physical injury and the depression spiraled out of control after the injury. She suffered from fatigue, insomnia, uncontrollable crying and self-isolating behaviors. She was counseled by an in-house counselor at Hospitality Manor and also consulted by telephone with Paul DeFazio. Ultimately she saw a psychiatrist associated with DeFazio, Dr. Joseph Mason, who prescribed Zoloft for her.

It was while she was seriously depressed that Riedl suddenly appeared at Hospitality Manor on January 8th. She was very surprised when he showed up and he spoke very fast. She had trouble processing what he was saying, but understood that he wanted her to return to work on the following Monday. She was surprised by this, because Dr. Shapiro had said nothing about a return to work when she saw him two days earlier. She returned to work but sought a leave of absence, which was denied. Because she was in severe pain, she did not continue to work, instead using vacation and casual days. She was never warned that her leave balances were exhausted or that her absences in mid-March could trigger a discharge.

The Grievant said that she was not aware of any efforts by Riedl to contact her while she was at Hospitality Manor and never got any messages from her mother that he had called the house while she was at Hospitality Manor. She also said that Lisa Alberte never told her to contact Riedl. She knew Riedl had called her home once she left the rehabilitation center, but she was so depressed at that time that she could not leave her room. She simply cried whenever he called, because she felt he was harassing her. She said that she was essentially incoherent with depression during most of this time and incapable of understanding what Riedl wanted. In any event, DeFazio had advised her not to speak to anyone from the County and to

go through the Union instead. As evidence of her confusion and disorientation, she pointed to her attempt to deposit check stubs in the bank in March, when plainly they were not actual checks.

The Grievant said that the documents Riedl claimed to have found on his desk on March 19th were, in fact, sent to him separately at various times. She personally witnessed the staff at DeFazio's office place the March 11th note, attesting to her appointment that day and to her March 17th appointment with Dr. Mason, in the mail to the County. This was done at her appointment on the 11th, so she knew the County must have received it before the 19th. Likewise, the March 17th note from Dr. Mason saying that she could not return to work for three weeks was mailed in her presence by DeFazio's staff at the end of her March 17th appointment. The two page, hand-written note to Riedl was written by her after her February 25th appointment with DeFazio and she personally mailed it to Riedl. As for the various medical forms that Riedl sent to her, she gave those to her primary care physician, who promised to complete them and mail them back to the County. In fact, she had her doctors submit reports to the County whenever she had an appointment and she had personally seen her Rheumatologist complete one in February and knew it had been mailed that day. Thus, she had been responsive to the County's desire to have information about her condition.

The Grievant noted that Mason had certified that she was not medically able to work for the period when she was discharged and that she was totally and continuously disabled from October 6, 1998, through their appointment on April 7, 1999. The orthopedic surgeon, Dr. Shapiro, did not issue a final return to work from her leg injury until September of 1999.

On cross-examination, the Grievant said that she did not understand a great deal of what she received from Riedl and had been advised by DeFazio not to speak with him. She said that she had contacted the Union and that representatives of the Union had communicated with Riedl, but she did not know when this was. Reviewing transcripts of her voice mail messages to Buening on February 16th and Riedl on February 26th, the Grievant confirmed that she was quite incoherent when she left the messages. Reviewing the two page letter she said she wrote on February 25th, she agreed that the text mentioned an appointment she had already had with Dr. Patel on March 12th, and that she could not have sent the letter in February. She explained that this illustrated how confused she was. Reviewing the envelope that Riedl claimed to have found on his desk on March 19th, she said that the handwriting on it was hers and agreed that there was neither postage nor a postmark on the envelope. She could not explain why that was, since she had mailed her letter to Riedl and had not included the notes from DeFazio and Mason.

The Grievant said she had not met with Riedl because DeFazio told her not to and because she was too claustrophobic to ride in an elevator to his second floor office. She agreed that she had attended her appointments with her doctors and had to ride in elevators to get to those, but said that the elevator in the County's Administration Building was very small. She agreed that she had filled out the forms for COBRA continuation of her health insurance

after her termination and had made the payments on time, but explained that Fanning had helped her with the forms.

Additional facts, as necessary, will be set forth below. /2

2/ Along with its reply brief, the County submitted an initial determination by a State Examiner on the Grievant's claim of illegal discrimination, and urged the Arbitrator to consider the decision as new and previously unavailable evidence. The Union objected. The decision submitted by the County is not offered as precedent in support of its legal arguments. It is an effort to supplement an evidentiary record that was closed months earlier. Without going on at undue length, I conclude that the decision is not particularly relevant to issues before the Arbitrator, and it has not been considered in arriving at this Award.

POSITIONS OF THE PARTIES – PROCEDURAL ARBITRABILITY

The County

The County takes the position that the grievance is plainly untimely. Article III of the contract — Grievance Procedure — provides that grievances must be presented within ten working days of the event, or be barred. Here, the Grievant was out of all paid leave by March 15th. She failed to respond to the County's efforts to contact her and she failed to report for three consecutive days – March 16, 17 and 18. The County justifiably treated this as job abandonment and advised her of this by certified mail and regular mail on March 18th. That same day, the County notified the Union through a call from Personnel Analyst Riedl to Union President Lynn Costello and by sending Costello a copy of the termination letter. Costello's self-serving claim that she received neither the phone call nor the letter is simply not to be believed. She denies speaking to Riedl on the 18th, but computerized phone records show a call to Costello from Riedl on that day, at the time he says he called her. Nor is there any reason to think that the Union's copy of the letter just vanished in the internal mail system.

Notwithstanding this clear notice, the Union did not contact the County's Personnel Director about the matter until an April 19th meeting, and did not file a grievance until May 28th. Thus, the grievance itself was filed 66 days after the termination and the initial meeting was not held until 31 days after the termination. By any measure the protest of this matter is grossly untimely. The Union's own April 23rd e-mail to Koons concedes this when it says "Based on the outcome of our April 19 meeting . . . Local 990 is requesting a step one grievance. . . ." Thus, it is clear that no grievance had been filed by April 23rd. No matter what happened after that date to explain the further delay to May 28th, the timelines for filing a grievance had already passed. Koons asked the Union's representatives at the April 19th meeting if they believed it was a step one grievance meeting, and they said "no." He then

advised them that any grievance was untimely at that point. There can be no credible claim that the County had somehow acquiesced in any extension of the time limits.

The Union's argument that the County allowed them to revive the grievance by agreeing to meet at Step 1 of the grievance procedure on May 24th cannot be accepted. Arbitrators have generally ruled that a party who has already preserved a timeliness objection by raising it at an early point should, nonetheless, still meet to discuss the merits of the grievance. The County continued to assert the untimeliness of the grievance even as it met to consider the merits, and this good faith conduct cannot now be used against the County.

While recognizing that arbitrators are reluctant to dismiss grievances on timeliness grounds, the County argues that there is no other choice. The contract language is absolutely clear, and the great weight of the evidence establishes that the Union and the Grievant had notice of the termination for more than a month before any protest was lodged. Accordingly, the grievance should dismissed as untimely.

The Union

The Union takes the position that the grievance is clearly arbitrable. The Grievant was suffering from debilitating depression and the County knew it. Yet they seek to hold her to promptly responding to legal notices, and to have her rights forfeited because she was not able to respond. Granting that the County attempted to advise the Grievant of her termination through certified mail, the Arbitrator must make reasonable allowances for her confused mental state. According to the mail receipt, the first attempt to deliver the letter occurred on the 20th and she received the letter on March 26th at the earliest. The Union first learned of the termination on March 31st, when Union President Lynn Costello received a fax from the Clerk of Courts which included a copy of the letter. She immediately advised Sue Fanning, who in turn called Robert Riedl, and questioned the County's decision to terminate an employee who was known to be suffering a temporary mental disability. Riedl ultimately agreed to provide A&S forms and withhold judgment until the completed forms were returned. The natural interpretation of this sequence is that the County agreed to waive the limits for submitting a grievance pending the receipt of the A&S form and a meeting with the Union. That meeting took place on April 19th, and at that time the County told the Union it would stand by the discharge decision. Four days later, the Union e-mailed Personnel Director Brook Koons to advise him that the Union wanted to set a Step 1 grievance meeting. Because Koons was going on vacation, the parties agreed to wait until May 24th.

The County's challenge to arbitrability must fall on two bases. First, the County claims that Riedl called Costello on the 18th to tell her of the discharge and also sent her a copy of the letter via inter-departmental mail. The County's computer system shows a two minute call from Riedl's extension to Costello's phone at 1:30 p.m. on the 18th, but Costello's phone log

shows no such call, even though she routinely logs her calls. Instead, the log shows a call at 1:28 p.m. from a client. Costello denies receiving either a call or a copy of the letter and it makes no sense to assert that she would simply have ignored such a significant contact. The Local is vigilant and aggressive in representing its members and there is nothing in the record

to explain this alleged lapse. The evidence is, at the very most, evenly balanced on Riedl's claim that he made some sort of contact with the Union on the 18th, and the Arbitrator cannot rely on such a mixed record to deprive the Grievant of her rights.

More significant is the conversation between Fanning and Riedl on the 31st. Riedl agreed to reconsider the matter and review the A&S form and meet with the Union before making a final decision. The only reasonable interpretation of this is that the County had made no final decision at that point, and thus waived any timeliness objections based on the March 18th letter. All subsequent actions by the Union were timely, and thus, the grievance is timely. Given this, the timeliness argument is nothing but a red herring and the Arbitrator should proceed to consider the merits.

The County's Reply Brief

The County disputes the Union's account of how events unfolded. First, the Union asks the Arbitrator to give greater weight to Costello's handwritten log of her calls than to the automated call logging system that proves a call was made to her extension by Riedl on March 18th. That is not a reasonable interpretation. The Union also asks the Arbitrator to assume that Riedl's letter to Costello simply vanished forever in the inter-departmental mail system. Again, this is not a plausible contention.

Even if Riedl somehow is mistaken about speaking to Costello and sending her a copy of the termination letter on March 18th, the Union indisputably knew of the termination on March 31st. The claim that they thought the decision was not final is contradicted by all of the evidence other than the self-serving testimony of the Union's witnesses. The Union knew that, as of that date, the County was seeking to post her job and that it was treating her as having resigned her position. The Union never asked for an extension of time to file a grievance and the County never offered such an extension. While the Union now claims that the County implicitly offered such an extension by agreeing to provide A&S forms and meet with the Union, this ignores the fact that the Grievant had already been terminated and no action was taken to change that status. Waivers cannot be lightly inferred and the fact that the County was willing to discuss the matter with the Union cannot be read as a waiver of the clear time limits for filing a grievance. Koons expressly informed the Union's representatives when the parties finally did meet on April 19th that any grievance would be untimely. Thus, Fanning's subsequent e-mail "requesting" a Step 1 grievance meeting, but not actually filing a grievance, cannot serve to revive the grievance. Neither can the County's presence at a May 24th meeting be read as a waiver. The County always has the right to meet with the Union and it cannot be held to place it self at risk by so meeting.

The simple fact is that the Grievant's employment relationship was terminated on March 18th when she abandoned her job. She was immediately notified of this and the Union was immediately notified of this. Despite the clear and timely notice, no grievance was filed

until May 28th. No amount of reinterpretation or argument by the Union can disguise the egregious untimeliness of the instant grievance and by the clear terms of the contract the Arbitrator is obligated to dismiss it.

The Union's Reply Brief

The Union asserts that the County's timeliness argument ignores a critical fact. The March 31st conversation between Fanning and Riedl resulted in an agreement to meet and discuss the Grievant's eligibility for A&S benefits in lieu of termination. That agreement obviated the need for a grievance, as the Grievant might well have been reinstated to her employment. When it became clear at the April 19th meeting that the County would not change her status, Fanning promptly requested a Step 1 grievance meeting. There is no issue of timeliness here, and the Arbitrator must proceed to the merits.

DISCUSSION - TIMELINESS

The contract requires the filing of a grievance within ten work days and bars consideration of untimely grievances. The Grievant's employment was terminated on March 18th and no written grievance was submitted until May 28th. The County asserts that the grievance is thus barred, while the Union argues that the parties were actively discussing the Grievant's situation throughout this period, and that a grievance could not have been submitted until mid-April.

I would note at the outset that the question of whether Costello did or did not receive a phone call from Riedl on March 18th is not relevant to my determination of the timeliness issue. The first action that can plausibly be termed the filing of a grievance is Fanning's e-mail to Koons on April 23rd requesting a Step 1 grievance meeting. Whether knowledge of the grievance occurred on March 18th when the letter was issued, or March 26th when the Grievant signed for her certified copy, or March 31st when Costello admits seeing a copy, the April 23rd submission would be untimely unless something occurred in the interim to toll the time limits. The Union asserts that Fanning and Riedl's conversation on March 31st effectively tolled the time limits until the Grievant submitted an A&S form and the parties could meet to discuss the case.

Fanning gave the following description of her discussion with Riedl on direct examination:

. . .

Q And could you please tell us for the record the substance of those conversations.

A Well, on the 31st, of course, it was why are you doing this when you know she's ill and expressing that we had a problem with it, and at one point in time he said to me and what do you — what is it that you want me to do about it? And I stated to him I want you to rescind the termination.

Q This was on what date?

A March the 31st.

Q Okay.

A And he stated that he wanted to wait until he received the A & S forms and then we would set up a meeting at that time. . . .

. . .

Q Okay. When you had these conversations with Mr. Riedl on the 31st of March, what impression did you leave with concerning the status of her employment relationship with Kenosha County?

A That it was still — it was still open and that they were concerned about getting the proper A & S forms from her even though she had received a handwritten — I think prescription pad note from the doctor.

They seemed concerned with wanting an actual A & S form. I did call him again on April 1st and told him that I did indeed pass those papers on to Judy and that she would be seeing the psychol — I'm sorry —

She was continuing seeing the psychologist. She would be seeing the psychiatrist which was the doctor — he was the one that it was necessary to have sign the A & S papers because he was indeed a doctor not just a psychologist.

Q Do you recall what, if anything, Mr. Riedl said to you when you had that conversation with him on April 1st?

A I asked him then about setting up a meeting and he said that he would call me when he — when and if he received the A & S forms.

Q Now, once again during this entire period of time, were you left with the impression that the decision for termination was pending at that point?

A Positively.

Q Why did you file a grievance on the 31st of March?

A Because at that time I thought that — silly of me — that we were really working together and that they were just concerned as well about what was going on with Judy and — and that once we got things in order that that would be resolved.

Q Okay. Did you subsequently meet with Mr. Riedl?

A Yes, we did. He did call me. I'm not sure of the date. I think it may have been April — I have it written on my calendar at work, but it was within a day or two after she had her doctor's appointment, and he told me that he did receive the A & S papers, and at that time he set up the meeting on April 19th.

. . .

[Transcript, pages 352-354]

On cross-examination, Fanning was asked why she concluded that the termination decision was somehow tentative or subject to change:

Q Now, you state it was your conclusion that the decision was still pending when you met with Mr. Riedl. Is that — What was the day of that —

A When I talked with Mr. Riedl.

. . .

Q Okay. Let's go back. You said that there was a meeting where you concluded that the matter was still pending?

A That was when I talked to him on the phone on March 31st.

Q On the phone? Did he ever tell you that the March 18 letter was being rescinded or reconsidered during that discussion?

A No, but he did not indicate that it was not either that he was —

Q So it was your conclusion?

A — waiting to meet with us when he received the A & S forms is what —

Q But he never said that the letter was going to be reconsidered or rescinded. That was your conclusion?

A He didn't.

Q Okay.

A He did not respond.

. . .

[Transcript, pages 355-356]

Fanning admits that Riedl did not say that the termination decision would be reversed, and there was no discussion of an extension of time limits for the filing of a grievance. The question is whether Riedl's agreement to review an A&S form if the Grievant submitted one should reasonably be seen as placing the termination in limbo for purposes of filing a grievance. Clearly, Fanning had a good faith belief that it did. March 31st was within the ten work day window for filing a grievance, and on that day she advised Riedl that the Union wanted the termination rescinded. Had she believed, after speaking with him, that the termination decision was final, she could have and, given her stated position, presumably would have, filed a grievance.

While I do not lightly infer any waiver of grievance timelines, I find that Fanning's belief in this regard was not unreasonable. Riedl was at that time not only the Personnel Department's point person for dealing with the Grievant's situation. He was also the Grievant's immediate supervisor and the one who had announced the termination. Thus, he would have had apparent authority to reconsider the termination. He agreed to review a properly completed A&S form for the Grievant and then meet with the Union, and the only purpose to reviewing the A&S form would have been to reconsider the termination. It is entirely possible, even probable, that when Riedl agreed to review the form, he had little intention of actually reconsidering the Grievant's status and did not give any thought to the possible effect on the timelines for filing a grievance. However, his subjective intent is not the question. The question is whether Fanning, on behalf of the Union, would reasonably have concluded from his agreement that the termination was not final and that the clock was not therefore running on the grievance. I cannot say with any assurance that she could not have so concluded. On these peculiar facts, I do not find a waiver of the timelines. Rather, I find that the timelines actually began running on April 19th, when the parties met and the County

unequivocally stated that the termination would stand. That was the point at which the Union knew or should have known that it had cause to grieve. Within four days of that meeting, Fanning sent her e-mail invoking a Step 1 grievance meeting. That submission was timely.

The fact that the parties did not meet until May 24th was due to the unavailability of the County's Personnel Director and that date was set by agreement of the parties. The written grievance was filed four days later.

In arriving at my conclusion that Riedl's conversation with Fanning had the practical effect of extending the time limits, I stress that I am not holding that the County's Personnel Department agrees to take a second look at decisions or consider compromise at its own risk. In the overwhelming majority of cases, any agreement to take a second look will be either an exercise of leniency or consideration of mitigating circumstances. That is a customary function of a Personnel Department and merely agreeing to do so would not usually raise questions about the finality of the initial decision for grievance purposes. Here, the person agreeing to take a second look was simultaneously a Personnel Department employee, the Grievant's nominal direct supervisor and the person who made the discharge decision. It is that combination of roles that would reasonably have led Fanning to believe that Riedl did not consider the termination decision final.

Based on my conclusion that the timelines did not begin to run until April 19th and that the Union invoked the grievance procedure four days later, I find that the grievance is timely, and accordingly turn to the merits.

POSITIONS OF THE PARTIES – THE MERITS

The County

The County takes the position that the grievance lacks merit and should be dismissed. The contract expressly gives the County the right to make and enforce reasonable work rules and requires that employees follow those rules. The Grievant violated Work Rule #10, which provides that an absence of two consecutive work days without notice constitutes a voluntary quit. The Grievant exhausted her available leave on March 15th and missed work on March 16th, 17th and 18th, all without notice and all without permission. The terms of the rule are clear and its substance is reasonable. The rule is well known and has been uniformly enforced. Accordingly, the Grievant must be held to have resigned her position with Kenosha County.

The County urges the Arbitrator to reject the Union's appeals to sympathy. This is not a just cause case, since the Grievant's own actions constituted a voluntary resignation. The Union tries to make an equitable argument to have the Arbitrator ignore the clear language of the contract and the rules, but the equities do not cut in her favor. This employee has missed

an enormous amount of work over the years. She claims to have been immobilized by depression, but received a return to work slip from her own doctor on January 7, 1999, that made no mention of depression or other ailments. She has refused to cooperate with the County's efforts to assist her in returning to work and indeed actively resisted those efforts.

She deliberately returned phone calls at times when she could be sure that the supervisors were not in. She refused to meet with Riedl, even though she was healthy and stable enough to make it to other personal appointments. This employee has claimed depression in the past, and yet has been able to apply for sickness and accident benefits in those instances. Indeed, she was an expert in the system of missing work without consequences. In this instance, however, the Grievant simply did not care enough about her job to take the steps needed to preserve it. That is not the County's fault, and the County cannot be forced to simply discard its rules in order to accommodate her.

The Union

The Union takes the position that the termination of the Grievant is unwarranted. The County is attempting to take advantage of the Grievant's disability and a strict and technical reading of the rules to rid itself of an employee it finds unsatisfactory. The County knew that the Grievant suffered from serious and recurrent bouts of depression. They had repeatedly been notified of this and the Grievant's supervisor, Tom Buening, acknowledged that the Grievant's problems were psychological in January of 1999, well before the termination. On February 8th, she called Buening and advised him that she had been diagnosed with major depression. He shared this information with Riedl. The County clearly knew that the Grievant was qualified to receive A&S benefits in the winter and early spring of 1999, and knew that she was not in a proper mental state to respond to Riedl's efforts to contact her. The County never copied the Union on its correspondence during this time, even though its representatives should have know that this would have insured an appropriate response. The County never warned her that she was running out of paid leave time, even though this simple step might have prevented this entire dispute. This employee was, quite simply, medically incapable of either cooperating with the County or returning to work when her leave was exhausted. The County knew or should have known this. The Arbitrator must not allow the County to mechanically apply its work rules so as to take away the job of a long-term employee who was, essentially, defenseless.

The County's Reply Brief

The County asserts that the Union's argument miscasts the facts and mischaracterizes the actions of County officials. The Union portrays a dedicated public servant, targeted by vindictive managers. Over the years, this employee was repeatedly counseled, warned and disciplined for her absenteeism. Over the past five years, she has been absent from work more than she has been at work. As recently as January of 1998, she served a five-day suspension for attendance. A month later she went out on medical leave, returning only long enough to

claim a new job in September of 1998. She went out on workers compensation leave three weeks later, beginning the absence that ultimately led to her being deemed to have quit her job. This employee has historically abused the system, abused her employer and abused the taxpayers.

In contrast to the Grievant's history of indifference to her job, the County's representatives were diligent in trying to help her return to work. Riedl devoted considerable time and effort to communicating with the Grievant, even going in person to the nursing home to meet with her when she would not respond to other contacts. He tried to ascertain her medical condition and help her obtain FMLA benefits. Riedl's efforts were above and beyond the call of duty. It was the Grievant who went to great lengths to avoid speaking with him or any other County manager. It was the Grievant who elected not to submit the necessary information to qualify for FMLA or A&S benefits. It was the Grievant who was so utterly unconcerned with her leave balances that she remained off work after all leave was exhausted, automatically triggering Rule 10. The Union's attempt to portray the County as the bad actor in this matter distorts and ignores the undisputed facts.

Turning to the Union's claim that the Grievant was medically unable to function during this time, the County points out that her alleged depression was never mentioned until after she and the Union were notified that she had been classified as a voluntary quit. The next day, medical documents suddenly and mysteriously appeared on Riedl's desk. This is a very rational act for one who is disabled by depression. Parenthetically, the County dismisses as absurd any suggestion that the documents were submitted the week before, observing that one of them is dated March 17th. The Grievant's "inability to function" is also belied by her ability to call in when she knew her supervisors were gone, leave detailed instructions on how to allocate leave time and where to send her paychecks. The logical conclusion is that the Grievant was willing to ignore Riedl's letters, phone calls and other efforts to get her back to work so long as she thought she could do so with impunity. She took the matter seriously only when she realized that her actions might have consequences. That is not a mark of "disability" – it is the mark of one who thought she could play the system and found out she was wrong.

The Union's Reply Brief

The Union dismisses the County's claim that the termination here was the result of a neutral application of a work rule. The County claims that it was patiently waiting to receive "proper" A&S forms, but when it received those documents in early April, it disregarded them. The County was told in early 1999 that the Grievant suffered major depression and this was confirmed by expert testimony at the arbitration hearing. The County knew then, and knows now, that the Grievant was medically unable to return to work until August of 1999, and it cannot argue that in applying Rule 10 it is doing anything more than seizing upon a technicality to rid itself of an employee it no longer wanted. Even if the Arbitrator determines that there was cause for some measure of discipline, discharge is far out of proportion to the conduct and the Grievant's prior record.

DISCUSSION - MERITS

The Grievant ran out of leave time at the end of the day on March 15th. She neither called in nor reported for work on March 16th, 17th and 18th, and had no leave time available to account for that time. The County applied its work rule treating two days of no call, no show as a voluntary quit and terminated her employment. The Union challenges the basic validity of Rule 10, as well as its application under these specific facts. These issues are addressed in turn.

The Validity of Rule 10

The County's Unified Work Rules specify that an employee who fails to call in or report for work for two days is considered a voluntary quit. The Union is correct that this is a unilateral work rule and that the negotiated standard of just cause for termination of seniority cannot be trumped by a work rule. However, the County has retained the contractual right to make and enforce reasonable work rules. The substance of Rule 10, that employees cannot both fail to report to work and fail to report their absence, is on its face reasonable. Virtually every employer has a rule of this type and virtually every employer treats a no call, no show as being a more serious offense than simply an unexcused absence. The specification of termination as a penalty for violations, which is the practical effect of classifying two days of no call, no show as a quit, is severe, but is not out of the ordinary for these types of rules. Indeed, it is not as stringent a standard as that contained in the negotiated contract provision (Article VI, Section 6.6) calling for a loss of seniority if an employee fails to report for work on the first day following the expiration of a leave of absence.

This rule has been in place for many years and Koons asserts that it has been uniformly applied. While the Union questions the validity of the examples cited by Koons – noting that they are confined to the Brookside Care Center and that many of the discharged workers may have been probationary employees — it has not provided any evidence to show that the County has failed to apply the rule and the specified penalty to other employees. There is no evidence of either lax enforcement or disparate treatment in this record and I have no basis for concluding that Rule 10, either in substance or in penalty, does not fall within the scope of the County's right to make and enforce work rules.

Having concluded that Rule 10 is valid, I must nonetheless agree with the Union that the County overreaches by claiming that any termination resulting from a Rule 10 violation is a voluntary quit, not subject to the just cause standard. The rule says this, but the wording of a rule cannot change reality and transform what is basically an involuntary discharge into a willful resignation. This grievant never resigned and if the County wishes to terminate her employment it bears the customary burden of proving that she violated a known rule or standard and that termination is the appropriate penalty for that specific violation.

Did the Grievant Violate Rule 10?

The Grievant indisputably failed to call and failed to come to work on March 16 and 17, 1999, and she had no leave on the books to cover the absence. The County argues that the rule is clear and unambiguous and that the Arbitrator cannot ignore it or rewrite it to accommodate this one employee. The Union argues, in essence, that the Grievant was incapable of complying with the work rule, owing to her deep confusion and disabling mental illness at the time.

Certainly Rule 10 is clear, but that does not end the inquiry in this case. The rule cannot be applied as if it were entirely a mechanical, no-fault device, unaffected by the employee's reasons for not reporting and not calling in. Had the Grievant been in a coma for the days in question, the County could not plausibly claim the right to terminate her employment for not reporting. Work rules are intended to influence conduct and where circumstances make it genuinely impossible for an employee to comply with a rule, a just cause standard requires the parties to take account of those circumstances. There is no conceptual difference between an employee who is incapacitated by a coma and one who is paralyzed by mental illness.

Having observed that there is no conceptual difference between physical incapacitation and psychological incapacitation, I must also observe that there is a large practical difference. The question of whether an employee is incapable of compliance is one of fact. In the case of a coma, the medical evidence is easy to assess. In the case of a psychological ailment, there are questions about the degree to which a person is disabled. Here, there is no real doubt that the Grievant was depressed. Everyone seems to have recognized this and her treating psychotherapist and psychiatrist attested to the diagnosis. She had suffered from depression before and still had been able to manage her leave accounts and document her illnesses. The issue is whether she was so depressed in 1999 that she was not capable of communicating with the County about her absences in mid-March. The evidence that she was not is largely self-reported and my conclusion on this critical point turns on an assessment of her credibility.

The Grievant testified that she was incoherent for large portions of her absence in late 1998 and early 1999, could not understand what it was that Riedl wanted from her, nor make any meaningful response to his inquiries. Simply put, I do not believe her. Her claim is inconsistent with her ability during this time to act in an organized fashion when she wanted something. She was able to immediately contact the Union to try and arrange a 30-day leave of absence when Riedl told her on January 8th that she had been released to return to work. She was able to time her contacts with supervisors so that she could be sure of not actually speaking with them. She was able to leave messages specifying what leave she wanted to use and how she wanted her paychecks delivered. None of this suggests someone who was paralyzed by her illness.

The most significant factor in discrediting the Grievant is the matter of the envelope that appeared on Riedl's desk on March 19th, the day after he mailed the termination letter to her. The envelope contained a slip from DeFazio, a slip from Mason and a two-page letter from her, explaining her condition and offering to provide documentation and to meet with Riedl. In short, the envelope contained a defense to a termination and the basis for claiming a medical leave. The Grievant claimed that all of this information had been sent by mail to Riedl separately and earlier than the 19th. The Grievant testified that she mailed the letter in late February, then conceded that it could not have been written until mid-March. She conceded that the envelope was hers, with her handwriting on it, but despite the lack of a stamp or a postmark, insisted she had mailed it to him. As for the medical slips, she insisted that she had seen those, and others, completed by the doctors and mailed by the doctors' staffs during her appointments. Not only is that utterly inconsistent with the evidence showing that they were received in the single envelope hand delivered to Riedl on the 19th, it is also on its face implausible. It is difficult to imagine why a doctor's staff would drop everything to address an envelope and immediately place a routine medical report or doctor's slip in the mail in the Grievant's presence.

The Grievant's version of how the letter and doctors' slips came to Riedl's desk is impossible to credit. Not only must Riedl be lying, the physical evidence of the envelope must be lying. Instead, I conclude that the Grievant hand delivered the envelope to the Personnel Department on the 19th. I conclude that the Grievant did this personally because the Union officials deny even knowing she had been terminated at this point and would not have been involved. If she did this, it draws further into question her earlier claims that she could not meet with Riedl because her claustrophobia prevented her from using the elevator. That claim is fairly incredible in any case, since she was regularly able to use elevators to get to her doctor appointments. This makes that claim look much more like an excuse for not wanting to meet with Riedl than a reason that a meeting could not take place. In any event, the more significant conclusion from the delivery of the materials to Riedl on the 19th does not depend upon the Grievant having personally placed the envelope on his desk. The delivery of these materials, by whatever means, shows that the Grievant was entirely capable of immediately compiling the information that Riedl had been seeking for months, including a coherent, well organized handwritten account her of her condition and justification for her actions, once she realized that there were consequences for not having responded to his inquiries. That is not something that a person paralyzed by mental illness would be able to do.

The Union has posited a valid defense for the Grievant and has passionately argued in her behalf. However, accepting the defense requires me to credit the Grievant's own description of the degree to which her psychological problems rendered her incapable of complying with the County's requests for information and with the County's work rules. Her actions during the time she claimed to be incapacitated are not consistent with the degree of disability she claims and her testimony at the hearing was demonstrably untrue. I therefore conclude that the Grievant was capable of understanding and complying with the County's procedures and rules in March of 1999, and simply failed to do so.

In finding that the Grievant was capable of complying with Rule 10, but did not, I am mindful of the fact that she is a long service employee and that it is quite unlikely that she intended to put her job in jeopardy by neither reporting for work nor calling in. It is more likely than not that she did not carefully track her leave balances and assumed some type of leave would be forthcoming once she exhausted her paid time off. Had she been willing to speak directly with Riedl, or any other representative of the County, it is possible that this option could have been explored. However, she cannot simultaneously work actively to avoid speaking with the County's representatives, completely ignore their requests for information and complain that no one told her what her leave balances were or what her options were for extending her time off work. The Grievant elected to manage her absence on her own terms, and as a consequence she violated a rule that is reasonable, well known and uniformly enforced. The penalty for violating the rule is specified in the text of the rule and is consistent both with penalties for no call, no show in other work places and with the penalties for similar conduct under this contract. While it is always possible to mitigate the penalty in an appropriate case and while long service is a mitigating factor, it is balanced by the aggravating factor of the Grievant's resistance to the County's efforts to manage her case and by her untruthfulness during her absence and at the hearing.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The grievance is procedurally arbitrable.

2. The County did not violate the collective bargaining agreement by removing Judy Dumesic from the payroll.

3. The grievance is denied.

Dated at Racine, Wisconsin, this 12th day of October, 2000.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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