

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE COUNTY

and

**WISCONSIN FEDERATION OF NURSES AND HEALTH PROFESSIONALS,
LOCAL 5001, AFT, AFL-CIO**

Case 687

No. 68906

MA-14397

(Virgo Suspension Arbitration)

Appearances:

Timothy R. Schoewe, Acting Corporation Counsel, Milwaukee County, 901 North 9th Street, Room 303, Milwaukee, Wisconsin, 53233, appeared on behalf of Milwaukee County.

Jeffrey P. Sweetland, Attorney, Hawks Quindel, S.C., P.O. Box 422, Milwaukee, Wisconsin, 53201-0442, appeared on behalf of Wisconsin Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO and bargaining unit member Nicole Virgo.

ARBITRATION AWARD

Milwaukee County, herein the County, and the Wisconsin Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO, herein the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission to resolve a dispute concerning the disciplinary suspensions of one of its members, Nicole Virgo, herein Virgo or Grievant.¹ Commissioner Paul Gordon was designated as the arbitrator. Hearing on the matter was scheduled but postponed twice at the reasonable request of one of the parties. Hearing was held on the matter in Milwaukee, Wisconsin on February 26, 2010, March 19, 2010 and May 24, 2010. No transcript was prepared. The parties filed written briefs and by July 12, 2010 determined not to file reply briefs when the record was closed.

¹ Virgo is alternately identified herein as Grievant for simplicity, and such designation is not meant to invoke any provision of the parties' collective bargaining agreement concerning grievance procedures as opposed to direct arbitration provisions available in suspension cases without otherwise going through the grievance procedures in the collective bargaining agreement.

ISSUES

The parties did not stipulate to a statement of the issues. The Union states the issues variously as follows:

Was there just cause for the discipline imposed pursuant to amended Order No. 1284? If not, what is the appropriate remedy?

Was there just cause for the discipline imposed pursuant to amended Order No. 1285? If not, what is the appropriate remedy?

In an email sent to the arbitrator and the County's counsel the same day of the first day of hearing, the Union's counsel wrote:

Just so that everyone is clear about the Union's position, the Union is challenging *all* disciplinary actions that the County/Sheriff took against Ms. Virgo in IA Case Nos. 08-135 and 08-339. Those are (1) the one-day suspension in 08-135, per amended Order 1284; (2) the restriction of Ms. Virgo to 2 assigned shifts of work in March 2009, per amended Order 1284; (3) the three-day suspension in 08-339, per amended Order 1285; and (4) the restriction of Ms. Virgo to 4 scheduled shifts "within a 30 day period immediately following the Personnel Review Board hearing concerning IA Case 08-339," per amended Order 1285. The orders are contained in the two disciplinary packets that I proffered at the hearing this morning. Please let me know if you have any questions about this. (*emphasis supplied*)

The County states the issues as follows:

Was there just cause to suspend Nicole Virgo? If not, what remedy should be awarded?

In an email sent to the arbitrator and the Union's Counsel in response to the above referenced email the County's Counsel wrote:

Milwaukee County agrees to arbitrate the two separate suspensions. In doing so, Milwaukee County reserves the right to challenge jurisdiction and arbitrability and waives no rights or defenses.

In the most recent email union counsel raises for the first time non suspension matters. The contract is clear and unambiguous that only suspensions may be referred directly to arbitration without having first exhausted the grievance process. A check on County records indicates that no grievance has ever been processed on these non suspension issues. Accordingly, Milwaukee County does not consent to arbitration of any matters outside the two suspension issues.

In the arbitrator's view the issues involve determining the nature of the discipline and nature and extent of the suspensions involved in the two cases, and whether the discipline included the removal of previously scheduled work shifts as part of the disciplines. Effectively, the question becomes whether the removal of the previously scheduled work shifts and limiting work shifts resulted in suspensions for those days. Accordingly, the Union's statement of the issues is chosen as it is drafted broadly enough to include the issue of the scope of the disciplinary suspensions.

RELEVANT CONTRACT PROVISIONS

4.02 GRIEVANCE PROCEDURE

The County recognizes the right of an employee to file a grievance and will not discriminate against any employee for having exercised his/her rights under this Section.

(1) **APPLICATION**

Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.

A grievance shall mean a controversy which exists as a result of an unsatisfactory adjustment or failure to adjust a claim or dispute by an employee or group of employees concerning the application of wage schedules or provisions relating to hours of work and working conditions contained in or referenced to in this Agreement. The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules which are matters processed under other existing procedures. Grievances filed under this grievance procedure shall not be resolved in a manner which conflicts with this Agreement, Civil Service Rules, Milwaukee County Government Ordinances and Resolution, or binding past practices established by the parties unless such resolution is agreed upon by the Director of Labor Relations and the President of the Federation.

(2) **REPRESENTATIVES**

An employee may choose to be represented at any step in the procedure by representative (not to exceed two) of the employee's choice. However, representative status shall be limited at all steps of the procedure to those persons officially identified as representatives of the Federation. The Federation shall maintain on file with the County a listing of such representatives.

(3) TIME OF HANDLING

Whenever practical, grievances will be handled during the regularly scheduled working hours of the parties involved. The County agrees to provide at least 48 hours written notice of the time and place of the hearing to the grievant and the Federation.

(4) TIME LIMITATIONS

If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing (extension of grievance time limit Form #4894). If any extension is not agreed upon by the parties within the time limits herein provided or a reply to the grievance is not received within time limits provided herein, the grievance may be appealed directly to the next step of the procedure.

(5) SETTLEMENT OF GRIEVANCES

Any grievance shall be considered settled at the completion of any step in the procedure if the president of the Federation or designee and the director of Labor Relations, and the appointing authority or their designee are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

* * *

(7) STEPS IN THE PROCEDURE

(a) STEP 1

1. The employee alone or with employee's representative shall explain employee's grievance verbally to employee's supervisor designated to respond to employee grievances.

2. The supervisor designated in paragraph 1 shall within 3 working days verbally inform the employee of supervisor's decision on the grievance presented.

3. If the supervisor's decision resolves the grievance, the decision shall be reduced to writing on a Grievance Disposition Form within 5 working days from the date of the verbal decision and a copy of said disposition shall be immediately forwarded to the Director of Labor Relations.

(b) STEP 2

1. If the grievance is not settled at the first step, the employee or employee's representative shall prepare the

grievance in writing on the Grievance Initiation Form and shall present such form to the supervisor designate in step 1 to initial as confirmation of supervisor's verbal response.

- (a) The employee alone or with employee's steward shall fill out the Grievance Initiation Form pursuant to Section 4.02 (6) (c), 1, 2, 3, 4, 5, and 6 of this Agreement.
2. The employee or employee's representative after receiving confirmation shall forward the grievance to employee's appointing authority or to the person designated by the appointing authority to receive grievances within 5 working days of the verbal decision.

* * *

- (9) No grievance shall be initiated after the expiration of 90 calendar days from the date of the grievable event, or the date on which the employee becomes aware, or should have become aware that a grievable event occurred, whichever is later. This clause shall not limit retroactive payment of economic benefits for which it has been determined the County is liable nor would it prohibit a prospective adjustment of an ongoing situation.

* * *

5.01 DISCIPLINARY SUSPENSIONS

- (1) In cases where an employee is suspended for a period of 10 days or less by the employee's department head, pursuant to the provisions of sec 63.10, Wis. Stats., the Federation shall have the right to refer such disciplinary suspension to the arbitrator who shall proceed in accordance with the provisions of Section 4.03(2)(a). Such reference shall in all cases be made within 60 working days from the effective date of such suspension. The decision of the arbitrator shall be served on upon the Division of Labor Relations and the Federation. In such proceedings the provisions of Section 4.03(2)(c) shall apply.
- (2) In cases where an employee is suspended a second time within a 6-month period, the employee so suspended shall have right of a hearing before the Personnel Review Board or the arbitrator on such suspension, but not both. Employees may be represented at such hearings by counsel or by their certified collective bargaining representative.

5.02 REPRESENTATION AT DISCIPLINARY OR DISCHARGE HEARINGS/
MEETINGS

- (1) At meetings called for the purpose of considering the imposition of a suspension or the filing of charges for discharge, the employee shall be entitled to Federation representation but only at the administrative level at which suspension or discharge may be imposed or effectively recommended, i.e., at the level of the appointing authority or designed for such purposes.
- (2) It is understood and agreed that such right is conditioned upon the following:
 - (a) At the meeting before the appointing authority or their designee, the employee may be represented by Federation officials equal to the number of management officials present at such meeting.
 - (b) The meeting at which the Federation official is permitted to be present shall not be an adversary proceeding. The Federation official may bring to the attention of the appointing authority or their designee any facts which Federation official considers relevant to the issues and may recommend to the appointing authority on behalf of the employee that Federation official considers to be the appropriate disposition of the matter. The employee shall not be entitled to have witnesses appear on employee's behalf nor shall the supervisory personnel present at such meeting be subject to cross-examination or harassment. These restrictions recognize that the purpose of Federation representative at such meeting is to provide the employee with a spokesperson to enable employee to put employee's case before the appointing authority and, further to apprise the Federation of the facts upon which the decision of the appointing authority or their designee is made.
 - (c) Recognizing that discipline is most effectively imposed as contemporaneously as possible with the incident leading to such action, it shall be the obligation of the employee to make arrangements to have employee's Federation representative present at the time the meeting is set by the appointing authority or their designee to consider the imposition of such discipline.

In order to carry out the intent of this Agreement, written notice of the meeting shall be provided to the employee and the Federation not less than 48 hours prior to such meeting, and such notice shall be accompanied by a brief statement of the basis for the proposed discipline. The

inability of the employee to secure the services of any particular Federation representative shall not be justification for adjourning such meetings beyond the date and time originally set by the appointing authority. Prior to setting a time and place for the disciplinary meeting, the County shall make a full investigation of the matter under consideration.

- (d) Nothing contained herein shall in any way limit the authority of the supervisory staff to impose summary suspension where the circumstances warrant such action. It is understood that a review of the action of the supervisor will be made at the level of the appointing authority or their designee for the purpose of reviewing the action taken by the immediate supervisor. Meetings to review such summary suspensions shall be held as soon as practicable at the level of the appointing authority or their designee. At such meeting the employee shall be entitled to the rights set forth herein.
 - (e) Following the conclusion of the hearing the employee and the union will be notified in writing of the results within 7 calendar days.
- (3) An employee against whom charges for discharge or demotion have been filed shall be entitled to a hearing on such charges before the Personnel Review Board, where they may be represented by Counsel or by their certified collective bargaining representative.
 - (4) An employee suspended for 10 days or less shall be entitled to a hearing before an arbitrator, in accordance with Section 5.01.
 - (5) Regular Pool Nurse (Mental Health), Regular Pool Nurse (Corrections), RN I (Pool) shall be eligible for representation in accordance with the provisions of (a), (b), (c), and (d) of Section 5.02(2).
 - (6) Discipline or discharge shall be administered in a manner consistent with Rule VII, Section IV, of the Rules of the Civil Service Commission.

2.05 SHIFT DIFFERENTIAL

Effective upon ratification employees shall receive shift differential of two dollars and fifty cents (\$2.50) per hour for all hours worked during shifts beginning between 1:30 p.m. and 11:00 p.m. provided employees whose shifts do not begin as indicated above shall be paid two dollars and fifty cents (\$2.50) per hour for all hours worked between 6:00 p.m. and 11:00 p.m. For those employees who work overtime from day shift to P.M. shift to meet staffing requirements, two dollars and fifty cents (\$2.50) per hour shift

differential shall be paid from the beginning of the P.M. shift. Employees working 10 or 12 hour scheduled shift in units with 24-hour coverage shall receive two dollars and fifty cents (\$2.50) for all hours worked between 3:15 p.m. and 11:00 p.m. Employees shall receive three dollars and fifty cents (\$3.50) per hour for all hours worked between 11:00 p.m. and 7:00 a.m. Shift premium, when earned, shall be added to the employee's regular rate for purposes of determining overtime compensation.

3.14 POOL EMPLOYEES (2007-2008 MOA)

* * *

- (5) Every effort will be made to offer assignments based on the employees' indicated availability. Pool nurses working in 7-day service are required to work a minimum of two shifts per month. One of the required shifts will be on a weekend, off-shift or major holiday. The minimum shift requirement will be met if there is no need to have the pool employee work a weekend, off-shift or major holiday. If pre-scheduled shifts are cancelled by management, then these hours will be counted toward meeting minimum requirements. Shifts cancelled by the employee will not count towards the requirements. Failure of a pool nurse to be available to meet the minimum requirements may be considered a resignation.

* * *

- (10) Scheduling Policies:

* * *

- (d) Pool employees who sign up for a shift are considered to be scheduled. Pool employees absent from scheduled shifts in excess of two (2) shifts within three (3) scheduling periods may be disciplined up to and including termination. This section shall not supersede or interfere with the County's right to discipline employees.

3.14 POOL EMPLOYEES (2009-2011 MOA)

- (1) A pool employee is credentialed by the State of Wisconsin and employed on an hourly basis. The rate of pay will be adjusted by any general wage increase.

* * *

- (6) Every effort will be made to offer assignments based on the employees' indicated availability. Pool employees working in 7-day service are required to work a minimum of four shifts per month. Two (2) of the required shifts will be on a weekend, off-shift or major holiday. The minimum shift requirement will be met if there is no need to have the pool employee work a weekend, off-shift or major holiday. If pre-scheduled shifts are cancelled by management, then these hours will be counted toward meeting minimum requirements. Shifts cancelled by the employee will not count towards the requirements. Failure of a pool nurse to be available to meet the minimum requirements may be considered a resignation. Pool employees who are receiving Social Security payments may have the shift requirement waived or reduced on a case by case basis in the event the requirement jeopardizes their Social Security payments.

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- (11) Scheduling Policies:

* * *

- (d) Pool employees who sign up for a shift are considered to be scheduled. Pool employees absent from scheduled shifts in excess of two (2) shifts within three (3) scheduling periods may be disciplined up to and including termination. This section shall not supersede or interfere with the County's right to disciplining employees.

BACKGROUND AND FACTS

Grievant is a Registered Nurse employed by the County in the Sheriff's Department Health Services Unit. She is a pool nurse for work scheduling purposes. As a pool nurse Grievant must achieve a minimum two shifts per month under the 2007-2008 collective bargaining agreement and four shifts per month under the 2009-2011 collective bargaining agreement. Pool nurses may sign up for more shifts than the minimum number. Grievant does not have a regular 40 hour per week schedule and has no guarantee of any hours during any given time frame. Her schedule varies and as a pool nurse she is required to sign up for one month's shifts by the 15th day of the previous month. Pool nurses do not accrue sick leave days.

At all relevant times Grievant was aware of Sheriff's Policy 202.04 Sick Abuse regarding Sick Leave/Absenteeism, and that the policy applied to her in her employment with the County.

Sheriff's Policy 202.04 has the purpose of helping to manage staffing and staffing problems that includes the need to use and the cost of forced overtime caused by absenteeism. It is also to help employees understand the basic reasons for a paid absence plan for illness which is not intended as an additional off-duty benefit. Sick Leave, Incident and Absenteeism are defined in the policy, and procedures to follow to call in under the policy are set out therein. This is a no-fault attendance policy. The policy provides in pertinent part:

The following actions will be taken with any employee who is absent within a rolling year time frame. A rolling year is the 12-month period dating backward from the most recent incident. Incidents occurring earlier than 365 days prior to the most recent incident are not included in the calculation.

1st Incident: Absence recorded by supervisor.

2nd Incident: Noted on Employee Activity Documentation record.

3rd and Subsequent Incident: Refer documentation to Internal Affairs Division for appropriate disposition. Based on the disposition, appropriate disciplinary action, if necessary, will be decided by the Sheriff and may require a doctor's excuse and increment denial.

Grievant was sick and otherwise absent from work on April 13, May 22 and July 16, 2007 and on January 17 and February 13, 2008. The Sheriff's Department's Internal Affairs Division (IAD) investigated this as a potential violation of the policy in Case 08-135. Thereafter, Grievant was sick and otherwise absent from work on October 1, 2008. IAD began another investigation into this as the basis for another potential violation of the policy in Case 08-339. None of the absences were excused by virtue of having been approved as FMLA time or other authorized absences under different provisions of the policy. Grievant admits she was absent those days and times as contended by the Sheriff's Department. Grievant attended quarterly bureau meetings in each case by herself. A bureau meeting is an intermediate step in the discipline process. The first bureau meeting occurred on June 8, 2008. The bureau meeting for the second case was on December 4, 2008. There was no discussion at either bureau meeting as to what discipline would or might be imposed, but Grievant did get a better understanding of what the rolling year term means in policy 202.04. She did not attend other meetings available to her to discuss potential discipline.

There were attempts by the County to schedule a disciplinary hearing with Grievant, but attempts by the County to contact Grievant for this were not successful. Eventually, on

February 19, 2009 a disciplinary meeting was held for Grievant concerning discipline for both cases. For Grievant at the meeting was her Union Vice President, Barbara Kelsey as her representative. The Department was represented by Inspector Kevin Carr and IAD personnel. The Department had determined that Grievant had violated policy 202.04 in both cases. A one day suspension without pay was issued for the first case, and a three day suspension without pay was recommended for the second case, pending a hearing by the Personnel Review Board. It is not uncommon for a Union Representative to suggest a disposition of the discipline matter at these meetings. In that meeting there was discussion between Kelsey and Carr about the scheduling of pool nurses beyond the contract minimum number of days for those that the Sheriff considered sick leave abusers.

There is a dispute of fact as to exactly what was said in this discussion. According to the testimony of Internal Affairs Officer James Cox, who was at that meeting, Kelsey stated she understood the sick abuse policy but did not understand why if a pool employee is having a sick abuse problem they are kept on the schedule. IAD explained the minimum staffing requirement. Kelsey then recommended that part of the discipline be the eliminating of Virgo's exposure to assignments. According to Kelsey's hearing testimony in this matter, she understood there was an absenteeism problem with the pool nurses generally. At the meeting she questioned if you have a pool nurse, how does this really impact them if they are pool and don't have to work. She initiated the discussion and shared with them the thought that in the future they may want to consider limiting the pool nurse to the minimum number of hours they could work in the month they are going to receive discipline. At that time it was a two shift per month minimum, which is now four shifts per month to remain pool eligible. Kelsey further testified that she was not speaking in terms of canceling days that were already scheduled. She assumed that Grievant was already scheduled for working days in March. No one at the meeting raised the issue of cancelling already scheduled days.

The actual dates of the suspension Orders were February 19, 2009 for the one day and February 20, 2009 for the three day, respectively. The first suspension for one day effective March 4, 2009 was Order No. 1284 in Case 80-135 and provided in part:

RN Nicole Virgo was sick/absent a total of 5 times between April 2007 and February 2008, on the following dates:

April 13, 2007	May 22, 2007	July 16, 2007
January 17, 2008	February 13, 2008	

The second recommended suspension for three days pending a hearing by the Personnel Review Board was Order No. 1285 in Case 08-339 and provided in part:

RN Nicole Virgo was sick/absent a total of 6 times between April 2007 and October 2008, on the following dates:

April 13, 2007	May 22, 2007	July 16, 2007
January 17, 2008	February 13, 2008	October 1, 2008

After the above noted discussion in the meeting Inspector Carr amended both orders and added an additional component to each. For the first suspension for one day was added: “. . . and RN Nicole S. Virgo shall have her assigned shift of work limited to two days for the month of March 2009, in order to maintain her pool status”. For the second recommended suspension for three days was added: “. . . In order for RN Nicole Virgo to maintain her pool status, RN Virgo shall be limited to four (4) scheduled shifts within a thirty day period immediately following the personnel Review Board hearing concerning Internal Affairs Case 08-339.”

Shift cancellation or the limiting of the number of shifts a pool nurse could sign up for, on the record in this case, has never before been a part of discipline for violations of policy 202.04 for this bargaining unit. As of the date of the amended orders, Grievant had been previously scheduled to work 8 hour shifts on March 1, 4, 6, 7, 11, 12, 18, 21, 25, 27 and 28, 2009. Grievant did work the first day of these previously scheduled days and the second day was the day of her suspension with the remaining nine days cancelled pursuant to the amended Order No. 1284.

Grievant and the Union did not file a grievance with the County over the inclusion of the limits or restrictions on the number of scheduled shifts that were included in the two disciplinary orders or her hours being potentially reduced. Grievant and the Union did, however, file for the instant arbitration concerning the imposition of the discipline contained in the two amended disciplinary orders. The Request to Initiate Grievance Arbitration in this case included an attachment which referenced Case 08-135 and Case 08-339 and also attached the Notice of Suspension for the three day suspension pending the Personnel Review Board hearing. Those two disciplinary suspension cases are the subject matter of this arbitration.

Under Section 5.01 (2) of the collective bargaining agreement, because Order No. 1285 was a second suspension within 6 months the Personnel Review Board was convened to consider that matter. On March 10, 2009 the Board took the following action:

RE: AMENDED Notice of Suspension Against Nicole Virgo.
Signed by Kevin Carr, Inspector, Office of the Sheriff,
Dated February 20, 2009

This is the first time this matter was before the Board. This is to confirm that the Milwaukee County Personnel Review Board, at its meeting held March 10, 2009, heard the report of Barbara Kelsey, Vice President, Wisconsin Federation of Nurses & Health Professionals, to place the matter of Nicole Virgo to the Call of the Chair to await the outcome of a grievance pending for the suspension prior to this matter currently before the Board. Should the grievance be found in favor of the employee, the suspension before the Board would not be a second in six months and therefore the Board would not have jurisdiction over this case.

Mr. Delmenhorst moved, Mr. Karst seconded, and the Board by unanimous vote (4-0) continued this case to the Call of the Chair as to await the outcome of the pending grievance.

Other than these two matters, Grievant had received a prior discipline in the form of a written reprimand for tardiness.

Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

County

In summary, the County argues that there is no issue that Grievant was absent from work in violation of policy 202.04 on the dates and times within a rolling 12 month period contained in the notices and disciplines. She knew the policy. Grievant attended a bureau meeting concerning the IAD investigation on June 8, 2008. She had an opportunity to review her personnel file and discuss potential discipline. She had no guarantee of any hours during the course of a given timeframe. It was Grievant's Union Representative who recommended at the discipline hearing that restrictions be placed on Grievant's scheduling as a pool nurse. Prior to these disciplines Grievant had been reprimanded for tardiness. There was just cause to suspend Grievant.

The County also argues that pursuant to the labor agreement the Union referred the suspension to arbitration. At no time was there a grievance filed contesting either the reasonableness of the Sheriff's policy or the imposition of other terms and conditions surrounding her suspension. This is important as the collective bargaining agreement allows only direct referral of matters that are suspensions to arbitration. Other disputes must first be subject to the grievance process articulated in the contract. The contract contains provisions for processing grievances arising under the terms of the contract which culminates in arbitration. The parties agreed to this process as the exclusive remedy for interpretations of alleged contract violations. Here, there is no dispute that no such grievance was processed for Grievant. The Union declared that it not only is going to arbitrate Grievant's suspension, which is its right, but it also intended to arbitrate other conditions as to her schedule of work. The scheduling issue has never been the subject of any grievance processing by and between the parties. Accordingly, the County rightfully asserted its rights under the contract that it would be pleased to arbitrate the discipline, i.e., the suspension, and that matter only.

The County did not, and does not, submit to the jurisdiction of the arbitrator as it might relate to any other matter other than the suspension and does refuse to arbitrate matters relating to scheduling of pool nurses within the confines of this case.

The County requests that the imposition of the suspension sought by the Sheriff be sustained.

Union

In summary, the Union argues that Kelsey did not recommend work schedule cancellation for Grievant. She did ask why the administration kept putting pool nurses whom the Sheriff considered sick abusers on the schedule, and suggested that in the future such pool nurses be permitted to sign up for no more than the minimum number of days required by the contract. She said nothing about cancelling shifts that a pool nurse was already scheduled to work as an added penalty over and above a suspension.

The Union also argues that this arbitration embraces both suspensions. In email correspondence between the parties and the arbitrator the County's counsel wrote: "Milwaukee County agrees to arbitrate the two separate suspensions." The contract procedural requirements were met for both suspensions as to time of filing under Sec. 5.01.1 and petitioning the Wisconsin Employment Relations Commission under Sec. 4.03(1). The attachment to the arbitration request referenced both cases with an attachment of the disciplinary schedule, though only one notice was attached.

The Union argues this arbitration embraces the scheduling restrictions imposed by the amended orders. Contrary to the argument of the County that the number of shifts Grievant could work were separate and distinct from the suspensions and must be grieved separately under Sec. 4.02, the limitations on days were not "non suspension matters." They were imposed as part and parcel with the suspensions in order to make the suspensions felt. They ensure that Grievant would work only one 8-hour shift in the month the suspension was served. She would work one shift and the suspensions would cover the other scheduled shifts. However, she was already scheduled to work 11 shifts in March, and all but two of the shifts were cancelled. One was the suspension. Consequently, management expanded the one-day suspension in March 2009 into an effective 10-day suspension. Therefore, the cancellation of days was clearly part of the punishment for Cases 08-135 and 80-339. No separate grievances were required to subject these penalties to the same arbitration as the one and three-day suspensions themselves.

The Union argues the scheduling restrictions were not for just cause. The ostensible penalty in case 08-135 was a one-day suspension. Were that all the Union would not arbitrate. However, the cancellation of nine additional shifts that Grievant was already scheduled to work was wholly lacking in just cause. The additional requirement was to make sure Grievant felt the one-day suspension by eliminating any possibility that she could circumvent it simply by signing up for additional shifts. If that were Carr's intent he could have ordered that she not be permitted to sign up in March for any more than the shifts she was already scheduled. That is not what he did. He ordered all nine of her March remaining shifts be cancelled. In effect, in order to enforce a one-day suspension he ordered a ten-day suspension. The absences did not support a ten-day suspension. Just cause requires discipline in increasing degrees of severity with employer and employee benefitting by rehabilitation and retention, citing arbitral authorities. This was Grievant's first discipline under the absenteeism policy that requires three absences in a rolling 12 months. A ten-day suspension was in no way progressive, which Carr implicitly acknowledged in his original penalty of only a one-day suspension.

The Union further argues Grievant could not reasonably be expected to have had knowledge that cancellation of those additional shifts as a penalty was a probable consequence of her absences. Such forewarning or foreknowledge is one of the seven tests under the Daugherty standards, citing arbitral authorities. Grievant had no forewarning or foreknowledge that shift cancellation was possible or probable. The administration had not even thought of it until Kelsey asked about it. That inquiry may be legitimate for going forward provided pool nurses were properly informed. It was not appropriate as an *ex post facto* penalty. The same reasoning applies to both amended orders.

The Union argues the three-day suspension imposed by Order No. 1285 was not for just cause. Simultaneous suspensions are contrary to the principle of progressive discipline, citing arbitral authorities. The employee is deprived of the opportunity to correct their behavior due to the first discipline. As a part of progressive discipline no window of time was provided to improve Grievant's behavior. The administration had plenty of time to do that before the October 1, 2008 incident. IAD had completed its first investigation in April and reviewed the case with her on June 8, 2008. Management's tardiness in bringing the matter to discipline deprived Grievant of the opportunity to correct her behavior. On February 19, 2009 Carr issued back to back disciplines contrary to principles of progressive discipline. The three-day suspension in Case 08-399 was without just cause. And the violation alleged – six absences between April 2007 and October 2008 – was not a violation of the sick leave policy. The policy has a rolling 12 month period after which incidents are not included in the calculation. The County alleged 6 absences between April 2007 and October 2008 in Case 08-339. Since the last incident occurred October 1, 2008, Case 08-339 could not properly be based on any absences prior to October 1, 2007. But the suspension explicitly referred to absences on April 13, 2007, May 22, 2007 and July 16, 2007. The discipline lacks just cause for lack of proper notice, citing arbitral authority. Nothing in the policy speaks to discipline for accumulation of absences over a period of time longer than 12 months. It assures employees that incidents more than 12 months old will not be counted.

The Union requests the arbitrator to exercise jurisdiction over the entirety of the disciplines imposed in both orders, including the limitations of days, and find that the amended Order No. 1284 limiting the number of shifts and cancelling previously scheduled shifts lacked just cause, and the amended Order No. 1285 three-day suspension and limit to four shifts in 30 days following review lacked just cause. The Union requests the arbitrator retain jurisdiction to permit the parties to bring any dispute concerning remedy before him for resolution.

DISCUSSION

This case involves the arbitration of two disciplinary suspensions given to Grievant for violations of Sheriff's Policy 202.04 Sick Leave/Absenteeism. In the first case Grievant was suspended for one day and had nine other previously scheduled work shifts cancelled. In the second case she was suspended for three days and is prevented from signing up for more than four work shifts in the 30 days after her case is considered by the Personnel Review Board

(were the case to be considered there). The parties' collective bargaining agreement provides for arbitration of suspensions without first going through the contractual grievance process. Disputes concerning other matters in the contract requires going through the grievance process before seeking arbitration. There were no grievances filed in this case. Grievant and the Union frame their issues in terms of disciplines. The County, on the other hand, agrees only to arbitrate that part of the cases which concern suspensions, and objects to this arbitration's jurisdiction and arbitrability to consider matters outside of the suspensions based on the different procedures in the collective bargaining agreement. Those other matters are the cancellation of Grievant's nine other previously scheduled work shifts and prohibiting her from signing up for work shifts after review by the Personnel Review Board in each case respectively. The County did agree to arbitrate the two separate suspensions

The threshold issue raised by the County must first be considered. The standards governing the enforcement of an agreement to arbitrate date back to the Steelworkers Trilogy. UNITED STEEL WORKERS V AMERICAN MFG. CO., 363 US 564 (1960); UNITED STEELWORKERS V WARRIOR & GULF NAVIGATION CO., 363 US 574 (1960); UNITED STEELWORKERS V ENTERPRISE WHEEL 7 CAR CORP., 363 US 593 (1960). The Wisconsin Supreme Court incorporated from the trilogy the teaching of the limited function served by the reviewing authority in addressing arbitrability issues. DENHART V. WAUKESHA BREWING CO., INC., 17 WIS.2D 11 (1962). The Court, In JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSOC., stated this "limited function" thus:

The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 78 WIS.2D 94, 111 (1977).

The JEFFERSON Court held that unless it can "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" the grievance must be considered arbitrable. 78 WIS.2D AT 113.

This case does not involve a grievance but does have an arbitrability issue. The above noted standard does supply guidance in determining how the issue of arbitrability raised by the County should be analyzed. Applying this standard, Section 5.01 of the collective bargaining agreement does provide for arbitration, and thus jurisdiction, of disciplinary suspensions. Both suspensions here are disciplinary. The collective bargaining agreement thus does provide for the arbitration of the suspensions. Suspensions are arbitrable under the agreement. The question is whether the cancellation of the previously scheduled work shifts and the prevention of signing up for more shifts is part of the suspensions with Grievant being suspended for those days as well. The scope of the disciplinary suspensions is an asserted dispute. The arbitration clause for disciplinary suspensions is susceptible to interpreting this issue. This includes determining if the cancellations and limits on shifts are disciplinary suspensions in addition to the one and three-day suspensions. Whether the action of the County as to cancellation of previously scheduled shifts and prevention of signing up for shifts is also a matter susceptible

of dispute under a different provision of the collective bargaining agreement that requires the grievance process to be used is a different question and is one not before this arbitration. This arbitration concerns disciplinary suspensions and not whether scheduling provisions or other provisions of the collective bargaining agreement were violated. Thus, the issues of whether the canceled and limited shifts issues raised by Grievant will be considered in a disciplinary suspension sense.

The parties do agree that the issue of just cause is applicable to both disciplinary actions. They do not agree as to a definition of just cause. Grievant's brief argues one or more of the seven just cause tests normally associated with the Daugherty standards. *GRIEF BROS. COOPERAGE CORP.*, 42 LA 555, 557 (DAUGHERTY, 1964). This is not a proceeding before a police and fire commission under Wis. Stats. Sec. 62.13(4)(em)1 requiring that definition. The County has not agreed to use the Daugherty definition and the collective bargaining agreement does not contain a definition of just cause. Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, *Elkouri & Elkouri, HOW ARBITRATION WORKS*, 6th Ed., p. 948. In essence, two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it had a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest. See, *AMERIGAS PROPANE*, A-6129 (GORDON, APRIL, 2006). Although the agreement here does not specifically provide for modification of penalties, the finding of a just cause standard includes the ability to consider the level of discipline, if any, for which there is just cause to impose. See, *BIG BUCK BUILDING CENTERS, INCORPORATED*, A-6354 (GORDON, JULY, 2007). See also, *MILWAUKEE COUNTY*, MA-13562 (GORDON, AUGUST, 2007). *MILWAUKEE COUNTY*, MA-13729 (GORDON, MARCH, 2008). This two element definition will be used here, with consideration given to the fundamental fairness concepts inherent in just cause.

As to the first just cause element, the County has legitimate interests in having its employees, including the pool nurses, work the shifts that they have signed up for. Policy 202.04 addressed sick abuse, sick leave and absenteeism. The policy purpose itself refers to staffing problems, holding over other employees and overtime, and addresses those concerns. It differentiates a paid absence plan and other additional off-duty benefits. These are all valid interests for the County and it has an interest in enforcing the policy. Grievant does not argue otherwise. Grievant does not contest being absent on the days in violation of the policy as alleged in the two disciplinary orders. A violation of the policy allowing for disciplinary action is three absences within a rolling 12 month period. In both cases Grievant was absent three times in a rolling 12 month period and was in violation of the policy. The Grievant argues that she was being disciplined for some absences that occurred beyond the 12 month period. That argument is based on the fact that several prior absences were included in the disciplines and orders. But that does not invalidate the orders. The disciplines do show the dates of three absences within each respective 12 month period. Thus, they do show a violation of the policy on two occasions even if they also contain additional dates that are not to be, and are not, counted toward the three instances amounting to violations. The County

has established conduct on the part of Grievant in which it has a disciplinary interest. Other arguments of Grievant, especially as to the second disciplinary order, will be discussed further below.

The second just cause question is if the discipline imposed reasonably reflects the employer's disciplinary interest. The central issue raised by Grievant is at this point, and is a determination of what disciplinary suspension was actually imposed. Grievant does not argue that there was not just cause for a one-day suspension for the first discipline, but rather that the actual discipline was excessive as really being a ten day suspension. The Grievant argues that the cancelling of nine previously scheduled work shifts in the first amended order and the limiting of signing up for work shifts in the second amended order amount to additional days of suspensions. The County argues that the suspensions are the one-day and three-day suspensions only, and that the cancellation and limitation of shifts is beyond the disciplinary suspensions not procedurally subject to review in this matter. The determinative question in this case is whether the cancellation and limitation of work shifts in the amended disciplinary orders are suspensions.

The context of the cancelling and limiting the work shifts was disciplinary. These shifts were eliminated as part of a disciplinary proceeding. They were made in the same disciplinary orders as the one-day and three-day suspensions. They were based on the two violations of policy 202.04 which provides for discipline. They were not raised or dealt with by the County in any other context than discipline. In addition to being made in a disciplinary context, both amended orders were designed to eliminate work shifts and prevent Grievant from working and being paid for that work. This is lost work and lost pay as part of a disciplinary order. It is adverse to Grievant. Discipline is an adverse action taken by an employer against an employee because of the employee's behavior. *Brand, DISCIPLINE AND DISCHARGE IN ARBITRATION*, (4TH Printing, BNA) p. 57. As explained therein, suspensions "result in the employee being removed from the workplace for a designated period of time, in loss of pay, and sometimes in loss of seniority for the period of suspension." *Id.* p. 64. Loss of pay is recognized by other arbitral authorities as the result of a suspension. "Temporary suspension or 'disciplinary layoff,' as it is sometimes called, results in loss of pay (and sometimes seniority) for the period of suspension, and mars the employee's record." *Elkouri & Elkouri, HOW ARBITRATION WORKS* (5th Ed.) p. 903. Here, the practical effect of Order No. 1284 was to eliminate nine previously scheduled work shifts for Grievant, preventing her from earning her wages and resulting in a loss of pay beyond the original one-day suspension. While the County may have wanted to prevent Grievant from simply signing up for another shift so that the one-day suspension would have no practical effect, what the County actually did was to effectively prevent her from working in the month of March beyond one day. She would have worked nine additional shifts and suffered a loss of pay for those shifts. These cancelled shifts amount to suspensions for those days Grievant had previously been scheduled to work. Because they are suspensions they are arbitrable under Sec. 5.01 of the collective bargaining agreement as part of the just cause analysis. This applies to Order No. 1285 as well, which prevents Grievant from signing up for any shifts beyond four days in the 30 day

period after review by the Personnel Review Board. That limit in scheduling shifts also prevents Grievant from working and earning wages, and results in a loss of pay in a disciplinary context.

Having determined that the cancellation of the nine previously scheduled shifts in Order No. 1284 and the limiting of signing up for other shifts in Order No. 1285 are suspensions, the second element of just cause must still be applied. In Order No. 1284 the result is a ten day suspension. In Order No. 1285 the result is a suspension of some number of days in excess of three and up to 26 days (30 day time period in the order less the four shifts allowed to sign up for, three of which are to serve the stated three-day suspension). The just cause question is if these suspensions reasonably reflect the County's disciplinary interests. The undersigned is persuaded that both disciplinary orders are not reasonably related to the employer's disciplinary interests. Discipline beyond a one-day suspension in Order No. 1284 is excessive and not supported by just cause. Similarly, discipline in excess of a three-day suspension in Order No. 1285 is excessive and not supported by just cause.

Additionally, as Grievant argues, prior to these cases the County had not cancelled scheduled shifts or limited a pool nurse's ability to sign up for shifts as part of a disciplinary process. Grievant would not have known that cancellation and limitation of shifts was a potential part of discipline for violating a policy or rule whether viewed as additional days of suspension or otherwise. Principles of progressive discipline and fair play require that an employee have some notice of potential penalties in disciplinary matters. As stated in *St. Antoine*, THE COMMON LAW OF THE WORKPLACE, (2nd Ed., BNA) at p. 213:

§6.17 Nature of Consequences

An employee is entitled to be informed of, or to have a sound basis for understanding, the disciplinary consequences that will result from violating policies or work rules in effect at the employee's place of employment.

That did not happen here and is another reason to find the cancelled and limitation of shifts, which are suspensions, is excessive.

The one-day and three-day suspensions need to be considered under the second element of just cause.

As to Order No. 1284, Grievant was aware of policy 202.04 before she violated it the first time by accumulating three absences in a rolling 12 month period. She was on notice that a violation of the policy could result in discipline. She had previously been disciplined in the form of a written reprimand for tardiness. Tardiness is related to absenteeism. Progressive discipline considerations take into account a prior disciplinary record and allow for increasingly severe penalties for more work place violations. A suspension following a written reprimand would be a normal progression here. The length of a suspension can vary from one or more days. A one-day suspension, when a suspension is called for, is neither unusual nor in this case excessive. It is reasonably related to the County's disciplinary interest. It is

Grievant's first suspension. It does make a stronger impression on an employee than a reprimand or warning. A one-day suspension is what the County originally was going to do in Order No. 1284 before the Kelsey/Carr discussion. Grievant acknowledges that a one-day suspension in that case would not have resulted in a request to arbitrate, and admitted at the hearing in this matter that there was just cause for a one day suspension.

As to Order No. 1285, the original three-day suspension follows progressive discipline principles as set out immediately above, and is reasonably related to the County's disciplinary interests. A progressive discipline principal is that discipline is imposed in gradually increasing levels. It is not to punish, but to correct behavior. This was Grievant's second violation of the policy in approximately seven and one-half months, and a suspension of more than one-day for violating the same policy is to be expected. Again, it is what the County originally expected to do. Grievant argues that it is not fair to impose this second suspension at the same time that the first suspension was imposed. She did not have the time or opportunity to correct her conduct from the first one before getting the second. However, Grievant was aware that the first IAD investigation was underway as to her absenteeism under the policy well before her incident on October 1, 2008. In fact, she attended a bureau meeting on June 8, 2008 as part of the disciplinary investigation in Case No 80-135. She admits that one of the results of that meeting was her better understanding of the rolling year and rolling 12 month concept. She knew that she was being investigated for a violation of the policy and knew from the policy itself that discipline could be a result of three absences in a rolling 12 months, even though a discipline was not discussed at the meeting. She did have another opportunity to discuss potential discipline with the department but she did not take that opportunity. She did not contest having been absent the days the County identified. She knew she has previously received a written reprimand for tardiness. By June 8, 2008 she knew she had been disciplined before, was under investigation for another potential discipline, and knew what policy 202.04 required. The undersigned is persuaded that it is likely that Grievant would realize by June 8th that yet another violation of policy 202.04 could result in increasingly more severe discipline even though she had not yet been disciplined in Case No. 08-135. Even had she not been disciplined in Case No. 80-135, it is likely she would realize that some type of discipline could result from further violations. This is the converse of the point addressed above as to notice of consequences. Grievant could have and should have known that a violation of the policy could result in disciplinary action, even if the exact nature of that discipline was not known. She did have notice of what was expected of her and had an ample opportunity, almost four months, to correct her attendance prior to October 1, 2008. This is a clear and material distinction from the cases cited by Grievant where there was no "window of time" in which to correct or improve her behavior between disciplines.² The County did not violate principle of progressive discipline or fair play when it issued both disciplines at basically the same time.

² GAYLORD CONTAINER CORP., 107 LA at 1142 (violations occurred on two successive days, a suspension and demotion were given on the same day with no time between and no warning before the more severe penalty); STRATOSPHERE TOWER & CASINO, 114 LA 188 (two warnings on same day and termination ten days later).

The County argues that the cancellation and limiting of shifts was at the suggestion of Union Vice President Kelsey when she discussed the pool nurse absenteeism problem with Inspector Carr at Grievant's disciplinary meeting. This is the conversation that has the factual dispute. The undersigned is persuaded that the conversation was along the lines as Kelsey testified to rather than as IAD Officer Cox testified. Both made a good faith effort to recollect a conversation that occurred over a year before their testimony. However, it is not likely that a union representative would argue for or suggest a penalty greater than the one that is being considered at that particular discipline hearing. It is likely that there would be a conversation about how to address the absenteeism problem prospectively. Regardless of who initiated the conversation or how the County understood the suggestion, it is not up to the union representative to make the disciplinary decision. There is no indication in the record that the parties were negotiating a discipline as if it were in the grievance process or that they reached any type of settlement as to what the discipline here should be. While a recommendation from the union is usual, valuable, and recognized in the parties' collective bargaining agreement, it is still a recommendation with the County having the ultimate decision. Moreover, regardless of when or how the suggestion was made, the disciplines in both cases are still excessive.

Having found that a one-day and three-day suspension is supported by just cause, the matter of remedy needs be addressed. Grievant has requested that the arbitrator retain jurisdiction for a period of time for the parties to bring back any dispute concerning remedy. The undersigned declines to retain jurisdiction. The remedy is a straight forward matter in Case No. 08-135 and amended Order No. 1284. Grievant lost nine additional shifts in the month of March, 2009 that she would have worked and earned wages and benefits. She was not able to schedule additional days for that month to, in effect, nullify the impact of the one-day suspension in a monetary sense. Accordingly, she should be made whole for the loss of the nine shifts she had previously signed up to work that month at the commensurate rate of pay that each such shift would have paid.

The remedy for Case No. 80-339 and amended Order No. 1285 is more challenging. The discipline there is reduced to the three-day suspension and the limitation on Grievant signing up for more than four shifts in the ensuing 30 days is to be removed from the discipline. The County still has a disciplinary interest in Grievant serving a three-day unpaid suspension. The challenge is how to effectuate that without Grievant being able to simply circumvent that by signing up for three days more than she normally would, thus suffering no real loss in pay that goes with a suspension. But loss of pay is only one ramification of a suspension. A suspension is a mar on an employee's work record beyond the monetary impact. Progressive discipline would also allow a longer period of suspension, and potentially discharge, for future policy or rule violations. A three-day suspension here does have impact beyond loss of pay to Grievant even if she were able to schedule more shifts to compensate for the loss of pay. This is the problem that Kelsey and Carr were attempting to address in their discussion at the disciplinary hearing. It was that discussion which resulted in the County amending its disciplinary orders to add the cancellation and limitation of shifts. Before that discussion the County was only going to issue an order of a three-day suspension and not address limiting Grievant's schedule. The undersigned is persuaded that the County felt that

the three-day suspension alone was a sufficient penalty that effectuated its disciplinary interest without the need, in that case, to do anything further. Accordingly, the original three-day suspension without further limitations on Grievant's shifts in this case does fulfill the County's disciplinary interest even if Grievant is able to schedule additional shifts beyond the four that are required to remain pool eligible.

The cancellation and limitation of shift selection were disciplinary suspensions, are arbitrable, and were issued without just cause. There was just cause for a one-day suspension only in Case No. 80-135. There was just cause for a three-day suspension only in Case No. 08-339. Accordingly, based upon the evidence and arguments of the parties, I issue the following

AWARD

1. The one-day suspension in Case No. 08-135 is upheld to the extent of one day only, and the additional cancellation of the shifts Grievant had previously signed up for in March 2009 is set aside.
2. As a remedy in Case No. 08-135 Grievant is to be made whole for the lost wages and benefits she would have earned for the nine days that were cancelled in March 2009.
3. The three-day suspension in Case No. 08-339 is upheld to the extent of three days only, and the limitation on signing up for more than four shifts in the following 30 days is set aside. Because Grievant has not yet and will not suffer an additional loss of pay beyond a three-day suspension in Case No. 08-339 pursuant to this arbitration, no additional remedy is made.

Dated at Madison, Wisconsin this 31st day of August, 2010.

Paul Gordon /s/

Paul Gordon, Arbitrator