

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**La CROSSE COUNTY**

and

**AFSCME, LOCAL 1403, LAKEVIEW EMPLOYEES**

Case 208  
No. 65340  
MA-13198

*(Grievance of Pat Seidel)*

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**Appearances:**

**Mr. Robert Taunt**, Personnel Director, La Crosse County, 400 Fourth Street North, Room 2190, La Crosse, Wisconsin 54601-3200, appeared on behalf of the County.

**Mr. Daniel R. Pfeifer**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appeared on behalf of the Union.

**ARBITRATION AWARD**

On November 21, 2005 Lakeview Employees, Local 1403, WCCME, AFSCME, AFL-CIO and La Crosse County 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 and decide a matter pending between the parties. A hearing was conducted on April 11, 2006 in La Crosse, Wisconsin. No formal record was taken. At the conclusion of the proceedings the parties agreed to the submission of letter briefs and to receive an expedited award. Briefs were received, and exchanged by May 1, 2006.

This Award addresses the disciplinary warning letter given to employee Pat Seidel for her attendance.

**BACKGROUND AND FACTS**

The parties are signatories to a collective bargaining agreement, the relevant portions of which permit the employer to “...discharge or discipline for proper cause...”, and to “...adopt and enforce reasonable rules and regulations. ...”. Acting under that authority, the County formulated an attendance and punctuality guideline, which included the following:

**COMPLIANCE WITH SUPERVISION AND RULES**

17. **Attendance & Punctuality** (Balance of work and personal life) – ability to be on the job when scheduled and measuring use of sick leave or other unplanned absence from work (Based on national average of health care in the Midwest, 4.4 days absent/year for full time employee.)

Needs Improvement	Meets Expectations	Perfect Attendance
<p>➤ Absences and/or tardiness exceeded facility standard: <i>Employees working 40 hours or more per pay period</i> 8 or more periods of absence per year. . .</p>	<p>➤ Absences and/or tardiness do not exceed facility standard: <i>Employees working 40 hours or more per pay period</i> 7 or fewer periods of absence per year <b>-OR-</b> Tardy no more than 2 times in a month <b>AND</b> totals 10 minutes or less in a month  <i>Employee working less than 40 hours per pay period</i> 3 or fewer periods of absence per year <b>-OR-</b> Tardy no more than 1 time in a month <b>AND</b> totals 5 minutes or less in a month</p>	<p>. . .</p>

**Guidelines for Evaluating Unplanned Periods of Absence**

**Situations counted as unplanned periods of absence:**

- Adjacent days of absence (Example: Sick, Sick, Sick = One period of absence)
- Medical slip from physician can connect days for one medical condition (Example: Sick, Work day, Sick = One period of absence IF physician's slip states the medical condition continued)
- Unscheduled days not counted (Example: Sick, Scheduled Off, Sick = One period of absence)
- Medical leave of absence/family leave to be counted as a single period of absence
- Partial days of absence to be added up and divided by the average hours per shift and added to the other number of full days absent. i.e. 6 full days plus 13 hours. Take 13 hours and divide by 8 (average number of hours per shift) equal 1 day with a remainder of 5 hours. Add 1 full day to 6 full days equal 7 full days of absence and 5 hours.
- A series of absences involving different medical conditions/people are counted as separate periods of absence (Example: Sick self, Work day(s), Sick child = Two periods of absence)

**Situations not counted as a period of absence:**

- Pre-approved medical appointments documented by a signed LHC absence report will not be counted. "Pre-approved" indicates the supervisor approved absence prior to day of appointment.

At the time of the events leading to this proceeding, the policy existed as a guideline to supervisory employees. It was not otherwise published. The grievant, Pat Seidel, had not received a copy, nor was she fairly on notice of its terms. It has since been posted, and otherwise distributed.

Employees are given annual performance evaluations. One of the evaluative criteria is attendance. Employees are assessed on their attendance for the one year period immediately preceding their evaluation. Supervisors do not otherwise formally counsel employees as to their attendance during the evaluation year. Pat Seidel has been employed by La Crosse County for approximately 30 years. She works at Lakeview Healthcare Center as an Activity Therapy Assistant. Ms. Seidel's October, 2004 performance evaluation was made a part of the record. She has a very favorable evaluation which variously describes her performance as

meeting or exceeding job expectations. In the areas of job knowledge and quality she is rated as “exceptional”. The single black mark on the evaluation document is attendance, where she is rated as “needs improvement”.

Ms. Seidel had missed 17.71 days in the evaluative year, 8.44 of which were counted pursuant to the rules set forth above. As a consequence, Ms. Seidel was placed on a 90 day work plan to improve her attendance. Under the policy, 7 or fewer absences per year is deemed satisfactory. The work plan requires the employee to satisfy the standard for a calendar quarter. Failure to do so (i.e. 1.75, or fewer, days off) results in discipline. Pam Semb, Lakeview Administrator, testified to the following disciplinary schedule:

- Failure to satisfy the 1.75 day standard during the 90 day work plan period leads to a written warning, and a second 90 day work plan.
- Failure to satisfy the second 90 day work plan leads to a second written warning, and another 90 day work plan.
- Subsequent failures lead to, sequentially, a 1 day suspension, a two day suspension, a three day suspension, and finally, termination. It requires 18 months following the evaluation year, to complete the disciplinary cycle.

It is not clear that the discipline schedule has ever been shared with employees or the Union.

Ms. Semb testified that the Attendance and Punctuality Guidelines and discipline schedule were adopted in 2000 – 2001. No discipline was issued under the system until it was triggered by the 2004 evaluations, notwithstanding attendance that would have been actionable under the applicable standard.

Ms. Seidel had more than 1.75 absences in the work plan period, and was given a written warning in January, 2005. She grieved in February, 2005, which grievance led to this proceeding. Ms. Seidel’s absences are a result of a number of medical conditions she suffers, as well as the fact that she cares for her elderly mother. Some of her 2004 – 05 absences might be regarded as “Medical leave of absence/family leave...”, but she did not apply for such designation because she was unaware of the Guidelines. It appears that Ms. Seidel’s sick leave use exceeded Lakeview Guidelines annually, at least as far back as 2000. There is no claim that Ms. Seidel abuses her sick leave or that its use is for other than authorized purposes.

### ISSUE

The parties could not stipulate an issue. The County believes the issues to be:

1. Has the county violated the collective bargaining agreement by giving Pat Seidel a first written warning for failure to meet facility standards on absences?
2. Has La Crosse County created unreasonable work rules and regulations in violation of the collective bargaining agreement?
3. If there is a violation, what remedy is appropriate?

The Union regards the issues presented as follows:

1. Did the County violate the collective bargaining agreement between the parties by giving the grievant, Pat Seidel, a disciplinary warning for excessive absenteeism? If so, what is the appropriate remedy?
2. Does the Lakeview absenteeism policy violate the collective bargaining agreement between the parties? If so, what is the appropriate remedy?

This Award will address the first issue posed by both parties. It will not address either of the second issues for reasons set forth below.

### DISCUSSION

Both parties have asked that the Attendance Policy and Discipline schedule, as applied to Ms. Seidel be addressed. Ms. Seidel was not provided either the Attendance Policy or the Discipline schedule timely. Her attendance was evaluated in October of 2004 under a set of criteria not made known to her. Under the guidelines, medical slips not otherwise required, and leave designated as family leave may be counted differently. Seidel was unaware of that fact as late as October, 2004. Similarly, she was unaware of what, if any, disciplinary consequence would attach to any particular level of absences. I believe this to be critical. It is telling that a 30 year employee with an otherwise strong performance history is unaware of the attendance system that exists to define and regulate what constitutes acceptable attendance.

The system has been “on the books” since 2000, but not applied. There was no explanation as to why that is so. Seidel’s first exposure to the process described in this award occurred in October, 2004 when she was advised that her attendance for the previous year was such that she would go into an attendance work plan. As of that date she had not seen the Guidelines or the discipline schedule. I think she is entitled to advance notice of the attendance expectations, an explanation of how they will be applied, and the disciplinary consequences of her failure to satisfy the standards.

I do not believe the County can rely on the Attendance Guidelines or disciplinary schedule to support its written warning.

What is before me is a written warning, advising the grievant to improve her attendance. It was issued in the context of an employee who had taken 17 + days of sick leave and had used significant sick leave for 5 years running. Her failure to meet the employer set standard would potentially lead to more discipline. I believe the County has a right and an interest in having employees achieve regular attendance, and can raise attendance shortcomings. However, the use of discipline must be preceded by fair notice to the employees and union.

This Award does not address the larger issue as to whether or not the policy violates the collective bargaining agreement. The concerns expressed above are of a procedural/notice nature, which may already be cured or may certainly be addressed prospectively. I do not know if there is other discipline pending, and if so, what the factual circumstance surrounding such discipline is. I believe a blanket statement with respect to such discipline is unwise.

Additionally, this is an expedited Award. Serious questions exist concerning notice to employees and the Union. With respect to the latter, there may or may not arise duty to bargain issues. The prospective application of the policy will create a more appropriate factual record against which to measure the work rule. The facts surrounding the application will flesh out the reasonableness of the work rule.

**AWARD**

The grievance is sustained.

**REMEDY**

The County is directed to withdraw the letter of warning.

Dated at Madison, Wisconsin this 3rd day of May, 2006.

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

