BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MANITOWOC COUNTY

and

MANITOWOC COUNTY HEALTH CARE CENTER EMPLOYEES LOCAL 1288, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, AFL–CIO

Case 396
No. 63429
MA-12585

(A. Opichka and G. Duggan Suspensions)

Appearances:

Steven Rollins, Manitowoc County Corporation Counsel, Manitowoc County Courthouse, 1010 South Eighth Street, Manitowoc, Wisconsin 54220, appeared on behalf of the County.

Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL–CIO, 14002 County Road "C", Valders, Wisconsin 54245, appeared on behalf of the Union.

ARBITATION AWARD

On March 5, 2004 Manitowoc County and Manitowoc County Health Care Employees, Local 1288, American Federation of State County and Municipal Employees, AFL-CIO requested the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on June 9 and 10, 2004, in Manitowoc, Wisconsin. A transcript of the proceedings was taken and distributed by July 1, 2004. Post-hearing briefs and reply briefs were submitted, and exchanged by October 1, 2004.

This Award addresses the suspensions given to employees Gary Duggan and Arnold Opichka for failing to come to work on Saturday, May 24, 2003.

BACKGROUND AND FACTS

The Union and County are signatories to a collective bargaining agreement, the relevant portions of which are set forth below. Gary Duggan and Arnold "Arnie" Opichka, the

grievants, are employed as Certified Nursing Assistants in the Manitowoc Health Care Center, and as members of the bargaining unit are covered by the contract. Arnie Opichka has been employed by the County for approximately 28 years, the last three as a CNA in the Health Care Center. Mr. Opichka has never received discipline for an attendance related matter. Gary Duggan has worked as a CNA in the Health Care Center for three years. He had one absence on his record at the time of the absence in question. He had one prior incident of discipline, which was withdrawn.

Duggan, Opichka and a co-worker planned a vacation trip to Hawaii, which was scheduled for May 15–26, 2003. Planning for the trip began in January, 2003. In late March/early April, the grievants made hotel and airline reservations. By March 15 Duggan had requested and been granted vacation that covered most of the days involved in the vacation. On May 2, he swapped a work day with a co-worker that left only Saturday, May 24, the Saturday of the Memorial Day weekend, scheduled to work. Mr. Opichka was in a parallel situation, having lined up most days needed for his vacation. Opichka had requested, and been denied, vacation for May 24 and 25. He subsequently managed to get the 25th off.

By the week of May 12, 2003 the work calendar showed Duggan and Opichka scheduled off May 15 through May 26, with the exception of Saturday May 24. Julie Place, Director of Nursing, whose responsibilities included scheduling, noticed the scheduling anomaly, and was concerned enough to talk with both men. On, or about May 12 she approached Opichka and asked him if he would be at work on May 24. Opichka indicated that he would be there, at work, as scheduled. Both Opichka and Place understood the conversation to permit Opichka to either physically attend work or secure a replacement.

Place had a conversation with Duggan on, or about May 12. According to Place, she asked if Duggan was planning to be at work on the Saturday. She testified that he replied that she was not a stupid person and that he would tell her the truth, that he was not going to be there because of his vacation in Hawaii. According to Duggan his response was to the effect "… well you're not stupid I'm not going to lie to you – yes there's a day in between… I'm going to get a replacement."

Place continued to be concerned about whether the two men would come to work that Saturday. A Saturday on a holiday weekend is a difficult and expensive day to schedule last minute coverage. She hand delivered the following letter to Duggan (May 13) and Opichka (May 14):

> This is to notify you that you are being directed to report to work on Saturday, May 24, 2003 as scheduled. Failure to do so will result in insubordination with discipline up to and including termination.
>
> If you call in sick for May 24, 2003, you will be required to see a physician on that day. The physician must indicate that he has examined you and found you were unable to work your shift due to your illness. After seeing the physician,

your MD slip must be brought to the facility and handed to the charge nurse. This is subject to a second opinion as well.

Contact me for any questions you may have concerning this issue.

Thank you,
Julie Place, RN /s/

There was a Union meeting on the evening of May 14. Neither Duggan nor Opichka had secured a replacement for May 24 by then. Opichka showed up for the Union meeting sometime after his shift ended; 9:30 P.M. or so. He arranged to swap a shift with Barb McCredie, local Union President. McCredie and other senior workers at the meeting believed the switch would work. Duggan did not attend the meeting, but called in to secure a swap. It was his testimony that he was advised that a swap had been arranged with co-worker Judy Jones. He did not speak with Jones, nor did Jones testify in this proceeding. Neither Opichka nor Duggan filed a request to swap shifts with the employer. The two men left for Hawaii early (approx. 4:00 A.M.) the next morning, May 15.

Barbara McCredie submitted a request to exchange shifts with Opichka, and attempted unsuccessfully to call Julie Place the next day. McCredie did reach Place by phone the evening of May 15, to discuss the request. Place denied the request on the grounds that it generated overtime for Opichka. Opichka worked 2nd shift, which workweek is calculated from Saturday to Saturday. McCredie worked 3rd shift which workweek is calculated from Friday to Friday. The various employees who had voiced confidence that the swap would work had miscalculated, based on the differences in the work weeks. The formal request for a switch was also denied.

There was never a request submitted to initiate a Duggan/Jones swap. Duggan testified that it would have been futile given the result of the McCredie experience.

Opichka testified that he called Barb McCredie on his cell phone from Hawaii. When he did not reach her he left a message asking if the switch went through, and requested a return call only if it did not. He testified that he left his cell number on McCredies' answering machine. There was no return call. There was no call from the employer, who had Opichka's cell number. Neither Opichka nor Duggan called the employer. McCredie testified that she never received a message from Opichka. She further testified that she had been having trouble with her answering machine; it was "eating messages".

Neither Opichka nor Duggan worked May 24. Neither man provided a replacement worker.

Upon their return to work, each man was called into a meeting to address their respective failures to come to work on May 24. Duggan was issued the following letter, on June 16, 2003:

Dear Gary Duggan

On May 13, 2003 you were given a written order to report to work as scheduled on May 24, 2003. You were informed that failure to report to work as scheduled would be considered an act of insubordination. You were asked if you have any questions regarding that work order. You did not ask any questions on May 13th or any day after.

On May 24, 2003 you did not report to work as ordered. You did not call to report your absence.

On May 26, 2003 you and I met to discuss your absence on May 24th. Human Resource Coordinator Sharon White, and your union representative Joe Goethels, were present. The purpose of this meeting was to provide you with an opportunity to explain the reason for your failure to follow the direct order given you on May 13, 2003. You stated that you were on vacation in Hawaii. You confirmed that you were aware that you did not have a working weekend off available to you to use. You stated that you did not call because there was nothing to say. You had purchased the tickets to go to Hawaii, and you felt you had no alternative but to not follow the direct work order.

On May 26th you were informed that your failure to report to work as ordered is being considered an act of insubordination and that termination is being considered. You were aware that failure to report to work as ordered would be considered an act of insubordination and may result in your termination because of our conversation on May 13, 2003 and the written notice you were given at that time. You did not acknowledge that your failure to report to work as scheduled was wrong, nor have you shown any remorse. You have not expressed any acknowledgment of the need to accept the consequences of your actions, other than you felt this matter should be “handled the same as a no call/no show”.

Your disciplinary record does not reveal any past instances of insubordination.

I have decided to impose a 30 working day suspension. Your suspension will begin on September 1, 2003 and continue until October 12, 2003. You are not to report to work during this time. You will not be allowed access to the facility unless escorted by a management employee of the Health Care Center.

Insubordination is commonly considered to be an act which justifies termination. You are not being terminated only because your act of insubordination did not have an immediate effect on patient care. Should you ever again commit an act of insubordination you will be terminated.

Sincerely,
Julie Place /s/

Duggan disputes that he said he had "no alternative but to not follow the direct work order" remark attributed to him.

Opichka was sent essentially the same letter. The first paragraph adds "In addition you stated you would be at work on May 24, 2003." The third paragraph of the Opichka letter provides as follows:

> On May 26, 2003 you and I met to discuss your absence on May 24th. Human Resource Coordinator Sharon White, and your union representative Sue Ebert, were present. The purpose of this meeting was to provide you with an opportunity to explain the reason for your failure to follow the direct order given to you on May 13, 2003. You stated that you were on vacation in Hawaii, had requested a swap the evening before leaving, and even though you had not received notice the swap had been approved, left for vacation.

Opichka was given a 33-working day suspension. Place regarded his behavior as more egregious, in that she believes that he lied to her about his intention to come to work in the first place.

Duggan filed a grievance on, or about August 21, 2003. Opichka filed a grievance on, or about September 12, 2003. Both were denied by Place in a letter dated October 9, 2003. The letter of denial raises both substantive and timeliness defenses. A meeting was scheduled, and held to address the grievances. All testimony is that grievance meetings are scheduled, so as not to disrupt patient care. The meetings are usually, but not always scheduled within 45 days. The initial approach is not always in writing. The date Management is approached satisfies the contractual time line. It was the testimony of Duggan and Marcia Aker, Union Steward that they approached Place on July 30, 2003, 44 days after the discipline. It was Akers' uncontradicted testimony that she handed Place a dated document relative to the grievance. It was Place's testimony that she was on vacation July 28-Aug.1, and was not on site on July 30. Place acknowledges a meeting, but could not recall when it occurred. On re-direct Aker and Duggan insisted the meeting was on or before July 30.

The Health Care Center has a written No Call/ No Show policy. The policy provides the following:

> The Manitowoc County Health Care Center Attendance Policy defines a no call/no/show as when an employee fails to report to work, and does not notify the Manitowoc County Health Care Center of their absence prior to the beginning of the scheduled work shift, unless medically incapable of doing so.

> The progressive discipline schedule contained within the attendance policy is triggered upon the first occurrence of no call/no show within the calendar year, and is as follows:
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> | | |
> |---|---|
> | 1st occurrence | 1 day suspension |
> | 2nd occurrence | 5 day suspension |
> | 3rd occurrence | termination |
>
> . . .

The Union introduced a number of exhibits demonstrating the application of the no call/no show policy and argues that the actions of Duggan and Opichka fall within the scope of the policy. One of the Union exhibits involved a three day suspension awarded to employee J.G. under the following alleged circumstance:

> On 8/29/02 Julie Place and Dawn Holsen phoned you and discussed the fact that you had scheduled vacation for 8/31/02 and holiday for 9/1/02. You did not have enough benefits to cover both days. You were told to let Julie Place know, by the end of the day, which day you were going to cancel … so that they could put you back on the schedule. When asked, you stated that you understood what was required. You failed to notify Julie of which day you were canceling so Julie put you on the schedule for 9/1/02. Julie attempted to call you to notify you of this decision, however, the phone number the facility had for you was disconnected. You did not show up or call into work on 9/1/02 therefore you are receiving this three-day suspension for failure to follow a direct work order.

The County denies that the no call/no show rule is applicable. In the County's view, the behavior was insubordination, a more serious matter. The County introduced the non-precedential resolution of the grievance filed on behalf of Mr. J.G. The discipline was withdrawn, due to a contention that the grievant did not understand the work order. The disposition letter, dated January 20, 2003, confirms the obligation of an employee to follow a direct work order. It further states that the discipline " …issued to Mr. G. was due to Mr. G.'s disregard of a direct work order."

ISSUE

The parties could not agree on an issue to be decided.

The Employer believes the issue to be:

Is Duggan's grievance timely?

Did the Employer have just cause to suspend Grievant Duggan? If not, what is the remedy?

Is Grievant Opichka's grievance timely?

Did the employer have just cause to suspend grievant Opichka?

And if not, what is the remedy?

The Union regards the issue to be:

Did the employer violate the agreement when it issued warning letters and modified the absence notification requirements on May 13 and 14, 2003, when it issued 30 and 33 working day suspensions on June 16, 2003 to Gary Duggan and Arnold Opichka, and when it delayed service of those suspensions to September of 2003?

If so, what is the appropriate remedy?

I believe it is appropriate to address the employers timeliness contentions. I further regard the substantive issue to be:

Did the employer have just cause to discipline the grievants for 30 and 33 days respectively for failing to come to work on May 24, 2003, after having been specifically directed to do so?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 3 – MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

. . .

ARTICLE 4 – DISCIPLINARY PROCEDURES

A. Employees may be disciplined for just cause. It is understood and agreed that just progressive discipline shall be followed. The Employer

shall provide the employee and, at the same time, the Vice-President of Local 1288 with a letter setting forth the reason(s) for the disciplinary action.

. . .

ARTICLE 7 – GRIEVANCE PROCEDURE

A. Definition of a Grievance: Should any differences arise between the Employer and the Union as to the meaning and application of this Agreement, or as to any question relating to wages, hours, and working conditions, they shall be settled under the provisions of this Article.

B. Time Limitations: The failure of a party to appeal a grievance in a timely fashion will be treated as a settlement to that particular grievance, without prejudice. However, if it is not possible to comply with the time limitation specified in the grievance procedure because of work schedules, illness, vacations, holidays, any approved leave or time off, these time limitations may be extended by mutual agreement.

The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure.

C. Steps in Procedure:

Step 1: The employee and one (1) Union steward shall present written notice within a reasonable period of time to the immediate supervisor but in no event later than forty-five (45) calendar days after the Union knew or should have known of the occurrence of such grievance. In the event of a grievance, the employee shall perform his or her immediate assigned work task, if any, and grieve the dispute later, unless his/her health or safety is endangered. The immediate supervisor shall within seven (7) calendar days provide a written notice to the employee and the Union.

. . .

POSITIONS OF THE PARTIES

The Union contends that the grievance was filed timely. The Union points to record testimony and indicates that the best evidence indicates that the grievance approach occurred

within 45 days. The Union also believes the employer has waived any timeliness objection by failing to raise the objection until October 9.

The Union argues that the Employer's May 13 and 14 letters violate the contract by requiring physicians statements for a single day's illness. The employer is alleged to have re-written the substance of the agreement.

The Union contends that the 30 and 33 day suspensions violate the just cause provision. The suspensions are described as severe, requiring clear proof of insubordination. The Union outlines record testimony, and concludes that Place erroneously concluded that the two grievants were insubordinate, while in fact they made efforts to secure replacements, and left believing they had covered their respective shifts. The Union points to the telephone call to McCredie as confirmation that the grievants were monitoring the situation, so that if the switches failed they could return early from vacation to work. The Union points out that Place knew how to reach the grievants, but chose not to do so.

The Union describes Duggan and Opichka's one day of unexcused absence as a misunderstanding, and contends that the penalty was neither reasonably related to the offense nor even handed. The Union points to the more modest penalties given no call/no show employees and contends the huge suspensions are out of place. The Union further notes that the grievants work records are "unblemished by attendance related offenses."

It is the view of the Union that the penalty was improperly imposed due solely to the delay.

It is the view of the Employer that the grievances are untimely. The suspensions were conveyed to the employees by letters dated June 16, 2003. The contract requires that grievances be filed no later than 45 days after the union knew or should have known of the occurrence being grieved. Both written grievances were received well after passage of the 45 days. The Employer contends that Union witnesses contradicted themselves and testified to a meeting date that could not possibly have occurred, due to Ms. Place vacation. The employer believes the Union must establish compliance with the timelines, and has failed to do so.

The Employer reviews the Seven Tests of Just Cause and concludes that the grievants were warned of the possible consequences of not showing up for work under the circumstances. The Employer further argues that the grievants are caregivers, whose absence jeopardizes patient care, and exposes the Employer to scheduling difficulties and added costs. The employer conducted a fair and objective investigation, providing the grievants an opportunity to explain their conduct before imposing discipline. There was substantial evidence that neither man intended to come to work on May 24. They left on vacation with no idea whether their shifts were covered.

It is the view of the employer that this is an insubordination case. Insubordination may result in immediate discharge in certain circumstances. The employer considered the work

records of the grievants in assessing the suspensions. As to the delay in serving the suspensions, the Employer notes that the Health Care Center was moving to a new facility and that move produced high staffing needs, above and beyond normal levels. It was the Employer's practice to schedule disciplinary time off, without Union objection.

In its Reply Brief, the Employer argues that this is not simply a no call/no show situation, and comparative evidence thus misses the mark. In the Employer's view this is the first instance of an employee being issued a direct order to come to work which was violated. The Employer argues that no other employee has ever engaged in the same misconduct as did the grievants. There is therefore no factual basis for the Union's claim that the discipline is relatively extreme.

DISCUSSION

Timeliness

I believe the grievances to be timely. The procedural objection is directed at the initial submission of the grievance. Under the terms of the parties collective bargaining agreement a grievance is initiated by an employee and one steward, who

> "…shall present written notice within a reasonable period of time to the immediate supervisor but in no event later than forty-five (45) calendar days after the Union knew or should have known of the occurrence of such grievance."

The letters of discipline were issued on June 16, 2003. A written notice was due on, or before July 31, 2003. Testimony of Union steward Aker was that she provided written, dated notice. Her testimony in this regard was not rebutted. There was thus a dated document, placed in the hands of the employer that would have established the date the Union presented.

Union witnesses initially testified that they were certain or near certain the date was July 30. Place testified that she was on vacation for the entire week that included the 30th. On re-direct exam, the Union witnesses indicated that if the meeting was not on the 30th, it occurred before that date. Place acknowledged the initial meeting, confirmed that the grievance meeting was scheduled for August, but could not testify whether or not the Union's approach occurred before or after July 30. There is some evidence to support a finding that this meeting occurred before July 30. There is nothing in the record to support a finding that the meeting occurred after July 31.

I believe the employer has to establish that the grievance was initiated outside the timelines. This is a procedural defense, in whose absence this matter would proceed directly to the merits. The Employer contends that the merits should not be addressed, due to the Unions failure to satisfy the timelines of the grievance procedure. To have this matter

dismissed on the basis of such a claim it is for the Employer to establish the facts necessary to that defense. Failure to establish such facts results in the matter proceeding to the merits.

Merits

The grievants scheduled a vacation in Hawaii well in advance of the date. They made flight and hotel reservations well in advance. Each of them scheduled time off in advance. Each of them had a scheduled work day in the vacation week they could not take off or switch. I credit their testimony that they tried to secure the day right along. By May 12, just a few days before departure, the scheduling problem persisted. Neither of them had raised it with management.

Each man testified that if no swap could be arranged he was willing to cut the vacation short, and fly home to work. It is possible that is true. It is also possible that each of the grievants gave some thought to a no call/no show day. Place called the issue on May 12. She ordered the men to work by letter dated, and delivered on May 13. For two guys scheduled to leave town at 4:00 A.M. on May 15, there was little time to develop and implement options. I believe that by May 13, there were few practical options left. If there had been a meaningful search for shift swaps over a two-month period, prospects for such an exchange to occur within 48 hours would seem dim. Neither man had changed the vacation schedule in anticipation of an early return home.

The employer contends that discipline is appropriate in light of each man's refusal to comply with the order given on May 12, and subsequently confirmed in writing. I agree. Both men were no call/no shows, and both were directed to come to work under circumstances where it appeared unlikely they would show. The employer analyzes the tests of just cause in defending the imposition and level of discipline. I agree that there was disciplinable behavior and that the investigation and due process elements of just cause were satisfied.

However, I struggle to regard a 30/33 working day suspension as reasonably related to the offenses committed or to the employees work records. These appear to be good employees without a history of attendance/absenteeism problems. It is hard to see what remedial/corrective purpose is served by such a lengthy deprivation of pay and economic benefits. A simple no call/no show would be subject to a dramatically reduced schedule of discipline. The grievants positioned themselves to be unable to come to work on May 24. In effect they made a conscious decision not to come to work, leaving the employer stuck, and scrambling for replacements at the last minute. I suspect they are not the first such employees to do so, and to be disciplined under the no call/no show provision.

What separates the grievants from the run of the mill no call/no show is the fact that Place figured out that there was a scheduling hole and called them on it in advance. Once she realized neither was likely to show up, she ordered them in under pain of severe discipline for insubordination. I believe that the stakes did go up. The employer has a facility to run, and patients to care for. Absenteeism and attendance are constant concerns in many Nursing

Homes. Employers are under constant staffing pressure. Once this employer realized that two of its employees were going to be no shows for a difficult and expensive to staff day, it acted within its rights to direct them in to work. In a typical no call/no show it is hard to know whether or not the employee planned the day off, or simply failed to call in on a day he/she was sick. Here, it was obvious.

I believe the grievants behavior is more egregious than a typical no call/no show, but I regard the 30/33 day suspensions as extreme. The suspension of J.G. appears to parallel this situation. The employee signed up for two days off, when he had only one. He was confronted by supervision and advised of that fact two days before the days in question. He was directed to remove one of the days. He was asked if he understood, and indicated that he did. He removed neither and did not come to work on either. He was given three days off for "failure to follow a work order". The settlement letter indicates the discipline was issued for 'disregard of a direct work order". J.G. was ordered to come to work and did not do so. The employer in that instance attempted to call the employee, only to find the number disconnected. The settlement letter is dated January 20, 2003, just five months before the incident giving rise to this grievance.

The grievants offer a pretty lame set of excuses for their behavior. Arrangements for a swap were being made the night before a 4:00 A.M. departure. Duggan was making his efforts by telephone. There was no call to the employer to see if the switch was approved, under circumstances where a failure to show up held the potential for discharge. One call was made to the Union President and the message was to call back only if there was a problem. No calls were made on behalf of Duggan's switch. The men left on vacation without confirming that the switch had been successful, and without leaving a number by which they could be reached.

Ms. McCredie testified that her answering machine ate the message. McCredie knew that the two men were in Hawaii, and by May 15 knew that the switch had been denied. McCredie was one of a number of people at the Union meeting who were aware of Duggan's and Opichka's vacation and scheduling problem. Once the swap was denied, Mc Credie and others knew the grievants would be in trouble, yet no one called the men. The record indicates that the men had a land phone and that the Nursing Home had Opichkas cell phone number.

Director of Nursing Place knew where the two men were. She denied the switch. She had the telephone number for the men. Her testimony is that she contemplated termination for the event. I find it odd that under those circumstances she would not place a phone call to the grievants to let them know there was a problem. The County policy is that it is the employees responsibility to confirm switches. The record reflects that there are a huge volume of switches taking place, and that it would be a burden for the employer to call to confirm approval on an ongoing basis. However, this is not a routine switch. This is a circumstance where the grievants had been confronted, ordered in, and where the employer contemplated the discharge of a 28-year employee. The failure to make that call undermines the huge discipline levied.

AWARD

The grievance is sustained, in part.

REMEDY

The suspensions are reduced to three-day suspensions. The grievants are otherwise to be made whole.

Dated at Madison, Wisconsin, this 9th day of June, 2005.

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

WCH/gjc
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