BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**VERNON MANOR EMPLOYEES, LOCAL 1667,
AMERICAN FEDERATION OF STATE,
COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

COUNTY OF VERNON, WISCONSIN

Case 140
No. 64008
MA-12776

Appearances:

Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appearing on behalf of Vernon Manor Employees, Local 1667, American Federation of State, County, and Municipal Employees, AFL-CIO, referred to below as the Union.

Dawn Marie Harris, Parke & O'Flaherty, Ltd., Attorneys at Law, U.S. Bank Place, Tenth Floor, 201 Main Street, P.O. Box 1147, La Crosse, Wisconsin 54602-1147, appearing on behalf of County of Vernon, Wisconsin, referred to below as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to appoint Richard B. McLaughlin as Arbitrator to resolve a grievance filed on behalf of Meredith Ames, who is referred to below as the Grievant. Hearing was held on November 2, 2004, in Viroqua, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs by December 4, 2004.

ISSUES

The parties stipulated the following issues:

Did the County violate the collective bargaining agreement by terminating the employment of the Grievant?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II
Management's Rights

2.01 Subject to the provisions of this Contract and applicable law, the County possesses the right to operate Vernon Manor and all management rights in it. These rights include, but are not necessarily limited to, the following:

. . .

B. To establish reasonable work rules . . .

D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause . . .

ARTICLE VIII
Sick Leave

8.01 A regular full-time employee shall be entitled to accumulate a total of not to exceed ninety-six (96) days of sick leave at the rate of one (1) day per month . . .

8.03 In order to qualify for such sick leave, an employee must report to his department that he/she is sick, not later than . . . two (2) hours before the beginning of the afternoon and evening shifts, except when said employee is taken ill after he/she starts his/her day's work. . . . Any employee . . . after a proper hearing . . . found to have violated any sick leave regulation is subject to discipline or discharge . . .

8.04 If any employee is sick for more than three (3) days, the employee may be requested to present his/her department head a certificate of illness . . .

BACKGROUND

The Grievant is a Licensed Practical Nurse employed by Vernon Manor, a skilled care nursing facility operated by the County. The County first employed her in 1976. She worked from 1976 until 1985, and then returned to the Manor in 2001; working the night shift as the charge nurse until her discharge on November 19, 2003 (references to dates are to 2003, unless otherwise noted). The County documented the discharge on an "Employee Violation Report" form, which states:

> On 11/7 & 11/8, employee used 4 hrs. of sick leave ea. noc. On 11/18/03, she used 12 hrs. of sick time. Used 20 hrs. of sick time & has only 16 hrs. accumulated. Improper notice was given. Called @ 4:30 p.m. – scheduled for a 12 hr. shift from 6P – 6A.

The form includes the following response from the Grievant:

> I had a Md's excuse. I furnished a doctor's excuse to be absent from work. In addition I called Nancy & Merna . . . to ask their advice on what I should do considering my frequent absenteeism and could not reach either one of them.

The County maintains a policy entitled "Disciplinary Action Or Dismissal", which identifies "Misuse or abuse of sick leave" as an example from a list of "minor to severe violations that are grounds for disciplinary action or dismissal for all employees."

The parties' dispute focuses less on the underlying facts than their disciplinary significance. The facts are best set forth as an overview of witness testimony.

Merna Fremstad

Fremstad is the Manor's Director of Nursing. She has known the Grievant for many years, both socially and as a co-worker. She worked with the Grievant at the Manor prior to the Grievant's departure for another job in 1985. Fremstad knew from that experience that the Grievant had difficulty maintaining regular attendance. Fremstad testified the Grievant was, during that period, "a good nurse, she just had attendance issues."

By 2001, Fremstad had become the Director of Nursing, and hired the Grievant to be the night shift charge nurse. The Manor could not hire a Registered Nurse and welcomed the Grievant's application. At the point of hire on April 21, 2001, Fremstad emphasized to the Grievant that regular attendance was essential to the position and that their friendship could not excuse a repeat of her earlier attendance problems.

Attendance problems arose early in the Grievant's employment. In a memo to the Grievant dated September 18, 2001, Fremstad and Nancy Witthoft, the Manor's Administrator, documented the problems thus:

> . . . (w)e have found your work to meet the requirements of the position. However, we have found your attendance to be a problem.
>
> During your probationary period, you have been sick or absent 17 times. This is unacceptable. As a result, we are extending your probationary period . . . in the hopes that you can resolve this problem and make the commitment necessary to be a long term employee . . .

The Union opposed the extension of the probationary period. Witthoft and Fremstad decided not to press the issue, and moved the Grievant off probation in spite of their concerns.

The problem persisted, leading to a verbal warning, documented in an "Employee Violation Report" dated October 24, 2001, stating "no improvement noted" regarding "absenteeism." The Grievant wrote a response stating, "Recently was instructed by MD to be excused from work from 10/16 – 10/22 d/t depression and anxiety . . . returned to work on 10/21 (with) MDs approval." Fremstad issued a written warning dated October 24, 2001, concerning the Grievant's failure "to give proper 2 hour notice to be absent from her scheduled shift" on two separate occasions. The Grievant filed a response stating that "family . . . circumstances" had caused her to miss work and that she had not abused sick leave since "I've not accrued any sick days." She added, "I will however curb absenteeism, unless indicated by MD."

In May, Fremstad issued the Grievant a warning for "Abuse of sick leave" and for "Sleeping while on duty." The report notes the Grievant had "been short 12h per pay period in 4 of the last 5 pay periods." The warning included a statement that "suspension or termination" could follow a reoccurrence. On September 10, Fremstad suspended the Grievant for three days, in-house and with pay, noting that the Grievant "(i)s currently out of sick time" having used thirteen days to that point in the year. The Grievant wrote a response stating, "I understand the reason for this action and will strive for improved attendance." When they discussed the suspension, Fremstad warned the Grievant that the next time she called in without sufficient sick leave to cover the absence would result in discharge. Sometime during this period, Fremstad and Witthoft directed the Grievant to call them personally before missing a shift. Fremstad stated that on "multiple times" she had successfully talked the Grievant into reporting for work. In her view, the Grievant missed work primarily due to the emotional effects of problems within her family.

The Grievant entered November with sixteen hours of accrued sick leave. She used four hours on November 7 and another four hours on November 8. On November 18, she called the Manor to note she could not report for work for her shift, which ran from 6:00 p.m. until 6:00 a.m. She did not have sufficient sick leave to cover the shift. Fremstad and Witthoft discussed the matter, and decided the absence was the last straw. They summoned her to a meeting on November 19, at which they issued her the notice of termination.

Sometime during the November 19 meeting the Grievant produced a doctor's excuse stating, "Please excuse from work today d/t medical reasons." Fremstad and Witthoft did not view the excuse as a basis to alter their decision to discharge her. They did not understand the reasons for the absence. In Fremstad's view, the problem was chronic absenteeism, and the excuse afforded no reason to believe the Grievant could change her behavior. Fremstad and Witthoft had discussed the problem for months, and the November 18 absence could not alter the fact that the Grievant did not have sufficient sick leave to cover the missed shift. In her view, the Grievant and her Union representative could have altered the decision only if they provided new information. Fremstad did not view the Grievant's statement that she would have reported for work had she known the absence would result in discharge to constitute new information.

The Grievant requested leave under the Family and Medical Leave Act (FMLA) in early December. The County denied it.

Nancy Witthoft

Witthoft has served as the Manor's Administrator for roughly six and one-half years. Fremstad discussed hiring the Grievant with Witthoft, and noted her past attendance problems. They decided, however, that the problems could be addressed. Fremstad discussed the resulting attendance problems with Witthoft throughout the Grievant's employment. Witthoft covered one shift for the Grievant roughly a year ago, but phoned the Grievant during the shift to tell her she did not feel qualified to be a charge nurse. The Grievant then reported for work to fill out the shift.

Witthoft personally counseled the Grievant to call her or Fremstad before calling in sick. On several occasions, Witthoft successfully convinced the Grievant to report for work on nights she called to claim sick leave. In Witthoft's view, the County's progressive discipline system is triggered whenever an employee does not have sufficient sick leave to cover an absence, whether or not an employee has a doctor's excuse. In her view, the September warning necessitated the November discharge.

Witthoft was present for the November 19 termination meeting. The Grievant's claim to have called in did not excuse her absence. There were no messages on her or Fremstad's

answering machines. In her view, only approved FMLA leave could excuse an absence that an employee could not cover with accrued sick leave. The Grievant had used FMLA earlier to cover a surgical procedure, but did not request FMLA in November. The Grievant did not supply the doctor's slip until the meeting was effectively over. Witthoft could not recall the Grievant claiming that her doctor ordered her not to work, and could not recall the Grievant claiming to have symptoms consistent with strep throat. In her view, the Grievant was habitually absent and showed no signs that she could modify her behavior.

The Grievant

When hired in April of 2001, the Grievant worked from 10:00 p.m. through 6:00 a.m. When she took FMLA leave for surgery, her replacement asked for and received a twelve hour shift. On her return from surgery, the Grievant assumed the twelve hour shifts.

On November 18, she woke at 3:00 p.m. with a sore throat. She phoned her doctor, who advised her to come in to be tested for strep. She took the test sometime shortly after 4:00 p.m., and became concerned that she could not make it into work unless she left the office within one-half an hour. Sometime during this period, her doctor advised her that the test was negative, but that she had a virus. He recommended she not report for work. Also during this period, she phoned the Manor three times. She first phoned sometime after 4:00 p.m., and informed a ward secretary to tell Fremstad she was not sure if she could make it in to work. Fremstad did not return the call. The Grievant phoned the Manor again, around 4:15 p.m., and was informed by the ward secretary that Witthoft was not answering the phone. Sometime later, the Grievant again phoned the Manor. This time she informed the charge nurse that she had a virus and a doctor's excuse directing her not to report for work. She fully intended to report for work on November 18, and did not call in prior to 4:00 p.m. because she had no idea whether or not her doctor would direct her not to report for work. She did not leave the excuse at the Manor on November 18 because no one was in the office to receive it. She was, however, concerned for her job due to the September warning.

Early in the morning of November 19, Fremstad called, and directed her to report for work. The Grievant supplied the doctor's excuse at the start of the meeting, and stated that she was "sure I told them what he (the doctor) said" regarding the virus. She explored the possibility of securing FMLA leave prior to or at the November 19 meeting. Her Union representative spoke with the County, and was informed the request would not cover the type of absence she was seeking leave for. She filed the application for FMLA leave in December because of delays traceable to her doctor.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The County's Brief

After a review of the record, the County notes that the concept of "'just cause' is one of fairness", and concludes that "there is more than just cause to support the legitimate and reasonable termination in this case."

More specifically, the County contends that whether "the punishment of termination" fits "the crime in this case" is the sole issue. The Grievant was rehired in April of 2001, in spite of "her prior history of sick leave abuse and chronic absenteeism." Fremstad warned her at the point of hire that "her prior absenteeism problem would not be tolerated." The Grievant responded, however, by calling in sick seventeen times during her probation period. Although the County worked with her to correct the problem, including granting FMLA leave in 2002, her "blatant abuse of sick leave reared its ugly head again in 2003". In May, the County issued her a written warning for sleeping on the job, sick leave abuse and improper charting. Instead of terminating her for these multiple offenses, Witthoft and Fremstad attempted to work her through the problems. They required her to call them personally before taking sick leave, and were able to coax her to work to avoid depleting her sick leave. By September, however, she "went into negative usage of sick leave" and received a three day suspension.

In spite of stating that she would improve, the Grievant called in sick for four hours on November 7 and 8. On November 18, she again called in sick, without complying with the County's formal call-in policy or the informal policy instituted by Fremstad and Witthoft. The November 18 absence again put her in a negative sick leave balance, and left the County no option but to terminate her. That she could produce a physician's statement cannot obscure that she ignored the call-in policy and once again moved into a negative sick leave balance. That her absences may be traceable to a difficult family situation "does not legally excuse her responsibility to perform her job." It follows that the County met "the legal requirements of just cause as both a matter of law and fact."

The Union's Brief

After a review of the record, the Union contends that the Grievant "was not given appropriate 'due process'". More specifically, the Union argues that Witthoft had the notice of termination prepared prior to the November 19 meeting. Thus, the County afforded the Grievant no opportunity to give her side of the story.

Nor will the evidence permit a finding of just cause. The evidence preceding the November 18 absence has no bearing on this point. The Union successfully opposed the County's attempt to extend the Grievant's probation, and the County's retention of her

diminishes the force of its contention that it could have discharged her at that point. Similarly, whatever problems she had prior to her most recent hire cannot be considered to assist in the analysis of cause for her discharge. Earlier warnings have little force, since they are either stale or concern issues other than the absenteeism for which the County terminated her.

This leaves the events of November standing alone. She had sufficient sick leave to cover the absences prior to November 18. On November 18, she saw a doctor, believing she had strep throat. She called the Manor as soon as she knew the results of her test, but even with a negative test, her doctor advised her to take the night off of work. She called several times, attempting to reach Fremstad and Witthoft. Eventually, she left a message regarding her absence with the charge nurse. Her actions were reasonable under the circumstances.

The County's were not. Its witnesses gave inconsistent testimony regarding whether an absence covered by a doctor's excuse could be considered an abuse of sick leave. Beyond this, a "one-day usage of sick leave should not be considered an unauthorized absence because it is granted as a benefit under the collective bargaining agreement." That the Grievant could not cover the absence of November 18 reflects no more than that she had a twelve, rather than an eight, hour shift.

The Union concludes that "the grievance (should) be sustained" and the Grievant should "be reinstated to her previous position with a 'make whole' remedy and . . . any references to this incident (should) be removed from any and all of the grievant's personnel file(s)."

DISCUSSION

The stipulated issue concerns whether the County had just cause to discharge the Grievant. In my view, unless the parties stipulate otherwise, two elements define just cause. The first is that the County must establish conduct by the Grievant in which it has a disciplinary interest. The second is that the County must establish that the discipline imposed reasonably reflects its disciplinary interest.

The parties dispute the conduct that should be considered at issue. The County's discharge decision points to a pattern of behavior that could not be modified through progressive discipline. The Union views the events of November 18 standing alone as the focus of the County's disciplinary interest.

The Union's attempt to ignore the Grievant's history of absenteeism is understandable, but is not a persuasive view of the County's interest in her conduct. Even if restricted to the events of November 18, the Union's view understates the proven disciplinary interest in the conduct. The Grievant did not have sufficient sick leave accrued under Section 8.01 to cover

her shift on November 18. Whether or not this is meaningful regarding other employees, it points to a pattern of conduct in this case. Even if the Grievant would have had sufficient sick leave to cover the November 18 shift, the Union's view ignores that she did not follow the call in procedure specified by Section 8.03. Under any view of the facts, she did not meet the two hour call-in requirement. Under Section 8.03, it is necessary to meet this requirement "(i)n order to qualify for such sick leave." The Grievant testified that she intended to report for work until the doctor told her not to, but offered no explanation why she chose to wait for this explanation prior to calling in. If the sore throat bothered her well before she went to the doctor's office, and if the doctor's appointment played a role in her decision to work, she should have called in to advise the Manor that it might need to secure a replacement.

More to the point, the Grievant's absenteeism problems are evident. The Union characterizes a substantial portion of the evidence as stale. This ignores that it is not any specific absence that prompts the County's disciplinary interest, but their consistent pattern. That the Grievant had absenteeism problems prior to her re-hire in April of 2001 affords no independent disciplinary interest to the County, but underscores the length and severity of the pattern. At a minimum, it indicates the Grievant was aware of the problem. More significantly, just as a history of solid work performance can impact the extent of an employer's disciplinary interest in a specific instance of misconduct, the Grievant's history of absenteeism impacts the extent and existence of the Employer's disciplinary interest in the November 18 absence.

More specifically, Fremstad warned the Grievant at her re-hire in April of 2001 that any absenteeism problems needed to remain in the past. The September 18, 2001 memo establishes that they did not. Even though her probation period was not extended, a pattern of absences started early. By late October of 2001, the absenteeism problem, combined with a failure to meet call-in procedure, had prompted a verbal and a written warning.

In May of 2003, Fremstad issued the Grievant another written warning for absenteeism. The warning notice stated suspension or termination would follow. By the following September, the Grievant had exhausted her sick leave and had received a three-day suspension. The accompanying warning notice advised her that termination was the next step. The Grievant's response that she would improve her attendance proved short-lived. Prior to the end of her shift on November 18, she had again exhausted her sick leave.

Thus, the evidence establishes that by November 18, the Grievant was aware of the significance of the County's concerns with her attendance and that she was unable to address those concerns. The incidents noted above ignore those in which Witthoft and Fremstad either called the Grievant or responded to her call-in by coaxing her to report for work. Their procedure of having her call them directly could not break the cycle of absences. The Union forcefully points out that there is a gap between the October 2001 and the May 2003 written

warnings. The evidence falls short, however, of establishing that the Grievant's attendance improved. Rather, it permits the inference that it did. Even with the benefit of this inference, the 2003 pattern is established, as is the Grievant's inability to address it, even with coaching.

The Grievant's response to the November 18 illness is less reasonable in fact than as argued by the Union. The Grievant's attempts to reach Fremstad and Witthoft were dubious at best. Each has voice-mail, and neither had a voice-mail message from the Grievant. In spite of the procedure by which Witthoft and Fremstad had the Grievant call them personally before missing work, the Grievant called neither at home. She made no effort to supply substantial information for the absence or the doctor's excuse to the Manor. Her failure to call in within the contractual two hour period is unexplained. In sum, the County has demonstrated a disciplinary interest in the Grievant's attendance record, including her absence of November 18. She demonstrated a pattern of behavior manifesting a casual attitude toward attendance in a position with significant responsibility.

The issue thus turns to whether discharge reasonably reflects the County's disciplinary interest. As preface to a view of the facts, it is appropriate to clarify the contractual basis for this interest. Section 2.01 D is the focus, since it establishes the just cause requirement. The assertion that the Manor has a policy of treating a "deficit" of accrued sick leave to call for discipline is unpersuasive. Under the "deficit" view, a doctor's statement could not excuse an absence, if the absence yielded a negative sick leave balance. This view, if established, would point to Section 2.01 B as the focus for the discipline. However, as the Union points out, Fremstad's and Witthoft's views of this point are difficult to square. In any event, the "deficit" view does not appear to have been communicated to the Union. Thus, the County's disciplinary interest turns not on a work rule under Section 2.01 B, but under the case-by-case cause analysis of Section 2.01 D.

In this case, Fremstad's and Witthoft's determination that the Grievant's absences were chronic and beyond her ability to control is reasonable. As noted above, the County attempted progressive discipline and individual coaching without success. There were no further steps on the progressive discipline system to apply. Against this background, the County's decision to discharge the Grievant for a pattern of absenteeism that culminated in the November 18 absence cannot be considered unreasonable.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. The Union persuasively argues that the County's post-discharge review of the Grievant's time records has no bearing on the discharge determination. Whether or not the admission of post-discharge evidence can be considered appropriate as a general matter, it is evident the County terminated the Grievant based on the evidence summarized above. That she may have attempted to hide the number of hours she missed had no bearing on the County's original decision and has no bearing on the conclusions stated above.

The Union's argument that the November 18 absence should be considered excused because the Grievant secured a doctor's statement has persuasive force. Beyond this, the Union argues that the County reached its decision without affording the Grievant an opportunity to give her side of the story. These related arguments state the most forceful parts of the Union's case.

However, these arguments are stronger as argued than as proven. The record regarding the excuse is mixed. If a doctor's excuse standing alone excuses an absence, then a company doctor's direction that an injured employee return to work before the employee individually felt capable would bind the employee. Neither is the case. Rather, a doctor's excuse is no more than, nor no less than, relevant evidence concerning an absence. The Grievant testified that the County effectively ignored it since Witthoft and Fremstad had already made up their minds. Witthoft does not recall seeing the excuse until after the meeting had effectively ended. The evidence is less than clear on when the Grievant supplied the excuse, and on how much detail concerning it she was willing to offer.

Ignoring this uncertainty, the excuse notes the Grievant should be excused from work due to "medical reasons." Witthoft and Fremstad reasonably viewed the excuse as supplying no new information. "Medical reasons" could include not feeling emotionally up to working, and the "please excuse" reference could reasonably be viewed as the doctor's response to an employee who needed a piece of paper to prevent discipline. From their view, the excuse stated the nature of the problem they had been unable to get the Grievant to address. In the absence of some more definitive statement of illness or at least of its symptoms, their view cannot be considered unreasonable.

More significant than the excuse is the Grievant's conduct. Her effort to call in fell short of the standard required by Section 8.03 and affords little reason to undercut Witthoft's and Fremstad's view of the absence. The Grievant's testimony at hearing was little better. Her testimony indicates she put more effort into securing the doctor's excuse than in communicating with the Manor regarding the absence. The statement that she intended to report for work until ordered not to by her doctor is difficult to square with the assertion that she was too ill to report for work. Neither is easily reconciled to her effort to reach Witthoft and Fremstad, nor to the assertion that she would have reported to work had she known her job was at risk. The Union persuasively argues that the Grievant made an effort to alert the Manor of her absence. The facts undercut the persuasive force of the argument. They indicate that her effort was geared less toward meaningfully notifying the Manor of an absence that needed to be covered, than to attempting to shield the absence from discipline.

Nor does the record establish that the County failed to investigate the matter. It is evident that Witthoft and Fremstad put considerable effort over a considerable time to get the Grievant to report for work. As a result, the Grievant's attendance problems were an ongoing

investigation and a continual source of discussion. Beyond this, it is evident that the Grievant gave contractually inappropriate notice of the absence on November 18, and made no effective effort to alert Fremstad or Witthoft of the basis for the absence. It is not apparent what the County should have investigated other than the doctor's excuse itself. If the meeting of November 19 started and ended with little new information, the Grievant played as significant a role as any other person in creating that void.

The discharge is not based on the Grievant's capability as a nurse or on the underlying problems that may have caused her absences. As argued by the County, it is based on the need to have her report for work reliably, and the need to have her responsibly call in an absence as required by Section 8.03. The discharge reflects her inability to do so even after the imposition of progressive discipline. The Award entered below affirms this, and focuses only on a pattern of conduct not altered by the administration of progressive discipline. The County has proven each element of just cause.

AWARD

The County did not violate the collective bargaining agreement by terminating the employment of the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 7th day of January, 2005.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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