BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY

and

KENOSHA COUNTY INSTITUTION EMPLOYEES, LOCAL 1392, AFSCME, AFL-CIO

Case 256
No. 66224
MA-13461

Appearances:

Mr. Thomas G. Berger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 044635, Racine, Wisconsin 53404-7013, and Wisconsin Council 40, AFSCME, Madison, Wisconsin, on behalf of Local 1392 and the Grievant.

Ms. Lorette Pionke, Esq., Senior Assistant, Corporation Counsel, Kenosha County, 912-56th Street, Kenosha, Wisconsin 53140, on behalf of the County.

ARBITRATION AWARD

Pursuant to Article III of the 2006 labor agreement between the captioned parties, the parties requested that the Wisconsin Employment Relations Commission issue a panel of seven staff arbitrators from which to select a single arbitrator to hear and resolve a dispute between them regarding the discharge of a Licensed Practical Nurse (LPN) C.S.[1] The parties jointly selected Arbitrator Sharon A. Gallagher from the Wisconsin Employment Relations Commission panel. Hearing in the matter was scheduled and held on November 9, 2006 where the parties were given a full and fair opportunity to present testimonial and documentary evidence. At the close of the hearing, the parties agreed to submit written briefs directly to each other with a copy to the Arbitrator postmarked December 27, 2006, and the parties waived the right to file reply briefs. The Undersigned received the parties' briefs by December 29, 2006 whereupon the record herein was closed.

1 The Grievant's initials are being used in this case.

ISSUES

The parties stipulated that the following issues should be determined herein:

1) Did the County have proper cause to discharge the Grievant?
2) Was the discharge executed in a fair and impartial manner?

RELEVANT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

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Section 1.2. Management Rights. Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this Agreement. The County will not contract out for work or services or the use of volunteers that will result in layoff or reduction of hours worked by bargaining unit employee(s).

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ARTICLE III – GRIEVANCE PROCEDURE

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Section 3.5 Work Rules and Discipline. Employees shall comply with all provision 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 and in a fair and impartial manner. Excluding discipline for patient abuse, any employee who has not been disciplined for any reason for a period of three (3) years shall be considered as having a clean record as of the end of such three (3) year period. 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 and the employee.

The foregoing procedure shall govern any claim by an employee that he has been disciplined or discharged without just cause. Should any action on the part of the County become the subject of arbitration, such described action may be affirmed, revoked, modified in any manner not inconsistent with the terms of this Agreement.

. . .

Section 3.8. Suspension and Discharge. No employee shall be subject to discharge without first sustaining a suspension from work for a period of at least three (3) days. During the suspension period, the County and Union representatives shall investigate and review the circumstances involved and then meet and attempt to resolve the issue. If not resolved and the employee is discharged, the grievance must be filed within five (5) workdays of the notification of discharge and shall be processed beginning at Step 3 of the grievance procedure.

RELEVANT COUNTY UNIFORM WORK RULES[2]

DEPORTMENT

Employees shall not engage in the following conduct:

. . .

18. Being under the influence of alcohol during work hours (any measurable B.A.C.) Any employee who tests positive for alcohol, as a result of a random test or a test based on reasonable suspicion, shall be subject to discipline.

19. Being under the influence of narcotics or other non-prescription controlled substances during working hours (any traceable measure). Any employee who tests positive for drugs (other than normal limits for prescription medication), as a result of a random test or a test based on reasonable suspicion, shall be subject to discipline.

. . .

2 All County employees receive a copy of these Rules at hire, and the Grievant received a copy thereof.

RELEVANT COUNTY DISCIPLINARY POLICY AND PROCEDURE

. . .

The Personnel Committee at its January 27, 1982 meeting reviewed and approved the attached disciplinary policy and procedure for use by Kenosha County.

This procedure is being recommended for adoption by the County Board of Supervisors for the following reasons:

1. Current union contracts provide for a "just cause" discipline procedure.

2. Current union contracts provide that the County notify the unions of disciplinary actions and the right of the employee to have a union representative present when such actions are taken.

3. This system provides for notice to the employee and the union of pending disciplinary action.

4. This system sets in place a "progressive" disciplinary system of a verbal warning, written warning, suspension, and finally, if necessary, dismissal.

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1. Policy

The Art of discipline is intended to be positive in nature and attempts to correct unacceptable employee actions. This attempt includes counseling sessions, suggested referrals to outside agencies, and other help with the purpose of improving the behavior of an employee that may be detrimental and disruptive to the effective operations of a department and/or work program.

In the process of trying to assist the employee resolve problems and improve his/her behavior, corrective action may be necessary. This corrective action may include discipline.

Progressive discipline is basically a series of disciplinary actions, corrective in nature, starting with a verbal or written reprimand. Each time the same or similar infractions occur, more stringent disciplinary action takes place. It is important in invoking progressive discipline, up to and including dismissal, that each time disciplinary action is contemplated, it must be definitely established that an infraction did occur which is organizationally inappropriate. To definitely establish that an infraction did occur means that a supervisor must be able to sufficiently substantiate the occurrence of any infraction.

After the infraction has been established, then an assessment of the type of corrective action required is made, taking into account the previous disciplinary actions that have been taken. It does not necessarily mean that an employee is required to violate the same rule or have the same incident behavior(sic) are issued together with a warning of what discipline, up to and including dismissal, may be taken in the future if behavior does not improve. The department will make an offer to the employee to have a union representative present.

Written reprimands must be sent to the Department of Personnel for approval prior to being issued with a copy to the union, if applicable.

c. Suspension

A suspension is a temporary removal of the employee from the payroll. A suspension may be recommended when lesser forms of disciplinary action have not corrected the employee's behavior. Suspension may also be recommended for first offenses of a more serious nature.

Suspensions may be imposed on an employee for repeated offenses when verbal reprimands and written reprimands have not brought about corrected behavior, or for first offenses of a more serious nature. Examples of some of the more serious infractions (but not limited to those listed) are:

- Major deviation from the work rules, including a violation of safety rules
- being under the influence of alcohol
- falsification or misuse of time sheets or records
- fighting
- theft of another employee's property
- disobedience of an order

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Discharge may be recommended for an employee when other disciplinary steps have failed to correct improper action by an employee, or for first offenses of a serious nature. Examples of some of the more serious infractions (but not limited to those listed):

- being under the influence of alcohol or drugs on the job
- possession of an unauthorized weapon on the premises
- willful destruction of County property
- insubordination
- fighting on the job
- theft of County property or funds
- abandonment of position

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BACKGROUND

The County operates Brookside Care Center (BCC) as a State licensed nursing home for county residents where it employs approximately 20 LPNs as well as RNs and CNAs among other employees on three shifts (A-C) twenty-four hours per day, seven days per week. At all times relevant hereto Sandra Hardt was BCC Director, July Iwen was Assistant Director of Nursing (DON) and Bill Riedl was County Director of Personnel. In October, 2004 the Grievant was hired as a licensed LPN at BCC.

On November 3, 2005 Assistant DON Iwen posted the following notice regarding missing drugs at BCC:

> Attention All Licensed Nurses
>
> We have been having an issue with counting of narcotics. We have many instances of the count being off, the keys not being passed from shift to shift, the controlled box not being counted upon receipt, and meds not being checked in properly. Please note that counting controlled substances is a requirement, not an option. It should be the first thing you do when you come on for your shift. There is no acceptable excuse for not doing this important part of your job. If anyone is having an issue with another nurse refusing to count, they need to see nursing management to report this.
>
> Thank you in advance for your cooperation.

Also in 2005, Iwen issued the following memo which she reviewed with all staff and then posted at BCC:

> Procedure for Storing, Ordering & Counting Narcotics:
>
> **All** routine and PRN controlled substances will be kept in the locked drawer in your cart. Once the current cards are used up, all shifts will take their meds from one card. Any new orders will automatically come on one card. If it is QID, you will receive 2 cards initially. When you have used up the first card, you should reorder.
>
> **All** the controlled medication sign out sheets are located in a separate binder and should be kept on your cart. Medications should be signed out immediately upon administration.
>
> **All** controlled medications will be counted between shifts. The nurse coming on should obtain the keys and count the locked drawer. The off going nurse will

check the sign out sheets for accuracy.

All controlled medications will now be "Order on Demand". The routine medications will no longer come with the cycle fill. C-shift will be in charge of reordering the controlled substances.

To reorder a medication, peel off the reorder sticker and place it on a reorder sheet and place it in the pharmacy tote. Make an "X" on the medication card to indicate that it has been reordered. A & B-shift will double check to make sure the medications are reordered. A good indication for when to reorder is when you come to the last row on the card.

. . .

At a March, 2006 in-service (which the Grievant attended), Iwen discussed the following exert from the BCC Policy Manual regarding the procedures for counting the narcotics kept in BCC drug boxes:

POLICY The schedule II contingency box will be monitored between every shift to ensure that all medications are accounted for.

PROCEDURE

- The keys for the schedule II locked cabinet will be carried at all times by the desk nurse or the 400 wing nurse, if there is no desk nurse.
- If a medication is needed from the contingency, the desk or 400 nurse will open the cabinet and stay with the staff person who is removing the medication. The desk/400 nurse and other licensed nurse will then do an audit of the entire contents of the box. The pharmacy audit sheet will be used for this.
- Between every shift, the keys will be handed from the desk/400 nurse to the oncoming desk/400 nurse. The tags will be inspected to make sure they are intact. The numbers will be compared to the previous shift's audit. If the tags match, check OK on the shift to shift audit tool. If the tags do not match the last audit, or they appear to have been tampered with, the entire contents of the box will be counted.
- Any discrepancies must be reported to administration.
- When a new box is received from pharmacy it will be audited according to the pharmacy policy.

It is undisputed that a complete copy of the Policy Manual is kept at each nursing station and that Iwen has in-serviced all staff concerning any changes made in the Manual. It is also undisputed that only RNs and LPNs are authorized to pass meds to residents and only these licensed nurses are expected to count and audit the narcotics in the drug boxes (one box is maintained at each nurses' station) before the end of each shift.[3] Finally, at hire each BCC

3 CNAs at BCC have no access to or authority concerning BCC drug boxes; only licensed nurses (RNs and LPNs) have such access/authority.

employee is given orientation regarding the use and access to these drug boxes.

FACTS

On June 22, 2006, Iwen arrived at work and Night Shift RN Chavez informed her that when she and the First Shift RN began to audit the drug box they found the tag seal on one of the Ziploc bags which should have contained two morphine suppositories had been tampered with and the suppositories were missing. Also, Chavez reported to Iwen that the two previous shifts (1st and 2nd on June 21st) had failed to check and audit the box. Iwen went to Hardt and asked that all RNs and LPNs who had had access to the drug box that had been tampered with, be drug tested to determine whether one of them had taken the two missing morphine suppositories. Hardt then got permission to drug test the 11 nurses who had had access to the drug box (6 Second shift nurses, 4 Third shift nurses and the 1st shift Charge RN) by an independent clinic at St. Katherine's Medical Center.

The eleven nurses, including the Grievant, were then sent to St. Katherine's to get drug tested. Before she left for her test, the Grievant spoke to Iwen and told Iwen she was taking a prescription drug for pain. Iwen responded that so long as the Grievant had a valid prescription for the drugs she would be OK. Union President Ingram also stated herein that the County never told her about the missing morphine or that it was sending 11 nurses for drug testing on June 22nd, but that on June 22nd while Ingram was on her morning break, CS had asked to speak to Ingram; that CS said it was not an emergency and CS did not insist on speaking to Ingram before leaving for her drug test. It is undisputed that all nurses who had had access to the drug box on June 22nd were drug tested on June 22, 2006 and that the Charge Nurses who failed to audit the drug box on June 21st were disciplined.

On June 26, 2006, Dr. Rick Goldberg of St. Katherine's called Riedl and told him that the Grievant had tested positive for cocaine, Darvon and Methadone and that all three drugs were found in more than trace amounts in the Grievant's system on June 22nd according to the ten panel urine drug screen performed at St. Katherine's Clinic. Goldberg told Riedl he had talked to the Grievant about the results of her test and she admitted that she had taken cocaine once, but did not say when she took it; that she admitted that her X-husband had given her the Methadone which she took for her restless leg syndrome; and that regarding the Darvon the Grievant said she had had a prescription for Darvon in the past but that she had taken the last pill and no longer had the bottle and that she could not recall who had prescribed her the Darvon or why and she did not know where she had gotten the prescription filled. Dr. Goldberg told Riedl that he then called area pharmacies and found that although the Grievant was listed as a customer at one of the pharmacies, she had no prescription for Darvon on file there.

It is undisputed that the Grievant was the only BCC nurse whose test results were positive for drugs and that Riedl then suspended the Grievant for three days while he investigated the situation. Riedl investigated the Grievant's work record, any past cases, the County's policies and work rules. It is undisputed that the situation described herein had never arisen at BCC before. However, BCC did terminate two other employees in the past – one was found in possession of drugs or alcohol and under the influence thereof on the job, the

other confessed to having stolen a BCC drug box.

The only relevant discipline the Grievant had received during her BCC employment was one verbal warning on September 23, 2005 for medication errors on six occasions in three months and one verbal warning (on August 23, 2005) for injury to a resident due to not following the resident's care plan which required a Hoyer lift to be used to move the resident.

On June 26, 2006, the County issued the following Notice of Pre-Disciplinary Hearing to be held on June 29th:

> You are hereby advised that on Thursday, June 29, 2006 at 9:00 a.m. at the Brookside Care. . . to discuss violations by you of the Kenosha County Uniform Work Rules:
>
> - **Work Habits, #2** Employees must be in a physical and psychological condition satisfactory to perform their assigned work.
>
> - **Deportment, #19** Being under the influence of narcotics or other non-prescription controlled substances during working hours (any traceable measure).
>
> These charges are the result of the following:
>
> - On June 22, 2006, you showed a positive result for Cocaine in a drug screen following reasonable suspicion.
>
> As a result of the above infractions of the rules of the county of Kenosha, the county is considering termination as appropriate discipline.
>
> You are hereby advised that you have the right to a pre-disciplinary meeting upon the charges in this notice. In addition, consistent with the State of Wisconsin open meeting laws [19.85 (b)], you are allowed to demand that this meeting be held in open session.
>
> You may waive your right to the meeting and admit that the charges are true. If you waive your right to the meeting, a penalty of termination may be imposed without further actions.

. . .

The Grievant attended this BCC hearing where she was represented by the Union after which she was terminated. The Grievant then filed the grievance which was denied on July 3, 2006 whereupon the grievance was brought forth for arbitration. The Grievant did not attend the instant hearing and the Union did not request a postponement when she failed to appear.

POSITIONS OF THE PARTIES

County:

The County argued that it had the right to send CS and the other ten nurses who were on duty and who had had access to the drug box on June 22, 2006 for random drug testing, based upon its "reasonable suspicion" created by the missing morphine on June 22nd. The County noted that there had been trouble with missing drugs in the past at BCC and that its managers had not been able to determine who was responsible; that the County's work rules supported this action of drug testing all nurses as those rules require County employees to be entirely drug free at work; that CS had been educated regarding County work rules and she had been trained and counseled on proper drug protocol at BCC.

As CS's ten panel drug screen resulted in her testing positive for having a measurable amount of each of the following drugs, Cocaine, Darvon and Methadone, Dr. Goldberg (who analyzed the test results) was aware that these drugs were in her system. Dr. Goldberg then called CS to inquire whether she had a valid prescription for the Darvon and whether she had taken cocaine and Methadone recently. In response, CS stated that she had tried Cocaine one time, that she had taken the Methadone (which belonged to her X-husband) for her restless leg syndrome and that she thought she had a prescription for the Darvon at some time in the past but could not remember when or why it was prescribed. Dr. Goldberg called local pharmacies and found CS listed at one of them but that there was no current valid prescription for Darvon in CS's name held at that or any other pharmacy in the area.

The County also pointed out that the collective bargaining agreement herein does not address drug testing; that BCC managers relied on County work rules in this situation and they received prior approval from County Personnel for the random drug test conducted on June 22nd, that the test done on June 22nd was done fairly and by an independent professional testing service; the BCC and its nurses are heavily regulated and must be licensed by the State and the State requires the BCC to notify it if a nurse tests positive for illegal drugs or controlled substances; and in the past, the BCC has immediately discharged employees for being "under the influence" of alcohol at work although the issues presented herein have not arisen in any past cases.

The County further noted that CS's work record was not clean – she had been counseled in September, 2005 for making medication errors such as administering patient medications at the wrong time, to the wrong patient, in the wrong dose and there were also occasions when CS missed or omitted ordered doses for patients. The County asserted that medication errors/problems increased when CS worked at BCC and ceased after her discharge.[4] After being found to have had more than trace levels of three drugs in her system on June 22nd, the County put CS on administrative leave for 3 days in (accord with the contract) during which a full and fair investigation was conducted of CS's work record, the

4 The County offered only testimonial evidence on this point; no documentary evidence was proffered.

facts of the case as well as prior cases were considered.

The County decided not to apply progressive discipline given the seriousness of CS's conduct, its affect on the safety and well-being of her patients and her prior work record. The County noted that CS did not appear in person at the instant hearing and no explanation was proffered by the Union for her absence; that the sole witness on behalf of CS herein was Union President Ingram who had no knowledge of the situation on June 22nd and whose testimony essentially consisted of hearsay as Ingram is employed at the BCC as a CNA, not on CS's shift and had no first-hand knowledge of CS's employment or her treatment as an LPN.

The County also noted that CS did not claim that the drug test was unlawful or violated CS's rights and she never disputed the findings or Doctor Goldberg's analysis of the test. As the test showed that CS had a cocktail of three separate drugs in her system in more than trace amounts on June 22nd, for which she had no medical authority, and as CS had made numerous medication errors in the past and drugs had been missing on her shift in the past, the County decided immediate termination was appropriate. The County urged that the fact that CS did not have the missing morphine in her system on June 22nd did not require it to retain CS and apply progressive discipline. In this regard, the County asserted that the missing morphine "supplied the probable cause for the drug test" and the overall record evidence proved that CS should be immediately discharged, which discharge the Arbitrator should sustain.

Union:

The Union pointed out several irregularities in this case which it urged require the Arbitrator to sustain the grievance and reinstate and make CS whole, as follows: 1) the County never advised CS or the other ten nurses it drug tested on June 22nd that any positive test result could result in their discharge or that they could refuse the test or request a split sample; 2) the County never notified the Union of its plan to test all 11 nurses; 3) no evidence was proffered herein to show CS had appeared to be under the influence on June 22nd and the Union noted that the County allowed CS to drive another nurse to the testing site in her vehicle that night; 4) neither CS nor any of the other 10 nurses tested positive for the missing morphine, although CS was found "to have trace amounts of (other) controlled substances in her system." In these circumstances, the Union contended that the County had no probable cause or reasonable suspicion to support the June 22nd drug test and CS was never even shown to have had possession of the drug box key on June 22nd. Thus, the above irregularities showed that the County's treatment of CS failed to meet the "Daugherty Tests" to show it had just cause to immediately discharge CS.

In this regard, the Union also argued that the County's Rule 19 Deportment constitutes an attempt to "legislate off duty conduct," as there was no evidence to show CS was observed to be under the influence of drugs on June 22nd and the County failed to show that Rule 19 was reasonable or reasonably related to the operation of the County's business. The Union also asserted that as CS is the first BCC employee to be discharged without progressive discipline following a random drug test, CS was disparately treated; and that CS had received only two prior verbal warnings for job performance issues during her first year of employment and one written warning for attendance more recently, the County should not have discharged CS

immediately.

Furthermore, the Union asserted that the County failed to prove it had sufficient basis to discharge CS due to her off-duty conduct as CS's behavior neither harmed the County's reputation or product, it did not render CS unable to perform her duties, nor did it lead to a refusal, reluctance or inability of other BCC employees to work with CS, and it did not undermine the County's ability to direct the BCC work force. The Union also noted that despite the County's notification to the State of Wisconsin of CS's positive drug test, as of the date of the instant hearing, the State had not taken any action to affect CS's LPN license. Indeed, Union President Ingram stated that after her County discharge, CS was hired and was working (at the time of this hearing) at another area nursing home. In all the circumstances, the Union urged the Arbitrator to sustain the grievance and to reinstate CS with full backpay and benefits.

DISCUSSION

Both parties in this case have adopted and used Arbitrator Carroll Daugherty's seven tests, articulated in ENTERPRISE WIRE CO., 46 LA 359 (1966), which the parties have applied to determine whether the Arbitrator in this discipline case should substitute her judgment for that of the County. As such, this Arbitrator feels compelled to analyze this case using this agreed-upon structure, as follows:

1. Whether the County forewarned C.S. of the potential disciplinary consequences of testing positive for drugs on June 22nd.

On this point, it is clear that CS was oriented as a new hire (in October, 2004) and in-serviced repeatedly as an LPN at BCC regarding the County's Deportment Rules as well as its Policies and Procedures regarding discipline. Indeed, H.R. Director Riedl stated without contradiction that CS signed a form stating she received a copy of the County's rules which included Rule 19, Deportment. In addition, the language of Rule 19 could not be clearer: no trace of drugs would be acceptable during working hours. Put another way, any employee who is found to have even a trace of narcotics/non-prescribed drugs in their system would be subject to discipline. Beyond this, it is also undisputed that the County's Policies are kept at each nursing station available for all employees to view. Also, the evidence showed that in the past, one employee was discharged for having been under the influence of drugs or alcohol at work and having same in her possession and the other employee was discharged for stealing a BCC drug box.

The Union has argued that the June 22nd drug test was not based on any reasonable suspicion. I disagree. Where, as here, the County has retained the management right to make and implement reasonable work rules (Article III) and there are no contractual provisions detailing how and when drug tests should be given, the employer is free to determine

"reasonable suspicion" so long as the actions taken or decisions made are not arbitrary,

capricious or discriminatory. In this case, it is undisputed that the Union never objected to or grieved the imposition of Rule 19, Deportment. In addition, in this case, BCC management decided to drug test all nurses who had had access to the drug box that was found to have been tampered with and not properly checked/audited. As no other BCC employees had had access to the drug box they were not tested. Thus, on its face the manner/imposition of the drug tests ordered was non-discriminatory.

Furthermore, in my view, this approach was neither arbitrary or capricious. Rather, in the circumstances, it was a reasonable method (it need not be the most reasonable method) of beginning the investigation into the missing morphine and the nurses' failure to audit the drug box across two shifts. This is particularly so where in the recent past, more traditional investigatory methods had not been effective and drugs had continued to disappear despite more stringent rules/policies being put in place to assure that drugs were audited and administered properly.

In this instance, the fact that CS was not found to have any morphine in her system on June 22nd does not make the drug test flawed or unreasonable. The fact that CS asked Iwen before she left for her drug test on June 22nd about whether her use of prescription drugs taken for pain would be a problem, showed that CS knew that the test could result in discipline. CS must have known she had no valid prescription for Darvon, as she later admitted to Dr. Goldberg, that this would affect her employment. It was at this point that CS should have refused to test or asked for a split sample. CS did neither.

In addition, we know that CS sought to speak to Union President Ingram before CS went to St. Katherine's for her drug test on June 22nd but that CS did not insist on seeing and talking to Ingram while Ingram was on her morning break and told Ingram it was not an emergency. CS never sought out Ingram thereafter. In all of the circumstances here, I believe the County satisfied Test 1.

2) Whether the County's Rule 19, Deportment was reasonably related to the operation of the BCC and to the performance the County could properly expect of an LPN.

It is significant that the BCC is not a manufacturing plant nor is it a County office or department (i.e. Highway, Parks and Recreation, etc.). BCC is a nursing home where elderly, frail and infirm County residents must be cared for and a nursing home which must maintain its license with the State of Wisconsin. The Union has argued that the County has attempted to legislate off-duty conduct by its Rule 19 and that it was unreasonable and unfair for the County to thereby limit its nurses' off-duty choices. In the specific circumstances of this case, I disagree. Here, the County must maintain its license with the State of Wisconsin and part of that requirement includes BCC's disclosure to the State of any positive drug test results

regarding its nurses.[5] In addition, as discussed above, the fact that no one reported or observed CS as being "under the influence" on June 22nd, does not make the County's decision to drug test all 11 nurses who had access to the drug box unreasonable, arbitrary or capricious given the BCC's prior experiences with missing drugs and its need to investigate the missing morphine on June 22nd . Finally, the fact that CS was responsible to make nursing decisions which would affect the health and well-being of elderly, and perhaps ill and frail patients requires a conclusion that the County should be able to rely on CS and all other nurses at BCC to be drug free at work. In this Arbitrator's view, it then goes without saying that having drug free nurses working at BCC is reasonably related to the County's operation of its nursing home business. Thus, the record facts show that the County has satisfied Test 2.

3. Whether the County before it administered discipline, made an effort to discover whether CS had violated Rule 19 by her conduct.

4. Whether the County investigation was conducted fairly and objectively.

As the Union agreed that the County satisfied Tests 3 and 4, they need not be discussed herein.[6]

5. Whether, at the investigation stage the County obtained substantial and compelling evidence that CS was guilty as charged.

On this point, the Union argued that the County failed this Test, because no evidence was submitted herein to show that CS was under the influence of drugs on June 22nd (as evidenced by the County's willingness to allow CS to drive a co-worker to St. Katherine's Clinic for the test and because Rule 19 was an unreasonable restriction of CS's off-duty choices). On the latter assertion, I noted above that the Union never grieved nor did it file any objections to Rule 19 when the County implemented it. In this case, reasonable suspicion was based upon the tampered drug box and not on any observations of employee conduct. Therefore, I believe Test 5 has been satisfied herein. Regarding the question whether CS was found to be under the influence of drugs on June 22nd, the ten panel drug screen was clear – that test showed undisputably that CS had more than trace amounts of three drugs in her system on June 22nd for which she had no valid excuse or prescription. Given that Rule 19 prohibits even a trace of drugs, the County had substantial and compelling evidence that CS was "guilty as charged" after Dr. Goldberg explained the results of the test, and detailed his conversation with CS and

5 In my view, it is unremarkable that CS's license as an LPN was still valid as of the date of the instant hearing, given the budget cuts and down-sizing which have been on-going in State government over the past few biennial budgets.

6 In my view, the record herein also fully supports this conclusion on Tests 3 and 4.

his further investigation of her prescription drug history.

6. Whether the County has applied its rules, orders and penalties even-handedly (and without discrimination) to all employees.

The Union asserted on this point that this is the first time the County has imposed a blanket drug test. This is true. However, as discussed above, when the drug tests of the 11 nurses done in this instance are put fully into the context of this case, the County's decision was based upon its reasonable suspicion. Whether or not employees were informed of the possible consequences of a positive drug test, in my view, this record showed that CS was fully educated and in-serviced regarding the County's Rules, Policies and Procedures as well as BCC's expectations regarding nurses' medication responsibilities and that CS was either given copies of or open access to these Rules, Policies and Procedures. In regard to what CS knew about the consequences of her drug test, this was also discussed above. The bottom line here is that the facts showed that CS knew at the very least before her drug test 1) that a positive drug test for a prescription drug for which she had no valid prescription would likely result in her being disciplined (based on her brief conversation with Iwen) and 2) that CS had access to a Union representative before her drug test, that Union President Ingram would have met with CS if she had insisted, but CS did not insist.

Finally, the two prior discharges of other employees for drug/alcohol related problems are not inconsistent with the County's decision to discharge CS. In one of those prior cases one employee was suspected of being under the influence at work and based upon the employee's conduct, the County had substantial and compelling evidence that the employee was "under the influence" at work. In the other case, the employee confessed to having taken a BCC drug box. Here, the County had clear evidence that drugs were missing and it began its investigation with a blanket drug test of all nurses who had had access to the missing drugs. Given the problem BCC had had with missing drugs in the past and its appropriate concerns for the safety and care of its residents, BCC's decision to drug test all eleven nurses was not unreasonable.

7. Whether the degree of discipline meted out here is reasonably related to CS's conduct and her work record.

The County has argued that CS's conduct - - working under the influence of three drugs on June 22nd - - is so serious that she must be discharged for this first offense. I agree. As discussed above, in this case, given the County's Rules and Procedures, and BCC's business and licensing requirements, I do not find CS's past work record particularly relevant. In my view, CS's proven misconduct was serious enough that the County could reasonably decide to discharge her outright. Therefore, I find Test 7 has been satisfied.

The Union has argued that I cannot find the County had just cause to immediately discharge CS for her off-duty conduct unless I also find:

1) that her behavior harmed the BCC's reputation or product;

2) that CS's behavior rendered her unable to perform her BCC duties; and

3) that CS's behavior would lead to a refusal reluctance or inability of other BCC employees to work with CS.

On this point, the Union misses the mark when it fails to acknowledge that CS worked on June 22nd with more than trace levels of three drugs in her systems – this was all on-duty. In addition, I believe it goes without saying that a BCC employee's having tested positive for three drugs if known by the public and/or the State of Wisconsin licensing authorities would certainly harm the BCC's reputation. Furthermore, it is hard to believe that CS having tested positive for three drugs on June 22nd would not render her, at the very least, impaired if not unable to properly care for the elderly and infirm residents at BCC. The fact that the County proffered no evidence on the third point, that other employees would refuse to work with CS, does not require a different conclusion, as I believe the record evidence clearly shows that if the BCC condoned such conduct in other employees it would not be able to effectively direct its workforce, properly care for its BCC residents or remain successful in the nursing home business.

Based upon the above analysis, the record fully supports the County's decision to discharge CS and I therefore issue the following

AWARD

The County had proper cause to discharge the Grievant and the discharge was executed in a fair and impartial manner. The grievance is therefore denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 11th day of May, 2007.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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