BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY

and

KENOSHA COUNTY LOCAL 990, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

Case 228
No. 63695
MA-12678

(Grievance of Wanda Tennant)

Appearances:

Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Madison, Wisconsin 53717-1903, appeared on behalf of the Union.

Frank Volpintesta, Corporation Counsel, Kenosha County, Kenosha County Courthouse, 912 –56th Street, Kenosha Wisconsin 53140, appeared on behalf of the County.

ARBITRATION AWARD

On May 26, 2004 Kenosha County and Local 990, American Federation of State, County, and Municipal Employees filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear a decide a grievance pending between the parties. Following appointment, a hearing was conducted on September 22, 2004, in Kenosha, Wisconsin. No record of the proceedings was taken. The Employer filed a post hearing brief, received on October 19, 2004. The Union filed a post-hearing brief, received on October 26, 2005.

This Award addresses a three-day suspension given to employee Wanda Tennant for calling in sick after her shift had begun.

BACKGROUND AND FACTS

Wanda Tennant is employed by Kenosha County as a Corrections Officer. Ms. Tennant was given a three-day suspension for an unexcused absence on January 28, 2004. The core facts giving rise to the discipline are not in dispute, and are summarized in the notes of the pre-disciplinary hearing, taken by Chief Deputy Charles Smith. Those notes provide the following summary.

> On Wednesday, January 28, 2004, Correctional officer Wanda Tennant did not arrive to work at her scheduled starting time of 0700 hours. At 0702 hours Correctional Sergeant Reith called Officer Tennant's residence. No one answered the telephone and Correctional Sergeant Reith left a message on the answering machine advising Officer Tennant that she was suppose (sp) to be at work. At 0703 hours Officer Tennant called Correctional Sergeant Reith and told her she would not be coming to work because she was sick. When Correctional Sergeant Reith asked Officer Tennant if she had received the message, Officer Tennant replied no. Correctional Sergeant Reith advised Officer Tennant that she did not provide proper notice for a casual day and that her absence is unauthorized.
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> . . .
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> C.O. Tennant was denied use of a casual day because she called in less than ½ hour before the start of her shift. Tennant had the authorized casual time available.
>
> C.O. Tennant had two prior 1 day suspensions for unexcused absences. On October 26, 2001 she called in sick 21 minutes before the start of her shift. On August 3, 2002 she called in 1 hour, 20 minutes before the start of her shift, but had no casual time available. On each instance she was given a one-day suspension. Following these events, the parties modified the casual time provision.

On, or about December 19, 2002 the parties resolved a grievance, causing then Sheriff Larry Zarletti to issue a series of memos, one of which contained the following provisions:

> It has been brought to our attention that the KCDC and the Downtown Jail are handling these cases differently when an employee needs emergency leave, they are forced to use a vacation day and then they are disciplined for that happening.
>
> We now agree that in both facilities an employee can apply up to 5 vacation days, as per contract, when all contractual authorized time off has been exhausted for an emergency purposes by the employee.

After the contractually authorized 5 vacation days any vacation days utilized for emergency purposes will fall under the guidelines of Policy 173 and may be subject to disciplinary action.

. . .

It was the position of the Union that one intent of this settlement was to retroactively expunge discipline previously administered that was inconsistent with the new policy. The employer denies this as an intended consequence, and it was the unrebutted testimony of Chief Deputy Smith that no such retroactive application was made.

ISSUE

The parties stipulated to the following issue:

Was there just cause for the discipline?

If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Section 3.5. Work Rules and Discipline: Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause in a fair and impartial manner. When any employee is being disciplined or discharged, there shall be a Union representative present and a copy of the reprimand sent to the Union. After one (1) year, written reprimands shall not be considered in future cases to determine the level or progressive discipline, and will be removed to a closed file upon the employee's request.

. . .

Section 10.5. Emergency Leave: Up to five (5) days emergency leave may be granted to each employee provided the employee notifies the department head before taking the time off. Such leave shall be charged against vacation time. Request for leave shall not be unreasonably denied.

. . .

Section 12.2. Casual Days: Every employee, in addition to the above coverage, will be entitled to six (6) casual days off per calendar year. An employee hired on January 1st of any year, but before March 1st will receive four (4) casual days. An employee hired from March 1st through June 30th will

receive three (3) casual days. An employee hired from July 1st through August 31st will receive two (2) casual days. Employees hired on or after September 1st of any year will not be entitled to any casual days that year.

(a) Casual days will be granted if verbal or written notice of the employee's intent to take such days is received by his/her department head at least twenty-four (24) hours prior to the scheduled date of such time off. The employee need not give any reason for the casual day taken under this subsection.

In the event of an emergency, shorter advance notice will be acceptable and a casual day will be granted by the department head.

(b) If an employee is unable to report to work due to sickness, the employee must notify his/her department head not later than one-half (½) hour before his/her scheduled starting time. The employee shall state the reason for his/her absence and the expected leave of absence. Any days taken under this section shall be charged to an employee's remaining casual days.

. . .

POSITIONS OF THE PARTIES

The County contends that there is no dispute as to the facts which underlie the discipline and grievance. The grievant knew that she had to come to work or call in advance. Her work involves guarding prisoners and her failure to report to work jeopardizes detainees, the public, and her fellow employees. There is no evidence of mitigating circumstances.

The County contends that the December 2002 grievance settlement was never intended to reach back and expunge the records of disciplines previously issued. Nothing in the collective bargaining agreement removes the prior suspensions from C.O. Tennant's record. Under Section 12.2.(b) an employee is required to give no less than ½ hour notice to be entitled to take a casual day. Had the current standard been in effect only one of the suspensions would have been voided, since the 10/26/01 sick call was not made more than 30 minutes before the start of the shift.

The employer concludes that it has suspended Tennant twice for calling in. Both were for 1 day. The next level of discipline is appropriately 3 days. The Employer contends that it should be able to expect employees to come to work, or failing that to call ahead to inform the employer they cannot make it.

The Union points out that the grievant's suspensions in September, 2001 and August, 2003 were for her failure to have casual time available when she needed it. In its post-hearing brief, the Union essentially concedes that the Zarletti memo was likely not intended to reach back and purge Ms. Tennant's disciplinary file. However, the Union raises the question, "What is the significance of the Grievant's 2001 and 2002 suspensions in January, 2004, given the subsequent contract revision at 10.5."

The Union notes that current contract provision 10.5 is drawn from the Zarletti memo. It intends to eliminate disparate treatment among operating facilities and allows for the use of vacation days for emergency purposes. The prior two suspensions are the disciplinary foundation of the three-day suspension in this matter. Those suspensions were issued under a rule that the parties agreed was unreasonable, and corrected. To use such discipline as the basis for this suspension, is equally unreasonable.

The Union contends that the rules, as applied in this proceeding, are unreasonable. There is no time frame specified. An employee with a small number of attendance violations over the course of 10 years, who generally has an unblemished record, could find himself terminated.

DISCUSSION

I agree that the employer has a legitimate interest in having its employees come to work promptly. The jail is a 24-hour operation, which must be staffed. The grievant is a Corrections Officer. Her absence can create security issues, overtime costs to the employer, and inconvenience/added work for her co-workers. The record demonstrates that the necessity of coming to work has been communicated to Ms. Tennant.

On the day in question the grievant did not come to work, did not call in before the start of her shift, and only called following a call to her. Under Section 12.2.(a) a Casual Day is available to an employee who provides 24 hour notice of the desired time off. In emergency circumstances shorter advance notice is permitted. The key here is that the notice is still required to be advance notice.

Par (b) specifically addresses use of Casual Days for sickness. It requires 30 minutes before the start of the scheduled shift. The grievant did not call before the start of her shift. Technically, she does not satisfy the notice provision of Par. (b). There is no indication in the record that the provision has been administered other than as written.

Section 10.5 allows for use of Emergency Days where " the employee notifies the department head before taking the time off…." Again the provision requires notice before the time is taken. The grievant called after her shift had begun. Nothing in the record suggests that this clause has been administered other than as written.

At one time, it was the Union's claim that the December, 2002 grievance settlement was to be applied to discipline previously imposed for unexcused absences. Such an application would purge Ms. Tennant's two 1 day suspensions, and cause the January 28, 2004 incident to move down the progressive discipline schedule. There is little record support for this claim. Chief Deputy Smith testified, without contradiction, that the settlement was not so intended. Ms. Tennant was not given her money back, nor is there any indication that anyone advised her that the discipline had been removed. On its face, the Sheriff's memo appears only to address one of the two prior incidents. Ms. Tennant had no casual time available on August 3, 2002. The Sheriffs memo appears to say that vacation can be substituted, without discipline, under those circumstances. This is consistent with the current reading of Sec. 10.5

However, the October 26, 2001 incident also involved calling in less than 30 minutes before the start of the shift. That does not appear to be addressed by the Sheriff's memo.

In its brief, the Union contends that the prior discipline forms an inappropriate basis for the three-day suspension. I disagree. Had the parties so believed, they could have gone back and removed such discipline. They did not do so. The discipline imposed in 2001 and 2002 was appropriate, or at least not challenged, under the then-prevailing collective bargaining agreement and work rules. Discipline imposed was left on the record after the Zarletti memo and subsequent modification of the collective bargaining agreement. The Union's claim, that it is an inappropriate basis for subsequent attendance-based disciplines, invites a de facto removal of the prior discipline.

The Union is critical of the lack of a time frame applicable to the progressive discipline schedule. I agree that such an open-ended schedule offers the potential for abuse. The kind of example cited above might fall well short of just cause. However, that is not the case presented in this proceeding. The grievant was given time off discipline on October 26, 2001, August 3, 2002 (9 months later), and January 28, 2004 (17 months later).

My review of the record is such that I believe the grievant had received time off discipline twice for unexcused absences, at least one of which related directly to calling in sick with too little notice. The employer has gone from a 1-day suspension to a three-day suspension. This reflects a classic progression, and cannot be said to be inherently arbitrary or extreme. I believe the employer had just cause to discipline for the event, and I believe it acted within its right in imposing a three-day suspension.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 30th day of November, 2005.

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

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