BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DENTAL ASSOCIATES, LTD.

and

UNITED STEEL WORKERS, LOCAL 9184

Case 1
No. 65209
A-6187

(H. S. Grievance)[1]

Appearances:

David W. Croysdale, Michael, Best & Friedrich, L.L.P., 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53213, appearing on behalf of Dental Associates, Ltd.

Douglas Drake, Wisconsin Sub-District Director, United Steel Workers of America, 1126 South 70th Street, West Allis, Wisconsin 53214, appearing on behalf of United Steel Workers, Local 9184.

ARBITRATION AWARD

According to the terms of the 2001-05 Collective Bargaining Agreement between United Steel Workers of America (Union) and Dental Associates, Ltd. (Company), the parties requested that the Wisconsin Employment Relations Commission appoint an impartial arbitrator to hear and resolve a dispute between them regarding the interpretation and application of certain provisions of the Agreement as they pertain to the suspension of H. S. (the Grievant) in July 2004.

The Commission designated the undersigned, Commission Chair Judith Neumann, to hear and resolve the dispute. A hearing in the matter took place on December 21, 2005, at the AmeriSuites Inn, 11777 West Silver Spring Drive, Milwaukee, Wisconsin, which was transcribed by court reporter Mark A. Perner. The parties filed written briefs on or before February 8, 2006, at which time the record was closed.

[1] In order to protect the Grievant's privacy, since these awards are published on the Commission's web site, I will either use her initials in this award or refer to her as "the Grievant."

ISSUE

The parties have stipulated that the grievance is arbitrable and have also stipulated to the following issue:

> Did the Company have just cause to administer a written warning to the grievant for her absence on 7-15-2004 and a three day unpaid suspension for grievant's absence on 7-16-2004, and if not, what is the appropriate remedy?

FACTS

Based upon the parties' stipulation of facts, joint exhibits, and the testimony and documents submitted at hearing, the following facts are found.

The Company provides a full range of dental services in all specialties at six locations in eastern Wisconsin and employs about 740 dentists, hygienists, patient care coordinators, and other employees. For several years, the Union has represented a bargaining unit comprising approximately 170 patient care coordinators working in all six Company locations, who are responsible for various clerical, receptionist, dental assistant, record keeping and similar duties.

The 2001-2005 collective bargaining agreement between the parties contained the following relevant provisions:

ARTICLE 2

MANAGEMENT RIGHTS

> Except as provided by this Agreement, the management of the Company is vested in the Company, which will not use its rights to discriminate against staff.

. . .

ARTICLE 6

HOURS OF WORK

1. A day is defined as a period of twenty-four (24) consecutive hours beginning with the start of the staff member's shift. A week is defined as a period of seven (7) consecutive days beginning with the start of a staff member's shift on Monday.

. . .

ARTICLE 9

DISCIPLINE AND DISCHARGE

Definition

1. The Employer agrees with the tenets of progressive and corrective discipline. Depending upon the seriousness of the violation, the staff member will receive progressive discipline, including oral reprimand, written reprimand, suspension or discharge.

2. Disciplinary action may be imposed upon a staff member only for just cause.

3. In following tenets of progressive and corrective discipline, prior similar actions that have not been repeated for more than 12 months will not be used as the basis for additional disciplinary action. However, when reviewing a staff member's suitability for continued employment, the staff member's total record can be used to make a determination of continued employment.

. . .

ARTICLE 13

PAID TIME OFF (PTO)

. . . The Paid Time Off program and pro-ration is effective 01/1/02 for all staff hired prior to 01/01/01. . . .

The Paid Time Off (PTO) program allows staff sufficient time away from the duties and responsibilities of work for relaxation and to attend to personal needs. It is a mechanism for paying staff for pre approved time away from work for vacation, personal time, same day illness and/or emergency needs.

. . .

Year 2002-2005

PAID TIME OFF (PTO)

Credited January 1st:

140 hours after 2 years of service

180 hours after 7 years of service

220 hours after 13 years of service

> One additional day (8 hours) for every year of service over 15 years with a maximum of 260 hours at 20 years of service.
>
> Usage
>
> Each January 1st when a staff member's bank of PTO is credited, the time is available to use. PTO may be taken in increments of no less than one half day at a time. A half-day shall equal the staff member's scheduled time before or after their scheduled lunch break. This time may be used in no less than three (3) hour increments. PTO time is liquidated and paid based on the staff members' regularly scheduled hours covering the time of absence.
>
> . . .
>
> PTO must be pre-approved except in the case of illness or an emergency. When PTO is requested without prior approval, the staff member must provide a reason and the time may be authorized by the manager. No request will be unreasonably denied. PTO must be scheduled so that it may be taken no later than the end of the calendar year in which it is requested.
>
> . . .

In addition to and/or in combination with PTO leave, the contract provides for Family Responsibility Leave, short-term disability leave, jury duty leave, and bereavement leave.

Since 1993 the Company has maintained a policy, entitled "Procedure No: 3, Attendance," which, as revised in 1995 and in effect at the time the instant case arose, provided as follows:

> All staff members are expected to be on the job during their designated shift unless specific alternative arrangements are made. In the event unforeseen circumstances cause a staff member to be absent, they are expected to follow their written call-in procedures. Sick days must be used for excused same day absences. The use of vacation days requires supervisor approval with a minimum of 1 week notice. However, in extreme emergencies, if all sick/personal days are exhausted, vacation days may be used. These will be reviewed on an individual basis and are also subject to supervisor approval. An exception to time off without pay is when there is a lack of work to be performed. If a staff member volunteers to take a leave or is released from her/his duties, the staff member may elect to take sick/personal or vacation time in no less than 4 hour increments for time off. Failure to comply with these procedures will result in an unexcused absence.

- The first unexcused absence will result in a documented verbal warning.
- The second unexcused absence will result in a written warning.
- The third unexcused absence will result in a written warning and a three day disciplinary layoff.
- The fourth unexcused absence will result in termination.
- Three consecutive days of unexcused absences will result in termination.

Warnings are purged on a twelve month basis. An individual warning will be purged after 12 months has elapsed. The status of warnings change according to the steps of progressive discipline; e.g., first verbal warning drops off, and the first written warning becomes the first verbal. However, when reviewing a staff member's suitability for continued employment, the staff member's total record can be used to make a determination of continued employment.

The foregoing attendance policy was implemented by the Company unilaterally and is not incorporated by specific reference into the collective bargaining agreement. When the parties negotiated their current PTO provisions, they substituted PTO for what had previously been separate contractual allowances for vacation and sick/personal leave. However, despite its outdated references to vacation days and sick days, the attendance policy was not amended subsequent to the 2001 contractual changes. The record indicates that the Company has consistently applied the policy, both before and after the 2001 contractual changes regarding PTO, such that each work "shift" in which an employee is absent without being eligible for paid leave is treated as an "unexcused absence" for purposes of the penalties specified in the policy, whether or not those shifts are consecutive.[2]

It appears that the Company has implemented the policy such that the first line supervisor generally will impose the disciplinary actions short of termination without exercising discretion. It also appears that termination decisions are within the discretion of higher-level managers in the Company's human resources department. The Company claims no authority to increase discipline beyond what the policy calls for. However, Company

[2] Subsequent to the events of the instant case, the record reflects a couple instances in which the Company introduced some leniency into its application of the policy, but each appears to have involved an employee needing sick leave during her first year of employment, i.e., before they had an opportunity to accumulate any significant PTO entitlement. Also subsequent to this case, the Union and the Company negotiated additional flexibility into the contractual PTO and Family Responsibility Leave provisions to accommodate the needs of first year employees. These situations are not sufficiently analogous to the one giving rise to the instant case to undermine my conclusion that the Company has been consistently strict in implementing its notion of "unexcused absence" and the consequences therefore.

human resource managers do reserve the right to examine whether mitigating factors, such as job performance, length of service, overall attendance record, or extraordinary events, may warrant reducing the strict application of the policy.[3]

The Company provides employees with a copy of the attendance policy and regularly discusses with employees both the terms of the policy itself and how the Company applies it. The Grievant herself was aware of the Company's interpretation of the policy and in fact, approximately one year early, in July 2003, had received two separate disciplinary actions for two consecutive days of illness. The Union generally receives copies of disciplinary actions involving bargaining unit members. However, the record does not reflect that, prior to the instant case, the Union was specifically aware of the Company's interpretation of "unexcused absence" as applied to consecutive days of absence owing to the same illness. This record reflects that, prior to the instant grievance, no member of the Union's bargaining unit had sought to grieve the imposition of discipline under these circumstances.

The Grievant has been employed by the Company since July 1, 1998, as a patient care coordinator. At all relevant times, she, like most bargaining unit members, worked a four-day, 38-hour work week. During her employment with the Company prior to the events giving rise to this case, the Grievant had been disciplined on several occasions for attendance and tardiness infractions. As of July 14, 2004, the Grievant's file had been free of any disciplinary actions involving attendance for the previous 12 months. Thus, for purposes of discipline under both the attendance policy and the contractual just cause provision (Article 9, set forth above), the Grievant had a clean record regarding attendance at that time. However, by that date she had exhausted all 140 hours of her annual PTO entitlement.

On the morning of July 14, 2004, the Grievant telephoned her supervisor and informed her that she (the Grievant) was ill with the flu and would be absent that day. The supervisor asked whether the Grievant intended to see the doctor and the Grievant stated that she saw no point in doing so, since there was nothing a doctor could do to alleviate the flu. The two then discussed the fact that the Grievant had no remaining PTO and, in the words of the supervisor at hearing, "would receive the actions." The Grievant called in the following day and again on July 16 to report her continued illness and absence. During the conversation on the third morning, the supervisor mentioned the fact that Grievant had now been absent three consecutive days and that the supervisor would need to speak with the Company's human relations department about how to handle the situation. When the Grievant returned to work on her next scheduled shift, the supervisor informed her that the Company had not yet reached a decision regarding the consequences of her absence. The Grievant was aware that termination was a possibility but testified that she expected that she would receive a three day suspension instead. The parties have stipulated that she was not eligible for any short-term disability benefits for this absence.

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[3] The policy itself suggests that discretion to consider the employee's overall employment record occurs only at the point of possible termination. However, the Company clearly stated at hearing that it views it as necessary to consider extraordinary circumstances in situations short of termination, as well. As discussed below, to be reasonable and consistent with just cause, such discretion to prevent unusually harsh or unjust results would be required at any step of the disciplinary process.

Company officials reviewed the Grievant's personnel file and discussed her job performance with her supervisor and decided that there were mitigating circumstances such that the consequence for the three consecutive days of absence beyond PTO should be limited to a three day suspension rather than termination. The principal mitigating circumstance was the Grievant's good job performance and, as her supervisor attested, her willingness to pitch in and help when extra work was needed. The Company also considered her relatively lengthy service with the Company and her recently improved attendance record.

On July 23, 2004, the Grievant was issued three "Staff Corrective/Disciplinary Action Forms," the first documenting a "verbal warning" for the July 14 absence, the second a "written warning" for the July 15 absence, and the third a three day suspension for the July 16 absence. Each form was dated and received by the Grievant on July 23.

On August 5, 2004, the Union filed a grievance challenging the Company's decision to impose three separate disciplinary actions for the Grievant's three consecutive days of illness. The grievance stated as follows:

> That the member did not receive corrective discipline action for the write ups dated 7/14/04, 7/15/04, and 7/16/04. That these write ups were given for each day the member was out, instead of for the same occurance – (resulting in only receiving a verbal documented warning) instead of a 3 day suspension.

The parties engaged in several diligent attempts to resolve the grievance, including protracted efforts to reach conceptual agreement on how to treat consecutive days of absence, without PTO, where the absence is attributable to the same illness/cause. These efforts took place both during successor contract negotiations and in separate meetings specifically addressing the instant grievance. Eventually the parties were able to reach agreement on some related issues, such as the accumulation of PTO by pay period rather than calendar year and some accommodations related to first year employees. However, they were not able to resolve the instant grievance or to reach a mutual understanding about how the attendance policy should apply in similar situations. Accordingly, the Union filed the instant petition for arbitration.

POSITIONS OF THE PARTIES

The Company

The Company argues that there was just cause for the written warning following the Grievant's absence on July 15, 2004, and for the three-day suspension following her absence on July 16, 2004, because the discipline was pursuant to a long-established, widely disseminated, and consistently applied work rule regarding attendance, which specifically sets forth the normal consequences for unexcused absences.

The Company notes the "strong and compelling business justification" for its attendance policy, because patient care coordinators, like the Grievant, are the "front-line staff" and "probably the heartbeat of . . . our success daily." The Company asserts that the policy is fair, as employees usually work only a four-day week to begin with and no penalties are assessed unless an employee exceeds the extensive leave allowed by the provisions in the contract.

According to the Company, both the Grievant and the Union were well aware of how the policy operated and that each day of unexcused absence, whether or not consecutive, counted as a separate violation. The Company contends that its actions were particularly justified, as the Grievant had a poor overall attendance record and could have been terminated under the policy for three consecutive days of absence, but instead the Company considered mitigating factors and chose to impose a three day suspension.

Finally, the Company claims that the Union has repeatedly tried and failed to obtain the Company's agreement to changing the policy regarding successive days of absence. Thus, a ruling for the Union in this case would have the arbitrator substituting her own "edict" despite "the inability of the Union to achieve this objective through the collective bargaining process."

The Union

The Union's central argument is that imposing a separate and increasing penalty for each consecutive day of a three day absence for illness "makes a mockery of progressive discipline," in that the Grievant had no opportunity to correct her behavior in between the successive penalties. In this connection the Union notes that the policy itself does not clearly define what an "absence" is and certainly does not indicate that each separate day of absence is subject to a separate penalty no matter what the circumstances. The Union contends that the Grievant herself did not clearly understand what the consequences would be, nor was the Union aware beforehand that the Company interpreted and applied its policy in this manner.

The Union also agues that it fundamentally defeats just cause for a "single period of unexcused absence of 3 work days, in an entire 12 month period [to] bring an employee to the brink of termination." The Union notes that the case involves only "30 hours of unexcused absence," and that bargaining unit employees should not have to "subject themselves to discipline if they have the misfortune or 'poor judgment' to use up their PTO time, whether such use is for a good reason or a bad reason." In the Union's view, the Grievant's attendance record did not warrant a three day suspension under a just cause standard.

Finally, the Union disagrees that it is trying to obtain in arbitration what it could not obtain in negotiations. The Union points out that the grievance arose in July 2004 and all discussions about what an "absence" should mean for purposes of attendance and discipline came *after* the grievance arose and were for the purpose of trying to settle the issue. Thus, these discussions should have no bearing on what the contractual "just cause" provision meant in July 2004, when the grievance arose.

DISCUSSION

Introduction

Distilling the parties' arguments to their cores, this case requires resolution of three issues: (1) Did the Union waive its objections or otherwise acquiesce in the Company's interpretation/application of its policy such that each day of unexcused absence, whether or not consecutive, counts as an "absence" or "occurrence" for purposes of the plan? (2) If not, is the Company's Attendance Policy a reasonable work rule and one that comports with just cause, insofar as the policy progressively increases penalties for each day of an employee's unexcused absence, whether or not the days are consecutive and regardless of the reason? (3) If the policy is generally reasonable, did its application in the current situation comport with the contractual just cause provision? Each issue is addressed below.

Union Waiver or Acquiescence

The Company contends that the Union has either acquiesced in the Policy as implemented here or is attempting to obtain in arbitration what it failed to obtain in bargaining. The record does not support either notion.

First, as to acquiescence, the record indicates that the Company has publicized its Attendance Policy since its inception in 1993, has provided a copy to each employee, and has consistently adhered to the policy (which, as discussed below, includes some measure of discretion over mitigating circumstances). However, the Attendance Policy was unilaterally implemented and is not a product of collective bargaining. The Policy itself contains some ambiguity about whether consecutive days of absence for the same underlying illness/cause count as separate disciplinary events. The first four bullet points on the Policy refer to "unexcused absence" without defining what constitutes as "absence." While the fifth bullet, stating "Three consecutive days of unexcused absences will result in termination" could suggest that "absence" means a single day, another construction is also possible, i.e., that "absence" refers to a single *cause* and that three consecutive absences with separate causes will be grounds for termination. Therefore, I cannot conclude that the Company's interpretation of absence (each single day regardless of cause) is so clear on the face of the Policy as to have put the Union on notice. While Union officials generally receive copies of disciplinary "actions," those documents (assuming the examples in the record are typical) do not state the reason for an employee's absence and therefore do not indicate on their face that discipline is being administered for consecutive days of absence for the same illness or cause. It is undisputed that no member of the Union's bargaining unit, prior to the Grievant doing so, asked the Union to grieve the imposition of discipline in a situation like this. Accordingly, the record does not support the Company's claim that the Union knowingly acquiesced in the Company's interpretation of its policy.

Second, as to using the grievance procedure to procure benefits the Union failed to obtain in bargaining, that contention is inapposite in a situation like this, where the grievance preceded all efforts to discuss or negotiate the definition of "absence/occurrence". The doctrine upon which the Company relies is sometimes invoked to preclude a grievance initiated *after* a party has unsuccessfully pursued the same result during previous contract negotiations. In the instant case, both parties are to be commended for their persistent efforts to reach a resolution of this difficult issue, and I note the Company's willingness to address various Union concerns about the operation of the Attendance Policy. However, it is axiomatic that discussions and even partial resolutions of issues initially raised in a grievance do not bar the underlying grievance unless, as part of those settlement discussions, the Union agrees to withdraw the grievance. This would be true whether or not the discussions occur inside or outside the context of successor contract negotiations. To hold otherwise would chill the parties' laudable attempts to resolve grievance-related issues. Here, despite the various subsequently agreed-upon alterations in the attendance/PTO provisions, the Union did not withdraw the instant grievance. Hence, the Union remains free to advance its arguments in support of the grievance.

Is the Company's Attendance Policy Reasonable as Applied to Consecutive Days of Absence?

It is apparent from the parties' extensive discussions/negotiations following the filing of the instant grievance that the primary problem to be resolved is whether the Company may continue to implement its Attendance Policy so that each separate day of unexcused absence, even if consecutive and even if originating from the same cause, is a separate disciplinary event.

Before examining the issue, it is important to note that both parties apparently accept certain aspects of the policy. Importantly, for example, the term "unexcused" as used in the policy means "beyond the leave entitlements provided by the contract and/or the law." As such, despite the outdated references in the Policy to vacation, personal, and sick leave, an "excused" absence does not depend upon the cause or reason for the absence. This is the essence of a no-fault policy, in that it is designed to avoid the supervisory problem of trying to make consistent, fair, and rational decisions about the "maddening variety of absentee situations that demand the kind of insight, judgment, and intuition expected of a trial judge." BLOCK AND MITTENTHAL, ARBITRATION AND THE ABSENT EMPLOYEE, PROCEEDINGS OF THE 37TH ANNUAL MEETING OF THE NAA (BNA 1985), at 95. Such policies also ease employee concerns about "searching interrogation into the reasons for their absence," and about exactly what the absence limits are. ID. Accordingly, despite the uneasy fit between just cause and no-fault policies, most arbitrators will find just cause as long as the policy itself is reasonable in the amount of leave permitted and in the safeguards it provides against "perverse applications." ID. at 104.

In the instant case, it is clear that the Union does not seek to overturn the no-fault policy as a whole. Rather, the Union accepts that the Grievant exceeded her permissible contractual leave when she was absent on July 14, 2004, and therefore, regardless of the reason for her absence, was properly subject to discipline. The Union accepts the first disciplinary step under the Attendance Policy (documented verbal warning) for the first day of absence. However, the Union contends that the Grievant's continued absence for the same reason on the following two days cannot be viewed as separate disciplinary events without contravening the progressive/corrective foundation of just cause. The Union's argument has much appeal, particularly to a labor arbitrator accustomed to wide latitude in determining just cause. Ultimately, however, the argument cannot prevail.

First, the Union is not reasonable in claiming that the Grievant is being penalized for having "the misfortune or 'poor judgment' to use up [her] PTO time." The Grievant has suffered no discipline for *using* her contractual and/or statutory leave. Unlike some no-fault attendance policies that have been overturned as unreasonable, this policy carries no penalties for absences that are permitted by contract. COMPARE, VERNON COUNTY, MA-10573 (BURNS,6/99) (employer's policy unreasonable because it treated use of contractually available sick leave as misconduct); ACCORD, MANITOWOC COUNTY, MA-11495 (EMERY, 5/02). Here it is only absences that *exceed* contractual or statutory entitlements that are subject to penalty. Moreover, the amount of leave that is allowed before penalties are assessed is sufficiently generous to pass muster – a minimum of 140 days of PTO per year, various other contractual leaves, as well as any statutory leave entitlements such as FMLA. By negotiating the 140 days of PTO, the Union has agreed to an amount of permissible leave. In short, this argument is inconsistent with the Union's agreement that absences that exceed PTO (or other entitlements) are "unexcused" for purposes of the policy.

Second, the Union's proposed interpretation inherently would require the Company to determine the reason for an employee's "unexcused" absence of longer than one day, and probably would require some system of investigation or verification, all of which are antithetical to the underlying purpose of a no-fault policy. As explained in the Block and Mittenthal article cited above, employees as well as employers benefit from leave policies that render such routine inquiries unnecessary. By agreeing to combine into one amount of PTO what previously had been distinct and separate entitlements for vacation, sick, and personal leave, the Union has endorsed the benefits of a system that limits investigations into the reasons for an employee's absence. While, under the Union's interpretation, such inquiries would be necessary only for consecutive days of absence, there is no reason to believe that such consecutive absences are rare, especially where illness is concerned.

Third, it is not at all clear what parameters the Union would have me put upon the penalties for consecutive days of absence. While the Union obviously believes that illness should be a valid reason for imposing a single penalty for consecutive days, this begs the question what other reasons might also be valid? Could it be a combination of valid reasons

(e.g., employee sick one day, child sick the next)? How much documentation or verification should be required for an asserted reason? Should the single penalty be limited to a three-day absence, and, if not, how many days of "unexcused absence" might justify an additional penalty? For that matter, if the reason for an absence should affect the degree of the penalty, why not an interrupted or intermittent absence owing to the same underlying cause (e.g., sick one day, at work the next, relapse of same sickness the third day)? The Union itself recognizes that my authority to rewrite the Attendance Policy is limited, yet any attempt to answer the foregoing questions for purposes of subsequent cases would be tantamount to rewriting the policy. On the other hand, if I do not answer these questions, I leave the policy in a very uncertain state, which defeats its central goals of clarity and predictability. Thus, while such vagaries are part and parcel of the typical just cause analysis, they are necessarily truncated in the context of a no-fault attendance policy.

Fourth, the Union advances a compelling argument that imposing successive disciplinary steps in this situation "makes a mockery of progressive discipline." The Union aptly notes that the Grievant could not correct her misconduct after the first step of discipline because she remained ill for two more days and did not even receive the action slips until several days after her return. Upon much reflection, I do not accept this argument. Corrective discipline has somewhat marginal relevance in cases involving absenteeism, especially where the absence is related to illness. Presumably, an employee who is too ill to work (or has some other valid impediment) is not engaging in the kind of intentional misconduct that could be "corrected" through progressive discipline. Instead, excessive absenteeism, no matter how far beyond an employee's control, can lead to discipline simply because an employer needs a reasonably reliable work force. It is a harsh fact of life that even "just cause" protection does not compel an employer to retain employees who suffer such frequent or debilitating illnesses or misfortunes that they cannot work a reasonable amount of time. Intermediate disciplinary steps in response to typical forms of absenteeism, therefore, are more akin to second, third, and fourth "chances" than truly corrective opportunities.

Fifth, contrary to the Union's argument, it is not inherently unreasonable or at odds with just cause in the context of this policy to bring an employee "to the brink of termination" after only three days of unexcused absence. The three days of "unexcused" leave follows at least 140 hours of authorized leave with pay. I agree with the Company that it is reasonable to combine this relatively generous authorized leave with a relatively strict response to unauthorized leave. Contrary to the Union's suggestion, it is reasonable to expect employees to use good judgment in conserving their available leave, to the extent it is within their control, precisely because they may not be able to control future absences.

Sixth, insofar as progressive discipline requires that employees be aware of the consequences for certain behaviors, that purpose is amply served in this Policy, even as applied by the Company. It states on its face what happens after each "unexcused" absence and I have accepted the Company's evidence that it keeps employees, including the Grievant, well-informed about what constitutes an "absence." In addition, by permitting employees to cleanse their records by avoiding similar infractions for 12 months, the policy builds in a reasonable automatic cushion that comports with notions of progressive discipline.

Finally, and importantly, I find the Company's Policy to be reasonable and to comport with just cause because, rather than apply the policy rigidly and mechanically, the Company professes a willingness to consider mitigating factors so as to avoid the "perverse applications" that Block and Mittenthal have warned against. By the same token, these discretionary judgments by the Company are subject to review under the just cause clause for consistency and fairness. In this present case, for instance, the Company interpreted its Policy to have permitted the Grievant's discharge after three consecutive days of unexcused absences. Had the Company mechanistically discharged the Grievant, it is questionable that the Company's action would have survived just cause review. Instead, however, the Company exercised its discretion regarding mitigating factors, and, in light of the Grievant's six and half years of service, good job performance, and recently improved attendance record, imposed a lesser penalty.

In sum, just cause and progressive discipline as a general rule do not require the Company to treat consecutive days of "unexcused" absence as a single "absence" or occurrence for purposes of the disciplinary steps set forth in the Attendance Policy.

Did the Company Properly Exercise its Discretion in this Case

As discussed in the preceding section, one reason for finding the Company's Attendance Policy to be reasonable is the discretion the Company reserves to consider whether, in a particular situation, a rigid application of the Policy would work a special hardship or "perverse" result. This is where arbitral review accommodates the interplay between the Company's no-fault Attendance Policy and contractual just cause. The question for arbitration in attendance-related discipline cases is whether the Company has exercised its discretion in a fundamentally fair manner.

First, contrary to the Union's argument, I have found that the Grievant understood how the Company would implement the Attendance Policy regarding consecutive days of absence. While the Union is correct that it would be foolish to base such "notice" simply on the employee having received a stack of policies at the outset of her employment, in this case the Grievant had been subjected to separate discipline for each of two consecutive days of absence only one year earlier. Moreover, she frankly acknowledged at the hearing that she had expected to receive a three-day suspension for the absence at issue here.

On the other hand, even though the Company declined to terminate the Grievant after considering mitigating factors, the Company's decision to impose a three-day suspension is also subject to review to determine whether mitigating factors should have led the Company to reduce the discipline even further. It bears emphasizing that this is a much more limited inquiry than the wide-ranging just cause analysis that would be applied if a no-fault Attendance Policy did not exist or if that policy had been held to be unreasonable. Nonetheless, some review is appropriate, as explained above.

In this case I conclude that it was fair for the Company to apply a separate disciplinary step for each day of the Grievant's three-day absence, such that she received a three-day suspension. As noted earlier, the Policy is relatively strict, but that strictness (absent unusual circumstances) is justified by the relatively liberal leave that employees are given. Had this been the Grievant's first experience exceeding her available leave, it may well have been unfair for the Company to apply its policy so strictly. But the Grievant had not only consumed her entire annual leave allotment by July 14, but had a history of similar attendance problems throughout her history with the Company. And, while one naturally sympathizes with the Grievant's predicament when she found herself too ill to work in July – a situation beyond her control – the whole point of ample PTO, 12-month cleansing of disciplinary actions, and no-fault policies is to encourage employees to regulate those absences that can be regulated so that leave is available when needed. The record does not reflect that all of the Grievant's previous leave during 2004 was attributable to absences beyond her control. Even if that were the case, it would not necessarily relieve her of the disciplinary actions called for in the Policy, given her previous attendance record. It is beyond dispute that an employer is entitled to some regularity of attendance, a regularity that these parties have negotiated in the form of annual PTO and other leaves. It is true that the Grievant had recently improved her attendance, but I agree with the Company that, given her overall history, that factor, while sufficient to mitigate the discipline from discharge to suspension, did not require further mitigation.

AWARD

The grievance is denied. The Company had just cause for administering a written warning to the Grievant for her absence on 7-15-2004 and a three day unpaid suspension for Grievant's absence on 7-16-2004.

Dated at Madison, Wisconsin, this 1st day of September, 2006.

Judith Neumann /s/

Judith Neumann, Arbitrator

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