

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1

and

AM COMMUNITY CREDIT UNION

Case 2
No. 67150
A-6301

Appearances:

Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Service Employees International Union Local 1.

F. Thomas Olson, Hall Legal, S.C., Suite 410, 759 North Milwaukee Street, Milwaukee, WI 53202-3714, appearing on behalf of AM Community Credit Union.

ARBITRATION AWARD

AM Community Credit Union, hereinafter AMCCU, Credit Union or Employer, and Service Employees International Union Local 1, hereinafter SEIU or 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 Employer, requested the Wisconsin Employment Relations Commission to provide a panel of five WERC Commissioners or staff members from which they could jointly select an arbitrator to hear and resolve a dispute between them regarding the instant grievance. Commissioner Susan J.M. Bauman was so selected. A hearing was held on October 19, 2007 in Kenosha, Wisconsin. The hearing was not transcribed. The record was closed on November 5, 2007, upon receipt of all post-hearing written argument.

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 stipulated that the issue to be decided is:

Did the Employer discharge the Grievant without just cause? If so, what is the appropriate remedy?

BACKGROUND and FACTS

The Grievant herein, Cindy Ziehr, was employed by AM Community Credit Union for approximately eleven years until her termination on June 26, 2007. At the time of her termination, she was a member service generalist. Ms. Ziehr's normal work day started at 9:00 a.m.

Ms. Ziehr is the mother of Tabitha, a 12 year old child diagnosed as having post-traumatic stress disorder, attention deficit disorder, bi-polar affective disorder and separation anxiety. Although receiving both psychological and psychiatric treatment, including medication and counseling, Tabitha often has "meltdowns" during which she engages in disruptive behavior that includes hitting, kicking, screaming, spitting and pulling hair. When Tabitha has such an episode, her mother must attend to calming her before doing anything else. This has resulted, at times, in Ms. Ziehr's having to be late to work, or to miss work altogether. She submitted appropriate documentation to AMCCU and thereafter used intermittent Family and Medical Leave (FMLA) to attend to her daughter's needs.

Tabitha's meltdowns often occurred when her mother was leaving for work in the morning, resulting in Ms. Ziehr's being late to work and having to use FMLA for that time. Tabitha attended public school and was enrolled in special education classes until June 12, 2007. Ms. Ziehr enrolled her daughter at the YMCA day care program for the summer of 2007, but Tabitha was only in the program for three days, June 18, June 19 and June 20. On June 19, Ms. Ziehr took her daughter to the YMCA around 8:30 a.m. and Tabitha started to meltdown, went out of control. The Grievant could not leave her daughter there, and Tabitha tried to follow her mother out of the facility when Ms. Ziehr thought that it might be safe to leave. She called her Employer between 9:30 and 9:45 a.m. when she realized that she had to take her daughter home and stay with her all day. On June 20, it became clear that Tabitha would not be able to attend the YMCA program, as she had threatened a teacher. Alternate plans were made for her to stay with her grandparents, the Grievant's parents. Ms. Ziehr arranged to have lunch with her daughter at her parent's home to provide her parents some relief from dealing with Tabitha all day.

On Friday, June 22, Ms. Ziehr was 14 minutes late in the morning. She had taken her daughter to her parents' home around 8:30 a.m. and there was a problem with Tabitha when her mother tried to leave. Ms. Ziehr's parents live about 5 minutes from her place of employment, at most 10 minutes if there is heavy traffic. That same day, at lunch, Ms. Ziehr was on her way back from an appointment when she got a call from her mother reporting that Tabitha was out of control, that she [Tabitha] was going to kill herself. Ms. Ziehr was on the phone with her daughter for almost half an hour calming her down. After she had persuaded Tabitha that it was alright to hang up, Ms. Ziehr called her place of employment to advise that she was going to be late due to her daughter's behavioral issues.

Upon her return to the office, Ms. Ziehr found a memo from Guida Brown, Director of Human Resources and Training:

MEMO

To: Cindy Ziehr
From: Guida Brown, Human Resources
Re: Your two tardies today
Date: June 21, 2007
CC: Tiffany Miceli, BOM, and Patt Valadez, Worksite Leader

Cindy,
First, let me explain why I am writing this...I have to leave for the day, and you are tardy coming back from lunch, so I am left with no other choice.

You called in, over 15 minutes later than your scheduled arrival time from lunch, to say that you would be late. This occurred after you were 13 minutes late for work in the morning. Both these events occurred the day after you were disciplined with a suspension and told...again...that the rules of AMCCU apply, regardless of the fact that you are on Intermittent Family and Medical Leave.

You reported to Patt Valadez today via telephone that you were on your way back to work when your mother called to tell you that there was a problem with your daughter. Your next action should have been to call work to indicate that you would be late...again...but you chose not to do that. Instead, you called in over 15 minutes late.

You are leaving us with no choices, Cindy. You know the rules and are not abiding by them.

Immediately upon her review of this memo, Ms. Ziehr talked with Kacie Robertus about it, asking Ms. Robertus what she should do inasmuch as there was no way to know ahead of time if her daughter would have problems when she was being left at Ms. Ziehr's parents' home or anywhere else or at any other time. The Grievant asked whether she should call in and say that she may, or may not, be late. Ms. Robertus told her to make the effort to call in as soon as she could.

On the following Monday, June 25, Ms. Ziehr called the AMCCU in the morning to say that she may, or may not, be late. According to the Employer, she was 10 minutes tardy in the morning, but did notify the Employer that she would be late, but gave no reason. Ms. Ziehr was one minute tardy returning from lunch, without notice.

Ms. Ziehr's use of FMLA was tracked on sheets entitled "Tracking of Intermittent Family and Medical Leave" by Kacie Robertus, Ms. Ziehr's supervisor. Ms. Robertus is a Member Services Coordinator/Loan Officer for AMCCU. She handles payroll and absence reports, and handles the duties of Tiffany Miceli, the Branch Operations Manager, when Ms. Miceli is away. Ms. Robertus is also the decision maker for all loans. She is the person that the Grievant would call in the event that she would be late or absent from work. Ms. Robertus also kept track of the number of FMLA hours Ms. Ziehr used, and her balance remaining, on these Tracking Sheets.

On June 25, 2007, Ms. Ziehr signed one of these tracking sheets that Ms. Robertus had prepared for the weeks of June 10 and June 17, 2007. Ms. Ziehr signed below the line that reads: "I verify that what I have indicated above is true and accurate to the best of my knowledge." Ms. Robertus had made the following entries on that sheet:

Week of 6/10/07	Monday	Tuesday	Wednesday	Thursday	Friday 6/15	Saturday
Originally Scheduled	9 - 5				9 - 5	
Time Frame on Leave*	9 - 5				12:07 - 6	
Total Difference	8				6.25	

Week of 6/17/07	Monday	Tuesday 6/19	Wednesday 6/20	Thursday	Friday 6/22	Saturday
Originally Scheduled		9 - 5	9 - 1		9 - 5	
Time Frame on Leave*		9 - 5	11:37 - 1		9 - 9:14 12:03 - 12:37	
Total Difference		8	1.50		1.00	

* Time Frame on Leave must be in 15 minute increments.

Ms. Ziehr was notified by Tiffany Miceli that she was terminated on June 26, 2007. The notice of termination stated that the employee was late three different times without calling: 6/21 (2 min.), 6/22 (14 min), 6/22 (29 mins) (called after 12 min.) However, the reference to the 6/22 incident was crossed out, as was the reference to a one day suspension due to tardiness on 6/19/07 which had been referenced in Ms. Brown's memo dated June 21.

The Union grieved the termination on July 10, 2007, contending that Ms. Ziehr had been “terminated for an unsatisfactory cause.” In its grievance response, the Employer stated:

Cindy was fired for just cause and through the proper procedure.

Per the agreement between the Service Employees International Union (SEIU) Local 1 and AM Community Credit Union (AMCCU), disciplinary notices or admonishments of a written warning or suspension are removed from an employee’s personnel file when an employee has worked twelve consecutive months without receiving a similar discipline.

Cindy received a written counseling for being tardy on 5/25/06 and 5/27/06. This disciplinary meeting occurred on 6/21/06. No grievance was filed for Cindy’s being disciplined for an unjust cause at this time.

Cindy received a written warning for being tardy on 8/10/06, 8/14/06 and 8/18/06. This disciplinary meeting occurred on 9/14/06. No grievance was filed for Cindy’s being disciplined for an unjust cause at this time.

Cindy received a one day suspension for being tardy on 4/18/07, 4/23/07 and 4/27/07. This disciplinary meeting occurred on 5/31/07. No grievance was filed for Cindy’s being disciplined for an unjust cause at this time.

After this discipline of a suspension was given:

- Cindy was 2 minutes tardy returning from lunch on 6/21/07.
- She was 14 minutes tardy on 6/22/07
- She was 29 minutes tardy returning from lunch on 6/22/07; she notified AMCCU after she was already over 15 minutes late and said that she need to calm her daughter down.
- She was 10 minutes tardy on 6/25/07; she notified AMCCU that she was going to be tardy but gave no reason as to why.
- She was 1 minute tardy returning from lunch on 6/25/07; again she notified the employer but no reason for the tardiness was given.

On Tuesday, June 26, when Cindy’s manager returned from a two-day absence (June 22 and June 25), Cindy’s employment was terminated for tardiness.

In addition to Cindy’s disciplines for tardiness, there are 18 other disciplines for tardiness amongst other employees. Not one of those disciplines had been grieved for being an unsatisfactory cause.

SEIU Worksite Leaders at AM Community Credit Union, as well as other SEIU members, through the Labor/Management Committee, have addressed the problem of tardiness, most recently at a January 9, 2007 meeting. We also discussed tardiness regarding Coordinators. This discussion took place on October 18, 2005. On April 12, 2005 we also discussed tardiness in the context of when unscheduled time off was acceptable.

While management maintains the right to establish reasonable work rules, we have used the Labor/Management Committee to develop many of those rules. On February 1, 2005, Janet Blaziewske, SEIU Worksite Leader, sent out an email to all employees indicating policy changes due to the new (current) contract. Her email stated: "Tardies: 15 to 30 minutes late starts at a written counseling. Over 30 minutes late starts at a written warning." This indicates that tardiness is a satisfactory cause for termination, a cause that AMCCU management as well as SEIU Local 1 representatives and employees at AMCCU have considered carefully while making rules.

RESOLUTION

The contract states:

"The disciplinary procedure shall be as follows:

...

Written counseling

Written warning

Suspension

Termination"

The SEIU itself asked AMCCU management to refrain from adding steps to this procedure. In this case, management followed the contract to the letter.

There is no violation of the contract. Cindy Ziehr remains terminated, and this grievance is denied.

The grievance was processed to arbitration.

Additional facts are included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE 8 DISCIPLINE AND DISCHARGE

SECTION 1. JUST CAUSE. After completion of the probationary period, no employee shall be disciplined or discharged except for just cause.

SECTION 2. DISCIPLINARY PROCEDURES. Employees shall be given the reason(s), in writing, for any disciplinary action taken at the time of discipline. The appropriate Worksite Leader shall immediately receive a copy of all disciplinary notices given to members of the bargaining unit.

When an employee has worked six (6) consecutive months without receiving a disciplinary notice or admonishment or an oral or written counseling, such will not be used toward future discipline and the original and all references will be removed from the employee's file and destroyed except in cases of suspicion of fraud. The Employer will include a Worksite Leader at any investigatory meeting where disciplinary action against the employee may result, unless the employee declines such representation. No employee shall be disciplined as a result of such meeting where such employee was denied the presence of a Worksite Leader or Union Representative.

When an employee has worked twelve (12) consecutive months without receiving a disciplinary notice or admonishment of a written warning or suspension, such will not be used toward future discipline and the original and all references will be removed from the employee's file and destroyed except in cases of suspicion of fraud. The Employer will include a Worksite Leader at any investigatory meeting where disciplinary action against the employee may result, unless the employee declines such representation. No employee shall be disciplined as a result of such meeting where such employee was denied the presence of a Worksite Leader or Union Representative.

The disciplinary procedures shall be as follows:

- Oral counseling
- Written counseling
- Written warning
- Suspension
- Termination

The Employer may initiate discipline for just cause at any of the above steps, based on the severity of the infraction.

All disciplinary notices will be subject to the Grievance Procedure as outlined in this Agreement.

**ARTICLE 9
GRIEVANCE PROCEDURE**

SECTION 1. A grievance, subject to the following procedure, shall include any and all disciplinary actions taken by the Employer, any and all questions and disputes involving contract interpretations and application of any of the provisions of this Agreement, and any and all questions and disputes involving conditions of employment.

. . .

STEP FOUR: A grievance that has been processed through but not resolved by the grievance procedure detailed in this Agreement may be appealed to arbitration by written notice given by the party desiring to arbitrate to the other. Such notice must be given within ten (10) days after completion of Step Two of the grievance procedure.

. . .

The award of the arbitrator hereunder shall be final, conclusive, and binding upon the Employer and the Union. The arbitrator will have no authority to add to, subtract from, alter, modify, or amend any provisions of this Agreement in arriving at the decision.

. . .

**ARTICLE 15
UNPAID LEAVE**

. . .

SECTION 3. BENEFITS AND RIGHTS. . . .

The Employer agrees to abide by all provisions of the Family and Medical Leave Act (FMLA) and any other applicable law or regulation that provides rights and benefits to bargaining unit employees. The Employer agrees to make available to employees copies and explanatory material of the FMLA and other related laws or regulations the Employer is aware of.

EMPLOYEE HANDBOOK PROVISIONS

Section III – Hours Worked/Attendance Policies

ABSENTEEISM AND TARDINESS

Good attendance is required at the credit union. You are important to our daily operations. Your absence or tardiness can disrupt our ability to provide the best possible service to our members.

It is your responsibility to report for work on time. We expect you to be at work, ready to work, at your scheduled starting time.

The following is a schedule of our disciplinary steps for excessive absenteeism and tardiness. Paid personal days, vacations, approved leaves of absences, jury duty, and bereavement leave do not count in applying this rule.

Excessive absenteeism and tardiness will result in disciplinary action, up to and including discharge. An excessive occurrence is more than two (2) unexcused incidents in any thirty (30) day period or more than eight (8) unexcused incidents in any twelve (12) month period. An unexcused absence is any in which an employee is unpaid, in total or in part, or has not given proper notice to be off. A tardiness incident is being late reporting to work, returning from a break or lunch period. Emergency conditions may warrant occasional tardiness. Under these circumstances, an employee who anticipates being tardy due to the emergency conditions should call in to report the tardiness as soon as possible. Our disciplinary steps for excessive tardiness are as follows: (This is only a guide and management may determine other levels of discipline, up to and including discharge.)

- First occurrence (2 unexcused in 30 day period) Oral warning
- Second occurrence (2 additional unexcused = 4) Written warning
- Third occurrence (2 additional unexcused = 6) Final warning (with 1 -3 day suspension)
- Fourth occurrence (2 additional unexcused = 8) Discharge

Short Term: 3 days off in 60 day period – written warning. It indicates a possible trend that could result in further disciplinary action up to and including termination.

POSITIONS OF THE PARTIES

The Employer contends that it had just cause to terminate the Grievant due to her excessive tardiness. AMCCU does not dispute that Ms. Ziehr's daughter has a serious medical condition that requires immediate attention and necessitates Ms. Ziehr's absence from work for either short periods or whole days at a time. The Employer also does not dispute that Ms. Ziehr may not be in a position to call her employer at the very moment her daughter is engaged in disruptive behavior. However, the Employer argues that the fact that it logged Ms. Ziehr's tardiness on the morning of June 22, 2007 as intermittent leave under the Family and Medical Leave Act does not preclude AMCCU from discharging the Grievant.

AMCCU points out that the tardinesses in May 2006 and August 2006 for which Ms. Ziehr received respectively a written counseling and a written warning occurred before Ms. Ziehr applied for, and received approval to utilize, intermittent FMLA leave. The tardinesses in April 2007, for which the Grievant received a suspension, were not logged as

intermittent leave. Similarly, the June 21 tardiness was not treated as intermittent leave because Ms. Ziehr did not ask that it be treated in that manner and did not otherwise provide the Credit Union with information from which it could reasonably conclude that intermittent FMLA leave was to be used.

The Employer contends that it could have discharged Ms. Ziehr for the June 21 tardiness alone, as she had already been through the first four of the five disciplinary steps provided by the collective bargaining agreement. The Employer points out that the guidelines in the employee handbook are merely a guide and that management may determine other levels of discipline, up to and including discharge, for violations.

According to AMCCU, even if Ms. Ziehr's tardiness on June 22 was logged an intermittent leave under FMLA, AMCCU is not precluded from disciplining Ms. Ziehr for failing to call in or for failing to give the Employer notice "as soon as practicable." The Employer cites case law regarding the meaning of "as soon as practicable" and states that this phrase means as soon as practicable before or after the need for leave arises. AMCCU contends that the Grievant failed to tell her Employer, even after she arrived, why she was late on the morning of June 22 or whether the time should be treated as FMLA leave. AMCCU states, at page 10 of its brief:

The fact that AM logged the 14 minutes that Ms. Ziehr was late on June 22 as intermittent leave does not mean that it could not take the tardiness into account – even if it were necessary for it to do so – in the decision whether to terminate Ms. Ziehr's employment.

The Employer argues that Ms. Ziehr is not excused from giving notice after the crisis happened on June 22, even up to and including the date of her termination, June 26. AMCCU contends that if it is the Union's position that AMCCU waived its ability to look to the tardiness of the morning of June 22 because it logged it as FLMA leave, that the Union is wrong. Failure to give notice of the tardiness is a legal basis for discipline, including discharge, even if the employee is otherwise eligible for FMLA leave. Accordingly, there was just cause to terminate the Grievant, and the grievance should be denied and dismissed.

The Union contends that the Employer discharged the Grievant without just cause. The burden of proof rests with the Employer to demonstrate by clear and convincing evidence that the Grievant is guilty of the offense. Here, AMCCU failed to meet its burden.

The Union points out that it is undisputed that the Employer considered Ms. Ziehr's time off from work on June 19th and 22nd as family medical leave. Federal regulations prohibit an employer from disciplining an employee for taking family medical leave. The Union cites the federal regulations in support of its position that the June 19th and 22nd absences must be considered excused and for the proposition that rights under the FMLA cannot be altered by the Employer's attendance policy.

The only tardiness for which the Employer has not designated family medical leave in June 2007 were the two (2) minutes on June 21, for which there is no entry on the tracking system and no record of the reason for the tardiness, although it is most likely that Ms. Ziehr was having lunch with her daughter that date. The Union argues that this one instance of tardiness is insufficient under the Employer's policy to move the Grievant to the next level of discipline, discharge. The policy requires two (2) additional unexcused incidents within a 30 day period to move to the next disciplinary step.

In response to the Employer's contention that it did not receive proper notice of the June 22 morning tardiness, the Union points out that Ms. Ziehr testified that she understood that when she was less than 15 minutes late, she could report the reason for the tardiness when she arrived at work and that there was no contradictory testimony at the hearing.

Ms. Ziehr had no way of knowing that her method of providing notice was unacceptable the morning of June 22. It was later that afternoon that she received a memo from Guida Brown complaining about the 15 minutes late notice for tardiness. Based on the memo, Ms. Ziehr modified her method of reporting tardiness on the next work day. An employee cannot be disciplined for a claimed rule violation of which she does not have notice.

In addition, the Union argues that the Employer cannot rely on its claim that Ziehr was tardy on June 25, 2007 to support the termination. It is established that an employer cannot justify a termination on the basis of a claim not raised at the time of the employee's discharge. Here, the notice of termination, although dated June 26, did not reference the June 25 events. Furthermore, the evidence is that any tardiness which Ziehr had on June 25 were also the result of her daughter's behavior and must be considered excused under the FMLA.

Ms. Ziehr was subjected to double jeopardy, according to SEIU, in that on June 22 she received a warning memo from Guida Brown concerning the late notice for tardiness that day. There was no reservation in the memo that would indicate further discipline was under investigation. Yet, four days later, the Grievant received a termination notice for the same offense. The standard of just cause does not allow a second imposition of discipline for the same offense.

Finally, it is the position of the Union that the Employer failed to make an appropriate investigation of the circumstances of Ziehr's tardiness prior to discharging her. In support of this argument, the Union points to the suspension issued on June 21 which had to be rescinded as the absence was for an FMLA purpose. Four days later the employer issued a discharge for incidents on June 22 which were for an FMLA purpose and could not be used to justify discipline.

For all these reasons, the Union asks that the grievance be sustained, find that the Employer discharged Cindy Ziehr without just cause and order that she be reinstated and be made whole for all losses resulting from her termination.

DISCUSSION

At issue herein is the question of whether the Employer had just cause to terminate the Grievant, Cindy Ziehr. The collective bargaining agreement between the Union and the AMCCU, like many other such agreements, does not define just cause. Accordingly, in the absence of agreement by the parties or argument by either party as to the standard to be utilized, the undersigned will utilize 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 then to establish that the discipline imposed for the conduct reflects its disciplinary interest. Here, the parties are in agreement that the Grievant was tardy on numerous occasions, that due to the serious medical condition of her daughter Grievant was entitled to utilize intermittent family/medical leave, and that she did so on numerous occasions prior to her termination from employment on June 26, 2007.

Although the Employer's response to the grievance is quoted in its entirety in the Background and Facts section, above, and it makes references to tardies occurring on June 25, the Termination notice dated June 26, 2007 makes reference to only two events: 2 minutes on June 21 and 14 minutes on June 22.¹ Accordingly, the events of June 25 will not be considered as a basis for the termination. The Termination notice also includes a "history" of past offenses and the discipline imposed.²

The Employer's policy regarding tardiness calls for progressive discipline:

First occurrence (2 unexcused in 30 day period)	Oral warning
Second occurrence (2 additional unexcused = 4)	Written warning
Third occurrence (2 additional unexcused = 6)	Final warning (suspension)
Fourth occurrence (2 additional unexcused = 8)	Discharge

The Grievant's history reveals a written counseling for tardiness on 5/25/06 and 5/27/06; a written warning for tardiness on 8/14/06 and 8/18/06; and a one day suspension³ for tardiness on 4/18/07, 4/23/07, and 4/27/07. Ms. Ziehr did not grieve any of these disciplinary actions. The next step in the progressive discipline would be discharge if Ms. Ziehr had two additional unexcused absence or tardy occurrences. The Termination notice alleges two such events, while the Union concedes the two minutes on June 21 and contests the 14 minutes on the morning of June 22 as FMLA leave for which the employee cannot be disciplined.

¹ There is also a reference to 29 minutes on June 22, but that has been deleted and will not be considered.

² The reference to a one day suspension for a tardiness on June 19 has been crossed out and will not be considered.

³ Although designated as a one-day suspension, the Grievant was not removed from work for a day.

The Employer argues that even if Ms. Ziehr was late on June 22 because of her daughter's serious medical condition, it still can terminate her employment because she failed to give proper notice of the fact that she was utilizing FMLA time. AMCCU argues that the FMLA permits an employer to terminate an employee who utilizes Family and Medical Leave in the event that the employee fails to give proper notification, as soon as practicable, to the Employer that such leave will be taken. The Union appears to argue that since the time taken was FMLA time, the employee cannot be disciplined, regardless of the whether notice was given on a timely basis, or whether notice was given at all.

Both parties argue about the interpretation of the Family and Medical Leave Act and the regulations promulgated thereunder. The undersigned has an obligation to interpret the collective bargaining agreement, not federal law. Regardless of how, when, or in what manner the Grievant gave notice to the Employer that she was using FMLA time, it is clear from the fact that Kacie Robertus noted it as FMLA leave on the Tracking Sheet that Ms. Ziehr used FMLA on the morning of June 22. Ms. Robertus' testimony that the notation was probably in error is just not credible; it is belied by the methodical manner in which she described how she made other entries and how she compared time cards and other information in order to determine when to report tardiness and absences. Such an important error is also inconsistent with Ms. Robertus' general demeanor. The Employer had knowledge that Ms. Ziehr utilized Family and Medical Leave on the morning of June 22 whether she advised her Employer directly or not. This event could not be counted as an "incident" in the progressive disciplinary process.

In its written argument, the Employer appears to argue that the termination was not for the tardiness on June 22, but for the failure to provide notice in accordance with the Employer's expectation. It is possible that had the Employer put the employee on notice in the Termination Notice that the manner in which she was providing notice of her use of FMLA was inappropriate, that the June 22 event could have formed the basis for discharge. However, the Termination Notice fails to indicate that it is the manner of notification that is at fault, and as indicated above, the actual tardiness was valid FMLA leave for which the Employer did have notice. Accordingly, the June 22 event cannot form the basis for discharge.

While it is true that the AMCCU can deviate from the schedule of discipline indicated in the employee handbook regarding absences and tardinesses, the Employer has not argued, nor could it show, that the fact that Ms. Ziehr was two minutes late on June 21 was just cause for dismissal. The pertinent sentence in Article 8 of the collective bargaining agreement is "[t]he Employer may initiate discipline for just cause at any of the above steps, based on the severity of the infraction." Being two minutes late to work is an insufficient infraction to be the basis of discharge in this case. There is no just cause for the termination of Cindy Ziehr.

This is a difficult situation for both the Employer and the Grievant. The Grievant has no control over when she might be late to, or absent from, work due to her daughter's

meltdowns. The Employer, of course, has an expectation that its employees will be at work, on time, ready and able to deal with members at such time as they seek assistance. While I do

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not find, as the Union argues, that the attempt to terminate Ms. Ziehr was double jeopardy inasmuch as Ms. Brown sent Ms. Ziehr a warning memo regarding her attendance difficulties on June 22 and the Employer then attempted to terminate Ms. Ziehr for the same events, I do find that the Employer, probably in its frustration at Ms. Ziehr's attendance during the weeks of June 10 and June 17, failed to fully investigate the circumstances of each event. This, as pointed out by the Union, is exemplified by the issuance and rescission of a one day suspension for the events of June 19 and, again, by the issuance of the termination notice that included that suspension for June 19 and the morning and afternoon of June 22 when the Employer knew full well that that these events were the result of FMLA leave events involving the Grievant's daughter. In fact, Guida Brown's memo dated June 21, which appears should have been dated June 22, expressed the Employer's frustration and fails to recognize that the June 19 event was not an unexcused event.

The frustration experienced by all involved parties can, and should, be reduced by the Grievant and the Employer reaching a clear understanding of the Employer's notice expectation, within the constraints which result from the cause of the FMLA leave requests, Tabitha Ziehr's serious medical condition.

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

AWARD⁴

The grievance is sustained. The Employer terminated the Grievant without just cause. The Grievant shall be reinstated to her prior position. Her personnel file shall be purged of all references to the termination, and she shall be made whole for earnings and benefits lost as a result of her termination, less any interim earnings.

Dated at Madison, Wisconsin, this 12th day of December, 2007.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

⁴ The undersigned will retain jurisdiction over this matter for a period of 60 days following issuance of this award for the purpose of resolving issues of remedy.