BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 95, WOOD COUNTY TELEPHONE UNIT

and

WOOD COUNTY TELEPHONE COMPANY

Case 6
No. 62513
A-6079

Appearances:

Bruce F. Ehlke and Danielle L. Carne, Shneidman, Hawks & Ehlke, S.C., Attorneys at Law, 222 West Washington Avenue, Suite 705, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of the Office & Professional Employees International Union, Local 95, Wood County Telephone Unit, which is referred to below as the Union.

Jack D. Walker, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, Ten East Doty, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Wood County Telephone Company, which is referred to below as the Company.

ARBITRATION AWARD

The Union and the Company are parties to a collective bargaining agreement, which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint separate arbitrators to resolve two grievances filed on behalf of Marianne Webster, who is referred to below as the Grievant. The subject of the first grievance (Grievance # WCTC 01-003) was a one-day suspension, and the subject of the second grievance (Grievance # WCTC 01-003) was a two-day suspension. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as Arbitrator for the grievance concerning the two-day suspension. Hearing on each grievance was conducted on October 22, 2003, in Madison, Wisconsin. As agreed by the parties, briefing regarding the second grievance was triggered by a decision in the first grievance. The Union stated the briefing schedule in a letter filed with the Commission on July 26, 2004. In a letter filed with the Commission on October 8, 2004, the Company requested "that the grievance be dismissed for failure to prosecute, because of the failure to file a brief according to the schedule set by the

Union itself." In a letter filed with the Commission on October 14, 2004, the Union requested the denial of the Company's request, and offered a revised briefing schedule. In a letter filed with the Commission on October 20, 2004, the Company objected to the adequacy of the Union's response and continued its objection "to further processing of this case." In a letter to the parties dated October 21, 2004, I stated:

> . . . The Union does not challenge the accuracy of Mr. Walker's statement of its failure to comply with the briefing schedule, which poses a troublesome point. Mr. Walker's letters seek, however, not waiver of the right to file argument but waiver of a determination of the merit of the grievance. In the absence of a contractual provision demanding such a waiver, I am unwilling to take the force of the argument that far.
>
> Nor do I view it appropriate to suggest a determination of the merit of the grievance without your argument. Even without regard to the delay in the submission of briefs, considerable time has elapsed since hearing, and this argues against consideration of the record without your argument. Beyond this, the agreement to litigate the merit of Case 5 prior to the presentation of argument in Case 6 points toward receipt of argument. It is significant to me that the two of you address the impact, if any, of the litigation of Case 5 on Case 6. Thus, I will not close the file, but request that the two of you see if you can stipulate to a briefing schedule. If you cannot stipulate a schedule, I can set one. If the Employer believes the Union's delay in briefing impacts the merit of the grievance, then the argument can be incorporated into the brief. I will not, however, treat the delay highlighted by the Employer as a waiver of the grievance.

The parties filed briefs by January 24, 2005.

ISSUES

The parties stipulated the following issues for decision:

> Was there cause to suspend the Grievant for two days on February 6th, 7th and 8th, 2001?
>
> If not, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE IV

MANAGEMENT RIGHTS & PREROGATIVES

Section 401 – Reservation of Management Rights:

Except as otherwise specifically provided in this Agreement, the Company retains all rights and functions of management and administration that it has by law and the exercise of any such rights or functions, including the specific additional management rights set forth in this article, shall be exclusive and shall not be subject to notice or negotiation.

Section 402 – Specific Additional Management Rights:

Without limiting the generality of the foregoing Section 401, the Company and management rights and prerogatives shall include without condition or limitation:

402.1 -- The management and operation of the business and the direction and arrangement of the working forces including the right to hire and employ employees and to transfer, suspend, lay off, discharge or discipline employees with cause.

. . .

Section 4.03 – Employer Rules:

403.1 -- The Company shall have the right to establish reasonable rules for all employees as the Company deems appropriate; to promote the safety and welfare of all employees; to maintain necessary discipline; and to protect the interest of the Company.

403.2 -- Violators of rules will be subject to disciplinary measures ***including, but not limited to*** verbal warnings, ***written warnings, suspensions*** and immediate dismissal, depending upon the seriousness of the offense. Repeated violations of rules or compounded violations of more than one rule, shall be cause for accelerated disciplinary action . . .

BACKGROUND

The grievance, dated February 13, 2001, (references to dates are to 2001, unless otherwise noted) asserts the "Grievant's supervisor has arbitrarily and capriciously disciplined the

Grievant with an unpaid suspension". Terry Lee is the Grievant's immediate supervisor and issued a suspension letter to the Grievant, dated February 6, which states:

> This is letter of suspension without pay given on February 6, 2001 with Leif Street, Terry Lee, Union Steward and Marianne Webster present, regarding your presentation of a non-applicable family leave form in methods not in accordance with company policy on February 5, 2001 and failure to properly notify your supervisor concerning your return from this absence for your scheduled work tour of February 6, 2001 as is outlined in your Employee Practices and Policies Handbook.
>
> On February 5, 2001 you failed to properly notify your supervisor, Terry Lee, of your request to file for Family Medical Leave as is outlined in the Wood County Telephone Company Employee Practices and Policies Handbook; Family Leave Act Policy which states "An employee must request FMLA leave in writing to their immediate supervisor as far in advance of their FMLA leave as possible". Prior to your leaving, you failed to properly submit the required written Family Leave Request Form to your supervisor; instead, you went directly to the Company Controller, who was not present at the time. Your direct supervisor was, however, present at the time.
>
> On February 5, 2001 you failed to properly notify your supervisor, Terry Lee, of your inability to arrive for a previously scheduled department meeting on February 6, 2001 as is outlined in the Wood County Telephone Company Employee Practices and Policies Handbook; Work Rules and Notification Procedure for Sick Employees. These policies state:
>
> 1. Work Rules: Section 1; No deviation from work schedules, including early arrival or departure, will be permitted without prior permission of the employee's immediate supervisor. The employee's supervisor must be notified reasonably in advance by the employee of any absence from work to permit scheduling of work.
>
> 2. Notification Procedure for Sick Employee; the employee is expected to contact their immediate supervisor by a direct telephone conversation. This may be accomplished by calling the supervisor at home prior to 8:00 AM or at the telephone office or warehouse prior to the start of their tour of duty.
>
>   If their supervisor is gone or cannot be reached, the above procedure should be utilized to notify the appropriate department head.

> After reasonable attempts have failed to contact either a supervisor or department head, the employee should leave a voice mail message for their supervisor. In this case, the employee calling in sick should also notify another employee in their department that they will not be in to work.

In the event that, in the future, Marianne is unable to report for <u>or</u> complete her scheduled tour of duty or scheduled meetings, she will follow the above outlined policies in order to notify her supervisor. Marianne will also follow the above polices as soon as she has knowledge of the time she can return to either resume <u>or</u> finish her scheduled tour of duty.

In the event that Marianne must submit a Family Leave Request Form to her immediate supervisor, it must be a valid request as outlined in the Family Leave Act Policy in her Employee Practices and Policies Handbook. She must also request FMLA leave in writing to her immediate supervisor as far in advance of FMLA leave as possible".

Marianne will be required to reread and certify in a signed statement to her supervisor that she has read and understood the Employee Practices and Policies Handbook. This will be completed no later than Monday, February 12, 2001. If Marianne has any questions concerning the Practices and Policies Handbook she will address those questions to her supervisor.

Therefore, because you have previously received verbal and written warnings, as well as a suspension, I am giving you the remainder of February 6th, February 7th and the morning of February 8, 2001 off without pay. Report back to work on Thursday, February 8, 2001 at 1:30 PM.

I will remind you again that you have the Employee Assistance Plan available to you . . . This EAP service is anonymous and can help you work through problems affecting your work and/or well-being.

You may receive more severe discipline, including additional suspension or discharge, for any future offense or omission, whether or not the offense or omission is similar to the present event.

The grievance seeks that this letter be removed from the Grievant's personnel files, that she "be made whole for all unpaid suspension time from her normal work schedule", and that the Company "cease and desist from . . . continued harassment . . . and capricious disciplining of the Grievant."

The Company hired the Grievant as a Cashier/Receptionist in December of 1998. In February, she served as representative payee of her uncle, Nazar Gurunian, who then lived in Loving Care Villa, a small, assisted care facility. While visiting Gurunian on the evening of

February 4, she noticed he had swelling in his jaw and was in pain. She decided to make arrangements for him to see a dentist the following day.

She reported for work on February 5, phoned a dentist, described Gurunian's symptoms, and was told to bring him in as soon as possible. After some phone calls back and forth, the dentist made an appointment to see him at 11:00 a.m. The Grievant attempted to arrange for her sister to take Gurunian to the appointment. The sister could not. Loving Care Villa had no employee available to take Gurunian, and the Grievant arranged to move the appointment to 1:00 p.m., to permit her to take him during her lunch break. While making these arrangements, the Grievant and Mary Newberry, who then worked as a Service Representative and as the Union's Vice President and Unit Chair, discussed the situation. Sometime after this, the Grievant phoned Lee to determine if she could use Family Medical Leave Act (FMLA) leave to cover the appointment. Lee responded that she did not believe the acts covered an uncle. The Grievant advised her that she served as Gurunian's power of attorney, and wondered if that affected the acts' coverage. Lee did not know, and informed the Grievant to contact Jerold Johnson.

After this conversation, the Grievant tried unsuccessfully to reach Johnson or his administrative assistant. Ultimately, Newberry provided the Grievant with a blank FMLA request form, which the Grievant filled out. The form is headed by three separate lined entries stated as "Date:", "To:", and "From:". Beside the "Date:" heading, the Grievant filled in "2-5-01". Beside the "To:" heading, the Grievant filled in "2-5-01". Beside the "From:" heading, the Grievant filled in "1:30 pm to 2:30?" The form lists the following items for which FMLA leave can be claimed:

a) Birth, Placement or Adoption of Child.
b) My own serious health condition
c) Serious health condition of my spouse, child or parent.

The Grievant circled the form's "c)" item, and signed the form. Before leaving the office to pick up Gurunian, she placed her cash drawer in the vault in case she could not return. Scheid was present when she did so. After doing this, the Grievant left the FMLA leave request form on Johnson's desk.

The Grievant took Gurunian to the dentist's office. After the examination, the dentist referred him to an oral surgeon for a tooth extraction that afternoon. Sometime during the oral surgery, the Grievant phoned Lee. Lee was not at her phone, and the Grievant left a voice-mail, indicating that she did not think she would be able to return to work.

Sometime after this call, but prior to the completion of the visit to the oral surgeon, Lee phoned the Grievant at the oral surgeon's office. Lee informed the Grievant she did not qualify for FMLA leave. The Grievant responded that she wished to take personal leave. Lee determined the Grievant had sufficient personal leave to cover the absence, and asked her to return to work to complete her shift. The Grievant responded that she could not leave her

uncle. Lee reminded her of a staff meeting set for the following morning, and the Grievant responded that she intended to be there.

When the extraction procedure was completed, the oral surgeon released Gurunian to the Grievant, advising her that he wished to see him the following morning at 7:55 a.m. to check for signs of infection. Feeling the appointment would conflict with the staff meeting, the Grievant phoned Lee at work sometime after 5:00 p.m. She did not reach Lee and left a voice-mail that she would not be able to make the staff meeting. She made no further attempt to contact Lee.

The Grievant took Gurunian to the 7:55 a.m. appointment on February 6, and returned to work in time for the scheduled start of her shift at 9:00 a.m. She did not, however, attend any part of the staff meeting, which started at 7:45 a.m. The Grievant and one other employee, Kris Grueneberg, missed the meeting. Grueneberg was on a previously approved vacation. Grueneberg and the Grievant made up for the absence by meeting with Street to go over the substance of the meeting.

The background set forth to this point is essentially undisputed. The balance of the background is best set forth as an overview of witness testimony.

Terry Lee

The Grievant is one of two Receptionist/Cashiers supervised by Lee. The other is Lynn Scheid. Lee directed the Grievant to Johnson during the February 5 phone call because she was unsure whether power of attorney authority affected the Grievant's FMLA eligibility regarding her uncle's care.

Sometime after her lunch hour, Lee found, on her desk, the FMLA leave request form filled in by the Grievant. Lee phoned Johnson to determine whether the Grievant had contacted him. He responded in the negative. She asked him whether care for an uncle fell within FMLA coverage. He again responded in the negative. Sometime near closing, Lee played the voice mail the Grievant left, at roughly 2:30 p.m., to advise Lee that she would be unable to return to work. The Company's voice mail system permits a caller to reach a receptionist. The Grievant had not done this, and had not tried to have Lee paged. The voice mail system also records the originating phone number of a caller. Lee used that function to locate the clinic at which the oral surgery was being performed. She phoned the Grievant at the clinic. Lee advised her that FMLA could not cover the absence, and the Grievant responded by requesting personal leave. Lee verified that the Grievant had sufficient leave to cover the afternoon, then asked her if she would be able to close the office. The Grievant answered in the negative, and Lee arranged to have Scheid stay over. Having done this, she approved the Grievant's use of personal leave.

Lee reported for work at roughly 7:30 a.m. on February 6, and found the voice-mail left the prior afternoon, at 5:08 p.m., by the Grievant to note her inability to attend the

meeting. Lee's normal hours are 8:00 a.m. until 4:30 p.m. The Grievant reported for work on February 6 at roughly 9:00 a.m. Lee discussed her absence, understanding the Grievant's response to be that she could have worked the meeting into the dental appointment, but chose not to. Lee disciplined the Grievant because she left work on February 5 without checking the FMLA request with Johnson, and failed to properly complete the form. Because she did not qualify for FMLA leave and did not secure approval for personal leave, she failed to obtain permission to leave the office. Lee believed the Grievant's voice-mail messages belied a deliberate attempt to avoid contacting her directly.

Lee discussed the absence with Scheid, who informed Lee that she observed the Grievant taking her cash drawer to the vault on February 5. Scheid asked what she was doing, and the Grievant responded that she was leaving the drawer in the vault in case she could not return. Although Lee could not identify where the "Notification Procedure for Sick Employees" referred to in the suspension letter came from, she noted that employees understand as a matter of departmental practice the significance of direct contact with a supervisor for leave approval.

Mary Newberry

Newberry overheard the Grievant making arrangements for her uncle during the morning of February 5, and heard the Grievant describe some type of guardianship authority for him. When she and the Grievant discussed the situation, Newberry suggested the possibility of using FMLA leave. The Grievant phoned Lee to determine if she qualified, and then attempted to reach Johnson, including attempting to reach him at his office during break. After the Grievant failed to locate him, Newberry gave her a blank FMLA leave request form, suggesting that she should fill out the form to preserve any rights she might have.

Newberry attended the February 6 meeting, but was not aware it was mandatory until Lee suspended the Grievant for failing to attend. She acknowledged that employee attendance is expected and that employees do not miss such meetings absent extenuating circumstances. In the past, the Company excused employee absence from similar meetings if the employee advised a supervisor of the basis for an absence prior to the meeting. Scheid avoided discipline for failing to attend a meeting by apologizing for the absence after-the-fact. Newberry denied any bias against Scheid for resigning from the Union, or any bias in favor of the Grievant for joining.

Jerold Johnson

Johnson is the Company's Controller and Assistant Secretary/Treasurer. Johnson noted that the Company implemented the "Notification Procedure for Sick Employees" effective June 25, 1996, and amended it, effective May 14, 2001. The amended policy is entitled "Notification Procedure For Deviations From Employee's Work Schedules."

The Grievant

By the time of the arbitration hearing, the Grievant had become Gurunian's caretaker. She reported for work at 9:00 a.m. on February 5 and phoned the dentist around 9:30 a.m. She phoned Lee to determine if she could use FMLA leave to cover the appointment. At around 11:00 a.m., she went to Lee's office to discuss the matter. Lee asked the Grievant if her one-half hour lunch would be enough to cover the appointment. The Grievant responded that she had personal leave available and would use that. Lee asked the Grievant how long she thought it would take, and the Grievant responded that she hoped the appointment would take no longer than one and one-half hours.

After her discussion with Lee, she returned to her work station. She phoned Johnson's office several times, but could not reach him or his assistant. She then called Loving Care Villa and made arrangements to pick up Gurunian. During her break she walked to Johnson's office, but found no one there.

The Grievant believed that she had permission to leave work to attend to her uncle's medical needs. She believed that by leaving the FMLA leave request form on Johnson's desk, she had preserved whatever right she had to the leave. If Johnson denied the FMLA leave request, she believed she had personal leave to cover the absence. She left the form on Johnson's desk. She circled the "c)" entry because she did not know what else to do, and felt that because she was responsible for her uncle, it was the closest applicable entry. She did not know if she qualified for FMLA leave, but assumed the form would pose the point for Johnson's determination. She made the "?" entry on the FMLA leave request form, because she hoped, but did not know, if the office visit would take more than an hour past her lunch break.

Prior to leaving the office, she left her cash drawer in the vault, informing Scheid that she had to face a medical emergency and was unsure if she could make it back to work. When she left the office, she believed she would return prior to the end of her shift.

After the dentist made the referral to a surgeon, the Grievant took Gurunian back to Loving Care Villa to permit him to change his colostomy bag, then took him to a pharmacy, and then to the oral surgeon's office. She believed she phoned Lee between 3:00 and 3:30 p.m., when she realized that the dental procedures were taking longer than she had anticipated and that it would not be possible to return to work. Her message noted that Gurunian was in surgery and gave the name of the oral surgeon. She phoned Lee again from the clinic sometime after 5:00 p.m. to advise her that she would be unable to attend the February 6 meeting. She was unaware the meeting was mandatory until Lee suspended her. The Grievant asked about the substance of the meeting, learned that it had been an important meeting, then attempted to get a tape of the meeting. The meeting with Street made it unnecessary to review a tape.

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

THE PARTIES' POSITIONS

The Union's Brief

After a review of the evidence, the Union argues that the Grievant's February 5 inquiry regarding FMLA leave "was not a just cause for discipline." Noting that the Company's discipline rests on the violation of two work rules, the Union contends that the evidence will support neither. Undisputed evidence establishes that the Grievant "was acting at the direction of her supervisor . . . in handling her FMLA inquiry." Neither the Grievant nor her supervisor knew whether the Grievant's attention to her uncle's dental problems "would qualify for leave under the FMLA." Lee directed that the Grievant take the request to Johnson. During the limited time available to her, the Grievant repeatedly tried to reach him before leaving work to attend to her uncle. Her failure to reach Johnson cannot be held against her, nor can her attempt to comply with work rules by completing an FMLA request form. She had no advice on how to proceed and no knowledge on whether the request was valid under the FMLA. That Lee could not advise her otherwise highlights the reasonableness of her actions, including her leaving the request at Johnson's desk. That the Company asserts better options were available to her is belied by its failure to specify what those options were. Had she left the request with Lee, she would have opened herself to discipline for not referring the request to Johnson. The Company's "hyper-technical standard" is unfair to the Grievant, whose actions resulted in no harm to the Company. In fact, Lee informed the Grievant on February 5 that she could not qualify for FMLA leave, and the Grievant made no further attempt to claim it.

Nor will the Grievant's failure to attend the February 6 meeting support a suspension. The meeting was not mandatory, and the Company made no attempt to inform her it was mandatory prior to the suspension. Another employee who missed the meeting was not disciplined. Past practice evidence indicates employees were excused from attending meetings by informing a supervisor prior to the meeting. Even though the Grievant informed Lee in the afternoon of February 5 that she intended to attend the meeting, she did so without knowing that her uncle would need a follow-up visit the next morning. When she learned she could not attend the meeting, the Grievant left a message on Lee's voice mail. Even if these factors are ignored, it is not clear that the work rule cited by the Company applies to the Grievant, who did not deviate from her work schedule for a personal illness and did report for work at the start of her scheduled shift.

The Union concludes that the Company lacked cause for the suspension and that "the correspondence dated February 6, 2001, related to the Company's discipline . . . should be removed from her file, and she should be made whole for her lost wages".

The Company's Response

The Company notes that the suspension rests on two work rules and that the Grievant, in fact, violated each. Her FMLA request sought leave for attending to a "spouse child or parent", and she failed to attend the February 6 meeting.

That the Grievant "had very good personal reasons for taking time off" cannot obscure that such reasons "do not justify the submission of false forms . . ." Each of the defenses offered by the Union is unpersuasive. The basis for leaving work was not sufficiently compelling to void the operation of Company work rules. Union assertion of Company insensitivity to the Grievant ignores that Lee "went out of her way" to locate the Grievant and granted her personal leave. The Grievant did not contact Lee to advise Lee that she was leaving or to advise Lee of the time she needed on February 5 or 6 to attend to her uncle. The contrast between Lee's efforts and the Grievant's "is telling." Lee was under no duty to locate the Grievant or to grant her personal leave. The Grievant's failure to reach Lee means "she did not have permission to be absent from the meeting the next morning."

The Grievant's history of discipline highlights the disciplinary significance of her assertion that she did all she could to contact the Company. The Jones' award concludes the disciplinary record "in the face of quite a list of excuses." The list is no more persuasive here. The contention that the Grievant was under a directive from Lee to submit the FMLA leave request form to Johnson ignores that Lee told the Grievant that she believed the FMLA did not cover an uncle. It also ignores that the Grievant, rather than telling Lee that she could not find Johnson, chose to consult Newberry. On Newberry's direction, the Grievant located and submitted the false form rather than tracking down a supervisor. The Grievant's voice-mails cannot obscure that she failed to page Lee, to ask for another supervisor, or to leave a message where she could be reached.

The Grievant's testimony belies the assertion that she was "unable" to attend the February 6 meeting. Nor will the evidence support the assertion that the meeting was not mandatory. The only other non-attending employee was on vacation. The argument of disparate treatment has no basis. Rather, the argument manifests the Union's desire to defend a member's interests against a non-member's. That another employee was not disciplined for failing to attend a meeting after the employee apologized underscores that the meetings are mandatory. The Grievant's non-attendance, if excusable, turns not whether the meeting was mandatory but on the quality of the Grievant's work record and personal responsibility for addressing the absence. Both are weak. Nor does it make any difference which supervisor's desk the Grievant left the false form on. The form was dishonest, and the Grievant's unwillingness to meet supervisors affords no defense to the discipline. Thus, the record establishes that "a two-day suspension is warranted."

The Union's Response

The Company's brief misstates the evidence regarding Lee's referral of the Grievant to Johnson. In fact, the evidence establishes that Lee sent the Grievant to Johnson and that the Grievant reasonably concluded that leaving the FMLA form on Johnson's desk "for his review" was the best means to meet Company policy. Even if the Grievant acted improperly, the evidence "reveals that absolutely nothing in . . . policy prohibits Company employees from filling out family leave forms to the best of their ability and submitting them for an evaluation as to whether the form has been properly completed and the circumstances qualify for family leave."

Nor will the evidence support an assertion that the Grievant could have attended the February 6 meeting and attended to her uncle's needs. Lee provoked the Grievant's response on this point with a "self-serving statement" which is valid only with the benefit of hindsight. Even if she could have traveled between the dentist's and the Company's offices, she would have tried to do so at the risk of failing to report for her scheduled shift on-time. In any event, the Grievant left a voice-mail for her supervisor as soon as she knew she could not attend the meeting.

The "record . . . does not support the contention that (the Grievant) avoided contact with her supervisor." There is no evidence to support the Company's view except Lee's self-serving testimony. The Grievant's repeated attempts to reach Johnson rebut this testimony. Nor is it clear why the Grievant would avoid such contact, since her reasons for leaving work are compelling.

The Company's analysis of the Grievant's conduct on February 5 and 6 reveals its desire to find fault with every move she made. This undercuts the force of any Company argument that she "could have done anything to avoid discipline." The weakness of the Company's position is established by its attempt "to expand upon its justification for having disciplined (her)." Her disciplinary history or the prior arbitration award cannot obscure the need to consider the merit of this grievance. Similarly, Company citation of an action before the NLRB and an action before Federal District Court attempts to obscure the contractual merit of the grievance. Neither action has any legally or factually meaningful relationship to the grievance. Whether or not the Grievant should have apologized for missing the February 6 meeting is also unhelpful in this matter, which turns solely on the application of cause. The Company's arguments manifest less attention to the merit of the grievance than to "an inexplicable desire to carry out a vendetta against" the Grievant. The grievance thus should be granted.

DISCUSSION

The stipulated issue questions whether the Company had "cause" under Section 402.1 to suspend the Grievant for two days. In the determination of cause for the one-day suspension which was litigated with this matter (WOOD COUNTY TELEPHONE COMPANY, A-6078), Arbitrator Jones stated the "analytical framework" of a cause analysis to consist of the following elements:

> . . . the first is whether the employer proved the employee's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was justified under all the relevant facts and circumstances. . . . (A-6078 AT 17)

That standard will be applied here. The Company contends that the two proceedings share a common thread involving the Grievant's unwillingness to communicate directly with supervision and her inability to assume responsibility for her conduct. The Union contends the focus should be on the evidence posed here, and that if broader issues are posed, they focus on a supervisory vendetta against the Grievant.

A cursory review of the record manifests broader issues including a welter of litigation. However, even if broader themes underlie the conflict between Lee and the Grievant, the cause determination established at Section 402.1 is fact-based under Section 403.2, demanding focus on the circumstances which prompted the two-day suspension.

Those circumstances are highlighted in the February 6 suspension letter, which ties the suspension to the Grievant's "failure to properly submit" the February 5 FMLA leave request form and her failure to attend the February 6 meeting. Regarding the first allegation, the evidence affords reason to doubt the Grievant's diligence in communicating with Lee, but affords no reliable proof of the misconduct asserted in the suspension letter.

The evidence will not support a conclusion that the Grievant submitted the form dishonestly. Without regard to the Grievant's testimony, Lee's testimony establishes that the Grievant identified that the source of her concern was her uncle and that she needed to transport him for required medical assistance. The Grievant may have identified herself as holding power of attorney for Gurunian, but there is no persuasive evidence she did so knowing it was false or believing that it got her an advantage regarding FMLA leave that she lacked by being his representative payee or a concerned family member. That she circled the "c)" form entry shows no more than her desire to determine whether whatever legal responsibility she had over Gurunian translated into an entitlement to FMLA benefits beyond that listed at "c)" of the form.

The more forceful portion of the Company's position is that the Grievant left work on February 5 without permission, and showed no responsibility in communicating the need for an absence extending through the balance of her shift. This is part of a broader theme tracing its roots to the Jones' award and earlier. The evidence affords some support for this view. Lee's testimony indicates the Grievant called in from the oral surgery clinic without identifying a phone number for a return call or attempting to have Lee paged. That the Grievant was scheduled to close the office that evening underscores Lee's concerns.

The evidence, however, undercuts the force of Lee's assertions and makes the Company's position stronger as a matter of argument than of evidence. The strength of Lee's testimony is that the Grievant made a single phone call to her, received no more than a caution that FMLA leave was doubtful, then took the balance of the afternoon off without any meaningful attempt to contact management. Viewed as a whole, the record falls short of confirming this. The Grievant's testimony indicates that she spoke with Lee more than once, including one visit to Lee's office. The discussions were broader than Lee acknowledges, including discussion of her uncle's condition; the Grievant's attempt to have the dental visit dovetail with her lunch break; the amount of time the appointment could be expected to take; and the amount of personal time the Grievant had available to cover the absence if she did not qualify for FMLA leave.

The record supports the Grievant's testimony on the breadth of these discussions. This is not to say Lee's testimony was not credible. The determination of fact posed here is not

whether the Grievant or Lee is to be believed. Rather, the evidence highlights evident conflict and the determination of fact must take that conflict into account. Both witnesses' perceptions are colored to a large extent by the conflict between them. Lee, for example, spoke briefly with Scheid concerning the absence, crediting Scheid's view that the Grievant left her cash drawer in the vault without any attempt at explanation until Scheid asked. There is no evidence Lee discussed the point with the Grievant prior to the suspension. This complicates the determination of fact. Scheid did not testify, and the Grievant testified that she explained her actions to Scheid without prompting. Here, the relevant fact turns less on which version is true, than on the implications of the accounts. There is no indication Lee sought the Grievant's view, or saw any reason to. This has more bearing on the assertion the Grievant sought to avoid contact with Lee than does the attempt to determine whether the Grievant volunteered information to Sheid.

More specifically, Lee's recall of the breadth of the conversations was limited. She acknowledged her inability to recall a significant part of her initial phone conversation with the Grievant. Her testimony as a whole affords no reason to believe she would have a conversation with the Grievant regarding a potential absence, then pay no more attention to detail than to offer a simple caution regarding FMLA leave, trusting fate for the rest. More significantly, Lee's testimony regarding their phone conversation at the clinic affirms the substance of the Grievant's view of the earlier conversation. Lee began the conversation by noting the absence of FMLA coverage. The Grievant responded by requesting personal leave. Lee then checked the Grievant's leave balance and affirmed she could use personal leave. This tracks the Grievant's testimony regarding the earlier conversation, which turned not on permission to leave but on the length of time required and on how it would be accounted for. Significantly, Lee's recall of the clinic conversation does not include any mention of the Grievant's leaving the worksite without permission. The Grievant's testimony accounts for this. Lee's does not, and highlights the weakness of the assertion that the Grievant left the office without a reasonable belief that she was authorized to do so.

More significantly, the February 6 suspension letter focuses on failure to follow policy regarding FMLA leave requests, not failure to secure permission before leaving the office or failure to communicate regarding office closing. The letter affords little support for the broader communication themes highlighted in post-hearing argument. More to the point, it is not evident what Lee sought to communicate regarding the FMLA leave request form. Under any view of the facts, the Grievant never asserted an entitlement to the leave. Rather, she questioned whether she was eligible at all, and hoped she was. The form communicates no more than this uncertainty. The February 6 letter of suspension asserts that the Grievant "must submit . . . a valid request". To the extent this implies an employee can be disciplined for misinterpreting the FMLA, it is unsupportable. The Grievant's communication of uncertainty is not misconduct.

The letter does, however, assert the Grievant's "direct supervisor was . . . present at the time" she left the form on Johnson's desk. This assertion is unsupported by the evidence. Beyond Lee's limited recall on the scope of her discussions with the Grievant, the evidence

establishes that the Grievant failed after repeated attempts to reach Johnson as Lee had suggested. That the Grievant left the form on Johnson's desk is, against this background, unremarkable. It is not clear that Lee was available when the Grievant left the form on Johnson's desk. It appears more likely that she was then on a lunch break. More to the point, there is no indication the Company considered, much less investigated the point prior to the issuance of the February 6 suspension letter. Rather, Lee phoned Johnson, learned that the Grievant had not spoken to him, then concluded that the Grievant had deliberately avoided her. The absence of record support for this cannot be held against the Grievant.

In sum, the evidence affords no support for the first basis for the suspension asserted in the February 6 letter. The evidence will afford support for the Company's post-hearing argument that the Grievant was less than diligent in communicating with Lee during the course of the afternoon on February 5. The degree of this misconduct is debatable. Lee's testimony confirms that she had no notice that the Grievant would miss the afternoon prior to the mid-afternoon voice-mail. This point has force, but obscures that the Grievant was unaware of the problem until the scheduling of oral surgery, which occurred after she had requested leave. Beyond this, lack of diligence in communicating regarding the oral surgery is not what the Company pointed to in its suspension letter.

The second asserted area of misconduct is the Grievant's failure to notify Lee directly that she would not attend the February 6 meeting. This assertion highlights the Company's concerns regarding the Grievant's lack of diligence in contacting Lee, and has support in the evidence. The Grievant's failure to have Lee paged at work to advise her of her inability to return to work on February 5 affords the background to this point. The evidence establishes that Lee reminded the Grievant of the need to attend and that the Grievant confirmed her intention to do so during their clinic conversation. When the Grievant determined she could not attend, she phoned Lee, again leaving a voice-mail. She made no serious effort to contact Lee directly.

The Union contends that the voice-mail contact is sufficient to excuse her absence. This view has limited support in the evidence. Whether or not the Company characterized the meeting as "mandatory", Newberry's testimony leaves no room to doubt that non-attendance demanded reasons beyond personal convenience. The Grievant had such reasons, and the issue is whether she followed policy in communicating them. That Grueneberg missed the meeting due to a prearranged vacation has no bearing on this point. The permission she secured through arranging vacation is the permission the Grievant could have secured through a direct phone contact. The absence of that permission cannot be held against the Company. That Scheid may have had an absence excused through an after-the-fact apology has at best a limited bearing on this point. The tense relationship between the Grievant and Lee argues for greater direct contact, not less. It is apparent apologies do not freely flow between the Grievant and Lee, and that the risk of misunderstanding is high. Direct phone contact to Lee could have hedged that risk.

The Union also challenges the clarity of Company policy regarding notice. That the asserted policy is entitled "Procedure For Sick Employees" and was later modified to address work schedule deviations affords no guidance regarding the Grievant's suspension. Lee's testimony indicates it was her policy and practice to require direct contact regarding absences. The significance of this point is, however, debatable. Lee acknowledged in her testimony that she did not know where the Procedure came from. The Grievant and Newberry denied knowledge of a consistently followed policy. Thus, the clarity of practice or policy on direct contact between employee and supervisor regarding meeting non-attendance is tenuous. However, viewed as a whole, the evidence will support the Company's assertion that it reasonably expected direct contact between the Grievant and Lee to excuse her absence from the February 6 meeting.

This poses the second element of the cause analysis. As noted in the Jones award:

> Section 403.2 references the traditional progressive disciplinary sequence of verbal warning, written warning, suspension and discharge. While some labor contracts say that the employer has to follow that sequence in each and every disciplinary situation, this language does not say that because it includes the following hedge words: "including, but not limited to" and "depending on the seriousness of the offense." These hedge words make it clear that the Employer is not contractually obligated to always impose discipline in the aforementioned order (A-6078 AT 20).

Here, the Company's two-day suspension followed progressive discipline in that it imposed a more stringent suspension for misconduct, but did not push the matter to discharge. Presumably, the disciplinary message is that the misconduct repeats a pattern which, if continued, demands discharge. As noted above, the Company was not obligated to continue that progression.

The evidence, however, falls far short of demonstrating the level of misconduct asserted in the February 6 letter. Section 403.2 makes "disciplinary measures" dependent "upon the seriousness of the offense." The first asserted basis for suspension is unproven. The second assertion has a proven basis, but the degree of misconduct is less than acute. The February 6 letter does not assert the Grievant failed to give actual notice of her inability to attend the meeting, but that she failed to give the appropriate type of notice.

Viewed against this background, the February 6 letter overstates the level of misconduct, and strays far beyond it. As a result, the Award entered below notes the absence of cause to suspend, but permits the Company to amend the Grievant's personnel file(s) to reflect a written reprimand to establish the appropriate way to report her inability to attend the February 6 meeting. The degree of overstatement in the February 6 letter of the Company's disciplinary interest must be given some remedial effect. Whatever broader themes may underlie the conflict between Lee and the Grievant, the evidence in this record cannot support the suspension imposed by the Company.

AWARD

There was not cause to suspend the Grievant for two days on February 6th, 7th and 8th, 2001?

As the remedy appropriate to the Company's violation of Section 402.1 and 403.2, the Company shall expunge from the Grievant's personnel file(s) any reference to the two-day suspension imposed through the February 6 letter. The Company may amend her personnel file(s) to reflect that it issued the Grievant a written reprimand to establish the appropriate way for her to report her absence from a meeting set for February 6. The Company shall also make the Grievant whole by compensating her for the difference in wages and benefits between those she received for February 6, 7 and 8, and those she would have received but for the suspension noted in the suspension letter of February 6.

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

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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