BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FAMILY HERITAGE CARE CENTER/PARKSIDE RESIDENCE

and

FAMILY HERITAGE CARE CENTER/PARKSIDE RESIDENCE EMPLOYEES LOCAL 621, AFSCME, AFL-CIO

Case 3
No. 66945
A-6291

(Ashley Woods Grievance)

Appearances:

Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656, appearing on behalf of Local 621, AFSCME, AFL-CIO.

Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C, 3624 Oakwood Hills Pkwy, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Family Heritage Care Center/Parkside Residence.

ARBITRATION AWARD

Family Heritage Care Center/Parkside Residence, hereinafter Home or Employer, and Local 621, AFSCME, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Home, requested the Wisconsin Employment Relations Commission to appoint a WERC Commissioner or staff member to serve as the sole arbitrator of the instant dispute. Commissioner Susan J.M. Bauman was so appointed. A hearing was held on May 31, 2007 in Black River Falls, Wisconsin. It was not transcribed. The parties filed written argument by August 2, 2007, and on August 16, 2007 advised that reply briefs would not be filed. The record was then closed.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided, and agreed to allow the arbitrator to frame the issue based upon the parties' proposed issues and the evidence and arguments presented. The Union's suggested statement of the issue is:

> Did the Employer violate the collective bargaining agreement by terminating the employment of the grievant? If so, what is the appropriate remedy?

The Employer frames the issue as:

> Did the Employer violate Article V of the collective bargaining agreement when it discharged the Grievant for excessive absenteeism and tardiness? If so, what is the appropriate remedy?

The undersigned adopts the Union's statement of the issue.

BACKGROUND and FACTS

Grievant Ashley Woods was employed by Family Heritage Care Center/Parkside Residence, a facility owned and operated by the Heyde Companies, as a CNA from December 21, 2005 until her termination on February 19, 2007. Her usual assignment was to work nights at the skilled nursing facility located in Black River Falls. The average CNA staffing on the night shift, based on a resident census of 40-45, is 2 full time employees. The routine duties of these employees include checking on patients and administering treatments and medications. At some time prior to the events giving rise to the instant grievance, on or about November 30, 2006, Ms. Woods changed her position from being a regular full-time employee to a casual on-call nursing assistant.

The Employer considers regular attendance by its employees to be very important. According to Administrator Apland, it is particularly difficult to replace a night shift employee when one is absent. Oftentimes, it is necessary to "patch things together" by extending shifts of other employees in order to meet staffing levels of the Nursing Home licensure requirements and to provide quality patient care.

During the course of her employment, the Grievant was frequently absent from work. On her 90 day review (Employee Performance Appraisal and Development Form) dated March 20, 2006, Ms. Woods was rated as "Not Acceptable" with respect to her attendance and punctuality. In all other respects, except Inservice Attendance, Ms. Woods was rated as meeting the requirements of her position.

On August 15, 2006, Ms. Woods received a written warning which stated:

> **DATE(S) OF INCIDENT (VIOLATION):** Ashley has continued to exhibit extremely excessive absenteeism and violates FHCC/Heyde Policy #14 on Absenteeism. She has been absent full shifts of 08/13/06, 08/12/06, 7/22/06, 05/11/06, 05/03/06, 04/26/02, 04/24/06, 04/14/06, 03/17/06, 03/16/06, 02/14/06, 01/20/06, 01/14/06, 01/06/06 and partial 12/29/05. She has also had numerous tardies. This amount of absences are extremely excessive and unacceptable according to policy and warrants this disciplinary counseling.
>
> **CORRECTIVE ACTION:** Employee must dramatically improve attendance and punctuality. If needs to be absent must find her own replacement to avoid further disciplinary action.
>
> **FUTURE OCCURRENCES OF THIS NATURE WILL RESULT IN:** Further disciplinary action according to policy which will include suspension and/or termination.

Ms. Woods signed the written warning on August 15 and indicated that she understood it. She did not file a grievance regarding this discipline.

On September 11, 2006, Ms. Woods' supervisor, Peggy Fulton, issued a two (2) day suspension to Ms. Woods, again because of absenteeism:

> **DATE(S) OF INCIDENT (VIOLATION):** Ashley has continued to demonstrate excessive absenteeism. Since receiving a written counseling on 08/15/06 she has been absent again 08/23/06 a full shift, and then on 09/02/06 a partial absence which was half of the shift. Her continued excessive absenteeism violates FHCC/Heyde Policy #14 on Absenteeism. Employee has failed to improve her attendance record despite recent counseling and warrants this further disciplinary action of suspension.
>
> **CORRECTIVE ACTION:** Employee will have no further absences. If an absence is completely unavoidable, employee must find her own replacement to avoid termination.
>
> **FUTURE OCCURRENCES OF THIS NATURE WILL RESULT IN:** Termination according to policy.

Ms. Woods acknowledged receipt of this "warning" on September 11, 2006 and served a two day unpaid suspension on September 11 and 12, 2006. She did not file a grievance regarding this disciplinary action.

On December 20, 2006, Ms. Woods received her annual performance evaluation. She was rated as meeting or exceeding requirements in all areas but attendance/punctuality and inservice attendance. With respect to both, she was rated as 1.5, mid-way between not acceptable and needs improvement. The "Justification of Evaluation" with regard to attendance/punctuality states that Ms. Woods "Has helped extra, thank you but numerous tardies and absences in past year. This has been addressed with her and she knows it must improve dramatically."

On January 23, 2007, Supervisor Fulton wrote up another disciplinary report regarding the Grievant. The document was given to Ms. Woods on February 2, 2007 and suspended her for one day, February 7, 2007. The disciplinary report reads as follows:

> **DATE(S) OF INCIDENT (VIOLATION):** Ashley has continued to demonstrate excessive absenteeism. She has been absent again on 01/20/07 and 01/14/07, 11/29/06 and has numerous tardies on 01/13/07, 12/16/06, 12/02/06, 11/20/06, 11/10/06. Her continued excessive absenteeism violates FHCC/Heyde Policy #14 on Absenteeism and warrants this suspension.
>
> **CORRECTIVE ACTION:** Employee needs to have no further absence occurrences. If employee must be absent she needs to find her own replacement to avoid further disciplinary action.
>
> **FUTURE OCCURRENCES OF THIS NATURE WILL RESULT IN:** Further disciplinary [sic] which will be termination.

Again, Ms. Woods acknowledged receipt of the document and that she understood it. She did not file a grievance regarding the discipline.

On February 19, 2007, Ms. Woods was discharged from her employment. The listing of the dates of violation on the termination notice are as follows:

> 3-16-06, 3-17-06, 4-14-06, 4-24-06, 5-3-06, 5-11-06, 5-13-06, 7-22-06, 8-12-06, 8-13-06, Written Warning – 8-15-06, 8-23-06, 9-02-06 ½, Suspension – 9-11-06 & 9-12-06, 11-29-06, 1-14-07, 1-20-07, Suspension 2-07-07.

Ms. Woods again signed the document indicating that she had read and understood the Disciplinary Record. This time, however, on February 28, 2007, a grievance was filed on her behalf. In pertinent part, the grievance alleges that Article III – Just Cause of the collective bargaining agreement was violated, and also indicates "Any other article which may be applicable." The requested relief is that the Grievant be returned to her previous position with a make whole remedy and that references to the termination be removed from her personnel file.

The discharge form was completed by Administrator Apland, as Supervisor Fulton was on a leave of absence. Mr. Apland testified that he audited the Grievant's employment history after a discussion with the charge nurse who indicated that Ms. Woods had left her shift early on February 16 after she had been told to stay until the end of the shift. As a result of this, Mr. Apland determined that Ms. Woods should be terminated. Ms. Woods contends that she had received approval from Ms. Fulton to leave before 7:00 a.m. as the time was needed in order to reach her other job in Onalaska. Ms. Fulton testified that she was aware of the time crunch between Ms. Woods' jobs and agreed that Ms. Woods could leave early on February 10 and February 11, but not for any other days. Mr. Apland and Ms. Fulton testified that it is most important for a CNA on the night shift to be there at the end of the shift when residents are awakening and need bathing and toileting.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE III – MANAGEMENT RIGHTS

Section 3.01 Except as expressly modified by other provisions of the Contract, the Employer possesses the full right to operate Family Heritage Care Center/Parkside Residence, and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of Family Heritage Center/Parkside Residence;

B. To establish reasonable rules and schedules of work;

. . .

E. To suspend, demote, discharge and take other disciplinary action against employees for just cause;

F. To maintain efficiency of Family Heritage Care Center/Parkside Residence operations;

G. To take whatever action is necessary to comply with State or Federal laws;

. . .

ARTICLE V – DISCIPLINE

Section 5.01 In the event job performance or behavior causes problems, disciplinary action may be necessary provided that the discipline is imposed in a fashion consistent with just cause. The progression of disciplinary action

normally is (1) verbal, (2) written, (3) suspension, and (4) discharge. However, this shall not be interpreted that the sequence is necessary to all cases as the type of discipline will depend on the severity of the offense.

. . .

If the Facility has reason to discipline an employee, it shall be done in a manner that will not embarrass the employee before the other employees or the public.

When an employee has worked twelve (12) consecutive months from the last warning notice, all warning notices shall be null and void.

RELEVANT POLICY AND PROCEDURE PROVISIONS

Policy No.: G-4 – Disciplinary Action

In the event job performance or behavior causes problems which interfere with work and the management of Heyde Health System, disciplinary measures may be necessary. The degree of action is dependent upon the severity of the problem. All disciplinary actions should be recorded on the "Heyde Companies Employee Disciplinary Record" form.

. . .

SUSPENSION: An employee may be suspended for just cause at any time. The employee's Supervisor, in consultation with the Department Head and V.P. of Human Resources, will determine the period of suspension. Any employee who is suspended will automatically be placed on 90 days probation when returned to work and informed that further disciplinary action may result in termination. Written documentation of this should be on the "Heyde Companies Employee Disciplinary Record" form and included in the employee's file.

TERMINATION: The V.P. of Human Resources must be consulted before a discharge is made. Before an employee is discharged, a full explanation of all events relating to the discharge must be submitted in writing to the Human Resources Department for inclusion in the employee's file.

. . .

Policy No.: G-7 – Absence – Tardiness

All employees must personally notify their Supervisor or his/her designee of an impending absence or tardiness. This notice must be done on a daily basis, as far in advance of the employee's starting time as is possible but at least 60 minutes prior to his/her shift.

Failure to report an absence may be considered grounds for immediate dismissal and failure to report absences for two consecutive days will normally be considered a voluntary termination without notice.

Excessive absence or tardiness will be considered grounds for suspension and/or termination.

Policy No.: G-35 – Code of Conduct

In any organization, it is necessary to have rules covering a number of subjects, including personal conduct. It would be impossible to write rules to cover every situation. However, good conduct is expected of all employees and violations such as the ones listed below, will result in disciplinary action. The degree of discipline, up to and including discharge, will vary depending on the severity of the infraction.

. . .

24. Repeated absenteeism or tardiness.
25. Failure to call in when absent.

. . .

28. Leaving duty stations without notification to and authorization from Supervisor.

. . .

This is not intended to be an all inclusive list of violations but a minimum. It is provided because Administration has an obligation to let employees know what is expected of them. Violations of the above may result in oral or written warnings, suspension or discharge.

Procedure No.: 14 – Absenteeism and Tardiness Control

Excessive and avoidable absenteeism creates a serious problem at Heyde Companies. It is important to the successful operation of our company and quality of care to our residents that employees be at work each scheduled work day.

In order to reduce and control absenteeism and assure consistent and equitable treatment of absenteeism, the following procedures will be followed:

ABSENTEEISM

1. For purposes of this procedure, absence will be defined as unscheduled time off from the job.

2. All employees are expected to report for work as scheduled and to work their scheduled hours. Employees will be charged with an "absence occurrence" when they fail to report for scheduled work hours.

3. A. Absences for which employees will be charged an occurrence include, but are not limited to, failure to report for such reasons as personal illness, personal accident, family illness, personal business, or similar non-work related absences.

   Absences lasting several days will be treated as one occurrence. Heyde Companies has the right to require an employee to submit a doctor's slip or undergo a physical examination, at the employee's expense, to verify claim of illness or injury.

   B. Absences that are NOT charged with an occurrence include, but not limited to, job related injury, jury duty, death in family as per Personnel Policy B-6, disciplinary time off, vacation or holiday and approved leaves of absence.

   C. Employees who work the 12-hour weekend shift will be charged 1 ½ occurrences on the first day (or second) of the weekend, but if you miss the second day (or first) of the weekend, it is still only 1 ½ occurrences.

4. It is our goal to help each employee become a more dependable and positive influence within Heyde Companies. Throughout each step of the following disciplinary process, the supervisor and/or department head will provide counseling. The counseling will include a discussion of the absence and possible remedies/referrals. The disciplinary procedure treats unexcused absences separate from the regular absence occurrence procedure.

   A. DISCIPLINARY "ABSENCE OCCURRENCE" PROCEDURE:

   1. Absenteeism is documented on a continuous 12-month cycle.

   FULL TIME EMPLOYEES:

   6 occurrences in 12 month period – verbal warning
   8 occurrences in 12 month period – written warning
   9 occurrences in 12 month period – 3 day suspension without pay
   10 occurrences in 12 month period – termination

PART TIME AND CASUAL EMPLOYEES

4 occurrences in 12 month period – verbal warning
6 occurrences in 12 month period – written warning
7 occurrences in 12 month period – 3 day suspension without pay
8 occurrences in 12 month period – termination

B. UNEXCUSED ABSENCE:

1st occurrence – written warning
2nd occurrence – termination

SPECIAL CIRCUMSTANCES

A. Any absence occurrence over one half hour causing the employee to be away from work half of their scheduled day or less will be charged with "1/2 absence occurrence."

B. A full time employee who changes to a part time status will be place on the same step of the program he/she was on under the full time schedule.

C. If you can't come to work on your scheduled day, you can avoid getting an absence occurrence by finding someone to work for you (self-replacement)

1. If you can't come to work on your scheduled day (for any reason), find someone to work for you. If you do, you won't be charged with an absence occurrence.

2. When finding someone to work for you, he/she must be qualified to do your job.

3. You must call your Supervisor/Charge Nurse to notify him/her that you won't be in and who will be filling in for you. The designee must then call the Supervisor/Charge Nurse to notify him/her that the designee will be working. It can't result in overtime.

4. If the designee does not call, the Supervisor/Charge Nurse will notify the employee that the designee did not call. If the employee fails to find someone and doesn't work, he/she will receive an occurrence.

If the designee doesn't show after making the call, he/she will receive the occurrence.

5. As per current policy, you must notify your supervisor a minimum of 90 minutes prior to the start of your shift.

Maintenance of attendance records is the responsibility of each department. Supervisors should maintain written record of employee's absences and tardiness that will include the reasons for missing work.

POSITIONS OF THE PARTIES

The Employer contends that it did not violate the collective bargaining agreement when it terminated the Grievant on February 19, 2007 for excessive absenteeism and tardiness. In support of its position, the Employer asserts that the Grievant's attendance record is dismal and that she did not dispute or grieve the prior disciplinary actions: the August 15, 2006 written warning citing 15 absences, one partial absence and "numerous tardies"; the September 11, 2006 two-day suspension citing one additional absence and one additional partial absence; the January 23, 2007 one-day suspension citing three additional absences and five additional tardies. Additional incidents of tardiness and absence are documented on the Employer's Attendance Summary,[1] resulting in a total of 40 absences/partial absences and tardies during the period December 2005 through February 2007, not including three authorized Leaves of Absences.[2]

The collective bargaining agreement states that the normal progressive discipline sequence of verbal warning, written warning, and suspension, followed by discharge is not required per Article V, Section 5.01. The Employer can decide to skip steps if it deems that it is appropriate, or elect to give an employee "another chance" if it determines to do so. Here, the record reflects a written warning and two suspensions prior to the termination.

Article III of the contract grants the Home the authority to establish reasonable work rules and it has done so in adopting the Disciplinary Action Policy (G-4) and Code of Conduct Policy (G-35) which both reiterate that disciplinary action should be proportionate to the infraction. Before terminating the grievant, Administrator Apland reviewed her attendance record and ascertained that during the one-year period, February 19, 2006 through February 19, 2007, she had 15 absences, 1 partial absence, and 17 tardies.

---

[1] The Attendance Summary was compiled by the Nursing Supervisor from the actual work schedules inasmuch as the actual time slips could not be located in the office of the recently deceased Business Manager.

[2] These approved leaves include a pregnancy leave, May-June; hand injury, October-November; and ill child, February 2007.

The Employer acknowledges that it imposed lower levels of discipline on the Grievant than authorized by Procedure 14. That procedure authorizes termination after ten (10) absences, but the Home was lenient and issued a warning and two suspensions in an attempt to work with the Grievant to address and correct the attendance and tardiness problems. Other than these areas, the Grievant was a good employee, and there were mutual benefits in attempting to correct these problems. The Home should not have its leniency held against it, nor should it be punished for its kindness to the Grievant.

According to the Employer, it was in the context of a poor attendance record and having been granted leave when she was not eligible for Family and Medical Leave that the Grievant asked to leave work an hour before the end of her shifts on February 16 and 17. The record contains conflicting information about the Home's reaction to this request. According to the Grievant, she had talked to her supervisor, Peggy Fulton, sometime during the first week in February about leaving before the end of the shift to get to another job. Fulton testified that she had granted permission to leave early on other dates, but did not authorize a permanent change in schedule and did not authorize an early departure on February 16 or 17.

The Grievant also testified that during her February 16 shift she asked Charge Nurse Linda Scheuwimer about leaving early. The Grievant testified that Ms. Scheuwimer told her she could leave early if she had authorization to do so. The Grievant's testimony indicated that she believed such authorization could come after the shift. Administrator Apland testified that prior to terminating the Grievant, Ms. Sheuwimer told him that she told the Grievant that she had to complete her shift.

The Home contends that leaving a shift early is a clear violation of the Code of Conduct Policy and that, although neither leaving early on February 16 and 17, nor two absences, and seven tardies that occurred in 2007 were recorded on the Termination Notice, these facts were considered by Administrator Apland in making the decision to terminate. The Employer had just cause to discharge the Grievant and the grievance should be denied and dismissed.

The Union takes exception to the Employer's statement of the issue in two respects: the limitation to a violation of Article V of the collective bargaining agreement and the Employer's inclusion of an allegation of excessive tardiness as a reason for the discharge when the notice of termination provided to the Grievant on February 19, 2007 only cites absences. An attempt to expand the reasons for the termination at the hearing is, according to the Union, inappropriate.

The Union contends that the burden of proof, which lies with the Employer in a discharge case, is particularly relevant in the instant case. During the processing of the grievance, the Union requested copies of the original documents that ultimately resulted in the alleged violations cited in the termination notice. This information was not provided, even after a second request. At hearing, Administrator Apland, who is not the recorder of employee absences, testified that the original records were not available as the keeper of the records had passed away. Inasmuch as the original records were not supplied, the Union takes the position that the Employer has not met its burden of proof.

The Union also points out that the termination notice does not cite any further violations after the February 7, 2007 suspension. With no further violations, the Union believes that a double jeopardy situation exists.

Additionally, the discharge notice cites a suspension on February 7, but the Employer's exhibit and documentation of attendance only shows the time off after the date of suspension was a Child Ill under FMLA on February 13, which is not counted as absenteeism under the policy. Accordingly, no additional discipline should have occurred.

The Home also alleged an inappropriate action by the Grievant in leaving early from work. The Grievant's testimony was that her immediate supervisor gave her permission to leave early on the dates in question, and told her that she would have to address leaving early on future dates with the Director of Nursing who was not working on the days in question. The supervisor was not at the hearing to contest the testimony of the grievant. In addition, this issue was not included in the notice of termination, nor included in any of the Employer's exhibits. The Union, again, takes the position that the Employer's attempt to expand the reasons for the termination at the hearing is inappropriate.

For all the reasons cited, the Union requests that the grievance be sustained, that the Grievant be returned to her previous position, all references to these incidents be purged from her personnel file, and that a make whole remedy be ordered.

DISCUSSION

At issue herein is the question of whether the Employer violated the collective bargaining agreement when it terminated the Grievant on February 19, 2007.[3] There is no question that the Grievant's attendance record was abysmal, notwithstanding the Union's objections regarding the loss of the original time cards and Administrator Apland's not being the individual who recorded employee absences and/or tardiness.[4] There is, however, a question as to whether, given the nature and contents of the termination notice, the Employer had just cause to terminate the Grievant. I find that it did not.

At hearing and in written argument, the Employer contended that the Grievant was terminated due to her frequent tardiness and absences, and because she had left before the end of her shift on February 16 and 17 without permission. The notice of termination, however, only lists numerous absences covering the period March 16, 2006 through a one day suspension on February 7, 2007.

---

[3] The undersigned has adopted the Union's statement of the issue as it is somewhat broader than that proposed by the Employer. In actuality, however, the real issue is whether the Employer had just cause to terminate the Grievant, whether the just cause standard is found in Article V, Article III, or elsewhere in the collective bargaining agreement.

[4] The Union's objection to the absences listed on the notice of termination is without merit inasmuch as they were the same dates that were listed on the prior written warnings and the suspensions, without an objection or grievance being filed.

Absent a definition of just cause in the labor agreement, the undersigned adopts a two prong analysis which requires the Employer to establish the existence of conduct by the Grievant in which it has a disciplinary interest and it must then establish that the discipline imposed for the conduct reflects its disciplinary interest. However, as a threshold matter, it is axiomatic that due process is an element of just cause.[5] Due process requires, in pertinent part, that the employee be provided with a precise statement of the charges for which the Employer intends to discipline or discharge the employee:

> Any reason the employer intends to rely on for a discharge must be either stated in writing or communicated to the employee, unless special grounds exist that excuse the failure to present the reasons for management's actions at the time discipline is imposed. . . . "[T]he discharge * * * must stand or fall upon the reason given at the time of discharge." The employer may not give the reasons for the discharge and then alter or add to them at the arbitration hearing.[6]

In the instant matter, the notice of termination includes only absences, no tardies, and no mention of the employee having left before the end of her shift, allegedly without permission to do so. The record evidence does not indicate that the employee was advised, at the time of her termination, that she was also being terminated for excessive tardiness or for having allegedly left before the end of her shift without permission. Mr. Apland, the person who drafted the notice of termination, testified that he didn't know why the notice does not include other dates after the suspension. Thus, the undersigned will only consider the listed absences to determine whether there was just cause to terminate the Grievant.

A careful review of the absences listed on the termination notice reveals that the first eleven instances of absences were included in the written warning issued to the Grievant on August 15, 2006; the next two instances formed the basis of the two day suspension issued on September 11, 2006; and the last three absences were the basis of the one day suspension issued on February 2, 2007. In other words, the Grievant had already been disciplined for all of the absences that are included in the notice of termination. The Union contends, correctly, that termination for the exact same offenses for which discipline has been previously imposed constitutes double jeopardy. That is, once the written warning and the two suspensions were imposed for absences on the dates listed on the termination notice, they cannot be utilized, without additional incidents, to support termination. That is not to say that were additional incidents included the prior events could not be listed on the termination notice to demonstrate that progressive discipline has occurred. In fact, the termination notice specifically demonstrates the discipline that has been imposed for the various events. Had additional incidents occurred after the suspension listed for February 7, double jeopardy would not be an issue. However, in the absence of other incidents being listed after the February 7 suspension, or clear testimony to the effect that additional events had taken place and were the basis for the termination, discharge for the listed incidents cannot be sustained.

---

[5] See, generally, Brand, ed., DISCIPLINE AND DISCHARGE IN ARBITRATION, 1998, pp. 35 – 45.

[6] IBID, at p. 43, citations omitted

The Union also argues that the absenteeism policy itself violates the terms of the collective bargaining and that the Employer has not consistently followed the policy or progressive discipline. Because the grievance is sustained on the grounds that the termination notice was faulty and did not reflect the bases for the termination argued by the Employer at and after the arbitration hearing, these issues will not be reached. The undersigned, similarly, will not address the Employer's arguments in which it contends that it should not be penalized for its leniency in not issuing a three-day suspension and terminating the employee earlier, in accordance with the attendance policy.

The Union has asked that the grievance be sustained, that Ms. Woods be returned to her previous position, that references to these incidents be purged from her personnel file(s), and that she be afforded a "make whole" remedy. The grievance is sustained, and the references to the termination are to be removed from the Grievant's file. Ms. Woods is to be reinstated to her position as a part-time call-in employee.

When a full time regular employee is reinstated, it is relatively easy to determine the nature of a make whole remedy. Here, however, the employee was a part time call-in employee. Theoretically, the Employer could have addressed its concerns with the Grievant's attendance record by no longer utilizing her services. However, because the Home chose, instead, to terminate her, a make whole remedy is appropriate.

How such a remedy is to be determined is not necessarily a simple task. The testimony of the Grievant was very clear that she could not work until 7 a.m. because she had to get to Onalaska by 7 a.m. for her other position. Under these circumstances the number of shifts which the Grievant would have been able to work is unclear. However, she was on the schedule for more than ten shifts between the time of her termination on February 17 and March 11. Employer Exhibit 8, developed by Supervisor Fulton, demonstrates that for many of those shifts, the Home was willing to accommodate Ms. Woods and have her work from 11 p.m. to 6 a.m. or 10:15 p.m. until 6:15 a.m., rather than from 11 p.m. to 7 a.m. In fact, during the period January 29 through February 11, she appears to be on the schedule, and worked, eight times, with all shifts ending at 6 a.m. or 6:15 a.m. For the period February 12 through February 25, she was on the schedule ten times, of which she was scheduled to complete her work at 6 a.m. or 6:15 a.m. all but twice.[7] The schedule for the period February 26 through March 11 indicates that Ms. Woods was on the schedule eight times, with her shift ending at 6 a.m. or 6:15 a.m. all but two of those days. It is also noteworthy that the ending times for the shifts of other employees were often at 6 a.m. or 6:15 a.m. as well. Of course, as an on-call employee, the facility did not have to schedule the Grievant if she could not work the hours offered. The corollary is that she did not have to work if the hours offered did not fit with her schedule. Thus, given the apparent ability of the Home to utilize Ms. Woods' services despite the early morning conflict and while perhaps difficult to ascertain the amount thereof, a make whole remedy is appropriate.

[7] She apparently only worked four of the shifts as she was on FMLA two days and was terminated before four of the other scheduled times.

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD[8]

The grievance is sustained. The Grievant shall be reinstated to her prior position as a part-time call-in employee. Her personnel file shall be purged of all references to the termination, and she shall be made whole for ascertainable earnings and benefits lost as a result of her termination, less any amounts that she may have earned doing call-in work for any other facilities.

Dated at Madison, Wisconsin, this 24th day of September 2007.

Susan J.M. Bauman /s/
Susan J.M. Bauman, Arbitrator

[8] The undersigned will retain jurisdiction over this matter for a period of 60 days following issuance of this award for purpose of resolving issues of remedy.