

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 1258, AFSCME, AFL-CIO**

and

**ROCK COUNTY**

Case 376  
No. 67308  
MA-13828

(J.C. Termination Grievance)

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**Appearances:**

**Thomas Larsen**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin, 53511, for the labor organization.

**Jerome A. Long**, Deputy Corporation Counsel, Rock County, Rock County Courthouse, 51 South Main Street, Janesville, Wisconsin 53545, for the municipal employer.

**ARBITRATION AWARD**

Local 1258, AFSCME, AFL-CIO and Rock County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. Local 1258 made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a commissioner or member of its staff to hear and decide a grievance concerning the terms of the agreement relating to discipline. The Commission appointed Stuart D. Levitan, of its staff, as the impartial arbitrator. Hearing in the matter was held on May 19, 2008, in Janesville, Wisconsin. It was not transcribed. The County and the Union filed written arguments on June 13 and June 17, respectively, and on July 1, 2008 waived their right to reply. On October 21, 2008, the arbitrator wrote the parties seeking clarification on three factual matters, as noted below, with the record remaining open until November 21, 2008.

**ISSUE**

Did the employer violate the terms of the collective bargaining agreement when it terminated J.C. on October 19, 2006? If so, what is the remedy?

**RELEVANT CONTRACTUAL PROVISIONS**

**ARTICLE I - MANAGEMENT RIGHTS**

- 1.01 The Management of Rock County and the direction of the work force is vested exclusively in the Employer to be exercised through the Department Head, including but not limited, to the right to hire, promote, demote, suspend, discipline and discharge for proper cause; the right to decide job qualifications for hiring; the right to transfer or layoff because of lack of work or other legitimate reasons; to subcontract for economic reasons; to determine any type, kind and quality of service to be rendered to patients and citizenry; to determine the location, operation and type of physical structures, facilities or equipment of the departments; to plan and schedule service and work; to plan and schedule any training programs; to create, promulgate and enforce reasonable work rules; to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement. The Union expressly recognizes the prerogative of the Employer to operate and manage its affairs in all respects with its responsibilities.

...

**ARTICLE IX - GRIEVANCE PROCEDURE**

- 9.06 Limit on Arbitrators. The Arbitrator shall have jurisdiction and authority to interpret the provisions of the Agreement and shall not amend, delete or modify any of the provisions or terms of this Agreement.

...

**ARTICLE X - VACATIONS**

- 10.05 Regular part-time employees shall be entitled to vacation benefits on a pro-rata basis.....
- 10.06 The number of employees on vacation at any one time, within a given classification or job title shall be determined by the Department Head.
- 10.07 Choice of vacation time within a classification or job title or department shall be by seniority.

10.08 All employees shall be required to utilize vacation in a block of one week not less than once each year. Additional days of vacation may be used in one-day increments under the following conditions:

1. A weekend vacation must include both days of the weekend
2. No more than two weekends may be taken off during a vacation year utilizing less than whole week increments
3. No more than three vacation periods of less than one-week increments shall be permitted in the period from Memorial Day through Labor Day.

Exceptions may be made by the Department Head in cases, which would not adversely affect the department's work schedule.

...

10.11 Vacation time .... may be scheduled using the following procedure:

- 1) Employees shall request scheduling of vacation no less than two pay periods in advance of the 1<sup>st</sup> day of the vacation period desired. The Employer shall respond to the employee within one pay period of the request as to whether the request is authorized. Scheduling shall be on a first come first serve basis.

#### **ARTICLE XI- SICK LEAVE**

11.01 Each full-time employee shall accumulate one sick leave day with pay for each month or major fraction thereof of employment until a total of one hundred thirty days have been accumulated.

11.02 Sick leave pay shall begin on the first day of absence for illness and notice shall be given by the employee at least one hour prior to his/her regular starting time. Failure to give such notice to the department office which is due to carelessness or negligence of the employee, shall result in a forfeiture of one day's sick leave pay to which such employee would otherwise be entitled.

11.03 Regular part-time employees shall be entitled to sick leave benefits on a pro-rate basis.

11.04 Sick leave may be utilized for preventative health care such as dental and doctor office appointments, provided that any employee utilizing sick

leave in such manner give written notice of his/her intent to the Employer to do so no later than seven days in advance of the day such employee desires to use for such purpose.

- 11.05 All employees shall be allowed to use accumulated sick leave for illness of their spouse and children.

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#### **ARTICLE XVII- DISCHARGE, SUSPENSION**

17.01 The Employer may discharge, suspend or otherwise discipline any employee for proper cause. An employee discharged or suspended will be informed of the reasons in writing, within two working days of the discharge or suspension and a copy of such letter shall be sent to the Union.

17.02 A steward or officer will be present when an employee is counseled verbally/written, suspended or discharged if requested by the employee or the Employer.

#### **BACKGROUND**

The grievant, J.C., began working as a part time Certified Nursing Assistant at Rock County's Rock Haven Nursing Home in March, 2001. She was terminated on October 19, 2006, for purportedly violating the employer's attendance policy.

On September 1, 2004, Rock Haven Administrator Sherry Gunderson had distributed to all Health Care Center staff the following memo:

The current disciplinary process involves progressive discipline for absences, tardiness, unauthorized overtime and refusal of mandation. Effective September 1, 2004, information regarding attendance issues will be forwarded to administration at the beginning of each week for the previous week. In addition, your manager, will be involved in the disciplinary process. We are initiating this change in order to assist our employees to avoid termination.

#### **Absences in a six-month period.**

**1<sup>st</sup>** – written notice to the employee, manager and union. **The manager will meet with the employee to discuss the seriousness of this step.**

**2<sup>nd</sup>** – suspension (date of absence) and warning the (sic) further unexcused absences will result in termination. Written notice to the employee, manager and union. **The manager will meet with the employee to discuss the seriousness of this step.**

**3<sup>rd</sup>** – Termination of employment. Meeting with manager, Nursing Home

Administrator and union.

**Tardiness in a six-month period.**

**1<sup>st</sup>** – Written notice to the employee, manager and union.

**2<sup>nd</sup>** – Written notice to the employee, manager and union.

**3<sup>rd</sup>** – Reprimand. Written notice to the employee, manager and union.

**4<sup>th</sup>** – Suspension (for the lost time). Written notice to the employee, manager and union. **The manager will meet with the employee to discuss the seriousness of this step.**

**5<sup>th</sup>** - Suspension (for the lost time). Written notice to the employee that further tardiness will result in termination. **The manager will meet with the employee to discuss the seriousness of this step.**

**6<sup>th</sup>** - Termination of employment. Meeting with manager, Nursing Home Administrator and union.

**Unauthorized overtime in a six-month period.**

**1<sup>st</sup>** – Written notice to the employee, manager and union.

**2<sup>nd</sup>** – Written notice to the employee, manager and union.

**3<sup>rd</sup>** – Reprimand. Written notice to the employee, manager and union.

**4<sup>th</sup>** – Suspension for 1 day. Written notice to the employee, manager and union. **The manager will meet with the employee to discuss the seriousness of this step.**

**5<sup>th</sup>** - Suspension of 1 day and a warning that further unauthorized overtime will result in termination. Written notice to the employee, manager and union. **The manager will meet with the employee to discuss the seriousness of this step.**

**6<sup>th</sup>** - Termination of employment. Meeting with manager, Nursing Home Administrator and union.

**Refusal of Mandation in a six-month period.**

**1<sup>st</sup>** – Reprimand. Written notice to the employee, manager and union. **The manager will meet with the employee to discuss the seriousness of this step.**

**2<sup>nd</sup>** – Suspension for 1 day. Written notification to the employee, manager and union. **The manager will meet with the employee to discuss the seriousness of this step.**

**3<sup>rd</sup>** – Suspension for 2 days. Written notification to the employee, manager and union. **The manager will meet with the employee to discuss the seriousness of this step.**

**4<sup>th</sup>** – Termination of employment. Meeting with manager, Nursing Home Administrator and union.

Pursuant to the collective bargaining agreement, J.C. earned sick leave on a pro-rated

basis, based on her .8 FTE position. Working about 50 hours or so in a pay period, J.C. would earn a little less than 3 hours sick leave per pay period. Rock Haven employees are credited with sick leave on the last day of a pay period.

In June, 2006, a malfunction in the employer's program for tracking employee leave resulted in employees not being properly credited with sick leave they earned. For the pay period June 4 through June 17, pay run 26, J.C. worked 55 hours and should have been credited with 2.95 hours of sick leave, but was not.

The mistake was rectified on August 25, with the accounting of pay run 34, for the period July 30 through August 12. During that time, J.C. used eight hours of sick leave, and was paid accordingly. However, her leave bank was debited only 5.05 hours, thus correcting the mistake from pay run 26. The leave bank on this pay stub, with a deposit date of August 25, correctly reflected J.C.'s sick leave bank of 4.47 hours.

On August 5, 2006, J.C. called in late to report that she had been locked out of her bedroom and did not have access to her work clothes. The supervisory employee who took J.C.'s call advised her that there were scrubs at the facility which she could use, but J.C. never reported for her shift that day. This is known as a "late call off," and as such is treated as an unexcused absence. The amount of time in J.C.'s sick leave bank on August 5 is irrelevant, in that all late call offs – even with sufficient sick leave -- are considered an unexcused absence. Gunderson wrote to J.C. to inform her of this disciplinary infraction August 22, 2006. <sup>1</sup>

In August, 2006, J.C. suffered a work-related injury and was on Worker's Compensation starting on August 10. According to the employer's records, J.C. was on Worker's Compensation from August 10 through August 17, "returning to work on Aug. 19<sup>th</sup> with no restrictions." <sup>2</sup>

The employer did not deduct from J.C.'s sick leave bank during her use of Worker's Compensation. J.C. was scheduled to work on September 2, but called in sick on that morning.

The most recent pay stub J.C. had received prior to September 2 – pay run 34, for the period ending August 12, with a deposit date of August 25 – corrected the malfunction from pay run 26 and accurately reflected that she had 4.47 hours in her sick leave bank on August 12. She was credited with another 2.79 hours on August 26, and used no sick leave that pay period, leaving a balance on August 26 of 7.26 hours. As she would not earn any further sick leave until September 8, that is the amount J.C. had in her sick leave bank as of September 2.

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<sup>1</sup> According to the most recent accounting J.C. received prior to August 5, for pay run 30 (July 2-July 15), she had 4.98 hours in her sick leave bank. Adding the 2.95 hours that was improperly not credited for pay run 26 would have left J.C. a few minutes short of the full eight hours needed to cover her absence on August 5.

<sup>2</sup> The grievant testified she was on Worker's Compensation from August 9 through September 1<sup>st</sup> or 2<sup>nd</sup>, working the last two weeks in recreational therapy. It is not necessary to resolve this discrepancy to evaluate the grievance.

September 2. Accordingly, this was treated as a second unexcused absence in a six-month period, and the forty-four minutes were considered a suspension.<sup>3</sup> The employer notified J.C. of this second “disciplinary infraction,” and the resultant suspension, by letter dated September 15, 2006, and in a personal meeting on September 20.

On October 6, 2006, when she had 4.75 hours in her sick leave bank, J.C. called in sick. As she was 3.25 hours short of the eight hours needed to cover her full shift, this was treated as a third unexcused absence within a six month period.

On October 19, 2006,. Gunderson wrote J.C. as follows:

Effective October 19, 2006 your employment with Rock Haven is terminated due to absenteeism. You incurred absences on August 5, September 2 and October 6, 2006. The Administrative Work Rule on Absenteeism states:

<u>Instance of Absenteeism</u>	<u>Disciplinary Action to be Taken</u>
1 <sup>st</sup>	Written counseling notification of responses for future absenteeism
2 <sup>nd</sup>	Written reprimand and suspension; notification of responses for future absenteeism
3 <sup>rd</sup>	Termination of Employment

This action is taken in accordance with Articles I and XVII of the current AFSCME labor agreement. Please make arrangements to return all County owned property (i.e., ID card, keys, and name tag) to Payroll. If you have questions concerning this action, please contact me.

The Union grieved the matter on October 31, contending that the county violated Section 16.04 of the collective bargaining agreement by its “failure to adequately keep employee apprised of benefit time accurately. Removing benefit (time) from employee’s benefit bank without any notification. Terminating employee without just cause.”

On November 3, Gunderson issued her Step 2 response as follows:

I received the grievance related to {J.C.’s} termination for absenteeism. Her termination was the result of a progressive discipline for poor attendance and followed our attendance policy exactly. With reference to 16.04, there was no discrimination. I am enforcing the attendance policy consistently for all

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<sup>3</sup> Although the payroll checkstubs clearly indicate J.C. had 7.26 hours of sick leave as of September 2, the employer used the figure 7.25 in the subsequent discipline, and held that she was 45 minutes, not 44, short on her sick leave bank on that date. It is not necessary to resolve this discrepancy to evaluate the grievance.

employees.

On 8/5/06, {J.} called off late. All late call-offs are automatically treated as absences. The amount of benefit time available to her was not a factor.

On 9/2/06, {J.} called in ill without sufficient sick time.

On 10/6/06, {J.} also called in ill without sufficient sick time.

I have included copies of those call-offs, Kenlon Meyer's review of {J's} sick bank from 6/30 to termination and a copy of her attendance history over the past year.

With reference to benefit time issues, it is the practice for payroll to use sick time for family illness even with FMLA eligibility until noticed by the employee of another plan. This prevents employees from having short checks. Kenlon's decision to pay {J.} for the 9/11 (sic) call-off related to her son was related to this standard of practice. Once she received the FMLA request, she returned the hours to J's bank.

Even with those hours, {J.} did not have sufficient time to cover the 10/6 illness. Jennifer's pay stubs provided enough information for her to realize that she did not have enough time to cover on 10/6.

{J.} has consistently been in the attendance discipline track for attendance (step 1 for 12/15, 17 and 18, 2003, step 2 for 5/4/04, step 1 for 10/16/05 and the 2006 dates). It was apparent to me that {J.} was aware of the process and her excessive call-offs and was expecting the termination when we met on October 19<sup>th</sup>. She came to work without calling Earl at 1pm to determine her assignment and told me that she did not expect that she would be working.

On April 19, 2007, Rock County Human Resources Director John C. Becker responded at the 3<sup>rd</sup> step as follows:

### **ISSUE**

Did the County violate the terms of the collective bargaining agreement when it terminated the Grievant, {J.C.}, for three unexcused absences pursuant to the absence policy?

### **FACTS**

The Grievant incurred absences on August 5, 2006, September 2, 2006 and October 6, 2006. At the time of the Aug. 5 absence the Grievant had a late call-off. Under Rock Haven's attendance policy late call-offs are treated as absences.



On Sept. 2, the Grievant called off sick with only 7.25 hours of sick leave in her bank, leaving .75 hours unpaid. Likewise, failure to cover absences with sick leave is in violation of the policy and this shortage in benefit time resulted in absence #2. Finally, on October 6, the Grievant called off sick having only 4.75 hours of sick time in her bank. This left 3.75 hours unpaid, and became her third absence within a 6-month period.

## **DISCUSSION**

Under the Administrative Work Rules of the Nursing Home, employees who are absent 3 times in a six month period shall be terminated from employment. The Grievant knew about the rule, as she had been disciplined several times before for absenteeism. The instant case is the first time, however, that she received the third absence, which caused her to fall afoul of the termination provision of the rule.

## **DECISION**

**THE GRIEVANCE IS DENIED.**

On October 20, 2006, payroll supervisor Kenlon Meyers wrote Gunderson as follows:

Re: {J.C.}

Use of sick time, earned sick time and ending balance of sick time from June 30<sup>th</sup> 2006 thru October 20, 2006:

### Paycheck

6-30-06	Balance of sick time on 6-17-06 – 6.8847 – nothing was earned for her this pay period
7-14-06	Earned 3.1385 – Balance on 7-1-06 is now 10.0232
7-28-06	Used 8 hrs on 7-5, Balance on 7-5 is 2.0232 – Earned 2.9538 on 7-15-06 – Balance 4.9770
8-11-06	Used 1.00 on 7-17, Balance on 7-17 is 3.9770 – Earned 2.9538 on 7-29-06 Balance 6.9308
8-25-06	Adjusted 2.9538 for June 17, 2006 –Balance 9.8846 – Used 8 hrs on 7-31 – Balance on 7-31 – 1.8846 – Earned 2.5846 on 8-13-06 – Balance 4.4692 – On 8-5-06 called off stating locked out of

bedroom has no scrubs, was told to come in since we have scrubs available but did not show up this is absence number 1.

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- 9-8-06            Earned 2.7923 on 8-26 – Balance on 8-26-06 – 7.2615
- 9-22-06            Used 8 hrs sick time on 9-2-06 (since she only had 7.25 hrs in the bank she is absent .75 hrs. this is absence number 2 – Balance would have been negative .7385 – but since we pay in quarter hours her balance is .0115. Earned 2.8731 on 9-9-06 balance is 2.8846.
- 10-6-06            Used 8 hrs of sick on 9-11-06 – could only again use 2.75 hrs since that is all she had in the bank – the balance would have been negative 5.8539, but since only 2.75 hrs could be paid the balance is .01346. This would have been absence number three but the next pay period a family leave was brought in. Earned 1.9269 on 9-23-06 – Balance on 9-23 – 2.0615
- 10-20-06            Gave back 2.75 hrs of sick time from 9-11-06 because of the family leave giving her a balance of 4.8115 – Used 8 hrs of sick time on 10-6 (but again since she only had 4.75 hrs her balance was .0615 instead of a negative 3.1885) being that only 4.75 hrs was used she is absent 3.25, this is absence number 3. Earn 3.6462 on 10-7-06 – Balance 3.7077.

On October 21, 2008, I wrote the parties as follows:

1. As of the most recent payroll material the grievant had received prior to September 2, 2006, how much sick leave did the employer represent to the grievant that she had as of that date?
2. How much sick leave did the grievant actually have on September 2, 2006?
3. The disciplinary letter of September 15, 2006, informed the grievant “you are hereby counseled and given appropriate notification/warning ....” My notes indicate that, on cross-examination, Ms. Gunderson testified that the grievant was suspended for 45 minutes for the events of September 2. Which statement is correct?

I asked for replies by November 7. On October 24, 2008, County Deputy Corporation Counsel Long replied as follows:

1. 7.25 hours.
2. 7.25 hours.

3. Both statements are correct.

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On September 2<sup>nd</sup> {J.C.} had 45 minutes absent without either FMLA time or benefit time coverage (8-7.25=.75 hrs = 45 mins). This was her second absence in a 6 month period, and per policy that 45 minutes is counted as a suspension. (See reverse of Employer's exhibit 17, "Absences in a six-month period")

She was also warned at the same time that further infractions could result in termination in the paragraph beginning "As an employee ..." on front of Employer's Exhibit 17, "... you are hereby counseled and given appropriate notification/warning ...."

I hope this answers your questions. If you need further clarification or have additional questions, please do not hesitate to contact me.

On November 11, 2008, AFSCME Staff Representative Larsen wrote as follows:

I previously contact(ed) Attorney Long with regard to making a joint stipulation regarding the answers to your questions. He indicate(d) that he had already responded to your inquiry. It is the Union's position that absent a joint stipulation, it is inappropriate to expand the record with additional facts not already in the record.

On that date, and also on November 18, I again invited a response from the union, to clarify the record. None was forthcoming, and I closed the record on November 21, 2008.

### **POSITIONS OF THE PARTIES**

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

The application of the work rule on attendance still must meet the test of "proper cause." The grievant in good faith believed she had sufficient time in her sick leave bank to cover her absences. It normally is incumbent on the employee to know what is in their bank, but that was not possible for the grievant due to the employer's error in its record-keeping.

It is not disputed that the payroll system had a glitch when it failed to credit sick leave for the June 17-30 payroll period. The employer says it credited back the sick leave by about August 25, and this may have happened. But the Grievant would not have known this prior to the absence on September 2, since she wouldn't have received the August 25 pay check with the leave hours on it by then.

The grievant had sufficient other time on the books, but was able to rely on the

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information regarding what her sick leave balance was. It was only after the employer had done an extensive analysis of the grievant's sick leave history that it could determine that her sick leave balance had gone into the negative by less than an hour.

The grievant could not have known on September 2 that she didn't have sufficient sick time to cover the full absence. Therefore she couldn't have known that she was in violation of the work rule. Accordingly, the discipline was without proper cause. The grievant should be reinstated and made whole.

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

Whether under the so-called "Daugherty seven-question" test or a "reasonable person" standard, the employer had proper cause to discharge the grievant.

The grievant had notice of the conduct that was expected of her. She had a history of unexcused absences, and each time she was disciplined her supervisor explained the infraction. The attendance policy is also set down in the employee handbook, which the grievant received. It strains credulity beyond any reasonable limit for the grievant to contend she had no notice of the attendance that was expected of her.

Although the employer provides information regarding leave time to each employee on their bi-weekly paycheck, employees have the inherent duty to track their own leave balances. It appears the grievant thought she had more time in her bank than she did, and did nothing to verify that. Moreover, testimony showed that when the grievant's benefit banks were recalculated, she still had insufficient time to account for all her leave.

The long-standing attendance rules are strictly enforced to ensure that all employees are treated fairly. As employees at a 24/7 nursing home, Rock Haven employees are subject to mandation; when a CNA is absent, another CNA is required to work, creating scheduling headaches for management and disruptions in the lives of the other union members. The attendance rule is a reasonable one designed to aid the employer to meet its responsibilities and to ensure employees are treated fairly and shielded from the abusive absenteeism of other employees.

The employer conducted a complete and fair investigation, and the grievant does not dispute that she incurred three unexcused absences. She gave no evidence that she in fact had sufficient time in an appropriate benefit bank to cover her third absence, and did not grieve the factual basis or discipline imposed for the

first two instances. She challenges only the notice of the lack of benefit time in her bank and the fairness of the discipline.

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There is no evidence to rebut the employer's witness testimony that the absenteeism policy is applied fairly throughout the nursing department.

The penalty is proper under the collective bargaining agreement. An employee who repeatedly and unexpectedly absents herself from her job creates difficulty for the employer and for other employees (and their families). Also, it is not unreasonable to assume that the quality of care for the facility's elderly patients may be adversely affected when a CNA has to work a double shift because a co-worker has played hooky. There is good reason for the employer's strict approach that requires termination for a third unexcused absence. And the grievant had considerable experience with the absenteeism policy, having a history of discipline for violating it. But instead of learning from her discipline, she seems to have chosen to push the envelop to see how much she could manipulate the system; it is truly egregious that the third absence came only slightly more than 60 days from the first, evidencing a deliberate effort to scam the employer and abuse the absence policy.

The grievant's termination was also appropriate because a failure to enforce the policy can lead to discipline and morale problems among other employees. Management must not be seen to be giving preferential treatment to any individual employee, and must be seen to mean what it says so there is no ambiguity about the policy and its application. The rule explicitly calls for termination and is integral to a long-standing policy. To allow this grievant to escape the consequences of her absenteeism would be to carve an exception and rewrite the collective bargaining agreement.

Having satisfied the Daugherty "Seven Questions" test, the termination also satisfies the "reasonable person" standard.

It is important to note the grievant was not terminated for the 45-minute shortfall (her second unexcused absence), which she did not grieve. She was terminated for her third infraction. The grievant is a frequent flyer regarding absenteeism, showing a pattern of egregious conduct. It is clear the grievant was pushing the policy right to the limit despite the knowledge that she might not have the benefit time she thought she had. But the grievant cannot expect the employer to ignore her continued misconduct, and cannot hide behind the sham argument that she didn't know how much time she had. She certainly knew she was walking a thin line and yet acted in reckless disregard for her situation. She miscalculated and now must pay the piper.

No reasonable person, reviewing the facts, could conclude that the grievant's persistent abuse of the absence policy was defensible or the penalty was unjust.

The grievant also alleged she was not given adequate notice of her benefit time and the removal of time from her bank without notice. The testimony at hearing rebuts this claim.

The grievant's allegations are without merit. She was aware of the attendance policy, and had reason to know she was in trouble. Yet she persisted in the conduct that led to her discharge. The grievance should be denied and the termination upheld.

### DISCUSSION

This is an unfortunate situation, but not a terribly difficult case.

The employer has properly promulgated a work rule addressing unexcused absences. Given Rock Haven Nursing Home's need for round-the-clock coverage by Certified Nursing Assistants, it is reasonable for it to have a work rule setting significant discipline for unexcused absences, up to and including termination. The union has not raised any procedural, contractual or theoretical objections to this rule.

Nor has the union alleged erratic, irregular or discriminatory administration of the rule. The employer claims it has strictly enforced the provisions of the rule, and the union has offered no evidence in rebuttal.

The union's argument seems to be that the employer provided erroneous information to the grievant about her sick leave bank, and that she could not have known on September 2, 2006 that she did not have adequate time to cover her full eight hours off.

It is disturbing that the employer's payroll records have the errors they do. It is undisputed that the grievant, and other employees, were not credited with sick leave they earned in early June, pay period 26, and that the employer did not make the proper adjustment until pay run 34, almost two months later. Also, the two pre-termination disciplinary notices each described the August 4 infraction as "insufficient time," when the first was in fact a late call-off. But however disturbing such errors are, they do not seriously affect consideration of this grievance.

There are two problems with the union's argument. The first is that we are long past the time for challenging the discipline arising out of the September 2 incident. As noted, the collective bargaining agreement requires that grievances be brought "without fourteen days of the alleged grievance or knowledge thereof." Although J.C. did contend that the employer's accounting was wrong when she received her discipline on September 15, 2006 for the September 2 incident, there is no evidence the union ever grieved after the employer reviewed its reports and found no discrepancy following the correction of August 25.

Moreover, even if the September 2 suspension *were* up for reconsideration, I do not think the union's argument is persuasive. Despite the employer's contention that it is the employee's responsibility to track leave balances, I do believe that an employee can reasonably rely on the employer's calculations as being presumably accurate; that is, if the employer informed the grievant that she had *more* than eight hours of sick leave in her bank, and the grievant relied on that representation, the employer could not discipline the employee if it later determined that she had less than that amount. However, that is not what happened here; indeed, the opposite happened, with the employer later *adding* time to the grievant's sick leave bank – and the grievant still coming up short. Specifically, the employer on August 25 restored to J.C.'s sick leave bank the 2.95 hours it had improperly failed to credit from early June, producing an accurate ending balance on August 25 of 4.47 hours. Adding to that the 2.79 hours the grievant was credited with on August 26 resulted in a total sick leave balance of 7.26 hours, which was insufficient to cover the eight hours she was absent on September 2. That is, even if the September 2 discipline were properly before me, I do not believe the union has made a persuasive challenge to it. Similarly, although the grievant did have time in her vacation bank to cover the absences of August 5, September 2 and October 6, it does not appear from the collective bargaining agreement that she would have been able to use vacation time to cover these absences.

Regardless of the merits of a challenge to the September 2 discipline, no grievance was ever filed, and that discipline cannot be challenged in this proceeding, which involves the aftermath of the events of October 6, 2006. There is no dispute that, on that date, J.C. again called in sick without sufficient time. In so doing, she violated the attendance policy for the third time within a six-month period, and thus, pursuant to the adopted policy, was subject to termination. As that policy was properly promulgated, and reasonably related to the employer's legitimate concerns, and routinely enforced, I have no choice but to find the grievance without merit.

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

**AWARD**

That the grievance is denied.

Dated at Madison, Wisconsin, this 21<sup>st</sup> day of January, 2009.

Stuart D. Levitan /s/

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Stuart D. Levitan, Arbitrator

SDL/gjc

