BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ST. FRANCIS IN THE PARK HEALTH AND REHABILITATION CENTER EMPLOYEES' UNION, LOCAL 1760-A, AFSCME, AFL-CIO

and

ST. FRANCIS IN THE PARK HEALTH AND REHABILITATION CENTER

Case 27
No. 68513
A-6349

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, on behalf of the Union.

Johnson, Killen & Seiler, by **Attorney Joseph J. Roby, Jr.**, 230 West Superior Street, Suite 800, Duluth, Minnesota 55802, on behalf of the Employer.

ARBITRATION AWARD

St. Francis in the Park Health and Rehabilitation Center Employees' Union, Local #1760-A, AFSCME, AFL-CIO (herein the Union) and St. Francis in the Park Health and Rehabilitation Center (herein the Employer,) are parties to a collective bargaining agreement dated January 15, 2008 and covering the period from January 11, 2008 to January 10, 2011. On December 22, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over discipline issued to several members of the bargaining unit (herein the Grievants) for failure to attend a mandatory inservice. The parties jointly requested the undersigned to hear the dispute and a hearing was conducted on March 3, 2009. The proceedings were not transcribed. The parties filed briefs by April 23, 2009, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issue. The Union would frame the issues as follows:

Did the Employer have just cause to give the grievants?

If not, the appropriate remedy is for the Employer to remove any and all records of this discipline from any and all files.

The City would frame the issues as follows:

Did AFSCME prove that the alleged binding past practices were unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as fixed and established practices accepted by both St. Francis and AFSCME?

If yes, did St. Francis violate the binding past practices, or stated another way, did St. Francis have just cause to impose the discipline?

The Arbitrator characterizes the issues as follows:

Did the Employer discipline the grievants for just cause?

If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 19 -DISCIPLINE

Section 1. The parties recognize the authority of the Employer to discipline, discharge or take other appropriate disciplinary action against employees for just cause.

Section 2. The following shall be the sequence of disciplinary action:

a). Oral reprimand
b). Written reprimand
c). Written reprimand with a one (1) day unpaid suspension as scheduled by the Employer.
d). Written reprimand with two (2) days unpaid suspension as scheduled by the Employer.
e). Discharge.

The above sequence of disciplinary action shall not apply in cases where the infraction is considered just cause for immediate suspension or discharge.

The following list some of the common infractions and their disciplinary actions. In general, any conduct, which exhibits disregard for the goals of St. Francis in the Park Health and Rehabilitation Center or the health and well being of its residents, may be grounds for immediate dismissal. **This list does**

not contain all actions that may call for disciplinary measures, but it is intended to be a guide, to help you avoid activities that are opposed to the goals of St. Francis Home.

Infractions for which you may be dismissed immediately include, but are not limited to:

. . .

19. Failure to view all mandatory facility training in-services within established timelines and/or failure to meet the states [sic] minimal training requirements for the employees certification/licensure. Time spent viewing in-service tapes in the Facility shall be compensated, provided the employee is on duty.

. . .

BACKGROUND

St. Francis in the Park Health and Rehabilitation Center (herein the Employer) is a nursing home and rehabilitative care facility in Superior, Wisconsin. As such, it is subject to regulation by the State of Wisconsin Department of Health and Family Services (DHFS). The St. Francis in the Park Health and Rehabilitation Center Employees' Union, Local #1760-A, AFSCME, AFL-CIO (herein the Union) represents a bargaining unit of St. Francis employees that includes regular full-time and part-time Certified Nurse Assistants (CNAs) and Licensed Practical Nurses (LPNs). The job descriptions for both positions list continuing education and in-service program attendance as essential functions of the position. Specifically, job function #17 for the CNA position states, "(a)ttends required in-service education programs, staff and unit meetings." In the LPN job description, in the category of "Developing," job function #2 states, "(a)ttend and participate in continuous education programs to expand professional knowledge base and maintain licensure." In addition, Article 19, Section 2, para. 19 of the parties' collective bargaining agreement lists as a dischargeable offense: "Failure to view all mandatory facility training in-services within established timelines and/or failure to meet the state's minimal training requirements for the employee's certification/licensure."

In June of 2008, the facility was subject to an inspection by the DHFS over approximately a two week period of time. In early August the Employer was informed that during the inspection 23 deficiencies and 4 code infractions had been identified, mostly in the area of nursing care, which placed the Employer's licensure as a nursing home in immediate jeopardy. Thereafter, the Employer had 10 days to submit a proposed plan of correction to DHFS and 45 days to indicate its compliance with the remediation order. During the week of August 15, the Employer was informed that its proposed correction plan, which included training in-service programs for the CNAs and LPNs, had been approved. The Employer then immediately retained consultants and scheduled in-service sessions for the CNAs and LPNs for

Tuesday, August 19 and Wednesday, August 20, 2008, with three sessions scheduled each day at 7:00 a.m., 1:30 p.m. and 3:30 p.m., in order to accommodate employees working on each of the facility's three daily shifts. Jill Hess, the St. Francis Administrator, prepared a notice to employees about the trainings, as follows:

Staff Re-Survey Training

All licensed staff and nursing assistants need to attend one of these training times. The training is mandatory, these are the only times the training will be available. Staff will not be able to work unless they attend the training next week. This is training related to the survey deficiencies that were issued during the re-survey last week. Staff need to attend one session, regardless of any other training you attended previously.

1. See Kim in staffing to sign up for the date and time you plan to attend.

2. Staff who do not sign up for a training date and time will be assigned a meeting
to attend.

3. Staff who do not attend, on the date and time assigned, will receive disciplinary action and will be removed from the schedule.

MANDATORY
Licensed Staff Training
Tuesday 8/19 7:00 a.m. or 1:30 p.m.
Wednesday 8/20 3:30 p.m.

MANDATORY
Nursing Assistant Training
Tuesday, 8/19 3:30 p.m.
Wednesday 8/20 7:00 a.m. or 1:30 p.m.

Hess directed Brenda Dolsen, a clerical employee in the Business Office, to post the notices in the three nurses' offices, the three CNA rooms, the break room and next to the time clock the week prior to the trainings. She also told Dolsen to have the notice visible and have a sign-up sheet for in-service times on Friday, August 15, when the employees picked up their paychecks, which she did. The employees were told the training was mandatory and that if they could not attend they must clear it with the Director of Nursing. After checks were distributed, the list was given to Staffing Coordinator Kimberly Marksman. Marksman was to compare the sign-up sheet with the staff list and then contact all employees not on the sign-up sheet to remind them of the training. The only employees not contacted were two who were on leave of absence at the time.

At the time of the in-service trainings, employees were required to sign an attendance sheet to certify their compliance. After the in-service training sessions were completed it was discovered that six employees had failed to attend a training session – LPN Linda Finckler and CNAs Mary Lipinski, Janette Larson, Karlie Lisdahl, Nicole Smith and Jessie Trout. On Thursday, August 21, 2008 the employees were called in to attend a make-up session to receive the material they missed in the training and each was issued a one day suspension for missing the training. The discipline notices provided space for the employees to indicate whether or not they agreed with the discipline and to make comments. Finckler indicated that she was out of town at the time of the trainings due to a family member's surgery. Larson stated that she did not pick up her check on Friday, August 15, and that when she did pick it up on Monday, August 18, she was not informed about the trainings. Lisdahl, Smith and Trout all stated that they believed there was going to be a training on Thursday August 21 and had planned to attend at that time. In addition, Trout explained that her son was sick on Tuesday and Wednesday, making it difficult for her to attend those days. Lipinski did not comment. Subsequently, Finckler's discipline was rescinded due to her family emergency. Because the five CNAs all made up the missing training prior to their next work shift, their suspensions were all reduced to written warnings.

On September 25, 2008, the Union filed a grievance on behalf of the disciplined employees in which the Union contended that the discipline violated a past practice within the facility whereby employees who are unable to attend in-service trainings are given an opportunity to make up the training by reviewing the materials during or outside of work hours at a later date without disciplinary consequences. The Employer denied the grievances and the matter was advanced through the contractual grievance procedure to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The Employer

The Employer asserts that the Union's grievance is predicated upon the Employer's violation of a binding past practice with regard to advance notice to employees of upcoming trainings and of employees being permitted to make-up missed mandatory trainings without disciplinary consequences. In order to prevail, the Union must establish the existence of such a practice, which it cannot. To be binding, a practice must be 1) unequivocal, 2) clearly enunciated and acted upon and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. Here, the Union offered no evidence on the amount of advance notice given for trainings prior to the case in question. Further, only witnesses Trout, Lisdahl, Larson and Androsky testified to ever being given opportunity to make-up missed trainings and their testimony was vague as to when this occurred or on how many occasions it occurred. Thus there were approximately eight examples given of employees being allowed to make-up trainings over many years covering dozens of in-services. This does not meet the threshold required to establish a binding past practice, so the grievance must be denied.

Assuming that such a practice did exist, it would still not be binding, for two reasons. First, the contract explicitly states that failure to view all mandatory training in-services within established time lines is grounds for immediate dismissal. It is well established that a practice cannot be used to vary or contradict unambiguous contract language. Further, in an emergency situation an employer is entitled to depart from an established practice. Here, the Employer was constrained by its timetable and the demands set by the state's Directed plan of Action. It was responding to an emergency situation and had no alternative but to act as it did.

Even if there was a binding past practice, however, the Employer had just cause to impose the discipline. The contract language explicitly makes missing a mandatory training cause for discipline. The employees testified that attending in-services are part of their jobs. The notice stated that the training was mandatory and that those who failed to attend would be disciplined. The notice was prominently displayed throughout the facility and employees who did not sign up were contacted. Three of the employees actually signed up for the training and the other two were notified verbally, yet none attended or contacted management to make other arrangements. Some of the grievants appeared to be under the impression that there was a Thursday training offering, although none of the notices referred to a Thursday training. Trout and Lisdahl admitted to making scheduling mistakes and Larson admitted she forgot about the training. Lapinski did not explain why she did not attend. The Employer was required, as part of the Directed Plan of Correction, to maximize attendance at the trainings and to list any employees who did not attend. It did so and disciplined the employees, as it was entitled to do. The Union suggests that the employees were mistaken, not insubordinate, in missing the training, but mistakes, as well as intentional misconduct, can be a basis for discipline and a written reprimand was appropriate in this case.

The Union

The Union notes that there was a long standing practice of posting notices of training well in advance and giving employees who could not attend a reasonable amount of time to make up the missed training without imposition of discipline. The Union believes that in this case there were extenuating circumstances that make the disciplines issued to the grievants inappropriate. Prior to August 2008, the notice and sign up sheet for trainings were always posted on the bulletin board and employees had a reasonable time before the training to select a time that fit their schedules. Here, the notice was located at the desks where employees received their paychecks. In such a hurried environment, they were not able to careful consider the sign-up options. This was a new procedure and given the confusion and fact that the employees were anxious to get their checks and leave it was a less than ideal means of conveying important information. This problem was underscored by Janet Larson, who testified that she was not working on the 15th and only found out about the trainings the next week, so she never had a chance to sign up. Under the previous practice she would have had adequate notice and opportunity to sign up before the training.

Also, in the past employees who miss trainings were given up to two weeks to make up the missed training by reviewing the material covered at the meeting by either reading written

material or watching videos of the training. In the past, employees who missed trainings were put on a "naughty list" and were removed from the list as they reviewed the material. If they did not do so within two weeks they were subject to discipline. Union President Mia Androsky testified that she was not aware of any instance where an employee was disciplined for missing a training without first being given an opportunity to make up the missed training or review the missed material.

There was also significant confusion over the training dates. Several employees believed that they had signed up for a training scheduled for Thursday, August 21. Karlie Lisdahl believed she signed up for the Thursday session, but the sign-up sheet shows that she was signed up for a Wednesday training. The misspelling of her name, however, shows she was signed up by someone else. This confusion would not have occurred under the previous practice. The Union does not dispute the right of management to schedule mandatory trainings and agrees that training is important. The method of noticing the training and lack of opportunity to make-up the training in this case were unreasonable, however, and mitigate the basis for discipline. Unfortunately, the Administrator was new to the facility and apparently was unaware of the practices that were in place regarding these matters. This, too, should not be held against the employees. In short, therefore, the Employer violated both the practice regarding advance notice of training and the practice of allowing a reasonable time to make-up missed training before imposition of discipline. By so doing, it disciplined the grievants without just cause and the grievance should be sustained.

DISCUSSION

This is a case where five employees of St. Francis in the Park Health and Rehabilitation Center were disciplined because they did not attend a mandatory in-service training session. The employees initially received one day suspensions, but the disciplines were later reduced to written reprimands. The contract provides for progressive discipline, but specifically lists failure to view mandatory training sessions within established time limits as a dischargeable offense. Furthermore, attendance at mandatory training sessions is specifically listed as a job function of Certified Nurse Assistants, which all the grievants are. In mitigation, however, the Union asserts that there was an established practice in the facility regarding how notice is given for such trainings and, further, a practice regarding opportunities to make-up missed training within a specified time frame without incurring discipline.

The Union has alleged that the grievants received discipline without just cause, as required by the contract. In such a case, a determination of just cause generally has two primary considerations. First, did the employee commit an act or omission for which discipline is warranted? If so, was the level of discipline that was imposed commensurate with the severity of the misconduct?

The Union maintains that in the past when there were to be in-service training sessions, the Employer would post a notice on the bulletin boards on each floor in the facility well in advance of the training so that employees would have an opportunity to see it and decide which

training session they wished to attend. Further, when employees have been unable to attend training sessions, they have been allowed up to two weeks afterward to review videotapes or written materials to learn the training information without receiving discipline. By contrast, here the notice was posted the Friday before the trainings and not in the place it normally had been in the past, and the employees had to sign up when picking up their paychecks, which was confusing and did not catch employees who did not pick up their checks. Further, employees who missed the trainings were immediately disciplined without first being given an opportunity to review the materials or otherwise make-up the training. The Union maintains that in the present case the record establishes that the Employer violated both practices and, therefore, the discipline should be revoked. It is necessary at the outset, therefore, to determine first whether the contract language is clear and unambiguous. If it is, it cannot be countermanded by a countervailing practice. If it is not, then it is necessary to inquire into the existence of the alleged practices and, if proved, whether they limit the Employer's latitude in issuing discipline in this case.

The pertinent language is found in Article 19, Sec. 2, para. 19, which authorizes discharge for "(f)ailure to view all mandatory facility training in-services within established timelines and/or failure to meet the states minimal training requirements for the employees certification/licensure." The Employer argues that this language clearly and unambiguously requires employees to attend mandatory in-services and authorizes discipline for failure to do so. The problem with the Employer's argument, and the contract language, is the phrase "within established timelines." One could interpret that phrase to mean that the Employer has unfettered discretion to establish the timelines and the employees must comply within those parameters in order to avoid discipline. What has apparently developed over time, however, is a practice, whereby the employer announces the upcoming training and employees sign up to attend. Employees who do not physically attend the training are provided an opportunity to make up the material later without incurring discipline. The Employer has apparently observed this protocol for several years and the employees have come to rely on it. Several of the employees who testified at the hearing spoke to how the practice was employed in the past and how it was departed from in this instance.

Jessie Trout, a CNA at St. Francis for over five years, and one of the grievants, testified that in the past the training notices were posted visibly on each floor. In this case, she did not work on August 15th, but came in to get her check and signed up for the training at that time. She signed up to attend training on August 19, but was unable to because her son was ill, so she planned to attend on Thursday, August 21 because she was under the impression there was also a training scheduled for that day. She only learned her error on Thursday when she was called into a meeting to review the training materials and was disciplined. She further testified that she has missed a number of trainings in the past, but has always been given a chance to make-up the material without being disciplined.

Karlie Lisdahl has been a CNA at St. Francis for over three years. She testified that she did not sign the sign-up sheet for the trainings (Jt. Ex. #12) and that the signature that appears there for the Wednesday afternoon session is not hers. Her name appears there, but is

misspelled. She does not know who signed her name. She testified that she signed a different sheet in Brenda Dolsen's office and thought it was for a Thursday, August 21 session. She learned there was no Thursday training on Wednesday afternoon, at which time she spoke the Administrator about it, who referred her to the Director of Nursing, Deb Petrie. Petrie told her they would get back to her. The next day she was told there was a meeting at 3:15 p.m. for employees who had missed the training. She reported to the meeting, whereupon she reviewed the training materials and then was issued the discipline. She stated that she had missed perhaps two mandatory trainings in the past and had not been disciplined.

Janette Larson has been a CNA at St. Francis for forty years. She has also been a Union Steward and member of the bargaining team. She did not work on August 15-18 and did not see the notice of the training. She was not called about the training and did not learn of it when she returned to work on August 19. She did not see the training notice posted in the facility. On the afternoon of August 19, Staffing Coordinator Kim Marksman approached her and asked her to attend a meeting after work, but didn't say attendance was mandatory. Larson agreed, but later forgot and did not attend. She was later told to attend an in-service after work on Thursday. When she arrived, Nursing Supervisor Inger Wolf issued the discipline to her. She has missed one mandatory training in the past, but was not disciplined.

Mia Androsky has been a CNA at St. Francis for over five years and is the Union President. She attended training on August 19 and was not disciplined. She also was under the impression that there was training offered on Thursday, August 21. She did not see the training notice on August 15 and did not work on August 16-20. She testified that she has missed several mandatory trainings over the years, but has never been disciplined and is unaware of discipline ever having been issued to employees for missing trainings in the past. She further stated that in the past the practice has been that employees who miss trainings have their names placed on a "naughty list," which is posted by the clock. The listed employees then must review the missed material by a date certain to have their names removed from the list. Employees who do not make-up the training are then subject to discipline.

The sum and substance of the testimony was that the employees who were disciplined had different reasons for missing the training, running the gamut from forgetting about it, to believing it to have been scheduled on a different day, to having to attend to sick children. All were consistent, however, in their belief that they would have an opportunity to make up the training material later without being disciplined, based on their past experiences with in-service trainings. The Employer argues that the testimony of the employees is insufficient to establish a binding practice, but I disagree. Collectively, the witnesses testified to numerous instances where mandatory trainings were missed and employees had opportunities to make-up the material without discipline. This was apparently a consistent practice because there was no testimony, from either the Employer or the Union, to the effect that any employee had been disciplined in the past for missing a mandatory training as long as it was made up. It was also well-known to the employees, because those who testified all expected they were attending a make-up session on Thursday, August 21, and were surprised when they received discipline. Testimony varied as to how much time employees were given to make up missed trainings in

the past, but all were consistent that there was no history of disciplining employees without first giving them an opportunity to make up the lost material. Here, the employees were disciplined even though they made up the material the day after the last training session, which is a clear departure from the existing practice.

A significant fact in this case is that the Administrator of the facility, Jill Hess, had only been working at St. Francis since May 2008 and there was no evidence in the record that there had been previous mandatory in-services during her brief tenure. As such, she would not necessarily have had the background to be aware of the past institutional practice regarding making up missed trainings. She testified that she had asked other personnel about past practice regarding mandatory trainings and was told that notices were posted and that employees were notified that trainings were scheduled over a period of shifts and days to accommodate the schedules of the employees. She did not apparently ask what, if any, practice existed regarding making up missed trainings, thus she could well have been unaware of the employees' expectations when these trainings were announced. It would not be unusual, therefore, for her to assume that the contract language, applied literally, permitted discipline for missing training regardless of any efforts at remediation. I do not see this as a case, therefore, where the Employer was attempting to alter a practice, but rather as one where the Employer was unaware of what had gone on in the past and acted out of that lack of information.

A further difficulty in finding just cause in this case arises due to the notice that was provided to the employees. The record reveals that the Employer placed notices in the facility on August 15th and following, announcing the trainings, informing the employees how to sign up and warning them that failure to attend would result in discipline. None of the employees who testified, however, recalled having seen the notice posted in the facility. Further, even though the sign up sheet does state "all employees must attend one session, or they will be subject to disciplinary action," this is not necessarily inconsistent with the possibility of a make-up session after the fact. In at least one case, Janette Larson was off work from August 15-18 and would not have had an opportunity to see the notice. She testified that she was asked to attend a meeting on Tuesday by Kim Marksman, but was not told it was a mandatory training. The Employer asserts that she admitted she was told it was a training, as recorded in the Employer's Step 2 response, but, even assuming that is true, there is no evidence that she was informed of the disciplinary consequences of failure to attend, or that there would be no make-up opportunity. To my mind, there were insufficiencies in the notice given to the employees, such that, under the circumstances, the Employer did not have just cause to discipline the employees for failure to attend. Going forward, if the Employer wishes to apply the language of Article 19, Section 2, para. 19 as it did here, it will have to clearly disavow the practice regarding make-ups and establish a clearly understood policy regarding notice of disciplinary consequences for failure to comply.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

AWARD

The Employer did not have just cause to discipline the grievants. The Employer is, therefore directed to expunge from the personnel files of the grievants any reference to the reprimands issued to them in this matter.

Dated at Fond du Lac, Wisconsin, this 4th day of September, 2009.

John R. Emery /s/
John R. Emery, Arbitrator

JRE/gjc
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