

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN COUNTY

and

**SHEBOYGAN FEDERATION OF NURSES and
HEALTH PROFESSIONALS LOCAL 5011, AFT, AFL-CIO**

Case 405

No. 68792

MA-14344

Appearances:

Mr. Michael J. Collard, Human Resources Director, 508 New York Avenue, Sheboygan, Wisconsin 53081 appeared on behalf of Sheboygan County.

Ms. Barbara Zack Quindel, Hawks, Quindel, Ehlke & Perry, S.C., Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442 appeared on behalf of the Union.

ARBITRATION AWARD

On April 8, 2009 Sheboygan County and the Sheboygan Federation of Nurses and Health Professionals, Local 5011, AFT, AFL-CIO filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Following appointment, a hearing was conducted on July 23, 2009, in Plymouth, Wisconsin. A transcript of the proceedings was taken and distributed on August 4, 2009. Post-hearing briefs and reply briefs were filed and exchanged by September 18, 2009.

This Award addresses the termination of employee C.T.

BACKGROUND AND FACTS

C.T. the grievant, worked for Sheboygan County for a number of years. The grievant worked from 1984 to 1987, and then left County employment. She returned in 1988. The grievant became a Registered Nurse in 1994 and worked in that capacity until she resigned her full time position in April, 2007. Effective May 1, 2007 the grievant commenced work for the County as a Casual R.N. The definition and role of a Casual Nurse is contractually defined by Article 6 of the collective bargaining agreement, which is set forth below.

For purposes of this dispute, a key requirement accompanying casual status is that the individual make herself available for at least one work shift per month. Record testimony indicates that there are a number of ways casual employees satisfy that requirement. Individuals call the scheduler and indicate their availability for work. The scheduler might call the casual employee and inquire as to their availability for work. Casual employees enter into direct agreements with full or part time R.N.'s, to take a shift. There is a volunteer sheet posted outside the door of the scheduler, where casual employees sign for shifts that might come available.

During the course of her status as a casual nurse, the grievant signed the volunteer list every month, called the scheduler frequently, and arranged for work directly with Nurses. It was her testimony that from March 2007 to October 2007 she worked regularly, one or two days a month. That changed, for reasons not made a part of the record. From October 2007 to October 2008 the only work the grievant did was on March 23-24, Easter weekend. Those hours were arranged between the grievant, and the Nurse she replaced.

The grievant continued to sign for work. In August, 2008 she signed for August 25, 30 and 31. She signed for September 1, 2008. The period August 30-September 1 was the Labor Day weekend. It was common for the grievant to sign for holiday weekends. She went on to sign for October 18, 27, and 31.

In late July, 2008 the grievant was given an evaluation. That evaluation, dated 7/31/08 essentially indicates that the grievant "meets expectations" in her performance, but does note that "... noted that C. at times needs a bit of review-especially if she has not worked a unit for some time. Being casual makes it difficult for C. to take leadership role at times. ...medication errors also an issue...". In signing the evaluation, the grievant noted, "I would like to pick up more days & have offered to pickup from Nurses but have been turned down due to policy of taking PT/FT staff for extra hours before giving to casuals."

Roughly simultaneously, the grievant received the following letter:

July 30, 2008

Dear C.T.:

As per the phone message I left you on July 30, 2008 at 1100 a.m., I will need you to come into Rocky Knoll within five working days of July 30th to discuss your medication errors that you made. If I do not hear from you within the five day period we will make the assumption that you have voluntarily resigned your position with Rocky Knoll Health Care Center. Also, your employee evaluation was mailed to you with the request that it be signed and returned.

...

Jennifer Rohrbeck, RN, Nurse Manager

It was the uncontradicted testimony of the grievant that she called Jennifer Rohrbeck, talked with her, and was told that Rohrbeck and Roxanne Taylor, the Director of Nurses, would like to meet with her about the matter. According to the grievant, Rohrbeck indicated that she would contact the grievant at a later time when the managers were available. The grievant testified that Rohrbeck never called back. The grievant testified that she was not sure what the medication error reference was about.

On October 16, 2008 the County sent the following letter, and placed a copy in the Union mailbox, at the Rocky Knoll facility:

October 16, 2008

Dear C.:

Individuals who are in the Casual status with Rocky Knoll are required to notify the scheduler of their availability to work one day each month. It has been brought to my attention that you have not fulfilled this requirement. Please be advised that your employment with Rocky Knoll has been separated effective your last day of work, March 24, 2008.

Thank you for your past service to Rocky Knoll. Should your employment situation change, please don't hesitate to contact us.

Should you have further questions, please feel free to contact me. . .

Sincerely,

Michael J. Taubenheim /s/

Michael J. Taubenheim, NHA

Administrator

The letter was misaddressed, in that it had the wrong City and zip code. The grievant never received the letter. Jorja Doherty, the Union President, found the union copy of the letter in the Union mailbox on Sunday, October 19. She called the grievant the next day, Monday, October 20 and was advised that the grievant was unaware of the letter and did not have a copy. Doherty faxed the letter to the grievant that day.

Upon receipt of the letter, the grievant called, and left a message for Michael Taubenheim. It was her testimony that she believed she had made herself available for work, and did not understand the non availability reference. She asked Taubenheim to return her call. When she did not get a return call, she telephoned Taubenheim again, on Wednesday, October 22. Once again, she asked that he return her call. When the second call was not returned, she called Michael Collard, Human Resource Director, on Friday, October 24 and complained that she had left two messages for Taubenheim and not heard back. Within an hour or two of the call Taubenheim called her back. The grievant asked why she had not gotten a copy of the letter and was told that it was not deliverable because of the wrong address. Taubenheim indicated that he would get a copy to her. The grievant asked when she was not available, and Taubenheim replied that he was not sure, and that she should speak with Roxanne Taylor.

Following that conversation the grievant called Roxanne Taylor. In the course of their conversation Taylor indicated that there was a 30 day period between dates that the grievant had made herself available. No specific time period was identified. No month was identified.

Neither Taubenheim nor Taylor testified in this proceeding.

The Union requested the volunteer sign up sheets. Upon a review of the August, September and October lists the Union became aware that the September 1 signing had been heavily crossed off. At hearing, the grievant testified that she did not cross her name off the sign up sheet. She further testified that during the course of the grievance procedure she so advised the Employer.

The grievant filed a grievance on October 30 protesting her termination. The grievance says, in part; "C.T. signatures on the volunteer lists satisfy the contract requirement language of Article 6, A-classification and qualifications 2-C...". The grievance was filed with Mr. Taubenheim. There was no response to the grievance.

On Saturday, November 8 the grievant received the letter of termination. It is identical to the letter dated October 16 with the exception that the address is correct, and the second letter is dated November 3. The envelope is postmarked November 7, 2008.

The Union moved the grievance to step 2 on November 17, 2008, by providing it to Mr. Collard. Mr. Collard is the second step of the grievance procedure, and also accepts grievances on behalf of the Human Resources Committee, which is the third step.

ISSUE

The parties could not agree on an issue.

The Employer believes the issues to be:

Is the grievance timely?

If so, did C.T. make herself available for a minimum of one eight hour shift in September, 2008?

If so, what is the appropriate remedy?

The Union believes the issue to be:

Is there just cause for discharging C.T. and if not, what is the remedy?

**RELEVANT PROVISIONS OF THE
COLLECTIVE BARGAINING AGREEMENT**

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the work force, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for just cause and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer.

. . .

ARTICLE 6

CLASSIFICATION, QUALIFICATION, PROMOTIONS, PROBATION

A. CLASSIFICATION AND QUALIFICATIONS

1. Employees covered under this agreement shall be classified as Graduate Nurse and Registered Nurse.
2. The qualifications for each classification are defined as follows:

. . .

- c. **Casual Registered Nurse** is a professional who is neither a full or part time (with benefits) employee of the County but is capable of working hours available. The working hours are those hours that have been previously refused by regular facility staff. Casuals will only be utilized when all regular staff RN's have been given the opportunity or offered the available hours. Reasons for availability of hours include vacation, weekends, holidays, sickness or emergency. Casual nurses will not permanently replace or reduce the regular staff of RN's.

The purpose of casuals shall be to augment or assist existing staff. All regular full time and regular part time employees will be given the option to fill shift vacancies, including necessary overtime, before a casual is used.

Casual employees may be used to fill shift vacancies during a period of layoff of regular full and part-time employees provided the use of casual employees does not prevent employees from being recalled from layoff. Normal schedules as agreed upon between the employee and the employer for full and part time RN's will not be modified to accommodate casual RN's. The employer shall, on January 1 and July 1, furnish the Union with a listing of the normally scheduled hours as agreed to between the employee and the employer. The listing shall be for information only and shall not represent a guarantee of any scheduled hours. Casuals will not work in excess of 600 hours per year. Article 7, paragraph c (4) shall not apply to Casuals. Casual Nurses will be required to make themselves available for a minimum of one eight (8) hour shift per month. Failure to comply with this requirement may result in termination from employment.

. . .

ARTICLE 16

GRIEVANCE PROCEDURE

Any grievance which may arise out of this Agreement between the Employer and an employee, or employees, or the Union, shall be presented within thirty (30) days of the event giving rise to the grievance or the grievant's first knowledge of the issue, except that grievances filed in discharge cases shall go directly to the Human Resources Committee within ten (10) days of discharge. If satisfactory agreement is not reached the provision of step 4 shall be followed.

Step 1. The grievant shall present the grievance in writing to the Administrator.

Step 2. If a satisfactory settlement is not reached as outlined in Step One within ten (10) days, the grievant and the Union representative may present the grievance in writing to the Human Resources Director, who shall respond in writing.

Step 3. If a satisfactory settlement is not reached as outlined in Step Two within ten (10) days, the grievant and the Union Representative may present the grievance in writing to the Human Resources Committee with a copy sent to the Human Resources Director. The Human Resources Committee shall consider the grievance and make a written determination within two (2) weeks after its receipt of the grievance.

POSITIONS OF THE PARTIES

It is the position of the County that the grievance was not presented in a timely manner in accordance with Article 16 of the collective bargaining agreement. It is the view of the County that the contract requires a discharge grievance to be initiated within 10 days before the Human Resources Committee. The grievant knew of her discharge no later than October 20 yet no grievance was filed with the Human Resources Committee until November 17.

It is the further view of the County that the grievant did not make herself available for a minimum of one eight hour shift in September, 2008 and therefore is terminable under Article 6, par. 2. c. It is the view of the County that Article 6 specifies the availability criteria for a casual employee, and therefore either pre-empts or defines just cause as applied to this case. It is the view of the County that it is fairly common for employees to cross themselves off the volunteer list, and that no one else would have reason to do so. The County argues that I should so conclude and find that the grievant crossed herself off the list and was unavailable.

If the grievance is sustained and the grievant is reinstated, it is the position of the County that no back pay is due, in that the grievant had no real expectation of work given the very few hours she worked prior to her termination.

It is the view of the Union that the grievant met the requirements for a casual nurse and there is no just cause for the termination. The Union points to the testimony of the grievant that she signed the list each month and did not cross her name off. The Union argues that there is no support for the County claim that the grievant crossed her name off.

It is the view of the Union that the just cause provision, in addition to Article 6 of the contract, governs this matter.

The Union points to testimony relative to the purpose of the minimum availability provision, which is to insure that those on the casual list are interested in working, and contends that the purpose is not served by upholding this discharge.

The Union regards the grievance as timely. The Union makes a number of arguments in this regard, including that the defense was not raised in the grievance procedure. The Union argues that the County was on actual notice that the grievant protested her termination from the very beginning.

It is the view of the Union that the grievant should be reinstated and awarded back pay in the amount of one shift per month.

DISCUSSION

Timeliness

The Employer raises an objection that the grievance is not timely. The factual background for this procedural defense includes significant procedural shortcomings in the processing of the termination. The grievant was terminated without a meeting and opportunity to be heard. She was sent a letter. The basis for her termination was the alleged fact that she had not made herself available for work. It appears that the basis for that conclusion was the fact that her name was crossed off the volunteer list. No one asked the grievant if she crossed her name off. This would seem an obvious question under the circumstances. No one asked the grievant if she had otherwise made herself available for work. The record indicates that there are a number of ways Casual Nurses make themselves available for work. The failure to even meet with the grievant to lay out the basis for the discharge and ask her to respond casts a procedural pall over the discharge. [see ENTERPRISE WIRE CO. 46 LA 359 (1966) CLEVELAND BOARD OF EDUCATION V. LOUDERMILL, 470 U.S. 532, 105 S.Ct. 1487 (1985)]

The employer sent the discharge letter to the wrong address. When it points to October 20 as the actual date of notice, the County relies on the fact that the Union advised the grievant she had been terminated. The reliance is misplaced. The Union forwarded the letter to the grievant. It did no more, nor could it do more. The County must tell the grievant she has been terminated. It is the Employer, not the Union, who has the authority to terminate for cause. It is the Employer who must advise the employee that she is terminated, explain why and afford the employee the opportunity to be heard. MCCARTNY'S, INC. 84 LA 799 (NELSON, 1985). The Union cannot satisfy that obligation of Management. The County did not supply any notice to the grievant until November 8. The union moved the grievance to step 2 on November 17. The Human Resources Director receives grievances at both step 2 and step 3. November 17 falls within 10 days of the date, November 8, that the employer told the grievant she was fired.

The County points to the first paragraph of Article 16 and contends that the grievant must file a grievance within 10 days of the discharge. If the County seeks to hold the grievant to 10 days, measured from the discharge, it must identify the date of discharge. The employer controls the date. In this dispute, this is particularly important since the grievant did not work a regular schedule. She was a casual worker who worked an irregular schedule. The termination letter, dated November 3, 2008 indicates that her separation date was March 24, 2008, seven months retroactive. The letter took 5 days to travel to the grievant. For purposes of establishing a discharge date, upon which to measure the 10 days, neither the date of the letter nor the date identified as the separation date suffice.

The County contends that the grievant had knowledge, within the meaning of Article 16 no later than October 20. The purpose of the grievance procedure is to resolve disputes between the parties. It is in that context that Article 16 uses the terms "the event" and "first knowledge of the issue", as triggering the duty to come forward with the grievance. It is

customary in termination cases for the employer to tell the employee why they are being fired. This allows the employee to respond to the charges and allows the Union to determine whether the matter is appropriately grievable. The termination letter does not identify the month in question. It was left to the grievant to try to figure out what month the employer meant. In this proceeding that was a particularly vexing question in that the grievant believed she had signed up for work each month, and in fact she had. To that end she called the drafter of the letter, the person who had terminated her, and asked. At first he refused to return her calls. When he finally did return her calls he did not know what month was involved.

The grievant was passed along to the Director of Nurses, whose response was curious in light of the contract and discharge letter. If the basis for the discharge was that the Employer believed the September 1 signing had been crossed off it would seem that the Director of Nurses would have told the grievant that there were no September dates indicated or possibly that her name had been crossed off. Rather, the director of Nurses offered an explanation for the termination that was not responsive as to what month the grievant had not made herself available. Her explanation was inconsistent with the reasons advanced by the employer in this proceeding, with the termination letter, and with the plain meaning of the words of the collective bargaining agreement. The response described is puzzling.

The grievant filed a grievance on October 30. This pre-dates her formal notification of her termination. The grievance lays out her contention that she signed the volunteer list. There was no response to the grievance. I think this assertion on her part would have prompted a discussion or exchange as to whether she signed for the month of September. I believe the silence of the employer in the face of the grievance assertion reflects a conscious decision to let the clock run and hope that the grievant would be time barred. This mirrors the approach taken in July.

For all of the reasons set forth above, the grievance was timely.

Merits

The basis of the discharge is that the grievant did not make herself available for an 8 hour shift in September. The grievant testified and the physical evidence confirmed that she did sign for September 1, 2008. The grievant testified, without contradiction, that she did not cross her name from the list. There is no evidence in the record to arrive at any other conclusion. The record demonstrates that she was available.

In light of the above conclusion, it is unnecessary to address other arguments made. The grievant had previously indicated that she wanted more hours. If the employer had a good faith doubt as to whether or not she was available, the employer would have asked her, or made other pre-termination inquiry. The County appears overly eager to terminate this employee without confronting the concerns that underlie that belief.

AWARD

The grievance is sustained.

REMEDY

The employer is directed to reinstate the grievant to Casual Nurse status. No back pay is directed because the record does not support a conclusion that the grievant would have worked an identifiable number of hours in the interim period. She worked very few hours preceding her termination, and there is no indication in this record that that was grieved.

Dated at Madison, Wisconsin, this 25th day of September, 2009.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

gk/dg

7484