BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ORCHARD MANOR EMPLOYEES UNION, LOCAL 3377
WCCME, AFSCME, AFL-CIO

and

GRANT COUNTY (ORCHARD MANOR)

Case 100
No. 66665
MA-13597

Appearances:

Ms. Jennifer McCulley, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, for the labor organization.

Godfrey & Kahn, Attorneys at Law, by **Atty. Jon E. Anderson**, One East Main Street, P.O. Box 2719, Madison, Wisconsin 53701-2719, for the municipal employer.

ARBITRATION AWARD

The Orchard Manor Employees Union, Local 3377, WCCME, AFSCME, AFL-CIO and Grant County (Orchard Manor) are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to discipline. The Commission designated Stuart D. Levitan as the impartial arbitrator. Hearing in the matter was held in Lancaster, Wisconsin, on May 17, 2007; it was not transcribed. The parties submitted written arguments by June 19, 2007, and reply briefs by July 3, 2007.

ISSUE

The parties stipulated to the following statement of the issue:

> "Did the County violated the terms of the collective bargaining agreement when it terminated the grievant? If so, what is the appropriate remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 It is agreed that the management of the County and the direction of employees are vested exclusively in the County, and that this includes, but is not limited to the following: to direct and supervise the work of employees; to hire, promote, demote, transfer or layoff employees; to suspend, discharge or otherwise discipline employees; to plan, direct and control operations; to determine the amount and quality of work needed, by whom it shall be performed and the location where such work shall be performed; to determine to what extent any process, service or activities of any nature whatsoever shall be added or modified; to change any existing service practices, methods and facilities; to schedule the hours of work and assignment of duties; and to make and enforce reasonable rules.

2.02 The County's exercise of the foregoing functions shall be limited only by the express provisions of this contract, and the County and the Union have all the rights which they had at law except those expressly bargained away in this Agreement.

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ARTICLE 6 – DISCIPLINE

6.01 The Employer shall not suspend, discharge or otherwise discipline any nonprobationary employee without just cause. When such action is taken against an employee, the employee will receive written notice of such action at the time it is taken, and a copy will be mailed to the Union within two (2) calendar days, except that written notice of oral discipline shall be given to the employee and the Union as soon as possible after the action is taken. Such notice shall include the primary reasons on which the Employer's action is based. In the administration of discipline, similar occurrences only shall be considered, and no such discipline which is more than one (1) year old shall be considered, unless it was a disciplinary suspension of one full shift or more and then a two (2) year time limit shall apply. Similar occurrences are defined in separate categories of job performance and tardiness/absenteeism.

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APPENDIX B – GRANT COUNTY DRUGFREE WORKPLACE AND ALCOHOL AND OTHER DRUG ABUSE POLICY

Grant County is committed to providing a safe work environment and to fostering the well-being and health of its employees. That commitment is jeopardized when any employee illegally uses drugs on the job, comes to work under the influence, or possesses, distributes or sells drugs or alcohol in the workplace. Grant County is committed to a drug and alcohol free work place. Therefore, Grant County has established the following policy. This policy is effective immediately and will be enforced uniformly with respect to all employees. The purposes of this policy are:

1. To establish and maintain a safe, healthy working environment for all employees, residents and the public.

2. To promote rehabilitation assistance for any employee who seeks such help.

3. To reduce the number of accidental injuries to person or property.

4. To reduce absenteeism, tardiness, and to improve productivity.

5. To safeguard the reputation of Grant County and its employees within the community at large.

Alcohol and Other Drug Abuse is defined as use of alcohol, illegal drugs, and taking medicine prescribed for another person. The words "illegal drugs" refers to any drug defined as a controlled substance under Wisconsin Statute or Federal Statutes. Alcohol and Other Drug Abuse also includes the use of prescription drugs and any product with the intent of purposely becoming intoxicated, euphoric, or high.

A prescribed drug is any substance prescribed for individual consumption by a licensed medical practitioner.

Alcohol is defined as follows: (a) Beer is defined in 26 USC 5052 (a) of the Internal Revenue Code of 1954; (b) Wine of not less than one half of one per centum of alcohol by volume; or (c) Distilled spirits as defined in Section 5002 (a)(8) of such code. Alcohol includes but is not limited to the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

An alcohol concentration of 0.02 or greater, while on duty for Grant County, as indicated by an alcohol breath test or blood alcohol test is cause for disciplinary action up to and including termination.

Federal Department of Health and Human Services drug test levels will be used to determine presence of illegal drugs. Drug testing will be done by DHHS certified laboratories. It is a violation of County policy for employees to be under the influence of alcohol (.02 or greater), illegal drugs, or misuse legal drugs during working hours for Grant County.

It is a violation of County policy for any employee to use, sell, possess, transfer or purchase illegal drugs, controlled substances or alcohol on Grant County property or while performing Grant County business unless such activity is part of an assigned job duty. Such action, may be reported to appropriate law enforcement officials.

Violations of this policy are subject to disciplinary action up to and including termination.

Any employee whose off-duty abuse of alcohol or illegal or prescription drugs results in excessive absenteeism or tardiness or is the cause of a work related accident(s) or poor work performance must see their physician and obtain a referral to a certified substance abuse program for rehabilitation and will face discipline and/or termination if he/she rejects that program or continues to have job performance problems.

Each employee may be tested for drugs and/or alcohol if he/she has been observed using a prohibited substance on the job (including but not limited to illegal drugs or alcohol), or if Grant County administration has other reasonable suspicion for testing him/her. A reasonable suspicion test shall be defined as follows: A reasonable suspicion test is an alcohol and/or controlled substances test administered to an employee as a result of a trained supervisor's or trained County official's belief that the employee has violated the alcohol or controlled substances prohibitions of this policy. A reasonable suspicion determination must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. These observations may include indications of the chronic and withdrawal effects of alcohol or controlled substances. Supervisory staff will contact a union representative prior to confronting an employee for a reasonable suspicion drug and/or alcohol test. Supervisors must document in writing the reasons for the reasonable suspicion determination. Management will designate a person to transport the employee to the drug/alcohol test site. Employees who play a role in identifying management staff who are in violation of this policy shall not be subject to any retaliation.

Employees testing positive for illegal drugs and/or alcohol will be subject to disciplinary action up to and including termination. Employees testing positive must see their physician and obtain a referral to a certified substance abuse counseling program. Grant County does offer group health insurance benefits to eligible employees. The employee will pay for all costs of rehabilitation not covered under the employee's benefit plan. If the employee is not terminated he/she will be subject to unannounced follow-up testing anytime during the first six months after returning to work or anytime during the course of the substance abuse counseling program. Employees must sign a release allowing Grant County to verify compliance with the substance abuse counseling program. Employees who fail to submit to required testing, test positive a second time, fail to sign a release, or fail to comply with the certified substance abuse program will be subject to disciplinary action up to and including termination.

As a condition of employment, employees must abide by the terms of this policy and must notify Grant County in writing of any conviction of a violation of a criminal drug statute occurring in the work place no later than five calendar days after such conviction. Employees who are convicted of any criminal drug statute violation will be discharged immediately if a nexus can be shown between the drug activity and conduct at the work place.

The administration of Grant County reserves the right to inspect lockers and/or vehicles owned by or leased to Grant County (and contents therein) at any time in an effort to enforce this policy. Employees are hereby put on notice that said locker(s) or vehicle(s), although assigned to individual employees, are subject to inspection and remain under the exclusive control of Grant County.

The goal of this policy is to balance our respect for individuals with the need to maintain a safe, productive and drug and alcohol free environment. The intent of this policy is to offer a helping hand to those who need it, while sending a clear message that the illegal use of drugs or alcohol is not compatible with employment at Grant County.

OTHER RELEVANT CONTRACTUAL LANGUAGE AGREEMENT BETWEEN GRANT COUNTY (HIGHWAY DEPARTMENT) AND TEAMSTERS UNION LOCAL NO. 695

21.07 Drug and Alcohol Policy. The purpose of this policy is to help prevent accidents and injuries resulting from the use of alcohol or use of controlled substances by drivers of commercial motor vehicles which are being operated on behalf of Grant County. This policy is intended to be consistent with, and in compliance with, the U.S. Department of Transportation Federal Highway

> Administration's drug and alcohol testing rules, regulations and procedures contained in Title 49 CFR. Nothing herein shall preclude the County from establishing rules, regulations, policies and/or procedures governing the use of alcohol and/or the use of a controlled substance by Grant County employee(s) so long as such rules, regulations, policies and/or procedures do not conflict with the specific requirements of Title 49 CFR.
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> This policy applies to every bargaining unit employee who is otherwise subject to a commercial driver's license (CDL) requirement and who is subject to the rules, regulations, policies and/or procedures contained in Title 49 CFR.

BACKGROUND

Among its various general government activities, Grant County owns and operates Orchard Manor, a nursing home located in the county seat of Lancaster, Wisconsin. Orchard Manor is licensed as both a skilled nursing home and an intermediate care facility. To maintain its round-the-clock operations, Orchard Manor employs 113 part-time and 53 full-time employees, in such fields as nursing, housekeeping and dietary. The Orchard Manor Employees Union, Local 3377, WCCME, AFSCME, AFL-CIO, represents all full-time and regular part-time nursing assistants, dietary, housekeeping, laundry, maintenance, activity and unit coordinator employees of Orchard Manor.

MM was hired as a Certified Nursing Assistant (CNA) on October 10, 2002. As a part-time employee assigned to the over-night shift (2:30 – 6:30 AM), she was scheduled for forty-eight (48) hours per pay period, but regularly accepted so many extra shifts that she averaged 71.91 hours per pay period in 2005 and 92.55 hours per pay period in 2006. MM also received exceptionally high ratings for her work performance, scoring 25 "excellent" ratings, two "outstandings" and seven "meets expectations" on her two most recent annual evaluations. In 2004, she received recognition and a gift for a year's perfect attendance. On April 11, 2006, she received a "Complimentary Action" letter for her "very professional manner in a traumatic situation" involving the death of a resident. "I commend her for the great job she did," nurse Betty Winters wrote, adding that MM "is a very good team member on our noc(turnal) shift." Prior to October 6, 2006, MM had not received any discipline.

The job description of an Orchard Manor CNA includes the following:

> The certified nursing assistant provides a safe environment, gives emotional and social support and attends to the resident's physical comfort. Performs direct care to the residents as assigned. Performs other duties as directed.

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ESSENTIAL FUNCTIONS

1. Works alone giving total care or assists residents with:

    a. Bed bath, tub bath or shower.
    b. Dental, hair and nail care, shaving, dressing and undressing, application of make-up.
    c. Elimination needs.
    d. Ambulating, transferring, positioning by using assistive devices such as a walker, wheelchair, Hoyer lift, gait belt or lift sheets.

2. Answers all call lights promptly.
3. Takes and records temperature.
4. Feeds resident, maintains intake and output as requested, weighs resident as instructed.
5. Observes and reports physical and/or behavioral changes in resident immediately to charge nurse.
6. Works tactfully and cooperatively with residents, families, visitors, and the entire staff throughout the organization.
7. Knows and follows existing lines of communication and authority.
8. Performs all resident care as assigned and according to (facility) nursing department's policies and procedures.
9. Participates in activities for cognitively impaired residents as directed.

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15. Follows all safety, security, infection control (including Category I Universal Precautions) and hazardous materials policies and procedures. Performs all tasks to assure resident and personal safety and the protection of (facility) property.

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PHYSICAL/SENSORY/COGNITIVE REQUIREMENTS TO PERFORM THE ESSENTIAL JOB FUNCTIONS:

Strength:

1. Using proper body mechanics, able to frequently transfer, life, turn or assist a resident to or from bed, wheelchair, Hoyer lift, toilet, tubs and showers. This requires the ability to push, pull, and lift from 25-75 pounds unassisted.

2. Push/pull residents weighing approximately 78-250 pounds in wheelchairs and geri-chairs. Reposition residents weighing approximately 78-250 pounds in chairs and in bed to assist with treatments, hygiene, and comfort needs.

Mobility:

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3. Able to deal with combative residents safely.

Manual Dexterity

1. Able to use hands and arms to carry trays, position residents, take pulses and temperatures, adjust bathtub temperature and use other equipment listed.
2. Simple manipulative skills are required to consistently manipulate wheelchairs, through doorways, moving linen carts, etc.

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Cognitive requirements

1. Concentrate on moderate detail with some interruption.
2. Attention span necessary to attend to a task/function for 10-15 minutes related to nursing assistant duties.
3. Ability to comprehend oral and written instruction, simple direction, and specific ideas behind actions.

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EMPLOYEE RESPONSIBILITY IN AN EMERGENCY

Expected to respond to emergency situations involving the safety of residents, other employees and the facility. This includes the ability to assist with a possible evacuation of residents. Must participate in O.M. emergency plan as assigned.

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A few days before October 6, 2006, MM had agreed to pick up an extra shift for another employee, working from 2:30 to 6:30 A.M. MM arrived at Orchard Manor at about 2:43 A.M. on October 6. Another CNA, Kim Lolwing, who encountered MM within a few minutes of her arrival, testified that MM "reeked of alcohol," that her "speech was slurred,"

and that when she "walked down the hallway she bumped into the wall." MM then commenced her duties. At about 3:15 A.M., Lolwing related her observations to a licensed practical nurse, Nicole Hamilton. Hamilton, who had not seen MM at this point, testified she then observed MM, and felt she "definitely smelled of alcohol," had "bloodshot" eyes, appeared "disheveled," that her speech was "slurred," and that she "definitely" believed MM had been drinking. Hamilton reported the matter to the Charge Nurse on duty, Rita White, who at about 4:00 A.M. informed Director of Nursing Angela Pierce of the situation.

Pierce arrived at Orchard Manor about twenty minutes later, and, after talking to White and Hamilton, brought MM into a conference room. Pierce testified MM denied she was under the influence of alcohol or drugs, but that she "could smell the alcohol" on her breath. Without offering union representation, Pierce told MM she believed there was reasonable suspicion to believe she was under the influence of alcohol, and asked if she would go to the Grant Regional Health Center for testing. MM, who did not request union representation, agreed. Prior to her removal from the floor at about 4:30 A.M., MM had performed her CNA duties without apparent incident. There is no evidence in the record as to whether or not MM had any resident contacts during this period.

A Health Center lab technician administered a urine test and three breathalyzer tests between 5:31 A.M. and 5:54 A.M., with blood alcohol content readings ranging from 0.070 to 0.080. The urine test for drugs was negative. Pierce and MM, who had been joined at the health center by Human Resources Director Jan Lintvedt, then returned to Orchard Manor, where, after a brief meeting to review the Orchard Manor alcohol policy, Pierce placed MM on unpaid suspension. MM punched out at 6:42 A.M., and was driven home by another Orchard Manor employee. At 7:05 A.M., Lintvedt made the first contact with a union official, informing local president Linda Klar of the situation.

There are two other instances of Grant County employees violating alcohol and drug abuse policies. In 2002, a non-represented licensed practical nurse reported for work under the influence of alcohol. The LPN – like MM, an excellent employee with exceptional work habits and a clean disciplinary record -- was terminated. On May 4, 2006, a Highway Department Shop Maintenance Worker, represented by Teamsters Union Local No. 695, tested positive for alcohol during a routine random screening. The County, following its DOT policy, drove him home, directed him to undergo an assessment from a therapist and required him to test negative before he could return to work under a "last chance" agreement. The County then subjected the employee to six random tests within the next year, all of which he passed.

After a meeting at which MM and Union president Linda Klar were present, Orchard Manor terminated MM the following Monday, October 9. The Union grieved on October 10. The grievance was denied and appealed through the proper steps, and appealed to arbitration on December 15, 2006.

At hearing, MM testified that following her shift on October 5, 2006, she returned to her home in Platteville at about 8:30 A.M., took a hot bath, had two beers, and went to bed. She further testified that she woke up at 2:00 P.M., and between 3:30 and 6:00 P.M. had three Bacardi malt beverages, which would result in a woman of MM's size having a Blood Alcohol Content level of about .050. MM testified she went back to bed at about 8:00 P.M and slept till 2:10 A.M. Realizing she did not have time to shower, she testified she threw on her clothes and ran out the door and drove to the facility in Lancaster. Due to road construction closing her normal route, the drive took about 25 minutes, and MM arrived about ten minutes after her shift began. MM testified she did not know she was intoxicated, and that if she had known she "would have called in" sick. She testified she was surprised at the results of the breath test, and feels "terrible" at the events. She denied having anything to drink after the three malt beverages, which she finished drinking approximately nine hours before reporting to work.

At hearing, the parties stipulated that the matter was timely before the arbitrator for a decision on the merits; that Orchard Manor had reasonable suspicion that the grievant was under the influence of alcohol, and that the results of the breathalyzer were valid.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

> The County violated the Alcohol Policy that is part of the collective bargaining agreement when it did not notify a Union representative of their reasonable suspicion of the grievant and their intent to remove her from the floor. Also, the county did not have just cause to discipline or discharge the grievant. The policy does not require the County to terminate and employee if they test positive for alcohol. The grievant was a good employee without any prior discipline related to this instance or otherwise and therefore her termination is excessive. Finally, there was disparate treatment, in that a highway employee who tested positive for alcohol was not terminated, but rather driven home and given a last change agreement.
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> Under Appendix B, the Drug Free Workplace and Alcohol and Other Drug Abuse Policy, the County had an obligation to notify a union representative that it had reasonable suspicion of the grievant and was intending to remove her from the floor. It failed to do so. This provision is to give the union notice so it can best advise the employee of their rights. The grievant never had that right, and was thus denied due process.

The policy also does not require the County to terminate an employee who violates the policy. That the policy actually lays out follow-up testing requirements for employees who test positive would lead us to understand that the County would not be terminating employees for a first offense. The question is then, why in this case did the County view the grievant's violation as so egregious that it warranted termination?

Further, the County did not have just cause to terminate the grievant, who unintentionally reported to work under the influence, but was not legally drunk under state statute. Her offense does not meet the standard required for termination on a first offense. During her two hours on the floor, she did nothing that endangered a resident, did not receive complaints about her performance, and generally did her job like she normally would. She has never been disciplined for reporting intoxicated before, or for reporting tardy, has a clean work record and in general has been an excellent employee. This was a one-time mistake; the grievant did not realize she still had alcohol in her system from the night before, and had she known, she would not have reported for work.

The record shows the grievant was an outstanding employee, with excellent performance evaluations. She had always been willing to pick up extra shifts, and was more than willing to help out when needed. She has not been a problem employee.

Finally, the County does not administer its policy uniformly. When a shop maintenance worker tested positive for alcohol, the County did not fire him, but rather drove him home, had him go through an assessment, and put him on a last chance agreement. That employee had a Commercial Drivers License and was repairing equipment; if he is intoxicated at work, he could be endangering the public safety. Highway workers are held to a much higher legal standard than Orchard Manor employees, but the County is treating the employees at Orchard Manor – who are largely female – differently than the mostly male employees of the Highway department. There is clearly disparate treatment; if a last chance agreement is good enough for a Highway worker, it should be good enough for an Orchard Manor employee.

The County erred in not contacting a union representative, and by treating the grievant much differently than the employees at the Highway Department. The grievant, a stellar employee with no prior discipline, didn't realize she was under the influence when she reported to work; had she known, she would have called in. She likes working at Orchard Manor, and wants to return there; she

is sorry this happened, and admits she made a mistake, but did not do so recklessly or with disregard for the residents or the employer. But the punishment does not fit the crime. Because the County violated the collective bargaining agreement, the grievance should be sustained, the discharge reversed, the grievant reinstated and made whole, and her record expunged.

In support of its position that the grievance should be denied, the Employer asserts and avers as follows:

Under the collective bargaining agreement, the county has the right to terminate employees. Under the collective bargaining agreement, employees who report to work under the influence of alcohol are subject to termination. Having an employee come to work under the influence of alcohol is tantamount to resident abuse under Wis. Admin. Code HFS 132.

The County had just cause to terminate the grievant, who without question reported to work on the morning in question under the influence of alcohol. She had all the indicators of alcohol use, and the union has stipulated both that the County had reasonable suspicion and to the results of the breath test. There can be no question that the grievant violated County policy by coming to work under the influence of alcohol.

The grievant had been given a copy of the relevant policy, and was thus aware of the policy and the possible consequences of proven violations. She was aware that a nurse who violated the policy several years before had been terminated. The grievant's testimony that she was not aware of this termination is not credible. That the nurse was unrepresented is not relevant; what is relevant is that the same policy applied to both employees. The testimony is clear – if it is proven that an employee came to work under the influence of alcohol, termination occurs. The case concerning the Highway employee does not reflect the special circumstances of a nursing home.

The grievant has offered no excuses or justification for her conduct, and has simply not been honest about what alcohol she consumed on the day in question.

The termination was appropriate and did not violate the collective bargaining agreement. She reported to work drunk and began her duties in that impaired condition. She jeopardized the safety of frail and elderly residents, which is very serious and warrants termination. The arbitrator's role is not to determine whether he would have come to a different conclusion about discharge, but only whether the employer had just cause.

The County's failure to contact a union representative does not detract from a finding of reasonable cause. The County made a good faith effort to notify a Union representative, and a Union representative was given timely notice at about 6:50 on the morning in question. Further, failure to notify the Union prior to the breath test does not impact on the outcome, in that the County's failure was not intentional, and the outcome would not have been affected thereby. There is no issue as to reasonable suspicion, which the parties have stipulated was present. The grievant would have had to take the test, or risk being fired anyway. The grievant clearly consented to the test, and at no time did she request a Union representative. Finally, time was of the essence; waiting for the Union representative could have impacted on the results of the test, which the Union has stipulated to. The lack of timely notice did not prejudice the grievant in any respect.

The grievant's action reporting to work in an intoxicated state was clearly against the rules. Given the nature of the work and the population served at Orchard Manor, it was reasonable, appropriate and necessary for the County to terminate her employment. Accordingly, the grievance should be denied and dismissed.

In reply, the Union posits further as follows:

It is distressing that the employer has improperly included statements in its brief that did not reflect the record evidence, including statements about the grievant's appearance and behavior.

The employer has misrepresented W.A.C, HFS 132, which does not equate alcohol at the work place with patient abuse. Further, if the employer believed that the grievant committed patient abuse, it would have reported such to the State of Wisconsin, which it did not do.

Further, the employer is failing to consider that its alcohol policy does not require that employees be discharged, and certainly not for their first offense. If the County and Union had intended employees to be discharged after one alcohol violation, their negotiated policy would say so; that it does not makes it clear that the intent of the parties was not to discharge employees after their first offense.

If the grievant were as drunk as the County insists she was, why did it take almost two hours to establish reasonable suspicion? Whose fault was it that the grievant completed two hours of work while under the influence?

What is the difference between being randomly tested for alcohol and testing positive and an employee who showed the appearance of being intoxicated and testing positive?

The County clearly minimizes the importance of due process inherent in the notice provisions. The purpose is to protect the employee's due process rights. It comes as a surprise the County would so casually check due process at the door before discharging an employee. That the Union was ultimately notified is not a justifiable defense. We do not know the impact of the lack of notification; whether the grievant would have been advised to take or not take the test is irrelevant. The simple fact is the Union was not notified, and the County clearly violated the contract.

Finally, the County is wrong in trying to strip the arbitrator of his right to modify the penalty.

The County has been very deceptive in how the grievant appeared and how she was clearly intoxicated. If the County is being accurate in its description then it seems odd and even negligent to allow her to work two hours before establishing reasonable suspicion. If they truly believed she was a threat and risk, they should have contacted a union representative immediately and had her removed as soon as possible and not allowed her to continue working. They did not do that.

The County is reaching at straws to justify their decision to discharge the grievant. The policy does not require mandatory termination upon reporting to work intoxicated. The grievant was a good to exceptional employee who worked more hours than anyone else. She made a mistake and regrets what happened. She had a reasonable expectation that she would possibly be discharged, but not terminated for her actions. The County over-reacted when it terminated the grievant after only one occurrence. There was no progressive discipline at all, and the grievance should be sustained.

In reply, the Employer posits further as follows:

The alcohol and drug policy neither dictates nor precludes any level of discipline. Discharge is clearly within the range of accepted discipline. The prospect for follow-up testing does not restrict managerial discretion in setting the penalty.

The Union errs in claiming gender-based disparate treatment for similar offenses. That argument is nonsense. This is not a discrimination case. The issue is whether the County had cause to fire the grievant based on what she did.

The Highway department operates under federal rules, which Orchard Manor does not. The record does not provide sufficient facts to evaluate the Highway situation. The grievant actually embarked on her job duties, working directly with the frail and fragile residents. Her situation is far more serious than the situation of the Highway worker.

The Union errs in suggesting that the County's failure to contact the union representative should somehow mitigate the penalty imposed on the grievant. The contract does not require this result. Even if the Union had timely notice, the facts concerning the grievant's conduct would not have changed.

The grievant's explanations of her behavior justify termination, in that she was not honest with her employer as to what, when and how much she drank. Her failure to recognize she was under the influence when she reported to work underscores the validity of the employer's decision to terminate. A nursing home cannot tolerate an employer who is so out of touch that she does not know when she is under the influence of alcohol or otherwise unfit for duty.

The grievant, who know about the properly promulgated rule, came to work under the influence of alcohol, endangering the lives of every resident and undermining the reputation of the nursing home. Given the nature of the work and the population served, it was reasonable, appropriate and necessary for the County to terminate the grievant. The grievance should be dismissed.

DISCUSSION

MM was an excellent young certified nursing assistant. She took extra shifts, got very high evaluations, had perfect attendance and even showed grace under difficult circumstances. Grant County couldn't have asked for a better employee.

Then one morning she showed up drunk, and the County fired her.

The County says it had just cause, and demands justice. The Union says not, and asks for mercy.

The gist of the Union's argument is that the County did not have just cause to terminate MM because she was a good employee who made a single mistake, the County violated her due process, the County policy did not *require* her termination, and that the last-chance agreement previously offered to a highway employee shows gender-based disparate treatment. The County's case is simply that the duties of a certified nursing assistant cannot be performed while under the influence of alcohol, so that contract language and practice justify immediate termination.

Appendix B of the collective bargaining agreement specifies the County's authority to discipline and discharge for drugs and alcohol in the workplace:

> An alcohol concentration of 0.02 or greater, while on duty for Grant County, as indicated by an alcohol breath test or blood alcohol test is cause for disciplinary action up to and including termination.
>
> Federal Department of Health and Human Services drug test levels will be used to determine presence of illegal drugs. Drug testing will be done by DHHS certified laboratories. It is a violation of County policy for employees to be under the influence of alcohol (.02 or greater), illegal drugs, or misuse legal drugs during working hours for Grant County.
>
> It is a violation of County policy for any employee to use, sell, possess, transfer or purchase illegal drugs, controlled substances or alcohol on Grant County property or while performing Grant County business unless such activity is part of an assigned job duty. Such action, may be reported to appropriate law enforcement officials.
>
> Violations of this policy are subject to disciplinary action up to and including termination.

But the County cannot act unilaterally in enforcing its policy. As the appendix also provides:

> Supervisory staff will contact a union representative prior to confronting an employee for a reasonable suspicion drug and/or alcohol test. Supervisors must document in writing the reasons for the reasonable suspicion determination.

The County asserts in its brief that it made "a good faith effort" to notify a Union representative prior to administering a breath test to MM. It did nothing of the sort.

Human Resources Director Lintvedt testified she was aware of the notice requirement, and that sometime before 5:00 A.M., before coming to the facility, she called and told nurse White to remind Director of Nursing Pierce of the need for union representation. For whatever reason – White did not testify -- Klar was not contacted, either before the test or before MM was suspended. Indeed, the County does not claim that she was. Nor does the County assert that it documented in writing its reasons for determining it had reasonable suspicion MM was under the influence of alcohol.

The County maintains that this denial of union representation was irrelevant, and that, given that the evident reasonable suspicion, Klar's advice to MM would undoubtedly have been that she submit to the breathalyzer.

The County is correct that, as a practical matter, its failure to notify Klar before conducting the breath test probably didn't matter, as to the imposition of the breath test. Given that the Appendix also provides that refusal to submit is grounds for termination, the Union cannot reasonably contend it would have advised MM against submitting to the test. In any event, as the parties stipulated, there *was* reasonable suspicion supporting the county's decision to subject MM to the test.

But the County is wrong in calling the Union's involvement "secondary" once it has reasonable cause for testing.

The collective bargaining agreement doesn't just provide for management to contact a union representative only where the factual situation is ambiguous; it mandates that management will contact a union representative prior to confronting an employee for a reasonable suspicion drug and/or alcohol test, and that it "must" document in writing its reasons for the reasonable suspicion determination.

In this instance, there seems little impact because MM acted appropriately – she submitted to the test, and didn't make any blatantly incriminating statements. But that doesn't mean MM's rights weren't violated – they most certainly were. And they were violated at the most important time of the disciplinary process – the initial investigation and interview, when a suspect employee's fate is largely sealed.

There must be a reason why parties provided in their agreement the County requirement to "contact a union representative prior to confronting an employee for a reasonable suspicion drug/alcohol test." It is to enable the Union to observe the employee contemporaneously, so it can challenge the County's assertion with its own eyewitness testimony, and to otherwise document the proceedings. Notice to the Union of an imminent alcohol/drug test is meaningless if the County can then whisk the employee off to the health center and prevent the Union from having access.

Moreover, the Union representative is not solely an observer, but may counsel the employee (to submit to the test, to cooperate with the investigation, to avoid volunteering incriminating statements, not to drive if impaired, and so on) and be present during all interviews. When the County relies on the contract to direct an employee to submit to a alcohol/drug test, it begins a disciplinary investigation that entitles the employee to representation.

The moment Pierce formed the opinion that MM was under the influence of alcohol, and that she intended to require a "reasonable suspicion" breath test, she was required to notify Klar. That is a clear and unambiguous mandate that the employer clearly and unambiguously violated. Whatever Klar would have done upon receiving such notice is irrelevant. The employer obtained an alcohol test, and discussed it with the employee, without following the contractually mandated process. The notion, "no harm, no foul" does not apply in such a situation.

I am aware that the parties have stipulated that the County had reasonable suspicion that MM was under the influence of alcohol, and that the breathalyzer test was valid. However, I do not understand those stipulations to override my authority to determine the admissibility of evidence.

The employer was aware of its contractual requirement to notify a Union representative before proceeding with MM's breath test, and it failed to do so. There must be some sanction on the employer for its violation of the collective bargaining agreement; otherwise, it has no incentive to honor the agreement in the future.

Accordingly, the County cannot cite the breath test results as evidence it had just cause to terminate MM. Nor can it cite any statements MM made between the time she was pulled off the floor and the time she was suspended.

As the Union correctly notes, the county also misstates the record when it makes representations about Wisconsin Administrative Code HFS 132. No such document is in the record.

The County further goes beyond the record when it states in its brief that "Hamilton and Stevenson also noted that (MM) looked tired, was pale, had droopy eyes, was slurring her words, and was 'giggly.'" No one, nurse or otherwise, named Stevenson testified, so any reference to "her" testimony is beyond the record. I also agree with the County that Hamilton did not refer to MM as "giggly."

I also agree with the Union that being intoxicated is generally incompatible with the duties and responsibilities of a garage mechanic. However, the record is silent on that worker's actual state of intoxication, his particular duties, or the federal regulations the Teamster contract references. I do not have sufficient information to reverse MM's discharge on the basis of the incident involving the highway worker.

I also reject any claim by the County that I lack authority to modify discipline; such authority is inherent in my power to find just cause. There's nothing unusual about an arbitrator finding that the grievant did something wrong, but that the level of discipline was excessive, and so must be modified. I thus disagree with the employer as to my role, and specifically find that I do have the authority to modify the discipline imposed.

But I do agree I don't have original jurisdiction, and that such authority should not be used when the employer's action was with just cause. Just because I might have imposed a different level of discipline does not allow me to pre-empt the employer's judgment *unless I have first found that initial discipline to be without just cause*.

Which means that, unlike the County, I have to evaluate more than just the breath test results (which have been excluded, anyway).

The Union complains that the County did not attempt progressive discipline. Although progressive discipline is a well-accepted concept in employee relations, it is also well-understood that there are certain jobs, and certain offenses, where that principle does not prevent discharge for a first offense. The Union acknowledges as much, citing the concept that if a collective bargaining agreement is silent on what offenses are serious enough to justify serious discipline for a first offense, "the arbitrator must identify dischargeable offenses by using common sense, past practice and company, industry and societal standards."

The question is whether a certified nursing assistant reporting for work in a nursing home under the influence of alcohol is one of those situations.

The County cites its termination of a licensed practice nurse who reported under the influence of alcohol as evidence it uniformly terminates all employees who engage in such misconduct. However, as the Union correctly notes, the licensed practical nurse in question was not a member of this, or any bargaining unit; that the County acted against an unrepresented employee in a particular manner certainly does not establish that the action was consistent with the collective bargaining agreement.

As is reflected in its position description, a certified nursing assistant has significant and sustained physical contact with frail and elderly patients, including transferring, lifting, turning and assisting them to or from their bed, wheelchair, Hoyer lifts, toilets, tubs and showers, along with other patient care tasks. Given the real risk of injury and death – and the devastating personal, financial and legal implications that would ensue -- it is obviously unacceptable to attempt to transfer or lift a frail and elderly patient in any of those situations while intoxicated, even if these tasks were to be performed in conjunction with another nursing assistant. And although assignment to an overnight shift might mean an employee would perform those duties less frequently, those duties would still remain.

Intoxication diminishes motor skills, mental acuity and other behavioral and performance standards; having a drunk certified nursing assistant on duty at a nursing home for frail and elderly could result in tragedy at any time. Common sense and societal standards support the conclusion that reporting to work as a nursing assistant in a nursing home under the influence of alcohol is sufficiently serious and would so offend the legitimate expectations of all parties that discharge is allowable even for a first offense.

The Appendix defines "under the influence of alcohol" as having a blood alcohol content of .02 or greater. For a woman of about MM's size, that contractual standard would be met by drinking 2 domestic beers over the ninety minutes before reporting.

The breath test results having been excluded, the question of whether MM had a blood alcohol content of at least .02 turns on non-scientific evidence – testimony from eyewitnesses and the grievant. [1]

[1] Throughout this proceeding, the County has correctly relied on its authority under the Appendix relating specifically to alcohol use and abuse, rather than its general authority to impose discipline under paragraph 6.01.

MM testified that she had two beers after her shift the morning before (for a B.A.C. of about .02), and three malt beverages the afternoon before (for a B.A.C. of a bit over .05), but nothing else to drink on the night before she showed up at Orchard Manor at about 2:45 on the morning – when, according to the sworn testimony of a fellow nursing assistant, a licensed practical nurse, and the Director of Nursing, she "reeked of alcohol," slurred her words, had bloodshot eyes, was "disheveled," and was unsteady on her feet.

That is, approximately nine hours after what she testified was her last drink, MM showed all the signs of someone who had contemporaneously been drinking to excess.

There are some people who are so sensitive to alcohol that two beers in ninety minutes would leave them slurring their words and unsteady on their feet. But based on her own admission of her alcohol consumption on October 5, MM does not appear to be unduly sensitive to alcohol. Certainly, she did not claim that to be the case, or otherwise testify to any ill-effects from her morning or mid-afternoon drinking the day before. Indeed, her actual testimony about her three Bacardi's – "I got up at about 3:30 and started drinking…" – shows an easy familiarity with the activity.

It is important to note that while the employer has the burden of persuasion in a disciplinary grievance, the burden of proof is "preponderance of the evidence," not the criminal justice standard of "beyond a reasonable doubt." Given the unrebutted testimony from three different witnesses – including one who is also a member of the bargaining unit –- as to MM's physical state, and the implications that flow from such descriptions, I conclude that the preponderance of the evidence establishes that MM had a blood alcohol content of at least .02 when she reported for work on October 6.

The final question is whether there are mitigating circumstances that the County has to take into consideration. I agree that MM was, up until the morning of October 6, 2006, a very good employee. Her performance evaluations were excellent, her attendance exceptional, and she was about the hardest-working CNA on staff. There is no evidence that MM had ever done anything remotely like this before, or that she has a significant, on-going drinking problem. By every evident measure, MM was the kind of nursing assistant county homes hope to attract and retain. But just because the county *could* have given MM dispensation for these fine qualities, they were not so extraordinary, nor her tenure so exceptionally long, that the County *had* to do so.

There is also the matter of MM's credibility. Obviously, my finding that MM had a B.A.C. of at least .02 when she reported for work means I reject her testimony that she hadn't had anything to drink since 6:00 PM the evening before. Although it is understandable that MM would deny drinking before work, a witness who testifies falsely under oath damages any claim as to mitigating factors.

Notwithstanding these two bad acts, one could have every hope that, given another chance, MM would continue to be the excellent employee she had been up to the morning of October 6, 2006. Consistent with the statement in the appendix that "(t)he intent of this policy is to offer a helping hand to those who need it," the County could certainly have stopped short of immediate termination. Perhaps imposing a year's suspension, followed by an offer for the next vacancy, under a last-chance agreement with random testing, would have been a better balance of deterrence and rehabilitation.

But a "better" answer to an unasked question has no value. The question is not whether the County could have done something else. The question is whether the County was barred from doing what it did.

The County has the right to impose discipline up to an including termination for a certified nursing assistant who reports to work with a blood alcohol content of .02. MM reported to work on October 6 with a blood alcohol content of at least .02.

However much the Union may wish that the County had been merciful, it is not mercy that the collective bargaining agreement requires, but just cause. The County had such cause to terminate MM for reporting for work with a blood alcohol content of at least .02 on October 6, 2006.

Having just cause to terminate, it was solely the County's decision whether to offer mercy instead. It chose not to do so, as was its right.

Accordingly, on the basis of the collective bargaining agreement, the record, generally accepted scientific evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 2nd day of October, 2007.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

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