BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BROWN COUNTY SHELTER CARE EMPLOYEES, LOCAL 1901-F, WCCME, AFSCME, AFL-CIO

and

BROWN COUNTY (SHELTER CARE)

Case 663
No. 61313
MA-11890

(Edward Zenko Termination)

Appearances:

Mr. Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, 2010 Memorial Drive, #206, Green Bay, WI 54303, appearing on behalf of Local 1901-F.

Mr. John Jacques, Acting Corporation Counsel, 305 East Walnut Street, Green Bay, WI 54305-3600, appearing on behalf of Brown County.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Brown County Shelter Care Employees, Local 1901-F, AFSCME (hereinafter referred to as the Union) and Brown County (hereinafter referred to as the County) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen to serve as arbitrator of a dispute regarding the discharge of Edward Zenko (hereinafter referred to either by name or as the Grievant). The undersigned was so assigned. A hearing was held on February 10, 2003, at the Brown County Shelter Care facility in Green Bay, Wisconsin, at which time the parties were afforded the full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A transcript of the hearing was received by the undersigned on February 28th. The parties submitted post hearing briefs and reply briefs, the last of which was received on April 7th, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

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 agree that the issues before the Arbitrator are:

1. Did the County have just cause to terminate the Grievant?

2. If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

The collective bargaining agreement provides that employees may be discharged for just cause, and further states that sleeping on the job is grounds for immediate termination, without recourse to progressive discipline. The contract further provides that the Employer may make and enforce reasonable work rules.

BACKGROUND

The Employer provides general governmental services to the people of Brown County, Wisconsin. Among these services is the operation of the Brown County Shelter Care Center for high risk minors placed there by the juvenile court. The Shelter Care is subject to regulation by the State of Wisconsin, and is responsible for complying with applicable statutes and administrative code provisions. James Hermans is the Superintendent of the Shelter Care and Steve Felter is a Unit Supervisor. The Union is the exclusive bargaining representative for the Center's staff. The Grievant, Ed Zenko, was employed as a Shelter Care worker beginning in 1997. He posted into a full-time position in March of 2001, generally working the 4:00 p.m. to midnight shift, until he was discharged on February 27, 2002.

On January 5, 2002, Derek Lutz, a part-time Shelter Care worker, approached Felter and told him about an incident the prior August or September. According to Lutz, he had worked as extra coverage on a shift with Carrie Mileski and Ed Zenko. During the shift, Zenko said he was going to the conference room to take his break. Zenko went to the conference room and napped for approximately 50 minutes. Breaks are only supposed to last for 20 minutes. Lutz said that he asked Mileski after 20 minutes if they should summon Zenko from his break, and she told him to leave him alone because he had been driving all day on his other job. Zenko remained in the conference room for approximately 50 minutes. Felter asked why he had not come forward with this information earlier, and Lutz said he had mentioned it to him after it happened. Felter said he did not recall any such report.

Felter subsequently re-interviewed Lutz, and interviewed Mileski and Zenko. According to the County's write-up of the interview, Lutz reviewed his time cards and determined that the likeliest date for this incident was August 29, 2001, since he recalled staying later than usual, and that card showed him punching out at 10:30 instead of 9:30 p.m. as he normally would. In that statement, Lutz said he recalled that Zenko went on break at approximately 9:20, after the bedtime for the children, and stayed in the conference room, laying in a fetal position on the couch for approximately 50 minutes.

According to the County's write-up of her interviews, Maleski said that she routinely kept tabs on her co-workers when they were on break, though she did not time them. Mileski said that Zenko typically did not take breaks at all, but if there was extra staff on duty and he had a headache, he would usually take a 20 minute break in the conference room. She said she had known him to lie on the couch to rest his eyes, but did not know if he was sleeping. She said he had never even spent 30 minutes in the conference room, much less 50 minutes. She said she had no recollection of anyone ever telling her that Zenko's break was up, and that she would not have told anyone that they should let him stay on break for more than 20 minutes.

According to the write-up of his interview, Zenko said he knew there was a rule against sleeping on the job, and admitted that he would sometimes go to the conference room, lie on the couch, rest his eyes and relax during his breaks. If he had a headache, he would turn the lights off and close the door. He said he had no recollection of falling asleep or waking up at any time while he was working for the Shelter Care.

On February 27th, Hermans issued the findings of the investigation, in which he concluded that, on "approximately August 29, 2001" Zenko was guilty of sleeping on duty, which is grounds for immediate termination. He also found him guilty of violating the work rules directing employees "Don't lay down or recline on resident couches" and "Don't sleep on the job at any time." Hermans terminated Zenko's employment. The instant grievance was filed protesting the discharge. It was not resolved in the lower stages of the grievance procedure and was referred to arbitration. At the hearing on February 10, 2003, in addition to the facts recited above, the following testimony was taken:

Derek Lutz

Derek Lutz testified that he was currently employed by two social services agencies, but not by Brown County Shelter Care. He stated that on August 29th, he worked from 2:45 to 10:30 p.m. with Zenko and Mileski. He recalled the date after the County showed him time cards in an effort to determine what the specific date was when the incident might have taken place. He mentioned the incident to a supervisor shortly afterwards and then told Felter about it in January of 2002. According to Lutz, he saw the Grievant lying on a couch, curled up in the fetal position with the lights out. He saw him once through the glass in the door, but could not see his eyes, so did not know if he was asleep. He mentioned to Mileski that the

Grievant's break was up, and she replied that he had a headache and they should let him rest. Shown his prior statement, he agreed that Mileski mentioned he had been driving that day, but he said he was not sure that Mileski said they should let him sleep. He believed she said "rest." Lutz said he could not tell if the Grievant was snoring, because the door was closed, but that he was motionless when he looked in. While the Grievant was in the conference room, Lutz recalled making four ten-minute bed checks of the children.

On cross examination, Lutz said he had no direct recollection of the date of the incident, but concluded from the time cards that it was August 29th. He said that employee breaks are typically taken in the conference room, unless the employee goes outside to smoke. Lutz said he knew there was a rule against reclining on resident couches, but expressed the opinion that the couches in the conference room were not resident couches, and he knew of no rule against laying on them.

Lutz agreed that he had been nervous when the managers interviewed him. Asked whether he had ever told another employee, Kathy Beeson, that he was concerned that his written statement was inaccurate because he had been nervous, Lutz said he did not recall ever speaking with Beeson about this matter.

Lutz said the Grievant took his break after the children's bedtime, which he placed at 9:00 p.m. Lutz was shown a copy of staff meeting minutes from October 10, 2001, stating that "Evening quiet times have been eliminated and replaced with an earlier bedtime. Bedtime will be 9 pm with earned points and 8 pm early bedtime." Lutz explained that earned points are a reward for good behavior, and that those who do not earn points must go to bed earlier. Lutz said he did not recall when the change to 9 p.m. took place. He estimated that it takes anywhere from 15 to 20 minutes to actually get the children to bed after the bedtime, and that if bedtime was 10 p.m. there would not have been 50 minutes between bedtime and the point at which he punched out. Lutz agreed that, after the Grievant was terminated, he applied for the Grievant's full-time job and received it.

On redirect Lutz reiterated that he had a clear recollection of the Grievant being on break for 45 to 50 minutes, and that he was lying on the couch in the conference room with the light off and the door closed. He also clearly recalled Mileski telling him not to disturb him because he had a long day of driving. On re-cross examination, Lutz said he also recalled that the Grievant said he was taking his break shortly after bedtime.

Carrie Mileski

Carrie Mileski testified that she had no specific recollection of a date on which she had seen the Grievant lie on a couch with the lights off and the door closed, but that he had done so on a few occasions when he was suffering from a headache. On those occasions, he would tell her that he was going to rest his eyes. She assumed from this that his eyes would be shut, but she said she had not seen him with his eyes shut.

Mileski stated that she, Zenko and Lutz would often work together, with Lutz on as additional staffing. She said she could not recall ever being told by Lutz that the Grievant's break was over, or telling Lutz that he should let be because he was tired from driving, and she said she did not think she would say that. She said she had never had to go and fetch the Grievant from a break.

Mileski said she was aware of a rule against reclining on resident furniture, but said she didn't think that was applicable to break time. Mileski was not able to recall when the bedtime changed to 9:00 p.m.

On cross-examination, Mileski said she had never seen the Grievant sleeping on the job, nor had she known him to extend his breaks. She said he rarely took breaks. Maleski said that reviewing the minutes of the October staff meeting refreshed her recollection that the change from a 10 p.m. bedtime to a 9 p.m. bedtime took place in October. She explained that she pegged the bedtime as 9 p.m. in her earlier statements because that was the bedtime when she made the statements, and she did not remember that it had changed between August and January.

Mileski said that the couches in the conference room would not normally be used by residents because the children were not normally in the conference room. She recalled that Lutz and another employee posted for the opening created by the Grievant's termination, and that Lutz was awarded the job. She also recalled Kathy Beeson mentioning that she had spoken with Lutz and that he told her he was concerned that his statement might not have been accurate.

On re-direct examination, Mileski said that Lutz only kept the Grievant's job for a week and a half or so, because the hours were too difficult to coordinate with his college classes. On the topic of Beeson's conversation with Lutz, Mileski could not say exactly when it had occurred but recalled that Beeson said Lutz told her he had been made fearful for his job when he was interviewed by the managers and that his statements might not be accurate.

Mileski said the couches in the conference room were there for staff use, and also for use in family visits and meetings with social workers. She said that residents would use the conference room on a daily basis, and that sometimes children on a courtesy stay, who were not formally intaked to the Shelter Care, would be allowed to sleep overnight in the conference room.

Mileski said that the Grievant would only lie down with the lights out when he had a headache, and that it did not happen very often. Asked if he only did it when a supervisor was not on the premises, Mileski said that the supervisor usually left at 10:30 p.m. but that she did not know of an instance in which he had laid down while there was a supervisor present.

James Hermans

James Hermans testified that he had been the Superintendent of the Shelter Care facility since 1994. He said that he had couches brought into the conference room in 1997 to provide a more comfortable environment for families and social workers to meet with children. Hermans said the he had seen staff sit on the couches during meetings, but had never seen any staff member lie on one of the couches. He stated the rule against reclining on resident couches was put in place in the mid-1990's, and was meant to ban all reclining on all couches in the facility. As with the rules against sleeping and extending breaks, the rule is intended to insure that staff are at all times providing a high level of supervision to the residents and are always available to assist other staff in the event of an emergency. To that end, staff members going outside for their breaks are required to carry two way radios, so they can be summoned if need be. Hermans noted that the Staff Positioning policy required staff members to keep themselves at all times in a position to observe what is happening with the residents. Hermans said that all workers were oriented on the rules when they were hired.

Hermans testified that he decided to terminate the Grievant. He noted that the Grievant had a prior one-day suspension in effect at the time, and that he had broken the rules of the facility and made himself unavailable to provide supervision for the children. He said he had given the Grievant every opportunity to respond to the charges, and that the Grievant had denied extending his breaks, but admitted to sometimes laying on the couch with the lights off and eyes closed if he had a headache, although he said he could say if August 29th was one such occasion. Hermans relied on the statements of Derek Lutz, whom he had no reason to doubt.

On cross-examination, Hermans said he had never designated certain couches as resident couches and others as non-resident couches, and that an employee would be foolish to think that there was a difference between couches. He also characterized the conference table and chairs as resident furniture.

Hermans conceded that he had no personal knowledge of events and that he was relying on the statements of the employees interviewed during the investigation. He said the Grievant admitted putting himself in a position where he was likely to fall asleep, and based on the fact that he went 30 minutes over his break time, Hermans concluded that he actually had been asleep. The Grievant did not directly deny extending his breaks, saying merely that he could not recall ever going over 20 minutes. Hermans found his admission of multiple violations of the rule against reclining on resident furniture significant, as well as the March, 2001, suspension he had received for failing to document residents who left during his shift, and instead passing that logging chore to the following shift. He was also impressed by Lutz's recollection that he made four bed checks while the Grievant was on break. Hermans conceded that bed checks are not supposed to follow a strict ten minute interval, and that the four bed checks were not mentioned in any documents supporting the discharge.

Stephen Felter

Stephen Felter testified that he is the unit supervisor for the Grievant's shift, and he customarily works from 2:30 to 10:30 p.m. Saturday through Wednesday. August 29, 2001, was a Wednesday, one of his regular workdays, but he had no recollection of being on duty that day. When Lutz came to him in January, he asked why he had not come forward earlier, and Lutz claimed to have told him about it shortly after the incident. Felter said he had no recollection of any such conversation, and Lutz said he might have said it in a joking way that would not have made an impression.

Felter testified that the rules against reclining on furniture applied to any laying down while working, including laying on the floor, and were intended to insure that staff were always providing adequate supervision and available to assist other workers if need be. He said that all couches were resident couches because they are intended for resident use.

Felter said that bedtimes were changed from an early bedtime of 10 p.m. and an earned points bedtime of 11 p.m. to 8 p.m. and 9 p.m. respectively to allow for more sleep for the children.

On cross-examination, Felter said that he was not sure when the bedtime changed. He stated that he never specifically told employees that all couches were resident couches or that reclining on anything would violate the rules, but expressed the opinion that it was commonly understood that no laying down anywhere on the premises would be permitted.

Felter said that Lutz did not seem intimidated when he spoke with him in January of 2002, and had not complained of feeling any pressure. He agreed that staff were trained not to do checks at precise ten minute intervals. Ten minutes is the maximum interval, but he advised staff to do them at shorter intervals, varying the time so that the children would not be able to make out a pattern. Felter said that he would normally have been at work until 10:30 on August 29th, and did not know of a reason why he would not have been, unless his schedule had been adjusted for a meeting.

On re-direct examination, Felter said he had issued four or five suspensions to the Grievant during his career, although the March, 2001, suspension was the only one still in effect at the time of this incident. On re-cross, he agreed that the prior discipline was principally for paperwork deficiencies and failure to follow proper procedures.

Richard DeBroux

Richard DeBroux testified that he owns a delivery service and employs Ed Zenko as a subcontractor. He reviewed his records, and stated that on August 29, 2001, Zenko made a pickup in Pewaukee at 11:00 a.m. and delivered the package to DePere at 1:15 p.m. DeBroux said the County first requested this information from him around end of 2002 or beginning of 2003.

Kathleen Beeson

Kathleen Beeson testified that she is an on-call Shelter Care Worker. She stated that at a shift change after the investigation was conducted, she overheard Mileski and Lutz talking, and Mileski complained that some of the statements in her written statement were not correct. Lutz then told Beeson that he had been scared and had felt pressured during his interview, and that he wanted to double-check his statement. He was very anxious about being involved in the matter and she told him that if he was not certain the statement was accurate, he should get a copy of it.

Beeson said that she subsequently had a meeting with Felter, in which Felter said he was concerned that she was intimidating Lutz. She told Felter she was simply telling him to be sure he was accurate, and she denied trying to intimidate him. She, Felter and Lutz met in the office afterwards and she asked Lutz if he felt at all intimidated by her, and Lutz said he did not and that everything was fine. Beeson said that since that time, she has spoken with Lutz on several social occasions away from work, and he has said that the management interviewers suggested to him that they already knew everything, and asked him leading questions. He told her he feared for his job, and just agreed with whatever they said. Beeson said that Lutz left the employ of the Shelter Care in late 2002, and that Lutz said he left under pressure from management over an incident with a resident.

On cross-examination Beeson admitted that she and Zenko were friends, though she said she was friends with most of the staff. She said she and the Grievant were not particularly close, and that they spoke perhaps twice a month. She denied that she went to Lutz on the Grievant's behalf, and said it was he who broached the subject of the investigation and expressed his concerns to her as a friend. She expressed surprise that Lutz had testified as he did at the arbitration hearing because he had told her he was going to admit that he did not know if the Grievant was sleeping, or how long he was in the conference room. Beeson stated she was contacted about testifying a month prior to the hearing when the Union's Staff Representative contacted her following a conversation she had with Maleski. She agreed that she did not go back to Felter with the information, but explained that she felt he was already aware of most of it through their meeting with Lutz.

Edward Zenko

Edward Zenko testified that he had never slept on the job, and that he had no recollection of ever having extended his breaks. He agreed that he had driven to Pewaukee and back on August 29th before reporting to the Shelter Care, but he said that was not a particularly difficult or tiring task, and he denied that he ever came to work too tired to do his job. Zenko conceded that he would sometimes take his break on the couch in the conference room, but said that he did not know that this was a rule violation. While he understood that staff could not lie on the couches in the resident's areas of the building, no one had ever said

that the couch in the conference room was off limits. The conference room was the designated break area, and he assumed the couch was available for everyone's use. He did not believe he had told Hermans during the investigation that he knew laying on the couch was a rule violation.

Zenko said that when he was questioned about this incident, no one could even tell him what date they were talking about. Assuming it to have been August 29th, that would have been just before school started, and the bedtime would still have been 10:00 p.m. He estimated that it takes a minimum of 10 minutes to get the children to bed, although sometimes it could take much longer. The amount of time required to make bed checks could also vary, depending on the situation. If children were being disruptive, the checks would be done at shorter intervals, and four checks might be done in as little as 20 minutes.

On cross-examination, Zenko said he was on friendly terms with Kathy Beeson, and had discussed his case with her. He said they were not close friends, but that he had attended a party at her house, helped her shop for a car and lent her his truck once when her car broke down. He is also friends with Mileski, and once sold her a dishwasher, and helped her purchase a snow blower.

Zenko said he went full-time with the Shelter Care in early 2001, having worked part-time since 1997. He conceded that he had been disciplined in the past and had not grieved any of discipline. The March, 2001, suspension was for not documenting residents leaving the facility. He did not file a grievance over the suspension, though he claimed that he spoken with the on-coming shift members and they said they would document the resident movement. He acknowledged that the suspension notice said that further infractions could lead to discipline including discharge.

Zenko acknowledged that he had, more than once but fewer than five times, lain on the couch in the conference room during his breaks. He said he only did this when he had a headache, and that he would customarily turn out the lights and close the door, though he had also lain on the couch with the lights on and his eyes closed. He said he did this to rest his eyes, and he denied sleeping. He said he knew it was against the rules to lay on couches in the resident area, but did not think there was anything wrong with doing it in the conference room, so long as the staff member was still prepared to respond to an emergency. He also said, however, that he while he had known other staff members to recline on furniture other than couches with their feet up, and to shut the door to the conference room, he was not aware of anyone else who reclined on the couch or who turned the lights off during their breaks. Zenko said he did not really monitor what other people did on their breaks, and would have no reason to be in the area of the conference room unless he was on his break.

Zenko agreed that his statement to the County during the investigation was that he did not recall sleeping and waking up, but he said that what he meant by that was that he had not done so. He said he was not aware of any grudge by Lutz against him, but that Lutz's

testimony about the length of his break on August 29th was simply untrue. He said that he did not know who might have been behind the false accusation but he'd been told that a former employee named Danielle might have pressured Lutz into making the accusation, because she hated him. He agreed that he had told other people that he might sue Lutz for defamation for lying about him, but denied this was an effort to pressure Lutz to change his story.

Zenko acknowledged that breaks were paid time and that if a break was interrupted staff was allowed to take it later. He also agreed that a staff member who felt ill could call in an on-call worker or, if one was already on site, ask that worker to stay for the entire shift. He recalled one instance in which he asked Lutz to stay for him, but Lutz begged off citing homework. He did not know if that was August 29th. He again stated that he had driven to Pewaukee on August 29th, but he said that was a routine trip, and that many of his deliveries were in the Milwaukee area.

James Hermans (recalled in rebuttal)

On rebuttal, James Hermans denied that he ever pressured Lutz in any way, and said he even spoke with Lutz directly about the Zenko matter. Hermans said that, to his knowledge, Lutz had been given copies of his statements to the investigators and was well aware of what the statements said. He denied pressuring Lutz into resigning, and said Lutz had been a very good employee who left for a better opportunity. Hermans also denied pressuring Mileski in any way and said she was given copies of her statements.

On cross-examination, Hermans denied that there was a possibility that Lutz felt even unintended pressure from management.

Stephen Felter (recalled on rebuttal)

Stephen Felter denied that he pressured either Lutz or Mileski in any way. He said that to his knowledge, Maleski and the Grievant were social friends, and that Maleski had also been disciplined for this incident. That discipline was the subject of separate pending grievance. On cross-examination, Felter recalled meeting with Beeson and Lutz after Lutz said he felt pressure from her and others to give over a copy of the statement he'd given management, and that people were saying a former employee named Danielle had put him up to making accusations against the Grievant. He told Lutz he had no obligation to speak with anyone about these matters or to give them any information. After that, he met with Beeson and Lutz. He could not recall the specifics of the meeting, but he did recall that each said they had no problem with the other. Felter said he did not know whether Lutz had a copy of the statement, but acknowledged that Lutz testified during the arbitration that he did not.

Additional facts, as necessary, are set forth below.

POSITIONS OF THE PARTIES

The Initial Brief of the County

The County takes the position that the Grievant was terminated for just cause. The Grievant admits that he reclined on the resident couch in the conference room on the evening of August 29, 2001, for a minimum of 20 minutes with the lights out, and also admitted that he had done this at least four or five other times. He also admitted that he only did this at times when the supervisors were not present at the facility. This alone established just cause for discipline inasmuch as there is a clear rule against reclining on resident couches, and he clearly knew it was wrong. The evidence also establishes that he remained on the couch for much longer than the permitted 20-minute break. Witnesses put his time in conference room at 45 minutes or more. Further, a person lying motionless on a couch, in the dark, in the fetal position for an extended period of time must be presumed to have been sleeping. It is the most reasonable inference that can be drawn from the observations of the onlookers. It is buttressed by the fact that Derek Lutz, a co-worker with no axe to grind, testified that Carrie Mileski told him not to awaken Zenko because he was tired from driving all day on his other job.

The Union's arguments regarding the facts of this case are misleading and incredible. The Union claims that there is no evidence that Zenko extended his breaks because he denies doing so. Yet, Lutz testified that Zenko was on the couch for 45 to 50 minutes, and that he performed several of the required 10-minute checks of the children while Zenko was in the conference room. This detailed recollection is more believable than Zenko's general denial. The only rebuttal offered by the Union was a vague rumor that Lutz was in cahoots with a former employee named Danielle who hated Zenko. An amorphous and unsubstantiated rumor cannot overcome the credible and certain testimony of an eyewitness. The County notes that Zenko claimed in January, 2002, only that he did not recall extending his breaks and/or sleeping on the job. At the arbitration hearing, he flatly denied both charges. The Arbitrator must weigh this evolution in his memory in discrediting his testimony.

As for the Union's claim that the couch in the conference room is not a residents couch because it is sometimes used by staff members during meetings, this is nothing more than hair splitting for the purpose of obscuring Zenko's failure to be in a position to respond to emergencies, as is required "at all times" of Shelter Care workers. Whatever label one attaches to the couch, it is clear that Zenko was in no position to provide any service to children, much less to respond to a sudden emergency.

Finally, the County urges the Arbitrator to discount the rank hearsay offered by Kathy Beeson in an effort to discredit Lutz. Beeson was not a witness to anything on August 29th. However, Beeson claimed that Lutz later told her he wasn't sure what he saw, and that answers had been suggested to him during the investigation and he had felt pressure to corroborate them. When Lutz testified at the hearing, he said no such thing and was not even asked about it by the Union. The Union waited until Lutz was gone to put Beeson's testimony on. It is rank hearsay and cannot possibly be allowed to overcome the sworn, direct and credible testimony of Lutz.

The Shelter Care has rules prohibiting extending breaks, reclining on resident couches and sleeping on the job. The latter is recognized in the labor agreement as grounds for immediate discharge. All three of these rules are reasonable and necessary if the Shelter Care is to fulfill its statutory mission of providing constant and vigilant care for a difficult, high needs population of young people. The Grievant violated those rules. Given his prior disciplinary history and the severity of his conduct, discharge is the appropriate response. For these reasons, the grievance must be denied.

The Initial Brief of the Union

The Union takes the position that the Grievant was not terminated for just cause and that he must be reinstated and made whole. The Union argues that the proceedings against the Grievant are grossly unfair, amounting to a denial of due process, since the alleged offense occurred in late August of 2001, and the investigation was not begun until late January of 2002. This is despite Derek Lutz's recollection that he mentioned this to Steve Felter shortly afterwards and got not response. Management's failure to respond until long after the alleged events seriously prejudices the Grievant.

After this five-month delay, the Grievant was asked if he took more than a 20-minute break and he honestly answered he could not recall doing so. Indeed, he had little recollection of that shift at all, nor did the other witnesses. The testimony is replete with people admitting they had difficulty recalling what did or did not happen on the night of August 29th. The County itself felt it necessary to say the alleged offenses took place "approximately" on August 29th. All of this puts the Grievant in the very unfair position of being essentially unable to defend himself. On that basis alone, the Arbitrator should reverse the discharge decision.

On the merits of the case, the Union observes at the outset that the County has the burden of proving the two charges against the Grievant – reclining on a resident couch and sleeping on duty. In order to meet that burden, the County must prove the conduct and prove that the conduct warrants discharge rather than some lesser response. It has failed to meet either burden.

The principle charge against the Grievant is that he was sleeping on the job. He has steadfastly denied this charge, and there is no persuasive proof that he did so. At most, the County's case depends upon circumstance and suspicion. Derek Lutz testified that he saw the Grievant laying on a couch, but admitted that he could not see his eyes and could not tell whether he was asleep or awake. The Grievant conceded that he would lie on the couch on his breaks if he was suffering a headache, but that is a different thing than sleeping on the job. The County tries to obscure this defect in its case by asserting, through Jim Hermans, that the Grievant put himself "in a position where he could have easily fallen asleep." That may or may not be true, but it has nothing to do with whether he actually was sleeping. There is simply no proof of this charge and the Arbitrator cannot sustain a discharge on the basis of a suspicion.

While extending breaks was not cited as a basis for the discharge, the County claims that he stayed on break for 40 to 50 minutes, and that this shows he must have been sleeping. The only "proof" offered to support this is the testimony of Lutz. That testimony does not hold up under close examination. Lutz claims he knows the timelines because the Grievant went on break shortly after bedtime, at "approximately 9:20 p.m." However, bedtime in August was 10:00 p.m. – it was not changed to 9:00 p.m. until October. Lutz signed out at 10:30 p.m. on August 29th. His own testimony was that it takes 10 to 20 minutes to actually get all of the kids in bed, so the Grievant's break would not have begun until 10:20, just 10 minutes before Lutz left for the night. Thus, it is impossible that he observed a 40 to 50-minute break, even though he swore that he did. This draws the entirety of Lutz's testimony into question.

As for Lutz's claim that he did four bed checks, 10 minutes apart while the Grievant was on break, the Union notes that the 10-minute spacing is inconsistent with the procedure, which is to vary the times so that children can't predict the pattern of checks. Ten minutes is the maximum time between checks, but in practice they are done more frequently. Thus, even if Lutz did do four checks after the Grievant took his break, it does not mean that the Grievant's break lasted for 40 minutes or more. The Union points out that Lutz admitted to Beeson that he did not really recall the length of the Grievant's break, and that he never said anything about using bed checks as a means of timing the Grievant's break until the day of the arbitration hearing. He had always before cited the bedtime as the basis of his recollection.

The practical problems with Lutz's testimony about the length of the break must be viewed an eye to the fact that Lutz posted into the Grievant's full-time job after the discharge. Thus, he had a motive to say whatever the County wanted him to say, since he could simultaneously cause a job to open up and curry favor with the persons who would be in charge of filling that job. Given the inconsistencies, indeed the impossibility of some of Lutz's claims and his clear motive to lie, the Arbitrator should give Lutz no weight as a witness in this case.

Turning to the charge that the Grievant reclined on a resident couch, the Union concedes that the Grievant reclined on the couch in the conference room, but argues that he did not know, and could not reasonably have known, that this was considered a resident couch. The residents, after all, are locked in a different part of the building and do not have access to the conference room except in unusual circumstances. Felter admitted that he did not tell employees which couches were resident couches and which were not, and that there has not been any prior incident of an employee reclining on that particular couch. An employee cannot be held to follow a rule which is unknown and which cannot reasonably be known to him. The County could not produce a single employee who could say that they knew the couches in the conference room were resident couches. The best they could do was generalizations by Hermans and Felter to the effect that everyone knows that all of the couches are for residents. They could not explain how everyone would know that, nor could they say why the rule specifies "resident" couches if it means all couches, everywhere in the building.

The evidence does not warrant any discipline against the Grievant. Even if the Arbitrator were to determine that some disciplinary offense took place, however, the County is obligated to follow progressive discipline. The Grievant has a single disciplinary act on his record, a one-day suspension. It cannot be that the next step is discharge, unless some capital offense is proved. The only allegation of that magnitude is the claim that he slept on the job. Since that has not been proved, it follows that discharge is an inappropriate penalty.

The Reply Brief of the County

The County points out that the Union's brief essentially admits misconduct, in that Zenko admits reclining on the couch in the conference room. The Union's hairsplitting about what type of couch he was reclining on misses that point that he is paid to care for children, not to lie on the couch. Breaks are only allowed "when work permits" and the Shelter Care worker is always under an obligation to be available to provide for the children's needs. Reclining on a couch in the dark in a conference room outside of the area where residents are, is clearly not being available. No matter how one characterizes the couch involved, the Grievant's conduct is a basic violation of his job duties and the work rules, and the Grievant has admitted to having done this on at least five occasions. The County is fully within it rights in discharging him. The Union's appeal to progressive discipline is simply misplaced, given that the conduct in this instance was serious enough to warrant termination in the first instance, and given his previous suspension for misconduct.

The County disputes the Union's claim that just cause has not been established. Again, the Grievant admitted repeatedly taking his breaks while laying on a couch where he was unavailable. Moreover, closing one's eyes, and spending a long period of time laying in a fetal position in a closed and darkened room, is a fair description of sleeping, which is a dischargeable offense under the labor agreement. The County notes that prior to the hearing the Grievant never directly denied sleeping on the job – he simply said he did not remember sleeping on the job. That is not the type of thing one would forget, and his evasive answers stand in stark contrast to his direct denial at the arbitration hearing. His credibility is completely undermined by his shifting answers, and the Arbitrator should give no weight whatsoever to his self-serving denials at the arbitration hearing.

The Union's attack on Lutz's credibility is not supported by the record evidence. The Grievant himself admitted that bedtimes would revert to 9:00 when school started. School had started by the end of August in 2001. The County also notes that there are two bedtimes – early bedtime, and an earned points bedtime an hour later. Under any scenario, there would have been a bedtime at 9:00 p.m. on August 29th, and bed checks would have been conducted after that bedtime. Thus, there is no inconsistency in Lutz's testimony. He was an entirely credible witness with no motive to lie, and his testimony makes it absolutely clear that the Grievant was guilty of reclining on the couch, sleeping on the job and extending his breaks on August 29, 2001. It follows that the County did not violate the contract, and that the grievance must be denied.

The Reply Brief of the Union

The Union asserts that the County's arguments to the Arbitrator are misleading and misplaced. The County claims that everyone agreed the Grievant went into the conference room, turned out the lights and lay on the couch for at least 20 minutes on August 29th. In fact, Lutz was the only on who said that – the Grievant and Mileski both testified credibly that they could not recall the specifics of that shift. Likewise, the County claims that Mileski saw the Grievant laying with his eyes closed on the 29th. Mileski specifically said she recalled such an occasion but could not recall when it was. The County accuses Beeson of presenting scripted testimony, without explaining what basis it has for that characterization. It simply uses invective in the place of actual evidence. On the other hand, the County credits everything Lutz said without explaining away the inconsistencies in his testimony, or explaining why he denied ever speaking to Beeson, when both Mileski and Felter testified that the conversation took place.

The County makes much of the Grievant making himself unavailable to immediately respond to a resident. However, staff members are frequently in such a position, either outside smoking on break or going to the bathroom. That was not the charge against the Grievant. He was charged with violating specific work rules, and the County cannot rewrite those rules to fit their evidence. The Grievant is accused of reclining on a resident couch. The County's argument that this means all couches and that the type of couch is irrelevant ignores its own written rules. In the same vein, the County's argument that the Grievant knew he was exposing himself to discharge by putting himself in a position where he could fall asleep, ignores the fact that the negotiated rule prohibits sleeping, not being a position to fall asleep.

The Union argues that the evidence relied upon the County at the hearing to show that the Grievant had driven to Pewaukee and back for his other employer on August 29th, should be given no weight by the Arbitrator. This is evidence that the County did not have and did not rely upon when it discharged the Grievant. It is well established that an employer making an arbitrary or capricious decision to terminate an employee may not then go back and build a case after the discharge.

For all of these reasons, the Grievant must be reinstated and made whole.

DISCUSSION

The Scope of the Case and the Due Process Issue

The notice of discharge states that the Grievant was terminated for sleeping on the job and for reclining on a resident couch, both violations of the work rules. He denies sleeping and while he admits reclining on a couch, he denies being told or knowing it was considered a resident couch. The County also alleged that he extended his break on August 29th by between

20 and 30 minutes. While it is not formally listed as a basis for discharge, the parties have litigated that issue, and the Union conceded in its opening statement and its brief that this was also one of the grounds for the discipline.

The Union has argued that the delay of five months in bringing this case operated to deny the Grievant a reasonable opportunity to defend himself and that the grievance should be granted on grounds of due process. I cannot agree. Certainly, management has a duty to respond promptly to disciplinary issues and does not have the right to simply sit on them, and then spring them at a time of its choosing. Failure to promptly investigate and act carries with it a number of problems, including basic unfairness, and inconsistency with the notion of corrective discipline. If one principal purpose of discipline is, as it is generally held to be, the correction of employee behavior, that purpose is not served by unreasonably delaying a response to misconduct. The delay by the County here was not unreasonable. Lutz said he mentioned this to Felter shortly after it happened, but he conceded that he might have first mentioned it in a manner that suggested he was just joking. Stephen Felter testified credibly that he had no recollection of ever being told of this allegation before January of 2002, and that he immediately investigated once he became aware of it. Management cannot be held to promptly investigate matters it knows nothing about.

That is not to say that the delay in investigating this matter does not have practical implications for this decision. Lutz was not asked, and did not offer, why this matter should go unmentioned from September to January, or what prompted him to go to Felter in January. That is an oddity and it raises questions about his motivation. Aside from why Lutz made his January report, the delay also substantially disadvantages the Grievant. Even as of the hearing, it could not be said with certainty that August 29th was the date in question. At best, it could be said that a reconstruction of records strongly suggested that as the date. The Grievant was called upon to detail his movements on a shift five months earlier. Many of his responses were couched in terms of what he would normally do rather than what he specifically did, or of just not recalling. That is often an indicator of deception by a witness, but in this case, it is just as plausible to regard it as the most honest answer he could provide, given the passage of time. Thus, while I do not regard the delay a violation of basic due process rights, I do find it a relevant factor in the weighing of testimony and in the assessment of credibility.

As noted, the Grievant disputes two of the charges – that he slept on duty and that he extended his breaks. He admits reclining on the couch, and admits having done this more than once. The County argues that this admission alone should support the termination, given his prior suspension.

The Undisputed Conduct – Reclining on the Couch

The Shelter Care's work rules are set out in a list of "Do's and Don'ts" and the fourth item on the "Don't" list is "Lay down or recline on resident couches." The Grievant concedes he reclined on the couch in the conference room. The question is whether that couch is

covered by the work rule. Hermans and Felter both testified that it was because the rule was intended to cover all reclining and all furniture. I have no doubt that both men believe what they say on this point, but I must agree with the Union that they are applying the rule they meant to have, not the rule they do have. On the face of it, the rule does not apply to all couches, and does not ban any and all reclining. Of course, if as the supervisors testified, everybody knows that the term "resident couches" encompasses all couches, the wording of the rule can be made to fit their interpretation. However, both testified that they had never briefed staff on what was and was not a resident couch, and that there were no guidelines making the definition clear to staff members. Moreover, every single staff member who testified, including management's witnesses, testified that they did not consider the conference room couch to be a resident couch and had never been told that it was a resident couch. Most agreed that reclining of any type in the resident areas would be against the rules, but none agreed with Hermans that the conference room was considered a resident area.

The County points out that the Grievant admitted he had never seen any other employee recline on the conference room couch, and that he had not done so when a supervisor was present. It suggests that this shows he understood there was a rule against it. However, the Grievant also said he did not monitor what other employees did on their breaks, and that is a believable answer, since when the other employee was on break, he would have to remain in the residents' area and would not be able to see into the conference room. As for the fact that he said he had not reclined on the couch in the presence of a supervisor, for the bulk of the time while he was a full-time employee, the bedtime was 10:00 p.m. and the supervisor would leave at 10:30 p.m. Depending on how long it took to put the children to bed, he would not generally have started his break until the supervisor was due to leave. Given that he estimated that he did this four times or so, it is difficult to view this as an admission of any kind.

The County also claims that the Grievant admitted to the Hermans that laying on the conference room couch on break was a rule violation. After initially saying he could not recall if the Grievant said he believed it was okay to recline on the couch (Tr. p. 106, folios 18-25), Hermans testified that the Grievant said, at a meeting on February 27th, that he knew laying on the couch was rule violation (Tr. p. 111, folio 22 – p. 112, folio 5). The Grievant testified he had no recollection of making any such statement to Hermans, and that he did not believe it was a rule violation to recline on that couch. Even though it is obviously a very significant admission, it is not documented anywhere, including in the findings Hermans made that same day in support of his termination decision. It may be that the findings and termination decision were already prepared when this conversation took place, and that Hermans decided not to supplement the document with the contents of their discussion, but I note that the Grievant did not sign for the receipt of the termination document until the following day, and thus there would have been time to note the alleged admission. The equivocal testimony of Hermans, together with the lack of any notation of this admission in his findings, makes it extremely difficult to use it as the basis for finding that the Grievant told Hermans he knew that he was violating the Shelter Care's rules by reclining on the conference room couch.

In connection with reclining on the couch, and also with the general charge of sleeping, the County argues that the Grievant violated the Staff Positioning policy. That policy requires staff members to be mobile and observant of resident behaviors, and not be stationed in the office or seated at desks. It also requires staff to "always position themselves in the facility to have a watchful eye on all areas." There are two problems with this theory. The first is that the Grievant was never charged with violating this policy, and it was not a basis for the discharge. An employer may not revise its grounds for discharge in the midst of the arbitration hearing. The second problem is that the County does not explain why reclining on the sofa in the conference room would be different from sitting on the sofa in the conference room, in terms of the Staff Positioning policy. Staff are required to either go in the conference room or go outside for their breaks. Since the conference room and the hallway to the outside are both physically separated from the resident area, it is not possible to maintain "a watchful eye on all areas" during the break, and staff necessarily cannot follow the policy during breaks. The thrust of the County's concern is that it believes the Grievant truly was asleep on the couch, and thus would not have known if there was a problem in the resident area. If the Grievant was asleep, he is subject to immediate termination, but that is not because he was violating the Staff Positioning policy.

While the general intent of the work rule might be understood to ban reclining of any type in the residents' portion of the building, whether on a couch or another piece of furniture or on the floor, it is just not possible to read the language used and conclude that it bans reclining on the couch in the conference room designated for staff breaks, particularly not after the residents' bedtime, when they are locked in another part of the building and cannot access that room. If there were evidence that there was a general understanding that that was the scope of the policy, it could be inferred that the Grievant knew reclining on that particular couch was banned and could be held to a rule violation. However, the testimony of staff members was uniformly that they did not regard it as a resident couch and had never been told it was. Neither does the record allow me to find that the Grievant individually had that understanding. Finally, the County's appeal to the Staff Positioning policy does not suffice to establish a rule violation. That policy was never cited as a basis for discipline, and the policy as applied does not make being in the conference room a disciplinary offense so long as the staff member is alert to his or her surroundings. For all of these reasons, I conclude that the Grievant did not violate the work rule against reclining on resident couches.

The Disputed Conduct – Sleeping on the Job and Extending Breaks

The meat of this case is in the allegation of sleeping on the job. The extension of the break of August 29th would be misconduct, but it is the sleeping charge that justifies immediate termination. Both of these charges essentially come down to the testimony of Derek Lutz.

Lutz testified that, 20-minutes into the Grievant's break, he looked through the window of the conference room door and saw him curled up on the sofa, with the lights out. He said he could not see his eyes and did not know for sure that he was sleeping, but that he believed

he was sleeping. He also said that Mileski told him he should let the Grievant rest, because he had a headache. This contrasts with the County's write-up of his statement in January, in which he said he saw the Grievant sleeping on the sofa, and that Mileski said he should let him sleep. Asked about these differences, Lutz said he believed that Mileski said "rest" rather than "sleep" but was not absolutely sure. He said she did mention that he had been driving all day.

On its face, Lutz's testimony provides inferential evidence that the Grievant was sleeping on duty, although it is hardly conclusive. His one brief observation is consistent with both the notion that the Grievant was sleeping and with the Grievant's claim that he was lying down with a headache, but was awake and alert. The suggestion that he was exhausted because he had driven to Pewaukee and back that day is not particularly persuasive. That is simply not a grueling drive, especially for someone who routinely drove between Green Bay and the Milwaukee area. As for the differences between his statement in January and his testimony at the hearing, there would normally be a tendency to give greater credence to the statement made closer in time to the events. However, there was a five month lag between the events and the statement, and it is not fair to say that events were fresh in Lutz's mind at any point during this proceeding.

The one factor that tilts Lutz's story in favor of the conclusion that the Grievant was asleep is the length of the break he took. Everyone agreed that the Grievant was not in the habit of taking breaks, and that when he did, he would return promptly. If, on this occasion, he did not return from his break for 45 minutes or more, it is a fair inference that he not only extended his break, but that he did so because he was asleep. That said, I have great difficulty in crediting Lutz on his story about the length of the Grievant's break.

Lutz said in his statement and testified at the hearing that he remembered that the Grievant went on break at approximately 9:20 p.m., after the children were put to bed, and remained on break for 40 to 50 minutes, returning shortly before Lutz left at 10:30 p.m. He also said at the arbitration hearing that he recalled doing four bed checks while the Grievant was on break. Both Mileski and the Grievant deny that he took more than a 20 minute break.

I have two problems with crediting Lutz. First, I am concerned about his long delay in reporting this alleged incident to the management of the Shelter Care. He claimed to have told Felter about it shortly after it happened, but Felter denied any knowledge of that. Felter said Lutz told him he might have framed his comments in a joking fashion, and Felter speculated that if that happened he might not have taken it as a serious comment. That's all possible, but it still remains unclear why Lutz waited for five months to repeat it if, as apparently was the case, this was for some reason a matter of great concern to him.

The greater problem with Lutz's testimony is the discrepancy in the bed times of the children. His testimony depends upon a 9:00 p.m. bedtime, just as was in effect in January, 2002, when he made his report. August 29th was identified as the date for this incident because it the date on which he worked with the Grievant and Mileski until 10:30 p.m., instead of his normal 9:30 quitting time. The critical part of his story – that he saw the Grievant laying on

the couch in the dark for an extended period of time after the children went to bed – depends upon there having been a substantial interval of time between bedtime and his 10:30 quitting time. A later bedtime would have meant he would have left work before the Grievant could have returned from a 40 to 50 minute break, and it is the length of the break that adds credence to his report that the Grievant was asleep. Yet, there is strong evidence that the bedtime in late August was 10:00 p.m., not 9:00 p.m.

The minutes of the October 10th staff meeting contain the announcement that "Evening quiet times have been eliminated and replaced with an earlier bedtime. Bedtime will be 9 pm with earned points and 8 pm early bedtime." The minutes do not announce when this change was effective, and Lutz said he had no idea when the change occurred. Neither could any of the staff or managers who testified say when the change took place other than generally saying it was sometime in the Fall. The only witness who had a recollection of when the change took place was the Grievant, who said it was made when school started that Fall, to allow more time to get the children up in the morning. He also testified that August 29th was before school started. If the change in bedtimes coincided with the start of school and if school had not yet started by August 30th, Lutz's statement is demonstrably untrue.

The County states in its reply brief that school had started by August 30th, the day after this incident and August 29th would therefore have been a school night. The County provides no citation to the record in support of that assertion and after a careful review I can find none. Wisconsin statutes require school districts to start the school year on or after September 1st. 1/ September 1st in 2001 was a Saturday, and Labor Day in 2001 was on September 3rd, the Monday following this incident. Thus, Tuesday, September 4th was the most plausible date for the start of school in 2001. The record evidence in this case establishes that the Shelter Care switched from a 10:00 p.m. bedtime to a 9:00 p.m. bedtime sometime in the Fall of 2001, and that the most likely time for this change was the beginning of school. The record evidence also sets the start of school as falling in the week after this alleged incident. The preponderance of the evidence persuades me that the bedtime for children on August 29th was 10:00 p.m. 2/ Given that, Derek Lutz's version of what he saw and heard on August 29, 2001, cannot be true. 3/

1/ Section 118.045, Stats.

2/ The County also argues that even if the earned points bedtime was 10:00 p.m., the early bedtime would have been at 9:00 p.m. and thus Lutz's statement would have been true. It was apparent from the testimony of the various witnesses on this point that, when they refer to "the bedtime," they are referring to the later of the two bedtimes. More significantly, assuming that there was a 9:00 early bedtime and 10:00 earned points bedtime, it is very hard to make Lutz's story fit. If the Grievant remained on break through the earned points bedtime at 10:00 — as he must have according to Lutz's 40 to 50 minute estimate — that would have meant a substantially greater workload for Lutz, since he would have had to get the male children to bed himself. If that were the case, he would presumably have used that as a touchstone for estimating when the Grievant returned from break, rather than his recollection, mentioned for the first time at the arbitration hearing, that he did four bed checks while the Grievant was away on break.

3/ In discrediting Lutz's testimony, I have not given any particular weight to the testimony of Beeson about his various concerns about whether he had made an accurate statement. Although the County is not correct in asserting that Lutz was never questioned by the Union about whether he had had conversations with Beeson about his statement – in fact, he was asked and either incorrectly or untruthfully denied speaking with her – the substance of his alleged comments to Beeson does not constitute a clear recantation of his statement to management. If he said these things, they are as easily attributed to a person who has second thoughts about reporting something that was accurate but unpopular with his co-workers as they are to a person who felt he made an inaccurate statement.

The charge of a rule violation for reclining on a resident couch cannot be sustained, since a reasonable person could have viewed the conference room sofa as not falling within the definition of a resident couch, at least not at night after the residents had been sent to bed and locked in a different part of the building. The charge of sleeping on the job rises and falls with the testimony of Lutz, and his credibility is open to substantial question. Even crediting his testimony entirely provides only inferential evidence of sleeping, and the most persuasive point he makes is that the Grievant took an exceptionally long break. However, that testimony hinges on the bedtime having been 9:00 p.m. and the weight of the evidence indicates that the bedtime in August of 2001 was actually 10:00 p.m. A 10:00 p.m. bedtime cannot fit with the remainder of his statement regarding the length of time the Grievant took for a break, and I conclude that that testimony was untrue. I therefore conclude that the County has failed to prove that the Grievant was sleeping on the job or extending his break on or about August 29, 2001.

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

AWARD

The County did not have just cause to terminate the Grievant. The grievance is granted, and the appropriate remedy is to immediately reinstate the Grievant, remove all reference to the discharge from his file, and to make him whole for his losses. The Arbitrator will retain jurisdiction for a period of forty-five (45) days from the date of this Award for the sole purpose of clarifying the remedy, if requested.

Dated at Racine, Wisconsin, this 18th day of August, 2003.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

DN/anl
6562.doc