

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OZAUKEE COUNTY (LASATA CARE CENTER)

and

THE LABOR ASSOCIATION OF WISCONSIN, INC.

Case 82

No. 67333

MA-13837

Appearances:

Ronald S. Stadler, Stadler and Associates, 309 N. Franklin Street, Port Washington, WI 53074, appearing on behalf of Ozaukee County (Lasata Care Center) with **Kristen D. DeCato** on the brief.

Benjamin Barth, Labor Consultant, N116 W16033 Main St., Germantown, WI 53022 appearing on behalf of The Labor Association of Wisconsin, Inc.

ARBITRATION AWARD

Ozaukee County - Lasata Care Center, hereinafter Lasata or Employer and the Labor Association of Wisconsin, Inc., hereinafter Association, are parties to a collective bargaining agreement covering the period January 1, 2005 through December 31, 2006 that provides for the final and binding arbitration of grievances. The Association, 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 February 8, 2008 in Port Washington, Wisconsin. The hearing was not transcribed. The record was closed on April 23, 2008, upon receipt of all post-hearing written argument from the parties.

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 violate the expressed or implied terms of the collective bargaining agreement when it unilaterally issued an updated *Attendance Policy* without bargaining the impact with the Association?

If so, what is the appropriate remedy?

FACTS

Ozaukee County is a municipal employer which operates a nursing home known as the Lasata Care Center (Lasata). The employees of Lasata are organized as the Ozaukee County Lasata Care Center Employees Local 905 of the Labor Association of Wisconsin, Inc. (Association) for the purposes of collective bargaining. In 2003 the County informed the Association that due to a growing absenteeism problem, as well as difficulties with employees arriving late and leaving early, an attendance policy was going to be implemented for all staff, both represented and unrepresented. The Association objected to the unilateral implementation of such a policy and Lasata agreed to meet with representatives of the Association to discuss and develop a policy. After numerous meetings, the parties agreed to a policy which reads as follows:

LASATA CARE CENTER ATTENDANCE MANAGEMENT POLICY

Regular attendance and punctuality by staff are important elements in our efforts to maintain high levels of quality care for our residents. We will be able to achieve our vision only when members of the team are contributing positively. When employees meet their obligation to report for work and do so punctually, the burden of work is not passed on to co-workers or delayed. Reworking assignments or schedules to accommodate absences/tardiness represents waste and inefficiency that prevents us from reaching our goals. Still we recognize that staff occasionally become ill, need to miss work or will be late.

This policy is a tool for use in managing attendance of all employees. Standardization and consistency are necessary, but good judgment and common sense are also vital to the success of the program.

Definitions

Absence means not present or not in attendance for a scheduled shift and/or missing 50% or more of a scheduled shift without a supervisor's prior written approval. Each absence as defined herein, equals one occurrence.

Late means missing less than 50% of a shift from the beginning of the employee's start time without a supervisor's prior written approval.

Left Early means missing less than 50% of a shift from the scheduled ending of an employee's shift without a supervisor's prior written approval.

There is no grace period recognized for lateness or leaving early. For the purposes of this policy, two (2) incidents of lateness or leaving early = 1 occurrence of absence.

Occurrence means the absence on one or more consecutively scheduled work days, whatever the reason.

Events that are not considered an occurrence of absence for this policy are:

1. Leaves of Absence approved under the Family/Medical Leave Act (FMLA).
2. Funeral, Workers' Compensation, Military and Jury Duty Leaves.
3. Other leaves of absence as approved by the Administrator, or the Administrator's designee, such as: Holidays, Vacations, Compensatory Time Off, etc.
4. An absence which is verified in writing after an examination by a health care provider.

Expectations

Employees are expected to be on the job, on time, dressed and ready for work at the start of their shift according to department schedules. Employees that report for work in a condition considered not fit for work, whether for illness or any other reason, will not be allowed to work.

Employees are expected to notify the appropriate supervisor according to department procedures when he or she will be absent due to illness or other unexpected reasons.

The notification can be no later than one (1) hour before the start of the shift unless a proper excuse is presented for the inability to call in. In departments where this requirement does not apply, an alternative notification will be established. Failure to comply with departmental procedures may be cause for disciplinary action.

Employees must obtain permission from their supervisor in order to leave the premises during working hours unless they are on an approved unpaid lunch break.

Discipline

1. Occurrences of absences, lateness and left early are monitored quarterly.

1 st Quarter	January 1 – March 30
2 nd Quarter	April 1 – June 30
3 rd Quarter	July 1 – September 30
4 th Quarter	Oct 1 – December 31

2. Four or more occurrences in each quarter may result in discipline.
3. Dates of disciplinary action will be recorded on the Attendance Record and a copy provided to the affected employee and the Association representative.
4. Progressive discipline for absences, lateness and left early is considered separate from other progressive discipline and is not cumulative with other disciplinary action.

In August 2005, Lasata modified the attendance policy by the addition of a requirement that the medical excuse form must be turned in to the Payroll Department upon an employee's return to work for an absence to not be considered an occurrence. The Association did not contest this amendment to the Attendance Management policy, nor did it request an opportunity to meet and discuss the change.

Neither the 2003 Attendance policy nor the 2005 revised policy were included in the collective bargaining agreement between the Association and the Employer. In bargaining for a successor to the 2005 – 2006 contract, on October 11, 2006 (if not earlier), the Association proposed inclusion of the 2005 "Absenteeism Policy" in the contract. During bargaining, the representatives for Lasata rejected the proposal. In fact, the Association was advised at the second bargaining meeting that the Employer was considering changes to the attendance policy. At the time, the Association did not request that the Employer bargain about the changes or their impact. The Association's proposal to include the Policy in the collective bargaining agreement was not included in the May 4, 2007 Final Offer submitted by the Association to the County.

Lasata continued to experience problems with employees failing to report for work, reporting late, or leaving early. Led by Lasata administrator Ralph Luedtke, the Employer developed a revised attendance policy which it hoped would resolve some of the attendance concerns it had in running a 24/7 operation. When the policy was completed, Luedtke sent a memo to all Lasata employees, including those represented by the Association:

April 20, 2007

TO: All Employees
FR: Ralph G. Luedtke, Administrator
CC: Damon Anderson
Ben Barth, LAW Inc.

RE: Attendance Policy

This memo is to inform all staff that effective June 1, 2007 Lasata will be replacing our current Attendance Management Policy with a new policy. Your [sic] invited to attend a staff meeting on Wednesday May 2nd at which time the new policy will be reviewed and explained.

These meetings will be held at 7AM, 10:30 AM, 2:00 PM and 2:30 PM, in the classroom. We will have copies of the new policy available at that time.

Upon receipt of this memo, no Association member or leader contacted Luedtke or any other Employer representative requesting to bargain the changes in the Attendance Policy or their impact upon employees represented by the Association. Few employees represented by the Association attended any of the May 2 meetings.

The new policy was distributed at the meetings and a copy was provided to each employee with paychecks on May 18. The revised policy reads as follows:

**Attendance Policy
Lasata Care Center**

Policy: Lasata Care Center expects all employees to maintain a reasonable attendance schedule to help us continue our tradition and outstanding reputation in the field of long term care. Excessive absenteeism, reporting late or leaving early is not acceptable and will result in disciplinary action up to and including termination.

Definition: **Absence** – any day an employee is not at work as scheduled for any reason (illness, personal, or family problems, transportation, etc), or does not complete at least fifty percent (50%) of their scheduled work shift, is considered an absence.

The following situations will not be considered absences:

1. Bereavement leave (for immediate family members defined by policy or labor agreement)
2. Leave of Absences (FMLA, military, and any other leaves required by state law, County policy or labor agreement)
3. Worker's Compensation Leave
4. Jury Duty (summons presented in advance)
5. Time off requested in advanced [sic] and pre-approved in writing by the department head.

Occurrence – is any period of consecutive shifts or one full shift the employee is absent for his/her scheduled work. Tardy and/or Left Early will count as ½ of an occurrence.

Scheduled – being placed on the work schedule prior to the time it is posted or placed on the schedule anytime after it is posted, provided the employee is notified of the change.

Tardy - any time an employee is not in their work area within 3 minutes after the start of their scheduled shifts or punches in after the start of their scheduled shift without approval of their supervisor.

Left Early – any time an employee leaves work before their scheduled ending time, but after working at least fifty percent (50%) of their scheduled shift.

No Call No Show – Failing to inform the facility of an absence and not reporting to work as scheduled.

12 Month Rolling Period – A period of time from the current date and looking (rolling) back twelve (12) months.

Procedure: Employees are to notify his/her supervisor 1 hour prior to the start of his/her shift each time he/she will be absent. Barring a medical emergency, an employee must report the absence his/herself. A specific reason for the absence must be given, such as employee's own illness (employee will not have to give a diagnosis or state the nature of the illness), transportation, child care, etc. Failure to properly notify the facility will result in disciplinary action up to and including termination.

Any absence for medical reasons exceeding three (3) consecutive scheduled days must be supported by acceptable documentation from a healthcare provider. An employee will be permitted to return to work only when a medical release has been presented to his/her direct supervisor or department head.

If an employee is absent without medical verification after having been denied a request for a vacation or a personal day off, it will be considered a refusal to work and the employee shall receive disciplinary action.

Disciplinary

Action: The following guidelines reflect how Lasata Care Center may respond to violations of this policy, consistent with any obligations under the collective bargaining agreement, including just cause. Management reserves the right to deviate from these actions bases [sic] upon the circumstances presented, consistent with the concept of just cause. Occurrences of any absences and/or tardy/left early, over a twelve (12) month rolling period will be counted to determine if the employee is scheduled to receive a corrective disciplinary action.

Oral Warning – Four (4) absences or eight (8) tardy/left early or any combination of the two, equaling four (4) occurrences, within a twelve (12) month period will result in an oral warning. In addition, one (1) incidents [sic] of failing to provide proper notice of absence within a twelve (12) month rolling period will result in an oral warning.

Written Warning – Seven (7) absences or fourteen (14) tardy/left early or any combination of the two, equaling seven (7) occurrences, within a twelve (12) month rolling period will result in a written warning. In addition, two (2) incidents of failing to provide proper notice of absence within a twelve (12) month rolling period will result in a written warning.

1 Day Suspension – Nine (9) absences or eighteen (18) tardy/left early or any combination of the two, equaling nine (9) occurrences, within a twelve (12) month rolling period will result in a one (1) day suspension. In addition, three (3) incidents of failing to provide proper notice of absence within a 12 month rolling period will result in a one (1) day suspension. The 1st No Call No Show with in [sic] a 12 month rolling period will result in a one (1) day suspension.

3 Day Suspension – Eleven (11) absences or twenty-two tardy/left early or any combination of the two, equaling eleven (11) occurrences, within a 12 month rolling period will result in a three (3) day suspension. In addition, four (4) incidents of failing to provide proper notice of absence within a 12 month rolling period will result in a three (3) day suspension. The 2nd non-consecutive No Call No Show within a 12 month rolling period will result in a three (3) day suspension.

Termination – Thirteen (13) absences or twenty-six (26) tardy/left early or any combination of the two, equaling thirteen (13) occurrences, within a 12 month rolling period will result in termination. In addition, five (5) incidents of failing to provide proper notice of absence within a 12 month rolling period will result in termination. The 3rd non-consecutive No Call No Show within a 12 month rolling period will result in termination.

- *Use of paid time-off does not prevent the imposition of disciplinary action for absences and tardy/left early.*
- *Management retains the rights to make exceptions to this policy if after reviewing an employee' [sic] work and medical history they believe there is justification to make an exception.*

On April 30, 2007, Association President Wendy Stencel signed the instant grievance in which it is contended that the Employer violated Article IV – Management Rights of the collective bargaining agreement, as well as any other Article, Section, Work Rule or Past Practice that may be applicable. The Grievance, 2007-30, states the Issue as:

Did the Employer violate the express or implied terms of the collective bargaining agreement when it unilaterally issued an updated *Attendance Policy* without bargaining the impact with the Association. If so, what is the appropriate remedy?

In the grievance, the Association alleged that the Employer had never offered to sit down with the Association to bargain over the new Attendance Policy or its impact. At the Step 2 grievance meeting the Association made proposals to the Employer regarding the changes in the Attendance policy. Ms. Wencel does not recall requesting that the Employer bargain over the changes prior to filing the instant grievance. According to Mr. Luedtke, the Association did not request to bargain prior to the filing of the grievance.

Additional facts will be presented in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE III – GRIEVANCE PROCEDURE

Section 3.01 – Definition: Only matters involving the interpretation, application, or enforcement of the terms of this Agreement shall constitute a grievance.

. . .

Section 3.05 – Arbitration Award. The arbitrator shall make a decision, which shall be final and binding on both parties. The arbitrator shall not add to, subtract from, or modify the provisions of the Agreement.

. . .

ARTICLE IV – MANAGEMENT RIGHTS

Section 4.01 – Management Rights: The Employer reserves and retains solely and exclusively all of its common law, statutory and inherent rights to manage its own affairs. Such rights include, but are not limited to, the following:

. . .

R) To issue and amend reasonable work rules, provided the Employer shall first furnish each employee with a copy of same.

ARTICLE XV – SICK LEAVE

Section 15.01 – Accumulation: Eligibility for sick leave shall begin after a regular full-time employee or a regular part-time employee who is normally scheduled to work at least forty (40) hours in a two (2) two week period, has completed six (6) months of employment. Once an employee becomes eligible for sick leave, accrual will be retroactive to the date of hire. Regular full-time will accrue sick leave at the rate of .048 hours for each hour they are paid and regular part-time employees shall accrue sick leave at the rate of .046153 hours for each hour they are paid, including overtime, to a maximum of ninety-six (96) hours of sick leave per calendar year. Unused sick leave may be accumulated to a maximum of twelve hundred (1200) hours.

Section 15.02 – Sick Leave Causation: Absences are compensable only if caused by legitimate illness or injury of the employee, or unless through exposure to a contagious disease an employee would jeopardize the health of the residents or other employees. The Medical Director, or any physician licensed in the State of Wisconsin, can determine if exposure to a contagious disease will affect the health of residents or other employees.

Section 15.03 – Medical Excuse: For absences exceeding three (3) consecutive work days, employees must submit a physician’s statement or hospital report providing information as to the nature of the illness or injury and the days of hospitalization, if any. For absences at frequent intervals, or when there is reason to believe that the sick pay policy is being abused, a medical certificate may be required to support any future granting of such leave. All employees must notify their Department Head prior to the start of their scheduled shift if they will not be at work because of illness or injury. Employees who will be late to work are expected to notify the appropriate supervisor. In both instances, a one (1) hour notice is required unless due to extenuating circumstances, it is not possible. Any employee who calls in to report that they will be late to work shall not be charged with a violation of the work rules, but may receive credit for an occurrence under the absenteeism policy. The employees shall be required to complete a sick pay requisition form provided by the Employer upon returning to work.

. . .

ARTICLE XXVI – CONDITIONS OF AGREEMENT

Section 26.02 - Entire Agreement: This Agreement constitutes the entire agreement between the parties and no verbal statements or agreements shall supersede any of its provisions.

DISCUSSION

The parties hereto stipulated that the issue to be decided is whether the Employer violated the express or implied terms of the collective bargaining agreement when it unilaterally issued an updated Attendance Policy without bargaining it or its impact with the Association. The Association cites the management rights clause, the sick leave clause, and the disciplinary procedures clause in its brief. The management rights clause, at Section 4.01 R, provides that the Employer reserves and retains solely and exclusively the right “to issue and amend reasonable work rules provided the Employer shall first furnish each employee with a copy of same.” Inherent in this reservation of rights is the ability of the Association to contest the reasonableness of any work rule or amended work rule that the Employer might promulgate. The Association does not specify the implied terms of the collective bargaining agreement that it contends the Employer has violated, but the arguments presented lead to the logical conclusion that the Association contends the amended Attendance policy is unreasonable.

The Association argues that the County had previously acknowledged a duty to bargain over the Attendance Policy and that it has changed its position in this regard over a period of less than five (5) years. The Association further contends that Lasata has been unreasonable in its application of its management rights reserved under Article IV of the collective bargaining agreement and that the revised Attendance Policy is an unreasonable work rule. Accordingly, the Association asks that the 2005 Attendance Policy be reinstated and that the County be required to bargain the impact of any changes to that Policy. It is clear that the Association is of the opinion that the Attendance Policy, as amended in 2007, is an unreasonable work rule.

The Employer argues that there has been no violation of the collective bargaining agreement inasmuch as the management rights clause specifically allows the Employer to make and amend work rules and does not establish a contractual duty to bargain either the work rules or their impact. Lasata also argues that the Association’s failure to bargain argument is not an appropriate basis of a grievance but is, rather, a basis for a prohibited practice complaint before the Wisconsin Employment Relations Commission. Further, the Employer contends that the Association failed to demand bargaining regarding the rule or its impact, or make a bargaining proposal regarding the matter until after filing the instant grievance. Finally, while it argues that the rule is reasonable, Lasata contends that the issue of the reasonableness of the rule is not properly before the undersigned and that the Association failed to put forth evidence that the rule is unreasonable.

There is no question that sick leave is a mandatory subject of bargaining. It is also clear that the parties have bargained about sick leave, specifically in Article XV of the collective bargaining agreement wherein the parties bargained and reached agreement as to the amount of sick leave an employee might utilize, might accumulate and the permissible reasons for use of such sick leave. They also reached agreement on the need to notify the Employer in the event of absence or lateness. Further, Article XV makes reference to an “occurrence” under the absenteeism policy. The parties also agreed to Article XXVI which clearly states that the “Agreement constitutes the entire agreement between the parties and no verbal statements or agreements shall supersede any of its provisions.” In addition, the management

rights clause of the collective bargaining agreement reserves to the employer the right to issue and amend reasonable work rules, provided only that each employee is furnished a copy of same prior to implementation.

The Association contends that when Lasata initially proposed a work rule regarding absenteeism, in 2003, the Association objected to unilateral implementation of such a rule and demanded to bargain regarding it. According to the Association, the Employer and the Association met several times over a period of time and agreed to the Attendance Policy as noted above. The Employer does not dispute that it met with the Association regarding the policy but contends that it did not bargain with the Association, that the policy affects all Lasata employees, and that it is not required under the terms of the collective bargaining agreement to bargain with the Association in the creation or amendment of work rules, including ones related to use of sick leave. Lasata points out that it unilaterally amended the work rule in 2005, at which time the Association did not object, request to bargain, or grieve. The Association rebuts this fact by indicating that since it agreed with the 2005 change to the Attendance Policy there was no need to bargain the modification or its impact.

Meeting with the Association in 2003 to discuss and develop a mutually agreeable Attendance policy does not establish a past practice that the Employer must follow when it determines a future need to adopt or amend a work rule regarding mandatory subjects of bargaining over which the parties have bargained and reached agreement in their collective bargaining agreement.¹ The contractual right to adopt and amend work rules remains a management right despite a one-time willingness to meet and confer with the Association regarding the work rule.² In fact the 2005 modification demonstrates that there is no past practice regarding a willingness to either bargain or meet and confer. The fact that the Association agreed with the 2005 amendment to the Attendance Policy does not cure a failure of the duty to bargain, if one exists. That is, an Employer, if obligated to bargain, must do so whether the proposed changes are viewed as positive, negative, neutral or agreeable by the Association.

Having found that there is no enforceable past practice of bargaining work rules related to sick leave that has been violated, attention must turn to the question of whether there is any express or implied provision of the collective bargaining agreement that has been violated. The Association has not identified any implied provision, other than the past practice of bargaining about the Attendance Policy. Hence the issue becomes one of whether the Employer violated any express provision of the contract. The express terms of the management rights clause allow the Employer to adopt and amend reasonable work rules. While stating that the new work rule is unreasonable, the Association also argues that the Employer acted unreasonably in adopting the amended Attendance policy. Although the

¹ There is no question that the forum in which to assert a failure to bargain regarding a mandatory subject of bargaining is through a prohibited practice complaint before the WERC.

² The Employer may not, by adopting work rules, unilaterally change the terms and conditions of employment regarding matters the parties have not bargained. Here, the parties bargained and reached agreement on sick leave but reserved to the Employer the rules by which the bargained language would be implemented.

grievance could have been worded more artfully, the undersigned is of the opinion that both parties have, albeit somewhat indirectly, argued the question of whether the new Attendance/Absenteeism Policy is reasonable. Accordingly, that question will be addressed.

While not presenting any evidence that the new Attendance Policy would impose any real hardship on the members of the bargaining unit, the Association points to the contractual language of Section 15.01 wherein employees accrue sick leave at the rate of .048 hours (full-time employees) and .046153 hours (part-time employees) for each hour worked. Because the revised Attendance policy includes absences which are excused or covered under the permitted uses of Sick Leave in the collective bargaining agreement as “occurrences,” the Association contends the policy is unreasonable. It points out that if an employee were to use all 96 hours of sick leave in accordance with the requirements of the contract during a calendar year, the employee would receive a written warning. Rhetorically, the Association asks, “How can a policy be considered reasonable when it disciplines an employee for using a benefit that has been previously bargained?” The Association then goes on to cite Section 7.01 of the agreement and points out that employees who have completed probation may only be disciplined for just cause and claims, erroneously, that the revised Attendance Policy does not mention just cause at all.

We start from the premise that the Employer operates a nursing home, a facility that must be properly staffed 24 hours per day, 7 days per week, 365 days per year. Lasata residents include frail elderly and other ill persons who rely on the Lasata staff for their daily care, including dressing, feeding and toileting. When employees are absent from work, or are not present for a large portion of their scheduled shifts, it is often necessary to assign other employees to cover those shifts. This can be disruptive to the residents and other employees, and can potentially be expensive for the Employer if overtime must be used to pay for the replacement employees. On the other hand, employees do, at times, have valid reasons for missing work due to illness, transportation difficulties, and the like. In developing the revised Attendance Policy, the Employer determined that paid time off, other than bereavement leave, leaves of absences, worker’s compensation leave, jury duty, and other pre-approved leaves, when an employee is scheduled to work, will be counted as an occurrence. In so doing, the Employer put the employees on notice that excessive absences, lateness, leaving early, no call-no show, and failure to properly notify in the event of an absence, would result in disciplinary action.

Contrary to the Association’s calculation that the use of 96 hours of sick leave in a calendar year would result in a written warning, the Policy provides that seven (7) occurrences in a rolling twelve month period will result in a written warning. An occurrence is defined as a period of consecutive shifts or one full shift an employee is absent from scheduled work.³ This could be seven (7) days (56 hours) if single day absences or, conceivably 15 days (105 hours) or more if the absences were of more than one consecutive shift such as a five

³ An employee can accrue occurrences by arriving late or leaving early. For the sake of clarity, this portion of the discussion will reference occurrences caused by absence.

consecutively scheduled days absence, and some combination of single and multiple day absences. Accordingly, an employee might well utilize more than an entire year's accrual of sick leave in a year and not incur a written warning.

The revised Policy measures occurrences over a twelve (12) month rolling period, rather than looking at occurrences quarter-by-quarter. Contrary to the testimony of Ms. Stencel, this does not mean that the occurrences last forever but, instead, that they are part of an employee's record for no more than twelve months. Instead of a calendar year, however, the Employer can look at an employee's record for the twelve month period preceding an incident to determine if discipline is appropriate, and at what level. This is inherently reasonable, especially in light of an employee's ability to accrue and accumulate sick leave from one year to the next, to a maximum of twelve hundred (1200) hours.

It is also important to note that under the 2005 Attendance Policy an employee could be disciplined for use of contractually allowed sick leave. In both the 2003 Policy and the 2005 revision, it is only when an employee provides documentation of illness verified in writing after examination by a health care provider that the absence is not considered to be an occurrence. Although the record is devoid of evidence regarding sick leave usage by Association members, it is logical to assume that there have been many one day absences that gave the Employer concern and resulted in the development of the new policy. Under it, an absence that is pre-approved by a supervisor would not be counted as an occurrence. This would mean that absences due to scheduled surgeries, for example, would not count as occurrences. Individuals who utilize all of their sick leave by, for example, taking a day off each month, would be subject to discipline under both policies.

With regard to occurrences accrued as a result of arriving late or leaving early without a supervisor's prior approval, there is no contractual basis for such behavior. In fact, the 2003/2005 Policy also included the imposition of discipline for occurrences resulting from lateness and leaving early. Discipline based on such events does not appear to be a basis for the Association's arguments, which appear to be confined to the accrual of occurrences for utilizing contractually allowable sick leave.

One significant difference between the 2003/2005 Policy and the 2007 Policy is that the new policy spells out the levels of discipline that an employee can anticipate in the event that he or she incurs a certain number of occurrences during a period of time. This provides more guidance to the Employer and the employee than the language of the old policy that provided for quarterly review of occurrences and indicated that "[f]our or more occurrences in each quarter may result in discipline," a statement that is rather open-ended and could be subject to a greater degree of arbitrariness in its application than the 2007 Policy.

Of concern to the undersigned in reviewing the Attendance Policy and deciding whether it is reasonable, is the use of the word "will" in connection with each possible level of discipline: So many occurrences within such a period of time will result in [form of discipline]. However, this concern is tempered by the reservation to management of "the

rights to make exceptions to this policy if after reviewing an employee' [sic] work and medical history they believe there is justification to make an exception." This language, of course, opens the door to the possibility of the Employer applying the policy in an arbitrary and capricious manner. However, the introductory paragraph on disciplinary action makes very clear that the contractual guarantee of just cause is applicable to the imposition of discipline arising from the application of the Attendance Policy. The Policy is clear that these are guidelines which may be utilized by Lasata in conjunction with just cause:

The following guidelines reflect how Lasata Care Center may respond to violations of this policy, consistent with any obligations under the collective bargaining agreement, including just cause. Management reserves the right to deviate from these actions bases [sic] upon the circumstances presented, consistent with the concept of just cause. (emphasis added)

In the absence of the underlined language, the undersigned would have no difficulty in determining that the revised Policy was, on its face, unreasonable. However, with these safeguards, it cannot be said that the policy is *per se* unreasonable, even given the difficulty of harmonizing a no fault attendance policy with just cause.

In conclusion, the Employer did not violate the collective bargaining agreement when it unilaterally revised the Attendance Policy. The revised Policy is not *per se* unreasonable, however it may well be that the Employer will violate the collective bargaining agreement in its application of the Policy. That, potentially, is a grievance for another day.

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

AWARD

No, the Employer did not violate the express or implied terms of the collective bargaining agreement when it unilaterally issued an updated *Attendance Policy* without bargaining the impact with the Association.

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 11th day of June, 2008.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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