BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEET METAL WORKERS INTERNATIONAL UNION, LOCAL 565

and

GREENHECK FAN CORPORATION

Case 32
No. 61975
A-6051

(Termination of P.B.)

Appearances:

Mr. William Haus, Attorney at Law, Haus, Resnick & Roman, LLP, 148 East Wilson Street, Madison, Wisconsin 53703-3423, appeared on behalf of the Union.

Mr. Ronald J. Rutlin, Attorney at Law, Ruder, Ware & Michler, LLSC, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appeared on behalf of the Company.

ARBITRATION AWARD

On January 3, 2003, the Sheet Metal Workers International Union, Local 565 and the Greenheck Fan Corporation filed a request with the Wisconsin Employment Relations Commission seeking to have William C. Houlihan, a member of the Commission's staff, hear and decide a grievance pending between the parties. A hearing was conducted on January 7, 2003 in Wausau, Wisconsin. A transcript of the proceedings was taken and distributed on January 23, 2003. Post-hearing briefs were submitted and exchanged by May 1, 2003.

This dispute addresses the termination of employee P.B.

BACKGROUND AND FACTS

Greenheck Fan Corporation of Schofield, Wisconsin manufactures air movement control equipment including fans, dampers, louvers, kitchen ventilation hoods, energy recovery, and makeup air units. Its Schofield plant is approximately 1,000,000 square feet, and is divided into 11 different facilities. Greenheck employs approximately 900 production and maintenance employees in Schofield, who are represented by the Sheet Metal Workers International Union, Local 565. The Company and Union are signatories to a collective bargaining agreement, the relevant portions of which are set forth below.

The grievant was hired on June 13, 1988. In 1995, she was employed as a power assembler and worked in Plant 3 on the A-1 and A-2 manufacturing lines producing spun aluminum products. Her supervisor at the time was Tim Weiss. From June 26, 1995 through November 24, 1995 the grievant was absent. She initially advised the company that she had back pains due to her work on the A-2 manufacturing line. She subsequently informed Greenheck that she was suffering from an anxiety disorder.

During her absence, the grievant, who was on short-term disability leave, filed a discrimination claim with the State of Wisconsin Department of Industry, Labor and Human Relations. That complaint was subsequently resolved, and the grievant returned to work in November of 1995 as a power assembler in the SP department where she produced a sub-assembly of the ceiling and cabinet fans produced in the SP area. Company witnesses testified that the grievant was placed in the SP department to accommodate her need for relatively light work in a structured, repetitive environment. The grievant worked in the power assembler position in the SP department without incident until March, 2001. At that time, she informed Mr. Weiss and Mr. Weiss' supervisor, Ken Tokarz that she was upset by the way a co-worker, C.M., was treating her. The company conducted an investigation, concluded that there was no harassment of the grievant by Ms. M., but further concluded that there was childish behavior occurring. Ms. M. was directed to behave professionally and stop calling the grievant names. Following the investigation, Mr. Weiss and a member of the union's committee monitored the situation.

In the spring of 2001, Mr. Weiss was moved to a different supervisory position, and was no longer the grievant's supervisor. On October 12, 2001, Weiss received a message on his voice mail from the grievant, indicating that she could no longer work in the SP department and asking Weiss to return her call. The grievant subsequently informed Mr. Weiss that Ms. M. was no longer picking on her, but would only talk to her when it concerned work. According to Weiss, the grievant indicated that she should be moved to Facility 8 to do assembly work, or that she should be terminated.

On that same day, October 12, 2001, the grievant went on Family Medical Leave and thereafter, short-term disability leave until December 20, 2001. During her absence, she sent a number of letters to the company. One of those letters requested a full investigation of the alleged harassment and hazing by Ms. M. In response to the letter, the company conducted an investigation. Additionally, company officials spoke with union officials and it was agreed that the union would conduct a separate investigation. At the conclusion of those investigations the company and union met, and compared notes. On November 1, 2001, Mark Berg, the company's Human Resource Manager, sent the grievant the following letter, summarizing the investigations:

> Dear P:
>
> Over the past couple of weeks the company and the union have been conducting separate investigations in the SP area to determine if there is any improper activities occurring between employees. Yesterday the union and the company met to compare findings from the investigations. As it turns out, the findings of both parties are very similar. First, we felt that the employees spoken to were not as forthcoming as they would have been about activity in the area. However, based on the information they were willing to give, we have been unable to establish any evidence of harassment in the area. We did discover that there have been inappropriate comments made between employees and in general immature activity between employees. That in itself does not constitute harassment. Given our findings, the company and the union agreed that no changes or moves to personnel will be made at this time. We are planning on speaking to the entire department about the immature behavior and inappropriate comments and we will increase supervision in this area.
>
> When the doctor has released you to return to work, we are anticipating that you will work in the SP area. If you are not comfortable in that area, we would suggest that you post into a different area or look at moving to a different shift.
>
> I hope you are doing well at home and on the road to recovery. We look forward to you getting better and seeing you here at Greenheck. If you have any questions or require additional information, please let me know.

Subsequently, Mr. Berg received a letter, dated November 6, 2001 from the grievant's physician expressing the belief that working with Ms. M. is detrimental to the grievant's health and requesting that the grievant be allowed to move to another location. The next day, Berg spoke with the grievant who informed him that she would not return to the SP department and that the only place she would work was Facility 8. Berg informed the grievant that moving to

Facility 8 was not an option: the work was too heavy; there were no openings in Facility 8; Ms. M.'s son was a supervisor in Facility 8; and Facility 8 was not under the control of the grievant's supervisor. Berg offered to have the grievant moved to the Gravity Assembly department, which would allow her to work 6:30 a.m. to 2:30 p.m. in a department that was across the plant from the SP department. Berg also indicated that the grievant's pay would be reduced after 90 days because she was requesting a transfer. However, the grievant refused to accept this alternative and indicated she would not return to work.

On November 7, Berg sent the grievant the following letter:

> As we discussed over the phone, the company has received the request from your doctor asking us to move you to a different location. I also understand from Tim Hintz that you prefer to work the 6:30 a.m. – 2:30 p.m. shift. Based on those requirements, we plan on moving you to the Gravity Department. This move puts you on the other side of the facility from SP's, yet keeps you working the same hours. We would keep you at your current wage for a period of 90 days. If you have not posted out in that time frame, we would move you to the top wage for a Gravity grade 3. By making this move, we feel we have accommodated the request of your doctor as well as your request for keeping your shift the same. You indicated on the phone that this was not an acceptable arrangement and that you would not be coming to work on Monday. I am very concerned about your continued employment with Greenheck based on this comment. Please be aware that in the contract it states that "No employee shall be absent without a reasonable excuse. If he is absent for three (3) consecutive working days without a satisfactory excuse, he shall be deemed to have quit and their employment shall terminate." It is now your decision whether this action is taken or not. I hope that you choose to come to work on Monday morning at 6:30 in the Gravity area.

On November 9, the grievant sent Berg a letter which indicated that she suffered from anxiety and panic disorder and alcoholism within the meaning of State and Federal disability law. The letter further indicated that should she be directed to work in the Gravity department, it would have an effect on her disability. The grievant wrote that such a placement would cause her intimidation by C.W. from the following situations:

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1. "Attending the same monthly meetings with her present.

2. Contact with her inside some departmental restrooms or going to and from.

3. Her stopping by in the same department that I would work in to talk to co-workers and passing by"

. . .

The grievant's letter expresses her view that such an assignment would disable her.

The grievant sent Mr. Berg a second letter dated November 12, which took issue with Berg's unwillingness to permit the grievant to transfer to Plant 8. A third letter, dated November 20, again attempted to alleviate the company's concern relative to the grievant being supervised by C.M.'s son.

The grievant did not return to work on November 12. She did return on December 20, 2001. She returned to Facility 5, where, after five hours of work she suffered a panic attack and subsequently went home. She informed her supervisor that the pace was too fast. Her treating psychologist provided the following letter:

January 8, 2002

Mark Berg
Personnel Director
Greenheck Fan Company
P.O. Box 410
Schofield, WI 54476-0410

Dear Mr. Berg:

I am writing to give you an update on my contact with P. Since my last letter to you I have received the results of psychological testing which she completed and have had additional meetings with Ms. B. It is clear that her current level of anxiety precludes affective functioning at work and I would recommend that she be placed on medical leave as of December 20, 2001. It is my understanding that Dr. Reed of the Marshfield Clinic has placed her on Zoloft and that she began taking Zoloft on Friday, December 7, 2001. It is further my understanding that such antidepressants generally take six to eight weeks to have their full affect. Her attempt to return to work after two weeks on the medication may very well have been premature.

The testing results show a profile that is typical of persons who are characterized by anxiety and depression. They tend to be tense, worried, with sleep problems, and being over-reactive to security threats. There is generally some constraint around showing anger. These persons usually have a history of good achievement, sometimes done in a rather compulsive manner with a very strict sense of responsibility. When the responsibilities accumulate to an overload these persons tend to become overwhelmed and collapse into an anxiety state. The profile is also typical of persons who tend to have a good prognosis in therapy. They tend to have good achievement histories, which supports the probability of improvement and return to previous functioning.

Ms. B. plans to continue therapy with me and to continue cooperation with the medication. It is hoped and anticipated that this will result in an improvement in her condition, enabling her to return to work with a target date of Monday, January 21, 2002. At that point she will have been taking the medication for seven weeks, which puts her into that six to eight week window. We also will have had an opportunity to discuss some of the underlying stresses.

Thank you for your consideration in this matter. I would be glad to complete a proper form. If that is necessary, please fax it to me at the number on this letterhead. If you require a specific return to work statement closer to January 21, 2002, please advise me of that. If there are specific questions about the medication, that of course would need to be addressed to Dr. Reed.

Sincerely,

Richard W. Hurlbut /s/
Richard W. Hurlbut, Ph.D.

Licensed Psychologist

On December 28, the grievant's boyfriend, also a Greenheck employee, called Berg and asked him if the grievant could be moved to a different area of Facility 5 upon her return to work. Shortly after speaking with the grievant's boyfriend, Berg received a call from the grievant, who informed Berg that she would not return to Facility 5 and that she would only return to Facility 8. The grievant also informed Berg that if something happened to her that weekend, it would be on his shoulders and then hung up. Concerned over the grievant's safety, Berg called the company's Employee Assistance Program and asked the representative to call the grievant or her boyfriend to make sure nothing happened. Thereafter, Berg received a call from the EAP representative who informed him that the grievant's boyfriend indicated he would stay with her to make sure she was safe.

The grievant used medically approved leave through January 18, 2002. On January 21, 2002, the grievant returned to work at a different position in Facility 5. Her new position involved performing a toggle-locking function. For the grievant's first day back, Greenheck transferred her boyfriend to Facility 5 so that he could support her return.

While working at the toggle-lock function, the grievant contacted Mr. Weiss, who once again was her supervisor, and alleged that other employees in Facility 5 were blackballing her. According to Weiss, the grievant claimed that other employees would not talk to her nor socialize with her. Weiss investigated the grievant's allegations and concluded that the grievant had had discussions with co-workers and had talked to them about how she was being paid so much more money than they were. Weiss concluded that there was no validity to the grievant's concern that she was being blackballed.

The grievant took a leave of absence beginning May 1 through June 7, 2002. She was on vacation from June 10 through June 14, 2002. The grievant returned to work on Monday, June 17. On Thursday, June 20, the grievant called Mr. Weiss and alleged that someone had sabotaged her equipment. Thursday, June 20 was the last day the grievant came to work.

The grievant raised two concerns with Mr. Weiss. First, the grievant claimed that the toggle-locking machine on which she was working had a cracked piece of material. Weiss investigated this claim and found that a piece of material was cracked, and directed a maintenance employee to fix the machine. The grievant also alleged that an employee or employees had deliberately left a roll former machine on so that material would feed out of the machine and create a danger to her.

On Monday, June 24 the Company and the Union agreed that the Union would conduct an investigation into the grievant's safety allegations. The Union did so, and found no evidence to substantiate the grievant's claim and so informed the Company. On Tuesday, June 25, the grievant called Mr. Berg and informed him that she had spoken with the Department of Labor and OSHA regarding her safety concerns. She was referred to the local police department. The grievant called the local police department and initiated an investigation. On Wednesday, June 26 the grievant left a voice mail message for Mr. Weiss indicating ". . .I am not coming into work, cause I feel that Tampers is an unsafe place for me to work, and until the Company can prove that it's a safe place, I am not coming into work. . ." Later in the day, Berg spoke with the grievant and advised her that she had been away from the company without a reasonable excuse for three days. The grievant requested a meeting with herself, her boyfriend and the Union and Berg. Berg replied that he would have a conversation with her if she provided documentation as to why she had been away for three days.

On Thursday, June 27, Berg had a conversation with the grievant. Berg's contemporaneous notes, corroborated by his testimony, included the following:

> . . .I told P. I would be willing to hold that meeting if she can provide us documentation as to why she has been off for three days, because at this point I consider her to be away from work without a reasonable excuse. I told P the typical way this is covered is by an excuse from a doctor.
>
> P indicated she is not at work because she feels it is unsafe and she has spoke to the Everest Metro Police, because she feels that there are employees who are trying to hurt her by sabotaging her equipment. I explained to P that Tom Hintze and Phil Darr her union reps have investigated her claims and were unable to substantiate them. Tim then called P and told her to come into work the next day or bring in a doctor's note. P acknowledged the conversation took place but still was not comfortable coming in. She also stated that Everest Metro is planning on coming in to conduct an evaluation. I indicated that we would cooperate with them in any way if they do choose to come in. I said that I believe the operation is safe and that I don't have concerns about safety.
>
> If Everest Metro does not find anything, P's only other way to cover this absence is with a note from the doctor and if she cannot provide one, she would be terminated. P was upset with this and I went on to explain that she is choosing to stay away from work. The Union has indicated that it is safe and she could have made herself available for work to be reassigned, but she refused to even come in. P said that she would be willing to come in if I would guarantee she would not get hurt. I told P we couldn't do that. Although I believe that her operation is safe, it is a manufacturing environment and people can have accidents. I also told her that others are doing that work and no one has gotten hurt. P asked if we are just waiting for them to get hurt. . .
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> P called me back about fifteen minutes later. She indicated that she had contacted her doctor's office. She wanted me to call the doctor and explain why we are demanding a medical note, as they don't believe it's a medical issue. I told P that I am not allowed to speak to her doctor and I am not demanding a medical note, rather I am telling her how people normally provide documentation to show a reasonable excuse why they are gone for three days. P indicated that they do not feel the situation is a medical situation, and will not give her a note to cover her absences.

The Everest Metropolitan Police Department conducted an investigation. In a letter dated July 1, 2002, addressed to the grievant, Daniel Vergin, Chief of Police, indicated

". . .I personally viewed these machines in operation, and the proximity of the role former to the toggle-lock machine and I do not feel that even if someone feeds the extruded metal through the machine that it would create a hazard to you or anyone else in the area.

As far as the police are concerned, there is no criminal act taking place at Greenheck, nor any conduct that would warrant any further investigation."

On or about July 2, 2002, Berg determined to terminate the grievant for being absent from work for three consecutive days without a satisfactory excuse. Prior to calling the grievant, Berg telephoned Tim Hintze and informed Hintze that the company was going to go ahead and terminate the grievant. Berg thereafter called the grievant and informed her that she was being terminated. Berg confirmed that termination by letter dated July 2, addressed to the grievant. That letter provides as follows:

Dear P:

Please consider this as written notification of the termination of your employment from Greenheck Fan Corporation effective June 20, 2002, your last day worked. Since that time you have not come into work because of concerns you have regarding the safety of your equipment. The Union has conducted an investigation and the Company has investigated the situation as well. The Everest Metro Chief of Police has also conducted an investigation and has found no evidence of wrongdoing. During this time you have chosen not to make yourself available to work. These investigations have demonstrated that there is no basis to support a claim that the equipment you operate is unsafe or that any person is trying to cause harm to you. Based on these findings, we are terminating your employment as you have been away from work for three or more consecutive days without a reasonable excuse.

Your health and dental benefits will terminate on June 30, 2002; you will receive additional information on continuing these benefits at a later date.

On July 3, the Union filed the following grievance:

This letter will serve as the Union's grievance in what I consider the wrongful termination of P.B. As you know, P was absent from work for more than three (3) days. However, P did make repeated efforts to arrange a meeting with the company to discuss the issues that caused her to be away from work, to find a solution to the problem that would allow her to return.

I myself spoke to you on Monday and asked for an extension of the three-day rule until we could meet. You told me no. Given P's efforts and my own, I can only conclude that the Company set forth a course to prolong a meeting past the third day in an effort to justify terminating P.

In addition, the Company violated the collective bargaining agreement when it terminated P without Union representation. Work rule 27 on pages 55 and 56 clearly state that "All disciplinary actions taken by the Company shall be done in the presence of a shop committeeman or steward." Further, under Step 4, "Termination of Employment", "A member of the Union committee will be asked to attend this meeting with the employee." No union representative was present.

The Union is seeking P's reinstatement with P being made whole for any wages and benefits that she has lost now and in the future by the Company's actions.

Sincerely,

Tim Hintze

ISSUE

The Company believes the issue to be:

Did the Company violate the collective bargaining agreement when it terminated the grievant effective June 20, 2002, for violating Work Rule 20, found at pages 53 and 54 of the collective bargaining agreement? If so, what is the appropriate remedy?

The Union regards the issues to be as follows:

1. When the Employer discharged the grievant on July 2, 2002, for being absent for three consecutive days in June, 2002, was such discharge for just cause? If not, what is the appropriate remedy?

2. If the discharge was with just cause, was it proper for the Employer to retroactively set the date for the discharge so as to precede the date on which the employee was informed of the discharge? If not, what is the remedy?

3. Did the Employer violate the terms of the collective bargaining agreement by the manner in which it implemented the discharge?

This Award addresses each of those issues.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 12
Management Rights:

. . .

B. Management Prerogatives

Nothing in this Agreement is intended to limit the Company's right to supervise and direct its work force, including the right to establish new jobs, increase or decrease the number of jobs, change materials or equipment, schedule or assign work to be performed, hire, rehire, recall, transfer or lay off employees according to production needs, all subject to the express limitations imposed in this Agreement. The Company shall have the right to discipline or discharge employees for just cause, including any violation of this agreement, and any violation of the work rules, a copy of which is being attached to this Agreement and approved by all parties, it being understood that the Company shall not discriminate against any employee under this Section. If it is determined that any employee has been discriminated against under this Section, said employee shall be offered reinstatement to that employee's job with full compensation for any lost earnings.

. . .

20. Employees must notify the Company, using the designated call-in system, prior to the start of their shift if they are unable to report to work or will be late. In the event of an unforeseen emergency, the employee must contact the Company as soon as possible and may designate a family member to place the call for them if they are unable to do so. Employees wishing to apply for Family/Medical Leave (under FMLA 1993) must designate their request 30 calendar days in advance for planned absences or as soon as practical for unforeseen circumstances, no later than two days following their return to work. No employee shall be absent without a reasonable excuse. If he is absent for three consecutive working days without a satisfactory excuse, he shall be deemed to have quit and their employment shall terminate.

. . .

27. A violation of the terms of the labor agreement or any of these work rules, except those that call for immediate discharge, shall subject the violator to disciplinary action as may be proper under these rules and under the following reprimand procedure:

. . .

REPRIMAND PROCEDURE

. . .

Step 4. Termination of Employment.

A reprimand form will be completed, indicating the reason for the reprimand and presented to the employee by his supervisor and the Manager of Manufacturing or the Human Resources Manager. A member of the Union Committee will be asked to attend this meeting with the employee.

All Disciplinary actions taken by the Company shall be done in the presence of a shop committeeman or steward. The Union shall promptly be given a copy of any reprimand. Any employee who works for four (4) months without committing another offense of the same nature shall thereafter return to Step 1 of the reprimand procedure as to offenses of that nature. Any disciplinary action taken before August 15, 1975, shall not be subject to this procedure.

. . .

DISCUSSION

The Company regards this as a relatively simple matter, dictated by three critical facts: 1) Work Rule 20 is in the Agreement as a result of good faith negotiations between the parties; 2) the grievant had been put on notice that she would be terminated if she did not provide a reasonable excuse for her absences; and 3) the grievant intentionally refused to report for work for three (3) consecutive working days and failed to provide a satisfactory excuse for her absences, thereby violating Work Rule 20. These facts are alleged to be indisputable. The Company argues that based on the clear and unambiguous language in Work Rule 20, the grievant was deemed to have quit, resulting in the termination of her employment with the Company.

The Union regards the Company's approach as oversimplistic, and lacking just cause. The Union notes that the grievant had a long medical history that compromised her ability to perform her job, and that the employer was aware of her condition. The Union goes on to point out that the discharge letter, dated July 2, is the sole basis for discharge in this proceeding. The Union contends that given the medical condition of the grievant, a mechanical application of the three-day no-show rule is inappropriate. The Union notes that the Company did not submit Dr. Hurlbut's letter of January 8 which characterized the grievant as ". . .overreactive to security threats. . . ." The Union contends that Hurlbut's letter essentially predicted the event that led to her termination. The Union notes that all of the employer witnesses believed the grievant was sincere in her concerns.

The Union contends that the employer ignored this fact. Berg refused to call the doctor, nor did he ask to see the grievant's medical file prior to discharge. He did not refer her to EAP, as he had previously done. In essence, the Company treated her as an employee without such medical problems. The Union believes that the grievant's termination reflects Company opportunism. The Union asks "Why is the grievant culpable in a situation that is explained by her known anxiety and panic medical problems?" The Union goes on to suggest the answer, "Is it because the employer suddenly decided that it preferred not to deal with these issues and because it saw what it perceived to be an opportunity to discharge Ms. B.?"

The Union concludes that the employer is overreacting. According to the Union, the grievant has a good prognosis. The Union argues "It is a violation of the just cause standard to use Work Rule 20 as a pretext for imposing the ultimate penalty on a sick employee who is capable of performing her job duties and whose condition is susceptible to treatment."

Dr. Hurlbut did predict an overreaction to security threats. The Union urges me to conclude that the grievant's absence, beginning June 20, was a product of her anxiety and depression. Yet there is no medical support for that conclusion in the record. This is a record which is otherwise filled with absences supported by contemporaneous medical verification.

The Union's contention that the Company did not call the doctor, nor conduct an independent review of the medical file, nor refer the grievant to the EAP is premised on the belief that the employer had an affirmative duty to do these things before it could invoke its rights under Work Rule 20. This record shows that the employer went to great lengths to accommodate this employee. There were a number of job changes. The Company, and the Union, conducted a series of investigations under circumstances where the employer was no doubt skeptical. There was a lot of lost time. The Company reassigned the grievant's boyfriend to facilitate one of her returns to work.

The Company has done a number of things to accommodate the grievant in the past. The inference is that once the employer has embarked on such a course of support, it is not free to stop. Also implicit in this argument is that it is the Company's responsibility to identify, and produce a "satisfactory" and/or "reasonable" excuse for analysis and review. All parties acknowledge that under an objective and rational standard, no such excuse existed. The Company asked the grievant to produce an excuse that would take into consideration her anxiety and depression. No such excuse has ever been forthcoming. The inference from this, according to the Union, is that the Company should assume that the absence is medically prompted. Nothing in the contract requires that.

This is a situation where the Company struggled to find work and worksites compatible with the needs of the grievant. Her employment produced distractions, concerns among co-workers, formal and informal complaints and investigations, and a stream of unreasonable demands. Her sincerity is not in question. The Company was presented with a situation where the employee refused to come to work. She called OSHA, the Department of Labor, the police, her doctor and her union. No one came forward to explain or offer satisfaction for her absence. Whether the employer was motivated by opportunism or a form of institutional exasperation and frustration is irrelevant to whether or not it possessed the right to terminate the grievant. The real question presented is whether or not the Company was in a position to end its accommodation to the grievant?

The Union claims that it is a violation of just cause to terminate a sick employee. Clearly this employee is sick. Whether or not this incident is a manifestation of her illness is something that her doctor could have shed great light upon.

The Union contends that it is a violation of just cause to terminate an employee who is capable of performing her job. It is not obvious that the grievant is capable of performing her job. There is certain work that she is unable to perform. There are certain work sites she is unable to be in. She missed a lot of work. At the time in question, she either would not or could not come to work.

The Union contends that it is a violation of just cause to terminate an employee who has a condition which is susceptible to treatment. This employee was undergoing treatment. The Union relies heavily on Dr. Hurlbut's January 8 opinion. That opinion was authored six months before the incident giving rise to the discharge. It is that opinion letter that forms the basis of the Union's claim that the grievant's condition is susceptible to treatment. However what the letter said is "The profile is also typical of persons who tend to have a good prognosis in therapy. They tend to have good achievement histories, which supports the probability of improvement and return to previous functioning." This is a general profile. The specific prognosis is a hope and anticipation that her condition will improve sufficiently to permit her to return to work.

That portion of the doctor's letter specific to the grievant indicated a treatment with Zoloft. The letter predicts that the drug will take full effect on or about January 21, 2002. The letter indicates that an initial return was premature based upon this schedule. Following this treatment, the grievant suffered a blackballing concern in April, a disability leave in May, and the sabotage concerns that led to her termination in June. It is not at all clear that the treatment was working.

The Union contends that the language of the contract does not support the Company's view that Rule 20 was violated. The Union argues that it is not unreasonable for an employee who fears for her personal safety to stay away from the source of her anxiety. The Union contends that the grievant is disabled due to her anxiety/panic disorder. If that is so, there should have been medical confirmation.

The Union contends that there is no requirement that a "satisfactory excuse" be found in a contemporaneous writing. Here, however, there was never a doctor's excuse specific to the June 20 absence, proffered. The Union contends that the Employer should have relied upon Dr. Hurlbut's prior documentation. This is an invitation to the Employer to play doctor, to engage in a diagnosis of an employee's mental health. It requires the Employer to assess the effectiveness of the treatment, and the relationship of the drug regimen to the workplace and other stimuli. I think this is better left to the doctor.

The Company contends that the doctor refused to give the grievant a note excusing her June 30 absences. The Union contends that it is unclear from the record whether she ever actually spoke with her doctor about the circumstances surrounding the June absences. The grievant did not testify. The ambiguity as to the conversation with her doctor could have been clarified by her testimony. The information is exclusively within her knowledge. She is responsible for bringing it forward.

The Union contends that the Employer acted improperly in discharging the grievant retroactively. The formal discharge decision was made on July 2. The Union contends the Employer cannot make that termination retroactive. The discharge letter does say ". . .We are terminating your employment. . .", and I would normally agree that that cannot be accomplished retroactively. However, the language of work Rule 20 provides "If he is absent for three consecutive working days without a satisfactory excuse, he shall be deemed to have quit and their employment shall terminate." The language is silent as to what specific date the quit and termination shall be considered effective, but the day following the third consecutive working day is a fair inference. The testimony in this record is that that date is how this matter has been handled in the past. To the extent that is consistent with the language of the Agreement, it is a reasonable construction of those terms. The termination letter is a follow-up document and serves to confirm the result. Its timing allowed the ongoing police investigation, which the grievant put into motion, to conclude. I do not believe that letter can serve to alter the collective bargaining agreement.

The Union claims the Company failed to follow Step 4 of the reprimand procedure. The reprimand form was not presented in the presence of a shop committeeman. I do not believe this is fatal to the termination. The Union representative was called before the termination call was made and the subsequent letter sent. The fact is the employee was not at the plant; because she refused to come to work. Work Rule 27, the Reprimand Procedure, is applicable to those circumstances ". . .except those that call for immediate discharge." The consequence of a violation of Work Rule 20 is discharge. Rule 20 appears applicable, and obviates the reprimand process contained in Rule 27.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 15th day of August, 2003.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

WCH/gjc
6558