BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1667, AFSCME, AFL-CIO

and

VERNON COUNTY

Case 126
No. 60351
MA-11587

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFL-CIO, appearing on behalf of the Union.

Mr. Mark B. Hazelbaker, Attorney at Law, appearing on behalf of the County.

ARBITRATION AWARD

The Union and County named above are parties to a 2000-2002 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the undersigned arbitrator to hear and decide the termination of David Aberg. The undersigned was appointed and held a hearing on January 10, 2002, in Viroqua, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by July 22, 2002.

ISSUE

The parties ask:

> Did the Employer, Vernon County, have just cause to discharge David Aberg on March 14, 2001, on the ground of excessive absenteeism and tardiness? If not, what is the appropriate remedy?

BACKGROUND

The County operates a licensed nursing home called Vernon Manor. The Grievant, David Aberg, was employed at the Manor from February 10, 1987, to March 15, 2001, when he was discharged. The Grievant worked in both the nursing and activity departments during his employment. He started as a nursing assistant on the night shift, then went to the day shift, then to activity, then back as a nursing assistant. The collective bargaining agreement contains a just cause standard for discipline and discharge, and the parties agree that the grievance over the discharge is timely and no procedural issues exist.

Nancy Witthoft has been the Administrator of Vernon Manor for the last three and a half years. She testified that the facility had posted a notice stating that any employee calling in without having earned sick days will be considered to be on an unauthorized leave and subject to disciplinary action, unless he or she has been treated by a physician who states that the employee is unable to work. The notice was posted in the employee break room from April of 1998 to around the beginning of 1999.

The collective bargaining agreement provides in Section 5.10 that:

> 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.

The Grievant's disciplinary record, for the purposes of this Award, starts in the year 1999. On April 15, 1999, the Director of the Activity Department counseled the Grievant about three tardy occurrences. She made a note that the Grievant understood the policy. Late in 1999, the Grievant was tardy four times, absent twice when he had no sick leave earned, and took sick leave on four occasions when it extended his weekend.

Full-time employees earn one day of sick leave per month and may accumulate up to 96 days of sick leave. Witthoft stated that there were no disciplinary measures given for the Grievant's use of earned sick leave. All disciplinary measures in this Award deal with absenteeism when sick leave has been exhausted and there is no sick leave to cover an absence. Such absences subject employees to discipline.

The Grievant was given a performance appraisal on February 25, 2000, for the prior year by Merna Fremstad, the Director of Nursing. She noted that the Grievant's attendance needed improvement, that he had 30 hours of unauthorized absence since July of 1999 and 14 hours since January of 2000. Her notes show that she considered this a verbal warning. The appraisal form also noted that the Grievant needed major improvement in attendance. In other areas, the Grievant met standards and Witthoft stated that he was a good nursing assistant. At the end of 1999, the Grievant was on light duty. He had been previously injured around 1997.

While on light duty, the Grievant could work different hours and he was not charged with tardiness during that period of time. The Grievant testified that his back injury and other medical problems caused problems for him and resulted in some absences. While on light duty, the Grievant brought doctors' slips in for absences and therapy.

The Grievant's attendance record continued to get worse in the year 2000. He was tardy a total of 68 times. He was absent without earned sick leave on 16 occasions. On 9 occasions, he took earned sick leave that extended a weekend off or a vacation. The Grievant was disciplined again on August 3, 2000, when Fremstad gave him a written warning, noting that he had 32 hours of absent time since he was given a verbal warning on February 25, 2000.

On December 21, 2000, the Grievant was given a three-day in-house suspension with pay. Witthoft issued the suspension. She noted that he had missed 115 hours, that his pattern of missed days had not decreased after two previous warnings, and that his tardiness was out of control.

During the first three months of 2001, the Grievant was tardy five times, absent three times, and took sick leave twice before his weekend off. On March 15, 2001, he was discharged. Fremstad signed the termination notice and made the following notes:

> On 2-22-01, David received his annual evaluation & was counseled on cont'd problems with his absenteeism. He has received verbal, written & a 3 day in-house suspension previously for attendance problems. Since receiving his evaluation, he has been absent 3 times. Once, to obtain in-service credits necessary to retain certification (prior auth. received from management.) A sick day was taken on 3/2 & on 3/12 he called just to say he would not be in. The 3rd day was on a Mon. following his weekend off. On 3/13 he had taken a vac. day, & 3/14 was his day off. It was made very clear to him during evaluation that time off with no time to cover would not be tolerated. Therefore, today on 3/15/01, we have elected to terminate him.

Witthoft made the decision to discharge the Grievant based on her discussion with his supervisor and looking at his record. The notice of discharge – called an employee violation report – was filled out and signed by Fremstad on March 15, 2001. A Union representative, Fremstad, Witthoft and the Grievant were in attendance at the termination hearing. Witthoft testified that the termination line on the form was checked off during this meeting, while the Grievant testified that the termination line already checked before hand. The Grievant asked for another chance but it was denied.

The Grievant's father died at the end of December of 2000. He took three days for the funeral, and five absent days also in December after the funeral leave. The Grievant did not ask permission for the absent days following the funeral leave. Witthoft called him to see if he

planned on returning to work, and he said he needed to be home. Shortly after that, the Grievant asked for a family medical leave due to the death of his father, and he told Witthoft that he need time off to take care of his mother. He told Witthoft that he had emotional problems, that he didn't feel he could do his job, and that his mother needed care at home.

The Grievant testified that before his father died, around December 7, 2000, his mother was quite ill and both parents were in the emergency room at a hospital. When his father was admitted to the hospital, he took his mother to his own home and cared for her. The Grievant's father died December 9, 2000. His mother was having trouble taking care of herself, and she stayed with him for about six weeks. The Grievant's wife returned to work, and the Grievant cared for his mother during that time.

Shortly after the funeral of his father, the Grievant gave a family medical leave form to a doctor who failed to fill it out, although he was told by a secretary that it would be sent to the Manor. Witthoft received a form from the Grievant for family medical leave, but told him that he had not read the instructions. She told him that the leave could not be approved the way it was written. If his mother's physician had filled out the portion of the form, he probably would have qualified for a family medical leave. When the Grievant offered to take the form back to the doctor to have the form filled out correctly, Witthoft told him that she would not accept it. While the contract in Section 6.01 allows for a leave of absence of personal reasons, the Grievant did not apply for such a leave.

The Grievant did not recall why he was absent in the first part of 2001 before his discharge. One of his absences was to attend court.

The Grievant did not file any grievances on the prior disciplinary steps. The first grievance he filed was over his termination. The Grievant did not attach any information to his performance appraisal. Witthoft stated that she has consistently disciplined other employees who have tardiness and absentee problems. The Grievant's tardiness and attendance problems affected other employees and residents.

THE PARTIES' POSITIONS

The County

The County asserts that the employee cannot challenge disciplinary history where he failed to file grievances for previous disciplinary measures. The Union appeared to challenge the Employer's imposition of a written warning in the context of a performance evaluation and the imposition of a three-day "in-house" suspension. However, neither the Union nor the employee filed a grievance contesting any of the first four disciplinary actions taken against the Grievant. Thus, those actions are beyond contest in this proceeding.

Moreover, the Union's complaint about imposing a written reprimand in the context of a performance evaluation exalts form over substance. The three-day suspension was imposed to maintain patient care. It would have been irrational to punish an employee with an attendance problem by requiring him not to show up. The contract does not contain any specific disciplinary proceedings, only that the Employer is required to act on the basis of just cause. The Employer did that – it alerted the employee to a serious performance issue and progressed to high levels of sanctions as the behavior continued. The Employer tried to accommodate an employee who had no regard for the consequences of his attendance, patient care and the welfare of fellow employees.

The Employer argues that the Grievant's failure to report to work despite having exhausted sick leave amounts to a constructive resignation. Unless an employee has sick leave or some other approved leave, an employee is expected and required to be present for work every day. The Grievant exhausted all sick leave but continued to fail to report for work and continued to report to work on time when he did show up. By failing to show up for work, the Grievant quit or constructively resigned his position.

This is not even a close case, the Employer asserts. The Grievant was absent on Mondays or Fridays and absent without paid leave dozens of times, despite efforts to accommodate him. He failed to reciprocate with any kind of responsibility. Attendance is an essential element of employee performance, and it is critical in nursing homes. Given the fact that nursing homes have become short staffed, everybody needs to be there every day. Woody Allen said that 90 percent of life is just showing up. The Grievant can't handle that 90 percent.

The Union

The Union objects to the "due process" given the Grievant. It argues that the notice of termination was already drafted and the County had made up its mind when the Grievant was called to the office to receive the termination notice. The Administrator did not discuss the matter with the Grievant before the March 15, 2001 meeting, but she testified she could have decided not to give him the termination notice during that meeting. However, Union President Judy Clark testified that Witthoft called her to be present at the meeting because the County was going to terminate the Grievant. The Grievant did not have appropriate due process because he was not given the opportunity to give his side of the story prior to the County's decision to terminate him.

The Union also questions the factual basis of this case. Witthoft testified that employees who had accumulated sick leave to cover an illness were not subject to discipline, but Fremstad noted that the Grievant had been absent three times since receiving his evaluation on February 22, 2001. He was sick on March 2nd, and should not have been subject to discipline. He was absent on March 12th – so the Union only finds him absent on one occasion since his last evaluation.

While the Grievant has instances of absenteeism and tardiness, there were extenuating circumstances. He suffered back injuries in 1997 and 1999 and was on Worker's Compensation. Both of his parents became ill in December of 2000 and went into the emergency room. The Grievant's mother was released but his father was hospitalized and died in December. The Grievant was on funeral leave December 11, 12, and 13, and then was absent on the 14, 16, 17, 18, and 19 – the days immediately following the funeral. The Grievant testified that he was taking care of his mother and he kept the Employer informed of the issues with his mother and father.

When the Grievant asked for a Family Medical Leave and submitted the form for it, he unfortunately listed the death of his father as the reason for the request rather than providing care for his mother. Witthoft denied the leave and did nothing to help the Grievant secure FML. She could have assisted him by telling him to resubmit the form with a check mark by the section for serious health conditions affecting parents. Progressive discipline is supposed to be corrective in nature and not punitive. The termination of the Grievant punished him in part for the absences he incurred for the care of his mother and the emotional distress he suffered at the loss of his father.

Finally, the Union believes that the County missed a step relative to a corrective progressive disciplinary procedure. The Grievant was given a three-day in-house suspension in December of 2000, which meant he worked without a loss of pay. The Union questions whether this is an appropriate form of discipline. The Grievant did not receive any unpaid suspension between his in-house suspension and termination, and that's the step that the County missed.

DISCUSSION

There is little doubt that the Grievant's attendance record in this case had become abysmal. And there is little doubt that the Grievant was given progressive discipline in order to have a chance to correct his record. However, despite being counseled, verbally warned, warned in writing and suspended, the Grievant continued to be absent and tardy and use sick leave in conjunction with his weekends off.

The record shows that in 1999, the Grievant was counseled after being tardy 3 times but he continued to be tardy and absent. The year 2000 was terrible – the Grievant was tardy 68 times and absent without available sick leave 16 times. He also took sick leave that extended his weekend 9 times. Despite a verbal and written warning, the record continued to show repeated tardiness and absences. Of the 16 absences in 2000, only 5 of them occurred after the death of the Grievant's father in December.

And this pattern continued into 2001, despite a suspension and warnings. By the time the Grievant was terminated in March of 2001, he had already accumulated three absences, five tardy days and took sick leave twice that extended a weekend.

The whole point of progressive discipline is to give an employee a chance to rehabilitate himself, to correct his behavior, change his ways. The Grievant showed no signs whatsoever of correcting his tardiness and absenteeism or use of sick leave that extended weekends. He continued to ignore counseling, warnings, and even a suspension. While the Union believes that the Employer missed a progressive disciplinary step by not giving the Grievant an unpaid suspension and paid him during an in-house working suspension, the Employer correctly points out that the Union never grieved prior disciplinary steps and they should not be reopened now.

The Union also objects to the way the termination notice was handled and believes that the Employer made up its mind before hearing the Grievant's side of the story. The Employer listened to the Grievant, even waited for him to give it some indication that things would change. The Employer could have discarded the termination notice had it heard anything that was of value. Whether the termination notice was already checked when the Grievant was interviewed or checked during or at the end of the interview is not all that relevant. The Grievant did nothing to help his own cause at any time in the disciplinary process. He had ample time to explain his lack of attendance, as well as ample time to correct it.

It is, of course, unfortunate that during this period of time when the Grievant's attendance and tardiness record was going rapidly downhill, he also had significant family problems. However, his record before his father's hospitalization and death and his mother's illness was the real problem. If the Grievant's record had been acceptable up to that point, certainly the Employer would have given the Grievant more leeway. But the Grievant has no explanation for all the absences and tardiness up to December of 2000. Even if the Grievant had properly applied for a Family and Medical Leave, he still had no answer to the terrible record he created before that time.

In conclusion, I find that the Employer had just cause to terminate the Grievant due to the Grievant's excessive absenteeism and tardiness.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin, this 2nd day of August, 2002.

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

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