BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LASATA CARE CENTER EMPLOYEES ASSOCIATION

and

OZAUKEE COUNTY

Case 57
No. 61859
MA-12086

(Z.A. Discharge Grievance)

Appearances:

Mr. Thomas Bauer and **Mr. Benjamin Barth**, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, for the labor organization.

Mr. John R. Kuhnmuench, Jr., Human Resources Director, Ozaukee County, Ozaukee County Courthouse, 121 West Main Street, P.O. Box 994, Port Washington, Wisconsin 53074-0994, for the municipal employer.

ARBITRATION AWARD

Lasata Care Center Employees Association ("the Association") and Ozaukee County ("the County") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to discipline, specifically the discharge of Z.A. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held on April 3, 2003 in Cedarburg, Wisconsin, with a stenographic transcript being made available by April 16. The parties filed written arguments on May 20. With its brief, the County submitted two documents it identified as County Exhibits 7 and 8. On May 21, the Association wrote to object to the submission of this new evidence. On May 27, I

wrote to invite the County to respond to the Association's letter of May 21, which it did by letter received on June 4. On June 13, I ruled that there was no justification for the late submission of the evidence, and therefore returned the exhibits to the County and struck all references thereto from the County's brief. On August 11, the County waived its right to file a reply brief, as did the Association shortly thereafter.

ISSUE

The parties stipulated to the following statement of the issue:

Did the Employer have just cause in terminating the grievant on August 7, 2002? If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE VI – SENIORITY

. . .

Section 6.06 – Loss of Seniority: Seniority and the employment relationship shall be broken and terminated if any employee:

A) resigns (unexcused absence in excess of three [3] consecutive workdays shall be construed as resignation. Inability of an employee to notify the Employer of such absence because of physical inability or other just causes shall be taken into consideration in determining whether the absence is unexcused);

. . .

C) fails, without being excused, to return to work after;

1. The expiration of an unpaid leave of absence;

2. The expiration of a period of eligibility for Worker's Compensation for temporary-total or temporary-partial disability;

3. The expiration of five (5) calendar days following the date a notice of recall from layoff is received or dated undeliverable;

unless an extension is granted by the County in writing. In the event a recalled employee is unable to report to work in the above time period because of sickness or injury, such employee's seniority and his or her employment relationship with the County shall not be broken or terminated because of such failure to report to work; . . .

ARTICLE VII – DISCIPLINE AND RESIGNATION

Section 7.01 – Just Cause Definition: No employee who has completed his or her initial probationary period, as provided in Section 5.01, will be suspended, demoted, disciplined, or discharged except for just cause. Any discipline of an employee shall be reduced to writing and a copy shall be given to the employee, the local Association president and a copy shall be sent to the Labor Association of Wisconsin.

OTHER RELEVANT PROVISIONS

LASATA CARE CENTER EMPLOYEE HANDBOOK & WORK RULES

LEAVE OF ABSENCE

Unpaid Leave of Absences will be granted under the terms of the current association contract or County Ordinance, whichever is applicable. The employee is responsible for following through and seeing that the necessary paperwork is filed. Prior to any unpaid leave being granted, all accumulated sick leave, vacation, holiday time and comp time must be used where applicable.

Whenever possible requests for Leave of Absences (paid or unpaid) should be made at least ten (10) days prior to the leave so that Lasata can arrange for necessary approval and find someone to perform your work during your absence. Requests for leaves must be in writing, stating the reason for the leave, the starting date and the date you plan to return to work. This information must be verified in writing by a physician for all medical and family leave requests.

If you are on an approved leave, you must contact your supervisor two weeks in advance of the expiration of the leave. You must also contact your supervisor before the first date of your return and bring a medical release from your physician, if your leave has been for health reasons. Failure to contact your supervisor prior to the date specified on the leave request or failure to return to work on the day after the expiration of the leave will be considered a voluntary termination of employment. Request for an extension of a leave of absence must be submitted to your supervisor in writing at least ten (10) days prior to the expiration of the leave. (emphasis added)

....

HOURS OF WORK

The work at Lasata differs from most employment in that we must provide service 24 hours a day, 365 days a year. In order that our residents receive the highest level of care, it may be necessary for you to work on weekends, holidays, evenings, nights and occasional overtime. Your agreement to meet these requirements is a condition of employment.

Department Heads are responsible for preparing a written schedule of employee working hours, which will be posted 14 days prior to the effective date of the schedule. Each work schedule has been arranged so that every shift is adequately covered, therefore, it is imperative that each employee report on assigned days. Schedules are not to be removed from their posted position unless authorized by the Supervisor. (emphasis added)

. . .

ABSENCES AND TARDINESS

Lasata places great emphasis on good attendance. Frequent absences or tardiness places an extra burden on your co-workers. Only when you are dependably on the job can Lasata carry out its schedules and meet the needs of our residents. Your individual contribution is important to the functioning of the organization.

Regular attendance is expected of every employee. It is your responsibility to be on the job on time each day, fully able and ready to work. Although there are justifiable reasons to take off from work, employment assumes the availability for work and excessive absenteeism and/or excessive tardiness shall

result in disciplinary action. Excessive, habitual repetitions, or patterns of absences and/or tardiness will also result in disciplinary action.

If you must be absent or late on any weekday, you must notify your supervisor at least one hour before your scheduled starting time. The number is (262) 377-5060. If you are absent due to accident or illness, management may request a release for your return to work signed by a licensed physician. For absences exceeding three (3) calendar days, employees must submit a physician's statement or hospital report providing information as to the nature of the illness or injury and days of hospitalization, if any.

Nursing employee's who are absent on a weekend day/s will be scheduled to work on a weekend day/s they would normally have off unless they provide a written physician's statement justifying the absence.

BACKGROUND

Among its other general governmental functions, Ozaukee County maintains and operates the Lasata Care Center, a residential nursing facility located in Cedarburg, Wisconsin. At the time of hearing, the facility had about 220 employees, 1/ almost all of them represented by a labor organization, attending to approximately 196 residents.

1/ The record evidence identifies only LAW Local 905, the non-professional unit which represents the grievant. The record does not indicate what, if any, representation the professional employees have.

The grievant, Z.A., was hired as a full-time casual certified nurses aide (CNA) on August 28, 2000. Pursuant to a memorandum of understanding attached to the parties' collective bargaining agreement, this position is covered by the agreement, but its incumbents do not receive such fringe benefits as sick leave or vacation. The parties have, however, established a practice under which casual CNA's receive in unpaid leave the same amount of time off as they would have earned as vacation time if they were in a regular benefited position.

As of May, 2002, 2/ A. was regularly scheduled to work 40 hours per week. On May 13, she submitted a request for a 6-week (240 hours) unpaid leave of absence from

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2/ All dates hereafter are 2002 unless otherwise specified.

June 18 to July 31, which she wrote was for "traveling home to Nigeria." Given her seniority at the time, if A. had been a regular CNA, she would have been eligible for two weeks (80 hours) vacation. On May 14, Lasata administrator Ralph Luedtke denied the request, writing "too long a time and during peak vacation time for all staff."

On May 15, A. submitted a request to reduce her hours from 40 hours per week to eight hours, effective July 8. That request was approved, and resulted in A. being assigned to work every other weekend.

Also on May 15, A. submitted a new leave request, seeking to be off from June 18 to July 5, stating the purpose was "traveling to Nigeria to take kids home & family issues." Luedtke approved this request on May 20.

Carron Godersky, a member of the bargaining unit, is the LCC scheduler. She testified that on several occasions from late-May to mid-June, she had conversations which related to A.'s July schedule. Godersky said she wrote memoranda on each conversation, in a notebook which later disappeared from her desk. Godersky later recreated the notes, as follows:

> On 5/22/02 at approximately 2:00 pm I had a conversation with Barbara Kingdom. Barbara asked about not being about not being able to work Z. A.'s scheduled weekends in July. I explained to her that schedule changes weren't being granted any longer. She asked me what Z. was supposed to do, "she won't even be in the state." Barbara also stated "she said she would just call in if she couldn't have off." I told Barbara that it wasn't adviseable to do such because if you call in and are not sick, disciplinary action can be taken.
>
> Between the weeks of 5/27/02 & 6/6/02 Z. came into my office asking about the weekends she needed off in July. I told her there was nothing I could do about it. She then responded "Can't you just forget to put my name on the schedule?" I told here I would not jeopardize my job. She then said, "Well, can I call in sick now for then?" I told here she couldn't and that she really shouldn't call in sick for those days because that wasn't true and if she did it was grounds for termination. She asked what she should do "I'm not going to be in the country"? (sic) Then she remarked that I shouldn't tell her to go to Stephanie or Rosie cuz she had already spoken to them and they told her no.
>
> On approximately 6/14/02 I spoke with Z.A. in regards to her weekends to working July. Inquiring if she was coming back sooner to work. She said no. He asked me what she should do and I told her she should get back here when she was scheduled to work next. I asked her what she was going to do and she

> said, "I'm just going to call in sick." I told her that wasn't advisable. She said, "Well there's nothing else I can do, I'll just call in sick and have my doctor fax a note. They can't fire me if I have my doctor fax a note."

Kingdom denies the conversation which Godersky recounted ever occurred. An association steward at the time of hearing (but not during the period of the events under review), Kingdom testified that, as Godersky reported, she did in fact seek to assume some of A.'s weekends in July, but that her offer was denied.

On June 3, Godersky posted a CNA schedule which reflected A. being assigned to work on July 13-14. On June 7, British Airways issued A. a passenger receipt reflecting A.'s purchase of a round-trip plane ticket. The accompanying itinerary, also prepared June 7, indicates departure from Chicago on June 18 and return on July 31. The receipt does not indicate the date the reservation was confirmed, nor necessarily the date it was paid for. A. testified she purchased the $4,339 ticket, in cash, sometime in May, but she provided no documentary evidence in support of that chronology.

A. neither reported for work on July 13-14, nor called to inform the LCC that she would be absent.

In early July, Godersky posted a schedule which provided for A. to work again the weekend of July 27-28, and alternate weekends thereafter. Although she was in Nigeria at the time the schedule was posted, A. could reasonably be expected to have known of its particulars, which were consistent with her new 8-hour per week assignment.

At about 5:00 in the morning of July 27, A. telephoned to inform the on-duty nurse that she would not be at work either day that weekend. The reason for her absence was reported as "out of country, no return flight until 7/31."

A. returned to the Ozaukee county environs sometime after July 31. She did not contact LCC upon her return. A.'s first contact with LCC came when LCC contacted her shortly before August 6 to discuss her failures to report on July 13-14 and 27-28.

Lasata Director of Nursing Stephanie Eron and assistant administrator Rosalie Kraus met with A. on August 6; they did not affirmatively inform her of any availability of Association representation, and A. did not ask. In her contemporaneous notes of that discussion, Kraus wrote as follows:

> Stated that we were meeting to determine if there were any circumstances that we were unaware of that would warrant her flagrant manipulation and dishonesty in circumventing the denial of her extended LOA. She admitted that what she did was wrong & that she just need(ed) to spend more time with getting her kids living situation settled. She asked that we suspend her but not fire her. We said we would discuss & review with HR & get back to her on 8/7/02.

As department head with supervisory authority over CNA's, Eron had the primary investigative responsibility, such that neither Kraus nor Luetdke conducted independent investigations or significant analysis beyond that conducted by Eron. In her investigation, Eron never looked at any other personnel records to assess what, if any, was the pattern or practice of discipline for like offenses.

When Luedtke returned from vacation on August 7, he met with Eron and Kraus, and, after hearing their presentations, suggested A.'s termination. Kraus and Eron met with A. later that day, as reflected in Kraus' contemporaneous notes:

> We called Z. in stating we were going to be issuing disciplinary action. She arrive(d) @ 2 pm & I explained she had a right to association representation. She declined. We presented the termination notice indicating that her manipulation of her leave of absence was flagrant in its dishonesty & could not be tolerated in the workplace.

In furtherance of Luetdke's suggestion, Eron thereupon issued to A. a notice of Termination of Employment, as follows:

LASATA TERMINATION OF EMPLOYMENT

Employee Z. A.

Last day employed August 7, 2002

Nature of termination: Discharged XX Laid off

Reason for termination:

Dishonesty and failure to return to work at the expiration of a leave of absence.

Employee requested a leave of absence from June 18, 2002 through July 31, 2002 to travel to Nigeria. The request was denied on May 14, 202 as being too long during peak vacation time for all staff. On May 15, 2002 employee requested a reduction in hours from full-time to only every other weekend effective July 8, 2002 and also resubmitted her request for a leave of absence from June 18,, 2002 through July 5, 2002. This leave of absence was granted.

She was a no call/no show on July 13, 2002 and July 14, 2002 and then called on July 27, 2002 saying she would not be able to work on July 27, 2002 and July 28, 2002 because she was out of the country and there was no return flight until July 31, 2002, which was the date ending of the original request.

Z. admitted that her actions were intentional at a meeting on August 6, 2002 with Stephanie Eron, DON, and Rosalie Kraus, Assistant Administrator.

Z. A. /s/	8-7-02
Employee Signature	Date
Stephanie Eron /s/	8-7-02
Supervisor Signature	Date

On August 16, Association representative Benjamin Barth filed a grievance challenging the termination as being without just cause and thus in violation of Article VII of the collective bargaining agreement. The Association also claimed the employer had "exercised its management rights in an unreasonable manner" by its action.

Luedtke, after meeting again with Eron, Kraus and Godersky and reviewing the schedule, requests for leave, and the record of A.'s change in status, but not interviewing A. or conducting any independent review, denied the grievance on August 30, writing as follows:

Z. A. was hired as a full-time Casual CNA on August 28, 2000. As a Casual CNA she was not eligible for sick time, vacation time or floating holidays. However, we have made it a practice to allow Casual CNA's the same amount of time off in unpaid leave, as they would have earned in vacation time if they were a regular CNA.

This means that after one year, August 28, 2001, Z. was eligible for two weeks of unpaid leave per year. In reviewing here record, I see she was given a one-week leave in January 2001, a two-week leave for medical reasons in May, 2001, and a one-week leave in November, 2001.

In May, 2002, she requested a six-week leave, this was denied because it was during out busy vacation time when more senior employees are entitled to be off, and it was well beyond the two-weeks maximum she could have been granted. The day after her request was denied, she changed her schedule from a full-time employee to a part-time every other weekend employee. She then submitted another request for leave, but this time only for four weeks. Even though this was still beyond the time we should have allowed, we did grant the leave because of the circumstances for which she was requesting.

Z. then made it known to co-workers and the nursing administrative department that she had no intention of coming back at the end of her four-week approved leave, but was taking the full six weeks. Z. asked about calling in sick, she asked about schedule change, she reduced her hours to only have weekends to try to miss less time at the end of her approve leave.

It is obvious that she was not going to abide by the four-week leave time frame. In fact on August 7, 2002, she admitted to Rosalie Krause and Stephanie Eron that her act of not returning after four weeks was intentional all along. Lasata Work Rules, page 3 state "… failure to return to work on the day after expiration of leave will be considered termination of employment."

Z. admitted that she purposely (sic) refused to return to work after the expiration of her leave. Z.'s actions were blatant and willful, they showed total disregard for facility policies and seniority rights and were handled in a deceitful and untruthful manner.

Grievance denied, contract not violated.

POSITIONS OF THE PARTIES

The Association

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

The grievant was terminated without just cause contrary to Section 7.01 of the collective bargaining agreement, in that prior to the discharge, the employer did not make a reasonable effort to discover whether the employee did in fact violate a rule or order of management. As testified to by the employer's witness, Carron Godersky, employees are allowed two no-call/no shows without the risk of being terminated. As the employer has clearly advised employees of how it intends to interpret unexcused absences, the grievant reasonably believed, as she was told by the employer's representatives, that she had the availability of at least two no-call/no-shows before she would be disciplined.

Further, the employer's investigation was not conducted fairly and objectively, and the employer did not apply its rules and impose penalties evenhandedly and without discrimination. There was evidence at hearing of three other employees having multiple no-call/no-shows without receiving discipline. Queenie Wesson failed to return to work following an extended leave of absence, and was never disciplined. Michelle Lujan did not receive any discipline for her numerous no-call/no-show incidents prior to her voluntary termination. Nicole Welch did not receive any discipline for her numerous no-call/no-show incidents. The employer's agents did not talk to witnesses or check records of other employees prior to the decision to terminate the grievant. The employer's witness Godersky lied about her conversations with Association witness Barbara Kingdom. If the employer would have conducted a proper investigation, they would have discovered that other employees have been allowed a lax enforcement of the no-call/no-show rule. By failing to conduct a fair and objective investigation, the employer did not have reasonable grounds to believe the statements and conclusions of Godersky and other management personnel. If the employer's agents had investigated prior incidents, they would have seen termination is by far not warranted. The employer's agents have told employees they are allowed a certain number of no-call/no-shows without the risk of termination. The employer cannot now terminate the grievant after it has allowed other employees leniency in their no-call/no-show incidents. The employer must put all employees on notice it intends to change the existing practice of lax enforcement of the rules.

Further, the degree of discipline is not reasonably related to the seriousness of the proven offense and the employee's record service to the employer. The employer never provided any testimony to refute that the grievant was not a good worker with a clean work record. The employer has clearly treated other employees who have committed similar offenses with less discipline. The degree of discipline is not reasonable.

The employer also failed to allow the grievant to have an association representative present at the August 6 pre-termination meeting. The employer knew they were going to discipline the grievant at that meeting; to preserve the grievant's due process rights, the employe had an obligation to ask the grievant if she wanted Association representation at that time.

Accordingly, because the employer terminated the grievant without just cause, the grievant should be reinstated and made whole, with all records of the termination expunged. In the alternative, if the arbitrator finds some degree of discipline to be warranted, the discipline should be modified to something other than termination.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The grievant was properly terminated with just cause due to her dishonesty and her failure to return to work after the expiration of an unpaid leave of absence. The grievant was well aware that she could not take off work without permission, but on July 13-14 and July 27-28 she failed to show. She did not provide any reason why she was unable to appear for work, other than telling a night supervisor on July 27 that she was still in Nigeria. The grievant was fully aware that she was to work July 13-14, yet she bought a plane ticket with the return date of July 31. Her unexcused absences were in excess of three consecutive workdays and also constituted a failure to return to work at the expiration of an unpaid leave of absence.

As a state-regulated nursing home, Lasata Care Center is required to meet certain nursing standards and have suitable staff to meet patient needs. The County's rules and work rules are reasonable and designed to assist in ensuring those standards are met.

The grievant knew when she bought her plane tickets on June 7 that she was not going to return to work until after July 31. In fact, she made no effort to contact the nursing home on her return, but was instead contacted by the nursing home to see if there were any mitigating circumstances. There were none. The grievant caused her own termination and has no one to look to for blame except herself.

There was just cause to terminate the grievant.

DISCUSSION

This is an unhappy case. A single mother, confronting a conflict between her family and her job, opts to attend to her two young children – and ends up unemployed. My responsibility is to determine whether her termination was consistent with the contractual requirement that no discipline be imposed except for just cause.

As a casual certified nursing assistant with just under two years experience, Z.A. was able to take two weeks unpaid leave; but to bring her children to Nigeria and establish their living and school situation, she felt she needed three times that. This was a conflict with no easy resolution. But whatever other courses A. might have followed, the path she chose was not the right one.

Sec. 6.06 of the collective bargaining agreement sets forth several bases for termination. Paragraph (A) provides that "unexcused absence in excess of three consecutive workdays shall be construed as resignation." Paragraph (C)1. provides that "the employment relationship shall be broken and terminated" if an employee "fails, without being excused, to return to work after the expiration of an unpaid leave of absence."

Z. A. was on an unpaid leave of absence from June 18 to July 5, 2002. She was scheduled to work the weekends of July 13-14 and July 27-28, but she failed to report. Accusing her of "dishonesty and failure to return to work at the expiration of a leave of absence," the County fired A. on August 7. In its brief, the County adds a third cause for her discharge, namely unexcused absences in excess of three consecutive workdays.

The Association has aggressively challenged the County's action, contending that it is contrary to the text of the agreement and the practice of the parties. It also criticizes the County for its failure to evaluate A.'s behavior in the context of other similar incidents which it contends did not result in discipline. In particular, the Association argues strenuously that A. could not be fired for "no call/no show" violations. Finally, the Association rebuts certain of the employer's evidence (namely Godersky's account of an encounter with Kingdom) as being untruthful.

I address the last first. The statements Godersky attributes to Kingdom, relatively insignificant given the rest of the evidence, are the subject of intense disagreement as to their factual predicate. Godersky swears the conversation took place as reported; Kingdom swears it didn't and couldn't, given that Godersky alleged the conversation to have occurred in a place she didn't frequent on a day she didn't work. I explicitly put to the side that part of

Godersky's narrative that implies any inappropriate activities or attitude on the part of Kingdom, and leave unresolved the question of witness credibility on this particular point.

The County claims that A.'s "dishonesty" provides just cause for her termination. The County did not, however, explain exactly what that charge meant, or what the grievant had done to be guilty of it. While A. certainly acted deceitfully, she did not commit any overt acts of falsehood. That is, A. deceived the County into believing she would report for work on July 13-14 and 27-28, but she did not submit a false time card for those days claiming that she had. As I believe the word is customarily used in the labor relations context, A. was not guilty of "dishonesty."

Accordingly, I find that the County did not have just cause to terminate the grievant for dishonesty, and strike that charge from the termination notice.

Nor, I find, did the County have just cause to terminate the grievant under Sec. 6.06(A), "unexcused absence in excess of three consecutive workdays."

First, I would be reluctant to allow the County to expand its argument beyond that which was in its mind at the time it acted on August 7, 2002. The County did not cite 6.06(A) in A's termination notice, and I would not be inclined to sustain a discharge on a basis that the employer did not cite contemporaneously.

If there were such circumstances that I did allow the County to proceed on a 6.06(A) claim, I would still have serious doubts about the substantive nature of the employer's case. I would require the County to establish through record evidence what an "unexcused absence" was, and how previous incidences were handled. This, the County has not done. Nor has it addressed the question of whether A.'s early-morning call on July 27 changed her absence from a "no call/no show" to something else.

Moreover, the Association asserts there have been several "no call/no show" incidents that did not lead to discharge. The Association further asserted that these other instances (such as dietary department employee N.W.) were sufficiently similar to A.'s so as to require similar treatment. That the primary example of purported leniency in the treatment of "no call/no show" incidents involved a dietary department employee raises certain questions; my experience is that certified nursing assistants and dietary department employees have differing scheduling pressures that *may* have been sufficient to differentiate N.W.'s situation from that of Z.A. But because the County failed to investigate whether there were in fact similar occurrences in determining the proper discipline for A., the County failed to offer evidence at hearing to establish such a distinction.

Accordingly, because the County did not meet its burden of proving that the grievant's conduct constituted "unexcused absence in excess of three consecutive workdays," I find there was not just cause to terminate Z.A. for violation of 6.06(A) of the collective bargaining agreement.

However, the County did not rely exclusively on 6.06(A), but primarily cited 6.06(C)1., which provides that "the employment relationship shall be broken and terminated if any employee fails, without being excused, to return to work after the expiration of an unpaid leave of absence." As LCC Administrator Luedtke noted in his grievance response to LAW representative Barth, the Lasata Work Rules also provide that "failure to return to work on the day after expiration of leave will be considered termination of employment."

The County has significant responsibility to the residents of Lasata Care Center and their families to provide attentive, high-quality care. The CNA's are a vital component to the care of LCC residents. Since a full component of CNA's is necessary for the proper delivery of care to LCC residents, the employer has a legitimate interest in requiring good attendance. And the easiest way to ensure good attendance is by setting clear standards of attendance and establishing the penalty for non-compliance. That is precisely what Section 6.06(C)(1) provides – a clear standard and a clear sanction.

A. cannot claim she was not on notice about the importance the employer assigned to good attendance and the risk of discharge for following the course of action she undertook. The employment sanctions for failing to return to work following expiration of an unpaid leave of absence are explicit and unambiguous, stated clearly in both the collective bargaining agreement and the employee handbook. However important her other activity was, A. did exactly what the collective bargaining agreement says can get you fired.

The Association also contends that employee Q.W. failed to report for work upon the expiration of an unpaid leave, and, unlike A., was not disciplined. Certainly, disparate treatment of employees who otherwise are similarly situated is a reason to sustain a grievance over discipline. However, the record of W.'s experience is limited to hearsay and implication, and does not offer sufficient information for me to accept the Association's contention of disparate treatment.

One ancillary matter remains unresolved -- the date A. paid for her ticket. A. maintains she paid for the ticket in May, testifying she spent $4,339.50, in cash, on a non-refundable plane ticket prior to submitting and receiving approval for the extended leave of absence necessary to accommodate her itinerary. However, she provided no documentation to verify her chronology. On its face, the "Passenger Receipt" (Er. Ex. 6) shows a date of issue of June 7, three weeks *after* A.'s length of leave was set.

Regardless of whether A. bought a non-refundable plane ticket before getting her leave approved, or after knowing her leave had been denied, the inescapable fact is that A. knew her work schedule could not accommodate her travel schedule – yet she proceeded anyway.

A. knew she did not have sufficient approved leave to accommodate her itinerary, yet she never contacted either the airline or her travel agent prior to departure to see about expediting her return. Instead, she left the country knowing that the employer was relying on her to work the weekends of July 13-14 and July 27-28, dates that she would be on another continent.

To determine that the collective bargaining agreement supports the County's decision to terminate A. is not to say that this is the outcome the contract required; it was certainly within the County's authority to impose a lesser penalty. Indeed, were I the responsible official I might well have chosen a lengthy suspension rather than termination. However, the collective bargaining agreement explicitly states that the employment relationship "shall be broken and terminated" if an employee fails to return to work after the expiration of an unpaid leave. This is the standard the parties have mutually determined should govern the workplace. It would be inappropriate in this case for me to substitute my standards for those which the parties have bargained.

For those so inclined, the facts of this case reasonably support a stern application of the disciplinary options. The grievant intentionally deceived her employer on a critical scheduling matter on multiple occasions. She may have had the highest of motherly motives, and perhaps relied on subterfuge out of fear rather than malice. But given the vital role of certified nursing assistants play in the provision of patient care, the County acted reasonably in casting a stern disposition towards an employee committing such a flagrant act. Accordingly, on the basis of the record evidence, the collective bargaining agreement and the arguments of the parties, it is my

AWARD

1. That because the County did not have just cause to terminate the grievant for dishonesty, the grievance is sustained in part and that charge is stricken from the termination notice.

2. That because the County did not have just cause to terminate the grievant for unexcused absences in excess of three consecutive workdays, the grievance is sustained as to the alleged violation of 6.06(A) of the collective bargaining agreement.

3. That because the County did have just cause to terminate the grievant for failing, without being excused, to return to work after the expiration of an unpaid leave of absence, the grievance is denied as to the violation of 6.06(C)1.

Dated at Madison, Wisconsin, this 10th day of November, 2003.

Stuart Levitan /s/
Stuart Levitan, Arbitrator

SDL/gjc
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