BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RACINE COUNTY

and

AFSCME LOCAL 310, AFL-CIO

Case 217
No. 65980
MA-13391

(Medical Leave/Termination Grievance)

Appearances

Thomas Berger, Staff Representative, AFSCME Local 310, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, 53717 and **K.A.**[1] in person, with **Jack Bernfeld,** AFSCME Council 40, on brief, appeared on behalf of AFSCME Local 310 and Katherine Aschauer.

Susan M. Love, Attorney at Law, Davis & Kuelthau, S.C., 111 East Kilburn Avenue, Milwaukee, Wisconsin, 53202, appeared on behalf of Racine County and Ridgewood Care Center.

ARBITRATION AWARD

The County and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the County agreed that the Wisconsin Employment Relations Commission provide a panel from which the parties selected Paul Gordon, Commissioner, to serve as arbitrator to resolve a grievance filed by the Union on behalf of K.A. (K.A. or Grievant, herein). Hearing was held on the matter in Racine, Wisconsin on December 21, 2006. No transcript was prepared. A briefing schedule was set and extended due to a medical condition of one of the advocates. Briefs were filed and the record was closed on June 11, 2007.

ISSUES

The parties did not stipulate to a statement of the issues. The Union states the issues as

> Did Racine County have just cause to terminate K.A.?
>
> If not, what is the appropriate remedy?

[1] Only the initials of Grievant are used herein due to the nature of the medical testimony involved and potential privacy concerns.

The County states the issues as:

> Did the County's refusal to return Ms. A to work due to her medical condition violate the collective bargaining agreement?
>
> If a contract violation is found, what is the appropriate remedy?

The County's statement of the issues is adopted as that which more closely reflects the record. It also encompasses the Union's statement of the issue. A violation of the collective bargaining agreement can include a just cause issue.

RELEVANT CONTRACT PROVISIONS

ARTICLE II
NON-DISCRIMINATION

2.01 Both parties hereto agree that there shall be no discrimination with respect to any employee because of race, creed, color, sex, sexual orientation, national origin, age, or marital status.

ARTICLE III
MANAGEMENT

3.01 Except as otherwise provided for herein, the management of the operations and the direction of the working forces, including the right to hire and the right to suspend, discipline or discharge for cause, and the right to transfer, promote or relieve employees from duty because of lack of work or other legitimate reasons, the right to establish and make effective reasonable rules of conduct, and the assignment of employees to a job is vested in the County, together with all other functions of management, with the understanding that such rights of management will not be used for the purpose of discrimination against any employee.

ARTICLE IV
SENIORITY

4.01 In matters involving increases or decreases of forces and layoffs, seniority shall be given primary consideration.

Skill, ability and efficiency shall be taken into consideration only where they substantially outweigh considerations of seniority or in cases where the employees who otherwise might be retained or promoted because of seniority are unable to do the work required.

4.02 Seniority is the period of uninterrupted employment with Ridgewood Care Center commencing with the latest date of hire into a regular position.

"Uninterrupted employment" shall include:
a) periods of absence with leave
b) periods of absence due to illness or injury
c) periods of absence due to compensable illness or injury
d) periods of lay off due to lack of work not to exceed two (2) years or one (1) year in the case of employees who have less than one (1) year of seniority.

4.03 An employee shall lose his/her seniority:
a) if the employee quits
b) if the employee is discharged for cause
c) if the employee fails upon recall, to report for work within five (5) working days of notice to do so.
d) if the employee fails to report for work following expiration of a leave of absence.
e) if the employee transfers into an on-call position.

4.04 Lay offs shall be primarily by seniority in each department, unless the person with greater seniority is unable to do the work available. However, employees having seniority shall be transferred to other departments where work is available rather than be laid off, providing they are competent to do the work available.

4.05 Upon recall from lay off, the above procedure shall be used in reverse.

4.06 The County shall post and keep up to date a seniority list of all employees, listing name, date of hire, job title, and department. The Union shall be provided the seniority list and any revisions thereto.

4.07 When it becomes necessary to lay off employees in a department, employees with greater seniority within the department may choose to be laid off in place of less senior employees Employees who so choose to be laid off must then remain on lay off up until such time as it is necessary to recall employees from lay off. An employee who is recalled from lay off to a similar position within 90 days of the date of lay off will be recalled at the same salary rate as he/she was receiving at the time of the lay off.

4.08 Work relief or General Assistance workers will not be assigned to duties where a regular employee is on lay off from those duties nor to duties that would cause a regular employee to either be laid off or have a reduction in work hours as a result of such assignment.

4.09 The County shall make every effort to effect staff reductions through attrition. If lay off becomes necessary, the County agrees to meet with the Union in advance to discuss any alternatives to lay off.

ARTICLE VII
GRIEVANCE PROCEDURE

7.01 A grievance is a difference of opinion between an employee or employees and the Management, or between the Union and the Management, concerning the meaning and application of the terms of this Agreement. It is agreed that grievances should be filed promptly and therefore any grievance must be presented within twenty-one (21) days after the occurrence of the event giving rise to the grievance.

7.02 The following procedure shall be used for the adjustment of grievances:

Step 1 Any grievance arising in the bargaining unit shall first be brought to the attention of the Department Supervisor, either by an employee affected and/or his/her Department Steward. The President of the Union, or his/her designated representative, may consult with the Steward and/or Department Supervisor regarding the grievance. Any such grievance consultations should be held at a reasonably scheduled time taking into consideration the immediate duties being performed by the involved parties.

Step 2 If the grievance is not satisfactorily resolved within three (3) working days in Step 1 above and the Union wishes to appeal the grievance further, the grievance shall be reduced to writing and presented to the Administrator, or his/her designee within three (3) working days of a receipt of an unsatisfactory answer in Step 1 above.

A meeting will then be scheduled between the Administrator, or his/her designee, and no more than three (3) representatives of the Union in an attempt to resolve the grievance. The aggrieved employee may be present as well as such persons as the Administrator, or his/her designee, may deem necessary to obtain all of the facts concerning the grievance. Such a meeting will be held within five (5) working days from the date of the presentation of the written grievance. The Administrator, or his/her designee, shall give a written answer to the grievance within five (5) working days from the date of the meeting.

Step 3 If the grievance is not satisfactorily resolved in Step 2 above, the Union may appeal the grievance further to the Labor Relations Director. Such an appeal must be made within three (3) working days of the date of receipt of the written answer in Step 2 above. A meeting will then be held between the parties in an attempt to resolve the grievance. Such a meeting will be held within five

(5) working days of the date of appeal of the grievance. The Labor Negotiator shall give a written answer to the grievance within five (5) working days from the date of the meeting.

Step 4 If the grievance is not satisfactorily resolved in Step 3 above, the Union may appeal the grievance further to the Personnel & Community Services Committee. Such an appeal must be made within seven (7) working days of the date of receipt of the written answer in Step 3 above. A meeting will then be held between the parties in an attempt to resolve the grievance. Such a meeting will be held within fifteen (15) working days of the date of appeal of the Grievance.
The Personnel & Community Services shall give a written answer to the grievance within fifteen (15) working days from the date of the meeting.

Step 5 If the answer of the Personnel & Community Services Committee still does not satisfactorily resolve the grievance, the Union may appeal the grievance further to arbitration. Such intent by the Union to arbitrate the grievance must be filed with the Labor Negotiator no later then twenty (20) days following the receipt of the answer from the Personnel and Community Services Committee.

7.03 If a grievance is not answered within the time limits specified at any step of the procedure, the grievance will be automatically advanced to the next step. However, the parties may extend the time limits contained in this procedure by mutual agreement.

7.04 The arbitrator shall be selected from a list of five (5) names obtained from the Wisconsin Employment Relations Commission, each party alternately striking names until there is but one left, that person shall be the arbitrator.

7.05 The decision of the arbitrator shall be binding upon the parties. The costs of the arbitrator shall be shared equally by the parties.

7.06 Any employee attending a grievance meeting, but excluding arbitration proceedings, shall not suffer any loss of pay as a result thereof.

7.07 When the President of the Union, other Union representatives, or Stewards are involved in the processing or investigation of a grievance, he/she must notify his/her immediate supervisor, or the supervisor's designee. The supervisor should be informed as to where the representative is going and the approximate length of time he/she will be away. It is expected that an employee so leaving his/her area of work assignment in the processing or investigation of a grievance will return to duty as soon as possible.

7.08 The Union will furnish the Administrator with an up-to-date list of Union Officers and Department Stewards.

ARTICLE XIV
LEAVE OF ABSENCE

14.01 Application for leave of absence for personal reasons and request for renewals thereof, shall be in writing and submitted at least ten (10) days prior to the date the leave or the renewal is to commence, except that the ten (10) days notice may be waived in case of emergency.

14.02 The granting of such leave and the length of such leave shall be contingent upon the reason therefore.

No leave of absence will be granted for seeking or taking other employment, except that an employee seeking election to a public office may be granted a leave for such purpose.

14.03 A leave of not more than three (3) months will be granted for necessary absences due to personal illness or for disability due to accident. Extension of such a leave may be granted, provided that a physician's certificate is furnished as requested from time to time to substantiate the need for continuing the leave.

14.04 Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions.

14.05 Applications for leaves shall be made to the head of the Department. If the head of the Department approves such application, it shall be referred to the County Personnel Director for approval or disapproval.

14.06 The Personnel Director shall file his/her approval or disapproval with the County Clerk. A copy of such determination shall be sent to the head of the Department who shall notify the employee of the determination made.

14.07 The results of any action taken on a request for a leave of absence shall be sent to the applicant within three (3) working days of the determination.

14.08 All leaves of absence granted shall be without pay.

14.09 All employees returning from leave of absence granted for personal illness or accident shall present a doctor's release prior to commencement of work by such employee. At its option the County may require any employee returning from a leave of absence due to personal illness or accident to be examined by a physician designated by the County, at its expense, without loss of pay to the employee. Any adverse action taken by the Human Resources Director hereunder shall be subject to the grievance procedure.

ARTICLE XV
SICK LEAVE BENEFITS

15.01 Sick leave is a benefit granted to an employee on account of personal sickness or accident disability.

15.02
Eligibility – after 6 months of employment.

Accident – first day coverage at full salary for 26 weeks.

Sickness – coverage after 3 working days at ¾ of salary until the start of long term disability coverage.

Long Term Disability – coverage after 26 weeks at 2/3 of salary to age 65 with offsets for Social Security Disability benefits, Wisconsin Retirement Fund Disability benefits and Worker's Compensation benefits. Maximum benefit of $3,000 per month. (Part time employees' sick leave benefits shall be prorated pursuant to Article XIX.)

To provide coverage for the first three (3) days of the sickness each employee will accrue five (5) casual days. There will be no carryover of these days from year to year. At the end of the calendar year, an employee shall be paid at his/her existing rate of pay for any of the five (5) days not used during that year. Payment shall be made prior to January 31st. Employees may use their existing banked sick days to supplement the above coverage. The employees must use the five (5) casual days they are given each year before drawing on banked sick leave. Newly hired personnel will receive prorated casual days based upon the number of months remaining in the calendar year of hire. Pro-ration shall be one-half (1/2) day for each full month to a maximum of five (5) days. Casual days may be used for sick days or for other purposes with prior authorization. An employee who terminates employment prior to June 30 of any calendar year, shall be reimbursed for ½ of any unused casual days. An employee who terminates his/her employment after July 1st of any calendar year, shall be reimbursed for any of his/her unused casual days.

15.03 Sick leave benefits shall be at a rate equivalent to that payable if the employee were present at work.

15.04 In order to qualify for sick leave benefits, an employee must report to his/her department that he/she is sick one (1) hour before the earliest time for which the employee is scheduled to report for work Each employee receiving sick leave benefits is subject to check to verify the alleged illness by a County representative. Any claim for sick leave benefits of five (5) days or more must be accompanied by a doctor's certificate.

15.05 Sick leave benefits may be used by an employee who is injured on the job to supplement the difference between his/her worker's compensation benefits and a regular sick leave benefit.

15.06 Accrued, unused sick leave benefits shall be paid at the rate of ten dollars ($10.00) per day upon death or retirement of the employee, or for those employees with one (1) year of more seniority, upon their termination of employment. Effective January 1, 1981, any sick leave benefits earned and accrued after that date will be paid at the rate of fifteen dollars ($15.00) per day upon the death or retirement of an employee. Any usage of sick leave benefits shall first be deducted from an employee's accrued benefits earned prior to the January 1, 1981 date. (Employees who terminate their employment would continue to receive the ten dollars ($10.00) per day payment for all accrued, unused sick leave benefits). Such payments shall be deemed not to be on account of personal sickness or accident disability for the purpose of the Social Security Act.

ARTICLE XVII
DISCIPLINE & DISCHARGE

17.01 No employee who has completed his/her probationary period may be disciplined, suspended, or discharged except for just cause. If the employee believes that he/she was disciplined, suspended or discharged without just cause therefore, the case shall be treated as a grievance subject to the grievance and arbitration provisions of the Agreement. In any such case if the arbitrator finds that the disciplinary action was not for just cause, he/she may revoke or modify the discipline or may reinstate the employee with or without back pay and seniority benefits in his/her discretion.

A Union representative shall be present at the time any employee is given notice of discipline or dismissal.

17.02 All warnings, including verbal warnings, shall be reduced to writing and a copy will be given to the employee and the Union representative.

The County will furnish the Union with written notification of all suspensions which will include the reason for the suspension. Written and verbal warnings, with the exception of those cases involving patient abuse, will be removed from an employee's records after two (2) years. The County recognizes the concept of progressive discipline. Any discharge or disciplinary action may be reviewed by use of the grievance procedure. Suspensions with the exception of those cases involving patient abuse, will be removed form an employee's personnel record after two (2) years if no further discipline (either formal or informal) were given to the employee for any related or non-related incidents.

BACKGROUND AND FACTS

Racine County operates a long term care facility known as Ridgewood Care Center, herein Ridgewood, serving people who are frail, elderly, in need of rehabilitation, have behavior challenges or who need services due to physical, emotional or developmental disabilities. Grievant has been employed by the County since 1977 as a Certified Nursing Assistant (CNA) and was working at Ridgewood until her employment was terminated by the County effective October 23, 2006. At the time of her termination she had pending the instant grievance which concerns her employment status and that had alleged she was being discriminated against by the County for not allowing her to return to work (from a medical leave of absence) after obtaining a proper medical authorization. The case primarily involves her physical ability to do the work of a CNA and her eventual termination from employment.

As a CNA Grievant had performed the full range of duties required of a CNA at Ridgewood, yet had a number of medical leaves of absence, including at least six since in 2004 due to a chronic foot condition diagnosed by her physicians as Charcot-Marie-Tooth Disease. She has had her right foot operated on for her condition and has also been fitted with a foot/ankle brace. The position description for her position includes, among other things, a statement of essential duties, physical requirements and working conditions. The essential duties, which she performs as a CNA, are, in part:

1. Assisting with lifting, turning, moving, positioning, and transporting residents into and out of beds, chairs, bathtubs, wheelchairs, lifts, etc.
2. Assist residents with dressing and ensure that dependent residents are dressed in clean clothing appropriate for season and in good repair.
3. Give or assist resident with bathing.
4. Assist residents with daily dental and mouth care.
5. Keep incontinent residents clean, dry and odor free; check every two hours to maintain.
6. Assist residents with bowel and bladder functions.
7. Position residents maintaining good body alignment.
8. Keep residents dry, changing clothes and gowns when wet or soiled.
9. Make beds and change bed linens when soiled.

. . .

12. Perform restorative and rehabilitative procedures as instructed.
13. Assist residents with hair combing and brushing, shampooing and styling.
14. Assist residents in preparing for activity and social programs and transport, accompany and participate when assigned.

. . .

19. Prepare residents for meals, assist serving food trays or feed as necessary and record/or report residents intake or acceptance of food.

. . .

22. Restrain resident in bed or chair as instructed with correct restraint as ordered by a physician.
24. Release restraint every 2 hours and provide for 10 minutes exercise, hygiene and bathroom needs.

. . .

27. Follow established safety precautions in performance of all duties.

The knowledge, skills, and abilities include, among other things:

- Ability to related to and work with the ill, disabled, elderly, mentally ill, emotionally upset and at times hostile and violent residents within the facility.

The physical requirements are:

- Frequent (34-66% of workday) exerting up to 50 pounds of force.
- Frequent (34-66% of workday) bending.
- Constant (67-100% of workday) using bilateral upper extremities.
- Ability to exert up to 40 lbs. of force in overhead lifting.
- Constant (67-100% of workday) walking and /or standing.

The working conditions include, among other things:

- Subject to hostile, emotionally upset residents as well as verbally and physically abusive residents on an occasional basis.

As a CNA, Grievant is expected to be able to meet all of the above criteria. Additionally, CNAs are expected to be able to bear the weight of a resident for resident safety when walking the resident, and be able to catch a resident in the event of slips or falls. Ridgewood has a "no manual lifting" policy and two people are always supposed to do the work of lifting patients, even when lifting equipment is used. This policy is not always strictly followed as practical matter. CNAs are also trained to ease a resident to the floor if a patient is suddenly unable to stand.

Grievant is a good employee who wants to work at Ridgewood as a CNA. She has received excellent marks in her performance review. She has not been disciplined for excessive absenteeism, although she has had numerous approved medical leaves and short term disability leaves. Relative to the six more recent leaves due to her chronic foot condition, several of the return to work releases signed by her Doctors have put or requested limitations on her work such as sedentary, light duty, sit down work only, sitting job only, permanent light duty restrictions, regular duty for ½ days for periods of time. Many of these restrictions had limited time periods associated with them. In the Fall of 2005 she was prescribed and used a type of support/brace for her right foot/ankle to provide a steady gait and stabilize her foot and ankle. Due to an unavailability of sedentary or light duty work at Ridgewood, Grievant was approved, effective October 24, 2005, for short term disability benefits pursuant to the provisions of the collective bargaining agreement. Prior to that she did have a very short period of light duty work that has been temporarily available to her.

Grievant had seen her Doctor, Dr. John Trotter, in December, 2005, who at that time found she had a permanent, chronic condition which required permanent light duty restrictions that does not require excessive walking or standing, particularly for prolonged periods of time. In January, 2006, Grievant had contacted Dr. Dana Trotter, who allowed her to return to regular duty for half days from January 30th, and full duty on February 4, 2006. Ridgewood noted an apparent contradiction between the two limitations from the two doctors. Dr. Dana Trotter referred an inquiry about this by Ridgewood to Dr. John Trotter. By letter of January 7, 2006, the County notified Grievant of the different limitations placed by the two Doctors, and informed her that Ridgewood, being unable to accommodate a permanent light duty restriction, was unable to accept Dr. Dana Trotter's release. Grievant's short term disability status was continued.

On February 2, 2006, Dr. John Trotter released Grievant to work with restrictions of four hours regular duty and four hours light duty (sit down work only) per day for two weeks. The limitations were in effect until February 18, 2006. An associated medical report indicated that the return to work was per patient request. Ridgewood noted this as an apparent contradiction from his earlier limitations. Ridgewood then scheduled an independent medical examination of Grievant by a Doctor of Ridgewood's choice, Dr. Marc Novum.

During this same period of time Grievant filed the instant grievance on February 6, 2006. The statement of grievance listed the applicable violation as:

> Article II – Discriminatory Practices. Employee not allowed to return to work after obtaining proper medical authorization.

The grievance form did not refer to any particular medial authorization or authorizations.

Grievant attended the Novum examination, which was a fitness for duty examination to see if she was capable of performing her job in entirety on a permanent basis. Grievant remained on short term disability during this time.

On March 28, 2006, Dr. Novum issued a report of the examination which included, among other things, a brief history, a review of Grievant's position description at Ridgewood, a medical records review, findings on examination, clinical impressions, response to eight questions posed by Ridgewood, and additional remarks. Among the answers to the questions in the report are the following:

> It is likely Ms. [K.A.] will require ongoing treatment for chronic pain involving right foot/ankle principally in the form of pain relieving medications. I am doubtful further operation would prove of substantive or durable benefit to this woman. It is asked if Ms. [K.A.] does not opt for surgical intervention is she at end of healing. Let me submit Ms. [K.A.] does not suffer from a work related health condition. Thereby the concept of healing plateau/end of healing is not germane to this clinical matter. For the present, Ms. [K.A.] maintains she is pain free and able to effectively resume all conventional work duties and consequently requires no further restorative or curative therapies.
>
> . . .

Ms. [K.A.] is capable of performing full-unrestricted work duties as a certified nursing assistant for a full eight-hour workday. However, I remain entirely dubious she will be able to maintain such work habit beyond a period of a few months where after she will undoubtedly meet with recrudescent right ankle/foot pain given the extent of anatomic deformity and joint/tendon disease recognized on past MR imaging studies. In effect, Ms [K.A.] is entirely naïve expecting to resume full-unrestricted work duty as a certified nursing assistant over a duration of time. Reasonable permanent restrictions would consist of avoiding lengthy standing or walking allowing for greater sedentary routine given the nature of her chronic pain state made worse with weight bearing. Such advised permanent restrictions essentially preclude her from maintaining long-term gainful employ as a certified nursing assistant for Racine County.

. . .

. . . It is my opinion Ms. [K.A.] will continue to complain periodically if not chronically over right foot/ankle pain depending on length of time with walking and standing activities at work. She will require considerable periods of time confined to sedentary position.

. . .

Ms. [K.A.] expresses interest returning to full-unrestricted work duty claiming she is pain free. I hold such assertion by Ms. [K.A.] is subject to great challenge. I remain entirely skeptical she will be able to resume full-unrestricted work duties for very long before she meets with reactivation of right foot/ankle pain seeking short-term disability and leave from work. It is my opinion Ms. [K.A.] is not a suitable candidate to return to employ as a certified nursing assistant given the chronic nature of her painful condition.

The report concluded with the Doctor's additional remarks:

Even if Ms. [K.A.] insists upon returning to full-unrestricted work duties as mentioned by her at today's examination there is little doubt in my mind she will meet with recrudescent pain in not too distant future seeking short-term disability leave from work. It is my firm medical opinion there exists no foundation or indication for short-term disability leave regardless of painful complaint as there exist no ready therapeutic intervention apart from protracted rest and avoidance of weight bearing which effectively precludes steady gainful employ. It then is my medical opinion Ms. [K.A.] will <u>not</u> be able to perform her job in entirety on a permanent basis. Even if she abides by restrictions as herewith outlined I am skeptical Ms. [K.A.] will be able to remain at work given the nature of her pain state and past work attendance record. She will never be able to meet the physical requirement of constant (67-100% of

> workday) walking and/or standing without incurring significant periods of work absenteeism. Ms. [K.A.] is best suited to alternative employ principally consisting of sedentary character with minimal requirements of standing/walking.
>
> (emphasis supplied)

Upon receipt of the above report the County wrote to Grievant on April 6, 2006, referencing some of the conclusions stated by Novum in his report (and provided her with a copy of the report).[2] Based upon that the County continued Grievant's short term disability status, reminding her the last day of that coverage would be April 26, 2006. The County also referenced the status of Grievant's application for long term disability and other disability benefits programs. The letter stated in part

> . . .You have been given the applications for Long Term disability, Wisconsin retirement disability and a Life Insurance Waiver of Premium.
> All forms have been returned with the exception of the Physicians Statement for Long Term disability. This must be completed and forwarded to National Insurance as soon as possible. If approved for Long Term disability, your status will remain active until the expiration of 6 months or your approval for a Wisconsin retirement Disability, whichever occurs first. At this time, your employment with Racine County would be terminated.

Sometime on or about March 28, 2006,[3] Grievant had applied for long term disability benefits under the collective bargaining agreement which were eventually approved on May 25, 2006.

The grievance filed in February was denied by the County and the grievance process continued until the request for arbitration was filed on June 14, 2006. Grievant has not applied for other positions with the County or attempted to post for other positions with the County.

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[2] The Doctor also testified at the hearing to the effect that Grievant: has a damaged foot and ankle and cannot make quick, suitable or abrupt, secure pivoting with that; she cannot turn the foot outward which can be unstable and can topple over onto the right side; she is prone to scuffing her foot while walking making her prone to trip forward; the nervous system is damaged and unable to relay information on changes in position of the foot; she lacks security in her station and gait even with a brace; that she would be unable to perform her job; that the residents in her care are at risk for catastrophic injury if Grievant were to loose balance or were unable to pivot on her foot sufficiently; that she would present a high risk of injury to herself and to those dependent on her; that 67 to 100% of her job duties from her job description involves standing or walking which is weight bearing leading to aggravation of her foot/ankle pain; her condition is permanent; it seemed entirely unsuitable for her to continue as a CNA..

[3] She signed an authorization on March 15, 2006 as part of her statement of claim for long-term disability benefits.

By letter of October 23, 2006 the County notified Grievant of what it referenced "Disability Termination". The letter stated in pertinent part:

> Your disability has been in effect since **October 24, 2005.** It is the County's policy that when an employee is approved for Long Term Disability benefits, his/her position will not be filled until the earlier of 6 months (26 weeks) from the start of Long Term Disability benefits or one year from the first day of Short Term Disability at which time employment will be terminated. Therefore, your termination date will be **October 23, 2006.**
> (emphasis supplied)

Apart from the collective bargaining agreement, the County has issued an EEO/ AFFIRMATIVE ACTION POLICY STATEMENT, which reads in pertinent part:

> Racine County is committed to equal employment opportunity for all employees. It is Racine County's policy to seek and employ the best qualified individuals without regard to race, creed, color, religion, sex, age national origin, disability, special disabled veteran, Vietnam era, other covered veteran status or other protected status. To this end, we support and will cooperate fully with all applicable laws, regulations and executive orders in all of our employment policies, practices and decisions. We will take affirmative action to assure that equal opportunity for employment is provided with regard to all personnel actions, including but not limited to:
>
> All recruiting, hiring and promotion programs in all job categories;
>
> Decisions regarding employment; and
>
> All personnel actions such as compensation, benefits, transfers, training, social and recreational programs, job opportunities, layoffs, recall, education and other terms and conditions of employment.
>
> We firmly believe that equal employment opportunity can only be achieved through demonstrated leadership and implementation of a viable affirmative action plan. Our Plan sets forth specific affirmative action and equal opportunity responsibilities for managers, supervisors and all our employees. All employees are expected to comply with this policy and our Affirmative Action Plan. We expect all employees to demonstrate respect for all other employees. It is imperative that all employees make personnel and employment decisions in accordance with the County's policies, practices and procedures.
>
> . . .
>
> Additional facts appear as set out in the discussion.

POSITIONS OF THE PARTIES

Union

In summary, the Union argues that Grievant's employment was terminated by the County unfairly and without just cause in violation of the collective bargaining agreement. Her own doctors have released her to return to work. The County's independent medical examiner said that she could return to work without restriction. She wants to work.

The Union argues that the problem is that the County made it's determination to terminate Grievant in January 2006 when it reposted the position, then took months to finally inform her she was terminated. The County made no attempt to accommodate her desire to return. She had nearly enough years of service to retire, but nowhere near the age, and could not qualify under any reasonable person's definition of disability. She was trying to work and to protect benefits that she had earned over nearly 30 years of dedicated service.

The Union argues that after being told she was fired, Grievant filed for long term disability under the County plan, citing the reasons the County gave her for refusing to allow her to come back to work. The County then, at hearing, tried to make that seem wrong. Short term disability pay was ¾ pay and now long term disability provides $^{2}/_{3}$ pay. The Union asks what is a person with bills to pay and no plan to retire soon supposed to do.

The Union challenges the County's position that a CNA who could not stand might place a patient in jeopardy. An LPN contradicts that, and stated that Ridgewood has a no manual lifting policy and that two people are always supposed to do the work of lifting patients, even when lifting equipment is used. Caregivers are trained to ease residents to the floor if suddenly unable to stand. The County's argument over safety to the residents is an empty one. Other caregivers have been on light duty and not told they are unsafe to work with patients. The Union further argues that Grievant does not have a disability award from Social Security or the Wisconsin Retirement System and does not qualify for Medicaid. Under those definitions she is not disabled. She is capable of working if only she were put back to work.

The Union also argues that the Language in Article 17 is clear and states that an employee may not be discharged except for just cause. These circumstances fail every test in the Daugherty Rules of Just Cause. The contract language cannot be ignored because the County attempted to argue Grievant is physically unable to work. That argument has been rendered moot by the County's own independent medical examiner and by Grievant's two medical releases. Citing arbitral authority, the Union argues an employer exercising its authority to disqualify an employee in an arbitrary manner constitutes a violation of the labor agreement where there could have been a reasonable accommodation. Here, in view of the work requirements at Ridgewood there could have been an accommodation offered. Grievant is an employee with nearly 30 years of service and an excellent work record, and was terminated without just cause. The County should not be allowed to give greater priority to its concerns about possible re-injury to the Grievant over the medical release from three different physicians.

County

In summary, the County argues that its refusal to return Grievant to work because of her medical condition did not violate the collective bargaining agreement. She was unable to safely perform her duties as a CNA. Citing arbitral authority, the County had the right to disqualify grievant from her position based on her inability to meet the physical requirements for the job. Based on her physician's permanent restrictions the County was justified in removing her from her duties. Further, on her disability application she admitted she was unable to perform her job. And the County's physician determined that her degenerative foot condition rendered her unable to meet the physical requirements for the positions. The County retains the exclusive right to manage and direct the work force and to relieve employees from duties for legitimate reasons. The decision of the County was fair and reasonable in light of the facts, and did not violate the contract.

The county argues it was justified in removing Grievant based on safety concerns. A CNA is directly responsible for the safety of the residents. The collective bargaining agreement does not restrict the County's right to evaluate an employee's ability to safely perform the job to avoid the real risk of serious injury to residents as well as the Grievant. The requirement that an aide be able to walk, stand with and bear the weight of residents is reasonable when considered in the light of the standard of care necessary and due to the residents of the Ridgewood Care facility. There can be no dispute over the appropriateness of the decision to continue Grievant on a medical leave. According to the County's doctor, the job duties would exacerbate her condition and definitely place the residents at risk. Arbitral authority agrees upon the principle that an employer is justified in relying upon his own medical advisors when opinion is in conflict. Where there is conflict in the views of qualified physicians the County is entitle to rely on the views of its own medical advisors. Reliance on Dr. Novum's opinion was reasonable.

The County also argues that there is no contractual right to permanent light duty. Grievant must be able to perform the duties of her job. She is not. She was granted all the benefits that she was entitled to under the contract. She said she could only perform work which she could do sitting. There is no such CNA position. The labor agreement neither expressly nor impliedly requires a permanent light duty position.

The County further argues that the termination issue is not before the arbitrator and is untimely. The collective bargaining agreement establishes a grievance procedure that requires grievances to be presented within 21 days after the event giving rise to the grievance. Here the grievance was filed before the termination and raised an issue of continuing Grievant on a medical leave, while no grievance was filed after the termination of Grievant's employment. The County argues that, therefore, the issue of termination is not before this arbitration and is not subject to the grievance process.

The County also argues that the Union did not allege in the grievance it filed that Grievant was terminated or that the County had violated Article XVII as it now alleges. The County argues this arbitration does not have jurisdiction to rule on the termination. The

grievance alleged a violation of Article II, but it argues here a violation of Article XVII. Grievant was terminated on October 23, 2006, and until then was an employee who received County benefits. Grievant chose not to post for or apply for positions while an employee that she could have performed. When the County posted a job opening in January 2006 the Union did not file a grievance within the 21 day time limit if they believed Grievant was terminated at that time. If the posting constituted a termination the grievance filed on April 17, 2006 was untimely. The Union also did not file a grievance after the County's decision to continue the medical leave after the March 28th report. The reason the Union didn't file a grievance is because it and Grievant knew she was not terminated in January, March or April. Grievant was not terminated until months after the request for arbitration. County policy provides that after an employee has been on disability leave for one year their employment will be terminated, and the Union did not grieve that. Therefore, termination is not subject to the grievance process.

DISCUSSION

The case involves a threshold issue of the nature of Grievant's termination from employment. The nature of that termination affects what provisions in the collective bargaining agreement control. The underlying facts concern Grievant's physical ability to perform her duties as a CNA. One of the arguments raised by the Union is that there was no just cause for the termination. If the termination requires just cause as contended by the Union then the just cause provisions in the agreement apply. If this is not a just cause termination but, rather an exercise of management's right to relieve employees from duties for legitimate reasons and to evaluate employees for their ability to perform the job, as the County contends, then those agreement provisions and analysis apply.

A just cause requirement for termination is often, but not universally, a matter which involves discipline situations. For example, there may be production standards which an employee is simply unable to make and which might serve, depending on contract language, as a cause or just cause for discharge. Here, the management rights clause in Article III of the agreement between the parties conditions suspension, discipline and discharge on, or for, cause. Cause does not modify or condition management's rights in Article III to relieve employees of duties for other legitimate reasons. But reading these parts of the same sentence in the Article together, there would need to be a legitimate reason relied on by the County as a cause for a discharge. Also, Article XVII DISCIPLINE & DISCHARGE, provides that no employees who has completed their probationary period may be disciplined, suspended or discharged except for just cause. The reasonable conclusion to draw from this is that the parties contemplated in their agreement that cause or just cause would apply to disciplinary situations, but also that other legitimate reasons besides discipline must be based on cause or just cause as well.

Grievant's case is not a disciplinary situation. She was not charged with or alleged to have committed any rule or policy violation or have engaged in any conduct which the County

would have a disciplinary interest in. By all accounts she was at all times a good employee

with good work reviews. There is no credible hint of any fault on her part for anything in this case. If this were a discipline situation requiring the County to bear the burden of just cause then the Union would be correct in that there is no just cause for a disciplinary termination, or discharge, of Grievant. This would be so under the Daugherty Rules of Just Cause or any other just cause standard. But just cause in a disciplinary sense is not the standard or contractual provision that applies because this is not a disciplinary situation. Similarly, this is not a layoff situation where the workforce is being downsized or positions eliminated so as to involve the specific provisions of the Article IV Seniority provisions. Rather, the contract requires the County to establish a legitimate reason which is just cause for the termination.

There is also the matter, as the County points out, that the termination actually occurred several months after the grievance concerning return to work and the request for arbitration was filed in February 2006 with there being no grievance filed after the actual termination in October, 2006. While the termination certainly became a ramification of Grievant not being allowed to return to work (and presumably would be part of a remedy), the grievance itself as it went through the grievance process was confined to the issue and allegation of Grievant not being allowed to return to work after obtaining proper medical authorization. Grievant continued to be an employee then on medical leave status. Her employment was not terminated through the posting of a position in January, as the Union has argued, with the County not notifying her of her termination until October. The County's letter refusing to accept Dr. Dana Trotter's release noted Grievant was on short term disability status. The County letter to her of April 6, 2006 with Novum's report informed her that her status will remain active until the expiration of 6 months or her approval for Wisconsin Retirement disability, whichever occurs first. The letter also informed her that at this time (expiration of 6 months or WRS disability approval), her employment with the County would be terminated. Grievant remained an employee in medical leave status until her employment was actually terminated in October, 2006. The Union has not challenged or argued the application of the County policy which provides for such termination. Accordingly, the merits of this case is not about Grievant's termination itself and it is not about her having been disciplined without just cause. Rather, the merits of the issue is whether there is just cause for refusing to allow Grievant to return to work because of a legitimate reason.

The Grievant does challenge the County's denial of her request to return to work in January, 2006. If Grievant were to prevail on that issue it would in effect also include the triggering of the policy which ultimately resulted in her termination and potentially set up a remedy including reinstatement.

Article XIV of the collective bargaining agreement gives the County the right to have a physical examination before returning to work from a leave of absence for personal illness. The Article provides in pertinent part:

> 14.09 All employees returning from leave of absence granted for personal illness or accident shall present a doctor's release prior to commencement of

work by such employee. At its option the County may require any employee

> returning from a leave of absence due to personal illness or accident to be examined by a physician designated by the County, at its expense, without loss of pay to the employee. Any adverse action taken by the Human Resources Director hereunder shall be subject to the grievance procedure.

This was the type of examination that the County required Grievant to take after it received what the County perceived to be conflicting releases from Dr. John Trotter and from Dr. Dana Trotter. Grievant had been on a leave of absence before submitting the various Trotter releases. The two John Trotter releases are different. The December 3, 2005 release places permanent light duty restrictions on Grievant's work activities, while the latter limits those restrictions to about two weeks and the medical record contains a reference to this being at Grievant's request. The Dana Trotter release allowed a return to full duty after a short period of time, which is in conflict with John Trotter's earlier permanent restrictions. Whether or not these releases were conflicting or raised questions about Grievant's ability to return to work, the County has the contractual right to require the Novum examination. Section 14.09 anticipates that the County might deny a release back to work either before or after a County requested examination because it gives the employee the right to use the grievance procedure for "[a]ny adverse action". Denial of return to work can reasonably be seen to be an adverse action. One returning from leave would normally expect to resume full pay from the ¾ pay of the short term disability benefit available under the agreement and remaining on a medical leave keeps open the possibility of termination of employment pursuant to the other County policies. Section 14.09 provides access to the grievance procedure for such actions and that is what the Grievant did in February, 2006.

The grievance had already been filed by the time of the Novum report and the County's April 6, 2006 letter. That letter continued the short term disability and explained how, when combined with the long term disability or other disability provisions, would eventually result in the termination. The letter referenced parts of the Novum report:

> Dr. Novum has determined that you are not able to return to work as a Nurse Aide without further restrictions on a permanent basis. He has indicated that "reasonable permanent restrictions would consist of avoiding lengthy standing or walking allowing for greater sedentary routine given the nature of her chronic pain state made worse with weight bearing. Such advised permanent restrictions essentially preclude her from maintain long-term gainful employ as a certified nursing assistant for Racine County." He further state that you "will never be able to meet the physical requirement of constant (67 – 100% of workday) walking and/or standing without incurring significant periods of work absenteeism." Therefore, you will be allowed to continue your 26 week period of Short Term Disability as allowed by your contract. Your last day of Short Term Disability coverage will be April 21, 2006.

It was at this juncture that the County's earlier decision denying the Trotter releases and continuing short term disability became a decision, based at least in part if not entirely on Novum's report, that Grievant would not be allowed to return to work at all and in fact would be terminated after the time periods called for in the policies. The County would not have been in a position to make this decision if it had not first questioned the Trotter releases. Thus, the grievance filed as a result of denying the Trotter releases applies to and directly bears upon the County decision based on the Novum report.

The issue then becomes whether there was a contract violation in denying Grievant's release and return to work in January, 2006 which then became an eventual termination. The County relied upon the Novum report to make the initial denial permanent. It had a contract right to seek its own medical examination of Grievant. The medical evidence reviewed by the County as of April 6, 2006 supports the conclusion that Grievant has a permanent medical condition which prevents her from performing the job of a CNA without restrictions on a permanent basis. It also supports a conclusion that her disability would endanger not only herself, but those in her care. Many Ridgewood residents are frail elderly and some have their own disabilities. The job duties of a CNA require many instances where stability and quick movement is needed. And the working conditions include situations where there are hostile, emotionally upset or physically abusive residents. Most of the work (67 – 100% of workday) involves walking and/or standing, a condition which becomes problematic for Grievant. The no manual lifting policy is not strictly enforced. And it would seem reasonable that a CNA must still be able to ease to the floor a frail or disabled resident in a manner which maintains stability. The Trotter reports are internally conflicting. There is no CNA work available at Ridgewood on a permanent basis that can accommodate Grievant's condition. These are legitimate reasons for not allowing Grievant to return to work. The record does contain some anecdotal evidence of another employee being able to perform similar work with some limitations, but nothing in the record shows that those matters were or are permanent or were shown to endanger anyone.

The Union argues that both Trotters released her to go to work and Novum felt she is capable of performing full-unrestricted work duties as a certified nursing assistant for a full eight-hour workday. However, as noted, the Trotter releases are conflicting. They do raise legitimate questions. Novum's statement must be read in its entirety. It is followed by a lengthy paragraph explaining and conditioning performing full-unrestricted work duties to a period of a few months before her condition would preclude her from maintaining long term employment as a CNA. That part of Novum's answer cannot be ignored. Nor can the rest of the report which served as a basis for the County's decision.

The County argues that it has the right to rely on its own medical evidence in making its decision. The issue of whether Grievant is physically able to perform all her job duties without permanent restrictions is not an issue for the arbitrator to decide, or even for the County for that matter. The arbitrator and the parties do not have the expertise to make that

type of medical/vocational decision. An essential question is whether the County had a legitimate reason for its actions. It did. As stated in How Arbitration Works, *Elkouri & Elkouri,* 6th Ed.

> The prevailing view is that management has the right and responsibility to take corrective action when an employee has a physical or mental disability that endangers the employees own safety or that of others. Depending on the nature and extent of an employee's disability, the employee may be subject to transfer, demotion, layoff, leave of absence, or termination. . . .

Pp. 1041, 1042.

In reviewing the County's action the undersigned is not weighing conflicting medical evidence, but rather is deciding whether the employer's determination was based on medical evidence of Grievant's condition and job requirements. *See,* HOW ARBIRTATION WORKS, *Elkouri & Elkouri,* 6th Ed. pp. 396-397. The County's decision was based on such medical evidence and the CNA job requirements.

The County made its decision based upon the March 28, 2006 Novum report, CNA job duties and available work. As indicated above, it was justified in doing so. Given the safety considerations and lack of light duty or sit down CNA work on a half time or part time, permanent basis, this is a legitimate reason for the termination. The County did not make its decision based on anything Grievant later put in her long term disability application. Any statements made therein are not dispositive. They do not change the medical report and the County did not rely on them. They are not probative here.

With section 14.09 allowing for the denial of a return to work there is an implication for the Article III management right to relieve an employee of their duties for a legitimate reason. The policy outlined by the County in its October 2006 termination letter and which was also referenced in the April 6, 2006 medical leave letter is a legitimate reason for the termination which relieves Grievant from her duties. She was not able to perform her CNA duties on a permanent basis without raising serious safety concerns for herself and those in her case. This legitimate reason is a just cause for the discharge of Grievant that was made through the termination. She had notice the termination was forthcoming. She did not present additional medical information in the face of the Novum report. There is noting in the record to indicate there was any other CNA work available to her that she could do on a permanent basis. Principles of just cause require that the action of the employer reasonably reflect the interests involved. The level of the County's actions must reasonably reflect its interests in the underlying actions or circumstances to constitute just cause. The County does have a very significant interest in the safety of the residents and employee, including Grievant herself. It also has an interest in being able to keep the position filled by a full time CNA without job duty restrictions on a permanent basis. It has no full time or part time CNA work available on a permanent basis that Grievant can do without restriction. The severity of Grievant losing her

long term employment does not out weigh the risk of danger to her or the residents given the

nature of her disability. She is not able to permanently perform the job safely without restrictions. Stated otherwise, severe as it may be, her termination reasonably reflects the interest in safety given her inability to do the job. The County interest in being able to fill the position with a CNA without job duty restrictions on a permanent full time basis makes this more so. The County has established legitimate reasons which are just cause for refusing to allow Grievant to return to work and her eventual termination.

The initial grievance alleged a violation of Article II Discriminatory Practices. Her grievance was about returning to work after obtaining proper medical authorizations. It is a medical condition or physical ability situation. Article II does not reference physical disability or medical conditions. The grievance cannot prevail on the discriminatory grounds found in Article II. The actual processing of her grievance through the grievance process did not maintain the discrimination claim, but limited itself to her physical abilities and medical release matters. Article II has not been pursued by the Union in this arbitration. The Union has argued that the County did not accommodate Grievant's condition. The County does have an affirmative action policy which does address disability. However, that is a policy and not part of the collective bargaining agreement. Importantly, the record indicates that there was no permanent CNA position available with the permanent restrictions needed by Grievant. There has been no demonstration of how the County could have accommodated her on a permanent full time basis in her job as a CNA. A fair reading of the job duties and working conditions of a CNA would appear to make such an accommodation on a permanently full time basis unlikely. Nor has Grievant attempted to post into or apply for other County positions which might lend itself to a reasonable accommodation. The Union has pointed to no contractual basis for an accommodation, and admits in its brief that the County has very limited light duty work available (p. 5). Regardless of that, the collective bargaining agreement does not require such an accommodation.

The County did not violate the provisions of the collective bargaining agreement when it initially refused to allow Grievant to return to work in January of 2006 and later made that decision permanent, thereby resulting in her termination of employment. The County had a legitimate reasons that it was not able to allow her to return to work which was just cause for the termination. Accordingly, based upon the evidence and arguments in this case I issue the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 13th day of September, 2007.

Paul Gordon /s/

Paul Gordon, Arbitrator

rb