

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RICHLAND COUNTY

and

**RICHLAND COUNTY EMPLOYEES' UNION, LOCAL 2085,
DISTRICT COUNCIL 40, AFSCME, AFL-CIO**

Case 174
No. 70793
MA-15050

Appearances:

Attorney Margaret Kurlinski, Godfrey & Kahn, S.C., Attorneys at Law, 780 North Water Street, Milwaukee, Wisconsin, 53202-3512, appearing on behalf of Richland County.

Mr. Joe Guzynski, Staff Representative, AFSCME, Wisconsin Council 40, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, 53717-2900, appearing on behalf of the Richland County Employees' Union, Local 2085, District Council 40, AFSCME, AFL-CIO.

INTRODUCTION

Richland County ("County") and the Richland County Employees' Union, Local 2085, District Council 40, AFSCME, AFL-CIO ("Union") are parties to a collective bargaining agreement that provides for final and binding arbitration of disputes arising thereunder. On June 2, 2011, the Union filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning the termination of the Grievant's employment with the County. The filing jointly requested the appointment of the undersigned as arbitrator in this matter. A hearing was held on September 15, 2011, in Richland Center, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. A transcript of the proceeding was made. The County and the Union each submitted initial and reply briefs; the last of which was received on January 30, 2012. On that date, the record in this matter was closed.

BACKGROUND

At the time of his discharge, the Grievant had been employed by Richland County for fourteen years. His employment began in October of 1997, when he accepted a part-time position working as a clerical assistant in the County's Veterans Service Office ("VSO"). In

October of 2005 the Grievant became a full-time County employee when he accepted, in addition to his VSO job, a part-time clerical position in the County's Child Support Agency ("CSA"). Leading up to the time of his discharge from County employment, the Grievant split his time between these two jobs, working at CSA in the morning and VSO in the afternoon.

The only positions in VSO are a department head and one part-time clerical position. Sandra Kramer ("Kramer"), the Grievant's VSO supervisor, is the department head. The Grievant filled the clerical position. As the only two VSO employees, both Kramer and the Grievant were trained to handle all of the state and federal veteran benefits issues that would come through the office. When Kramer was gone from work, it was expected that the Grievant would be able to cover for her; and when the Grievant was away, it was expected that Kramer would cover for him.

The Grievant's supervisor in his CSA job was Shelley Brookens ("Brookens"), who oversees CSA and acts as a CSA case worker. In addition to Brookens, CSA staffs another case worker and two clerical employees. The Grievant was one of the clerical employees.

Prior to 2010, the Grievant's supervisors generally had been satisfied with the Grievant's work performance. Kramer testified that she had no problems with the Grievant's performance. Brookens was generally happy with the Grievant as an employee, as well. Brookens did observe in 2008 and 2009, however, that the Grievant was taking enough leave that he exhausted all of his leave benefit and had to take leave without pay, that he did not seem to be attending to various matters related to his position, and that his desk was sufficiently cluttered that coworkers had difficulty covering for him in his absence. Brookens never disciplined the Grievant for these issues. Indeed, prior to the Grievant's discharge, he never had been disciplined for any issue during his employment with the County.

In 2010, Brookens began to notice that the Grievant's job performance was slipping. The Grievant was having some of the same issues Brookens had observed in 2008 and 2009, but they were much more significant this time around. First, the Grievant was missing a lot of work. From January through June of 2010, the Grievant's absences from work totaled approximately 420 hours. These hours were justified by doctor notes and were taken as paid leave out of the Grievant's leave benefit bank, as family medical leave approved by the County, or (after the Grievant had exhausted his County paid leave benefit, as well as the family medical leave option) as leave without pay.

Both Brookens and Kramer knew during this period of time that the Grievant suffers from irritable bowel syndrome. Irritable bowel syndrome is a condition that causes a phenomenon known as "yo-yoing", in which days of constipation are followed by an extended period of intense diarrhea. During such periods, the sufferer can literally be unable to leave the bathroom. In addition to these symptoms, irritable bowel syndrome causes nausea, fevers, and cramping. This condition periodically rendered the Grievant unable to function. Although there is medication that can be used to treat irritable bowel syndrome, there are medical downsides

to taking it, and the Grievant would attempt to use it sparingly. Moreover, it was difficult for the Grievant to predict how long a flare-up of the condition might last. The syndrome was simply something the Grievant had to deal with, with the assistance of his regular doctor as well as a specialist, on a continuous, unpredictable basis.

Kramer and Brookens also knew that the Grievant, in January of 2010, had been injured in a car accident on the way to work. The roads were icy and the Grievant lost control of his car and slammed into a fence, hitting his head hard enough on the doorframe of the car to suffer a concussion. The concussion caused the Grievant to suffer from an entirely new set of symptoms, including nausea, dizziness, migraine headaches, and sensitivity to light and noise. Unfortunately, two days after the accident, dizziness also caused the Grievant to fall down a set of stairs at his house and hit his head again, which exacerbated his injury by causing another concussion. The Grievant's doctor told him at that time that the head injury would take anywhere from a few weeks to a full year to heal.

The Grievant's performance while he was at work also began to decline starting in early 2010. One of the Grievant's primary CSA duties is to handle "suspense" matters. Child support payments in Wisconsin must go through the Wisconsin Trust Fund of Milwaukee. During this process, these funds sometimes get held in "suspense", due to missing information or for some other reason. It was the Grievant's job to determine why child support funds were in suspense and to make whatever adjustments were necessary to allow the funds to reach the custodial parent. The CSA policy is that any suspense issue that arises must be handled within one week, and the position description for the Grievant's position requires that suspense reports are to be generated (and related matters handled) three times per week. In 2010, the Grievant was observed not to be handling these suspense issues in a timely manner.

The Grievant also was responsible in CSA for entering child-support-related court orders into "KIDS", a software system used by all Wisconsin counties to handle child support cases. By law, court orders must be entered into KIDS within two days of when judgment is rendered, and they must be entered accurately. In 2010, the Grievant was observed not to be entering child support orders into the KIDS system in a timely manner and to be making entry mistakes with regard to the orders.

The Grievant's work area in CSA also had become cluttered and disorganized during this time. The disorder was a problem for two reasons. First, it prevented any other CSA employee from picking up where the Grievant left off on the days when he was unable to come to work. Second, the Grievant's habit of leaving files around the office violated an IRS privacy requirement that documentation was not to be left in plain view. Everyone in CSA had been told that files needed to be put away, but the Grievant was failing to meet this requirement.

Kramer began to notice similar problems in 2010 with the Grievant's performance in VSO. Kramer started getting calls and e-mail messages indicating that certain obligations for which the Grievant was responsible were not being handled. Where the Grievant in the past had handled suspense issues related to veteran benefits long before they were due, the Grievant

was now failing to handle them in a timely manner. Routine paperwork and information reporting obligations also were not being met. Files were not being put away, and the Grievant desk was in a state of disorder.

In July of 2010, the Grievant received a performance review by Kramer and Brookens. This was the first performance review he had received during his employment with the County, because such evaluations had not been done by the CSA and VSO as a matter of routine before that time. The County's personnel department, however, had instructed all County departments that performance reviews would be required going forward. When the Grievant learned he was being reviewed, he did not know that a County-wide evaluation requirement had been put in place. He testified at hearing that he assumed he was the only one being reviewed because of his poor performance that year, so he asked a representative of the Union to be present with him.

In the eleven areas in which the Grievant was evaluated for his CSA work in the July review, the following ratings and comments were made:

1. **JOB KNOWLEDGE.** Grasp of information, responsibilities, procedures, materials, equipment, and techniques required to do the job. **GOOD**

-Jeff's overall knowledge of KIDS financials and order entry is proficient.

-Jeff indicates understanding of required job responsibilities and procedures.

-For the most part, Jeff utilizes materials, equipment and approved techniques in satisfactory way. However, he is not currently using forms requested by CSA (i.e. audit template, daily work log, time slips)

2. **QUANTITY OF WORK.** Volume of work (not quality of work) accomplished as compared to work quantity standards. **UNSATISFACTORY**

-It is clear that Jeff is currently unable to complete designated tasks as job description indicates in timely manner. However it is difficult to determine what is and is not getting done as Jeff has not responded to Administrator's request that he complete Daily Work log (e-mailed to him on 05-28-10).

- o Suspense has had to out-sourced for 4 out of last 6 months.
 - Delayed suspense action (report dated 01-07-10 w/lines from 12/15/09)
- o Order entry has been done by Administrator on regular basis in order to meet BCS/DWD performance guidelines (IVD# 2909287).

- Unable to complete case audits in timely manner &/or inaccurate audits (IVD #3597323, #764563).
- Cross-training with other Clerk II not being done on consistent basis.
- Monthly, weekly reports not being done consistently. (IVD 3794719-CLSD)
- Order entry delays – According to BCS must be w/in 48 hours of Court judgment. (IVD#5366949) Modification of order request to Jeff on 02-10-10 still not entered on 02-19-10.
- Lack of investigation into why cases are on suspense even after being reminded by CSA (IVD# 546932, #3588340, #358901, #3936743, #2532227).
- Delays in getting order adjustments done in timely manner.
 - E-mail sent to employee on 08-30-07 (IVD # 4830596, #4830599).
 - E-mailed suggested schedule of priorities to employee on 04-01-10 to allow more time for audit completion.

3. **QUALITY OF WORK.** Accuracy, thoroughness, neatness, orderliness, and acceptability of work completed (not quantity of work) compared to department's work quality standards. **UNSATISFACTORY**

-Work area is continually left in a state of disorder

- Files on desks for weeks/months at a time w/no apparent action taken.
- Multiple trays of papers with no visible indication of what needs to be done.
- Jeff verbally admitted to CSA that he was unable to complete audit (IVD # 3597323).
- Several instances of new/modified order entries with basic errors.
 - Mid-month new orders entered w/out adjusting for payments already received. (IVD # 5295841)
 - Orders entered on wrong sub-account, not meeting BCS hierarchy rules, and causing lien issues unnecessarily to participants. (IVD # 5309212, 5534318).
 - Order entry w/missing monthly obligations and/or sub-accounts (IVD # 4844569, IVD # 5359940, #2920062, #3588845).
 - Entering end date for CSUP as Graduation date when child was not yet 18 years old. (IVD # 492402, #5070564).

- Order entry w/missing part or all medical obligations (IVD# 4531116, #4951741, 5249383).
- Order notes correct but order not entered correctly on OMED sub-account (IVD# 756433).
- Order entry: Sub-account open and closure as appropriate to Orders (IVD#4634937, #5370677).

4. **INTERPERSONAL RELATIONSHIPS.** Ability to communicate, interact, and deal effectively with supervisor, subordinates, consumers, and other employees. **AVERAGE+**

- Lack of consistent communication (per agency policy) on days absent.
- Jeff interacts well with participants.
- Jeff appears to interact appropriately with other employees.
- Jeff has not been proactive in communicating inability to complete all job requirements as indicated in job description even after Administrator reminds him to.
- Jeff has delayed submitting absentee information to Payroll personnel in timely manner.

5. **INITIATIVE.** Energy and motivation displayed in starting and completing tasks. The degree to which employee sees tasks to be done and does them. **UNSATISFACTORY**

- Employee communicates little proactive concern or motivation with regard to completion of his job tasks.
 - Jeff makes no attempt to verbalize need for assistance.
 - Administrator feels the need to continually check Jeff's work, asks if tasks are being completed in timely manner, and give him priority list of things to do.

6. **ADAPTABILITY.** Willingness to accept new ideas and reject old ones. Ability to be guided, directed, and instructed in making constructive changes in behavior. **UNSATISFACTORY+**

- There has been a marked change in Jeff in the last 6 to 12 months from an upbeat team player to someone who feels his employer is "out to get him."
- Jeff does not offer suggestions on how he or this agency can adapt to his current condition to create a better working environment, and does not always comply with suggestions by administrator.
 - Daily logs
 - Making time for audits

7. **JUDGEMENT.** Ability to reason, interpret, and use discretion in carrying out assignments. Degree to which decisions are made and conclusions reached are effective and sound. **AVERAGE+**

-It is difficult to determine whether Jeff is able to reason, interpret and use discretion with regard to his job at the present time as he does not communicate the ability to do so effectively, and usually indicates lack of clarity in thinking.

8. **ATTENDANCE/PUNCTUALITY.** Overall attendance promptness record compared to overall departmental standards, including reporting to work, respect for lunch/break times. **AVERAGE**

-Jeff filed FMLA paperwork earlier this year for a non-work related injury. This has allowed him to exhaust close to 420 hours of unpaid leave in the last 3 to 4 months.

-In addition to 420 hours of FMLA hours the employee has also taken a number of hours including LWOP (w/out prior approval) over and above his paid sick time and vacation hours.

9. **DEPENDABILITY.** The reliability and conscientiousness, with which the employee carries out tasks; the degree to which job responsibilities are carried out completely, competently, and punctually. **UNSATISFACTORY**

-Timeliness of job task completion has been a huge issue.

-Lack of proactive actions to make sure that his work is done and report to administrator what needs completion has not been done.

10. **USE OF WORKING TIME.** Ability to use working time constructively and productively. **SATISFACTORY**

-Jeff appears to be working productively, but without his daily logs and number of days absent it is hard to say for sure.

11. **PERFORMANCE UNDER PRESSURE.** Ability to handle pressure and remain calm in busy or crisis situations. **GOOD**

-Jeff has always been professional, composed, and able to defuse problematic issues with participants both on phone and at counter.

In a rating system that equates “A” with “meets requirements”, “B” with “meets requirements some improvements needed”, “C” as “needs improvement”, and “U” as “unsatisfactory”, the

Grievant received an overall performance rating of C for the evaluation. Brookens made the following statements in an “areas of strength” section of the evaluation:

- Jeff’s greatest strength is his ability to work with the participants and fellow employees, and for the most part with the Administrator.
- When Jeff is “on” he does a great job, especially with the financial aspects of the job. He often catches other’s mistakes and has a way of pointing it out that never accuses or indicates judgment.

She made the following statements in the “areas of improvement” section:

- Jeff’s current health issues appear to be causing the majority of his work-related inconsistencies, which is why I asked him to begin using the daily log and audit templates. By keeping me in the loop I can assist with areas that he is having problems.
- Jeff needs to reorganize his work station so that when he is gone other staff members can find files, documents, etc. and know why it is on his desk. Making case events or put notes on files/documents indicating the same will help other staff members assist participants in Jeff’s absence.
- Jeff has been unable to meet the requirements of addressing the Suspense, Order Entry, and Cross-training duties that are part of his job description and/or assigned by the Administrator. While part of this may be because of his inability to be at work due to medical issues, it also appears that there is an overall lack of motivation to take on the cross-training aspect this position requires.

Brookens stated the following in the “supervisor comments” portion of the evaluation:

Jeff is has a very friendly, calm, and intelligent person who has had a series of unfortunate medical issues plague him for several year effecting both his dependability and performance. The last 6 months have taken these issues to an extreme level that require me, as agency administrator, to consider whether this agency can continue to allow this less than adequate performance to continue without further deliberation.

The agency staff has all taken on portions of Jeff’s position for several months now & a portion of his job has had to be out-sourced. The hope has been that Jeff would find a way to rectify his issues and we would have the “spot-on” Jeff back. However, due to the ongoing and increasing inadequate performance, it is only fair to other employees in the agency that this is brought to Jeff’s attention and we set parameters to improve the situation.

Therefore, there will be another performance evaluation in 90 days from this date (October 12, 2010 @ 9:00 a.m. [*sic*] Until that date Jeff must complete

a Daily Log and e-mail it to the Administrator prior to leaving each scheduled work-day. In order to improve his performance standing Jeff will need to be completing **all** job duties, as indicated in the County/Union approved job description for the Child Support Agency Clerical Assistant II position, including regular cross-training with the other Clerical Assistant II.

The Grievant made the following written responses to the evaluation:

1. Job Knowledge:

The audit template is a recent form and is very similar to a flawed form used by my predecessor, which the current Supervisor/case worker and our other case worker had both rejected as a flawed make-work format; thus my confusion as to why I am to use a less-than-acceptable form. There was not any issue with my audit work before my traumatic brain injuries (three concussions since January 11, 2010. [*sic*])

I always use time slips for my leave, but if I go out on intermittent FMLA per a Doctor's order for an extended period, it is not something I could anticipate and thus there can be delays in turning in time slips. However, I always turned them in. Several times during this FMLA period, I went to a Doctor appointment and was then told not to go back to work for X number of days. I would call my supervisors to tell them, but the time slips were then turned in when I returned to work.

2. I thought the daily log was requested for one specific week, not permanently.

The questions that need to be asked in regard to the Suspense Report being out-sourced are:

Who decided to out-source it? My supervisor, not me.

Why? Because of my brain injury, which clearly is the cause of my January 11th to the present difficulties in completing all of my work.

Of course, my supervisor had to do order entry when I was out, just as I would have had to help if others in the office were out due to sickness/injury for an extended period of time.

In regard to case audit #3597323, I specifically told my supervisor that I was unable to complete it due to my lack of clarity and head pain. I went to my Doctor that same day and he pulled me out of work for two weeks to rest my head and try a different medication, which proved to be very successful. In regard to case audit #764563, I have no recollection of that audit. Again, due to my traumatic brain injury.

I have consistently been willing and have offered to do cross-training and my supervisor knows this. I cannot force someone to train me or force them to listen to my training.

Considering my normal work load, getting all reports completed every month is hard enough if I am at 100%, at < 100% it is not possible.

It is hard to respond to a specific order not entered on time. If order entry delay occurred it was due to intermittent days that I was at work in February.

Suspense was taken away from me, so it was a little hard to work the report.

Delays in order adjustments were also due to missed work time or times I worked but was unable to complete the work load due to my ongoing health issues. I take exception to my supervisor bringing a 8/30/2007 example into this Evaluation. I hope it is just an error on the part of my supervisor.

Obviously, if a person misses many days in any given month and it is of an intermittent nature, the work load just keeps getting bigger and harder to keep up with.

3. If files were on my desk for any period of time it was because I was out on FMLA. When I was at work I did my best to complete my "pile" of files or work to do.

I have only one in-tray, all of my work to be done is in that tray and my supervisor knows that.

All of my other trays (3) contain reference material needed to do my job correctly.

Once again, of course I stated I was mentally unable at that time to complete that audit. I was nauseated and had a growing headache that day and it was my last work day for two weeks of Doctor ordered rest and medication therapy.

To go through each order that I am accused of entering with errors would be counter-productive at this point. Suffice it to say again, any errors made were due to my brain injury and perhaps my medications played a part too.

4. I can only say that I have always tried to contact my supervisor with impending absences info as soon as I knew it. I have also tried to get time slips in to supervisors as soon as possible. If delays occurred it was due to my not knowing when I would be ill or not being in any shape to remember to call in or turn in a slip.

5. The desire to take initiative and be proactive in completing tasks is present in me. However, when one is as physically and mentally unable to function as I have been for much of the last six months, it becomes very difficult to have the energy to be successful.
6. Daily logs and audits covered already.
7. I have learned that one of the most common problems with a traumatic brain injury is the lack of clarity in thinking. For me, this has improved tremendously and I expect continued recovery.
8. I have actually been on FMLA since January 11, 2010. So I have used FMLA paid and unpaid leave for >6 months, not 3-4 months.

I was specifically instructed by the County Clerk's personnel worker to put LWOP/FMLA and LWOP for non FMLA hours because I did not have any leave left. I have since learned, as has my supervisor, that I should not have used the LWOP designation for non-FMLA time off.

9. Due to health issues.
10. I always work as hard and efficiently as I can when I am here.

Section B:

2. I have already addressed cross-training, which I am happy to do.

Section C: As always, when I am at work, I will do my best.

In the eleven areas in which the Grievant was evaluated for his VSO work in the July review, the following comments were made:

1. **JOB KNOWLEDGE.** Grasp of information, responsibilities, procedures, materials, equipment and techniques required to do the job.

Employee is fully trained and understands all information, procedures, responsibilities, equipment, techniques and materials to do the job.

2. **QUANTITY OF WORK.** Volume of work (not quality of work) accomplished as compared to work quantity standards.

Since the employee is only part time the volume of work to be accomplished is overwhelming. There is always a pile waiting for him

when he gets to the office. The workload increases when the CVSO is out for training conferences.

3. **QUALITY OF WORK.** Accuracy, thoroughness, neatness, orderliness, and acceptability of work completed (not quantity of work) compared to department's work quality standards.

Quality of work needs to be improved. He needs to follow up on files that have sit idle in his "to do" box. He does do at times, but it should be done at intervals that are not so spread out in time. If the file is no longer workable then it should be filed away in its proper place; this would also help with the neatness. He has improved on neatness, but still needs work. He has never had a problem with acceptability of work completed.

4. **INTERPERSONAL RELATIONSHIPS.** Ability to communicate, interact, and deal effectively with supervisor, subordinates, consumers, and other employees.

Jeff has never had a problem with communicating with anyone. This is his greatest gift.

5. **INITIATIVE.** Energy and motivation displayed in starting and completing tasks. The degree to which employee sees tasks to be done and does them.

Energy and motivation to get the tasks at hand completed has greatly declined this past year. The drive that he had to get the job done is simply not there. Interest in the job was at an extreme low.

6. **ADAPTABILITY.** Willingness to accept new ideas and reject old ones. Ability to be guided, directed and instructed in making constructive changes in behavior.

Jeff has no problems in this area.

7. **JUDGEMENT.** Ability to reason, interpret, and use discretion in carrying out assignments. Degree to which decisions made and conclusions reached are effective and sound.

Jeff has no problems in this area and is always discrete with all cases.

8. **ATTENDANCE/PUNCTUALITY.** Overall attendance / promptness record compared to departmental standards, including reporting to work, respect for lunch/break times.

Jeff always had problems getting to work on time. He had also prior to his FMLA become unreliable. I did not know from day to day whether he was going to be here or not. He called in a lot to be out for one reason or another.

9. **DEPENDABILITY.** The reliability and conscientiousness, with which the employee carries out tasks; the degree to which job responsibilities are carried out completely, competently, and punctually.

Dependability has become an issue. He does his tasks, but within the last year they have not been carried out completely and punctually. Several job tasks were left unchecked to a point where it became crucial and the department head had to step in order to protect the customer and his/her benefits.

10. **USE OF WORKING TIME.** Ability to use working time constructively and productively.

Usually no problems but within the last 8 to 9 months he did not use his time that he was given to fully complete tasks at hand.

11. **PERFORMANCE UNDER PRESSURE.** Ability to handle pressure and remain calm in busy or crisis situations.

Always has performed in a professional manner.

In the same rating system described in conjunction with the Grievant's CSA review, the Grievant received an overall rating of "C" or "needs improvement" in his VSO evaluation.

Kramer made the following statements in an "areas of strength" section of the evaluation:

Jeff's strongest point is his communication ability with fellow workers, department heads, and customers.

She also made the following statements in the "areas of improvement" section of the evaluation:

His interest level in the job is at an all time low. Somehow we need to discuss what needs to be done to get his level of interest and motivation back. His lack

of interest has caused him to get further and further behind in his work and then things begin to get forgotten or passed on to the Department Head to be completed. An embarrassment, not to mention very unprofessional, to this office when the customer comes back and the Department Head has no clue as to what the customer is referring to and has to dig through piles to try and figure out what's going on.

Improvement: Do a "to do" list and leave it in the same spot every day so the Department Head knows where to look for it. If the file is not a work in progress put it away. Files that do require work could possibly have a note left inside what is still needed or required.

Kramer wrote the following in the "supervisor comments" section of the evaluation:

There will be another performance evaluation within 90 days from this one as a follow-up to the areas that need improvement.

Kramer also attached a document to the evaluation that contained the following comments:

TASKS NOT COMPLETED

- Found two files on Jeff's desk on January 20, 2010 that should have been taken care of.
 - ❖ One file was for a 100% service connected veteran that was starting an application for WI Property Tax credit Program. I knew that application was not sent in by looking at the file due to the paperwork having original signatures. (We send in originals keep a copy for our files.) I made a call to this veteran and she had brought in the documents that I required of her and gave them to Jeff on a day I was out of the office on December 23, 2009. I apologized to her for the delay in sending out the application and sent her application for the tax credit program on January 20, 2010.
 - ❖ After the above incident I started going through Jeff's rather large pile of paperwork he had in the corner of his desk. I had thought this pile was from previous CVSO Conferences I had attended and gave him printouts of the slide presentations to read up on the changes when he found the time. I found the second file buried deep within this pile of stuff. It was military personnel records for a veteran who wished to file a claim for a broken foot while he was going through training. I called this veteran and he had dropped off the file to Jeff in October 2009. He was told by Jeff that this office would send the archives to St. Louis, MO for his service medical records so we could scan through them to see if there

was enough evidence to start a claim for his broken foot. The form to do this was signed but never sent. I called the veteran and he is scheduled to come in and do his claim paperwork with me on Feb. 1, 2010. (We do not send off for military medical files because this only delays the claim process which can take up to 15 months for a decision as it is. It is also by law the first thing the VA goes after when they receive a claim request it is the military personnel and medical files located at the archives in St. Louis, MO.)

- ❖ Had a young veteran come in on January 13, 2010 inquiring as to why he had not received anything for WI GI Bill educational benefits. He told me he dropped off his discharge to Jeff several months ago to start the process. I could not find the copy he had dropped off to Jeff. Luckily he had his discharge with him. I made a copy of the discharge, filled out the application and sent it off to WDVA (Wisconsin Dept. of Veterans Affairs) for his eligibility. After he left I went through Jeff's pile sheet by sheet and did find this veterans discharge. I also found several other discharges and filed them. Not only are they to be left out in the open, but it made me wonder who else has not received a benefit because applications were never started and sent in for them.
- I left a note on Jeff's desk in December to order Avery labels after January 1, 2010 when we had money in our budget. They were not ordered during the first week of the new year. I ordered them on Jan. 25, 2010.
- On March 18, 2010 I received a call from a WW II Widow who is receiving widow's pension. She received a nasty letter from the Federal VA that her annual Evaluation Expense Report has not been received and her pension benefit was about to be stopped. I again went through Jeff's pile and found her file. I do recall that the Friday prior to my surgery, Feb. 12, 2010, I told Jeff she was coming in to do this and had everything laid out for him. Just fill in the blanks, have the widow sign it and send it in. After I found her file the paperwork had indeed been completed and signed. Jeff failed to send it in. I sent it and faxed it to the Milwaukee Regional VA Office on March 18, 2010. She did not lose her pension.
- I also saw another file that had been in Jeff's pile for a couple of weeks. I pulled this file and found a veteran had dropped off his completed and signed application for the Property Tax Program on March 2, 2010 and it had never been sent in. I sent it in on March 18, 2010.
- On June 7, 2010 I found a file of a deceased veteran who had just passed away on June 1, 2010 filed away in our "Awaiting Contact from Family" file drawer and discovered the grave registration was not done. We do the

- grave location and register it with the WI Dept. of Veterans Affairs whether we have family contact or not. I finished this as well.

- June 17, 2010 – Had a customer walk in inquiring if Jeff had sent off to the National Archives in St. Louis for her deceased father’s military information. She had requested this back in March 2010. Jeff had mentioned to me when he was here that he only needed her signature to send this off. I got her signature and sent off for the information same day. The problem with this is the amount of time it sat on his desk awaiting her signature considering she works in the same building as we do and Jeff could have walked to her office on several occasions to get her signature. He did state to me that she was never in her office, but he goes by her office almost daily to send off mail. On the days she was in her office he could have made a second trip to the 3rd floor for her office once he saw she was in.

The Grievant submitted the following written response to his VSO evaluation:

Employee Performance Evaluation – 07/14/2010
Richland County Veterans Service Office Clerical Assistant

Section D: Employee Comments

Let me start by saying that I appreciate the positive comments made by my supervisor. I have always strived to do my best on the job, to be successful as well as efficient in handling my work load.

Section A:

5. **Initiative:**

Energy and motivation to get the job done has not declined for a year. I completely agree that due to my traumatic brain injury (January 11, 2010) I did not have the energy to be successful in the last six months. The few days I was on the job during this period were a struggle to function, much less be 100%. If it looked like I wasn’t motivated or interested, it was really a case of being physically and mentally less than normal, less than 100%. I take great exception to a suggestion that my interest in our veteran population has declined. This has been and still is my first love in helping our veterans and working with them.

8. **Attendance/Punctuality:**

I am the first to admit that I have been tardy at times, however I felt that had improved greatly until my head injury. Before my vehicle accident, my

schedule had changed to child support in the morning and veterans in the afternoon, which has obviously eliminated being tardy to the veterans service office.

9. **Dependability:**

Without going into excessive detail, nearly the entire “Tasks Not Completed” list the supervisor presented as evidence occurred during the six months since my January 11th accident. While I wish none of these tasks had gone uncompleted, I simply was out of work too much to maintain much continuity of task completion. When I was present at work I was often physically and mentally struggling to function, much less be able to give my usual 100%. The incident in regard to the veteran in October 2009 wanting his records from the NPRC bears closer scrutiny. I know enough that you don’t want to order records if we are going to do a claim, which is why I didn’t order his records and suggested he make an appointment with Sandy to do a claim. Obviously, he didn’t call and eventually Sandy called him while I was out on leave or I would have done so.

It bothers me that my supervisor states that “He does his tasks, but within the last year they have not been carried out completely and punctually. With the exception of the October 2009 incident detailed above, all of the tasks involving veterans were during the last six months, which I hope I have already explained above why those tasks did not get completed. It has simply not been a full year of dependability being an issue, and I resent the implication. However, I will endeavor from this point forward to perform at a 100% + level to prove this six month period was an anomaly.

10. **Use of Working Time:**

I believe I have already addressed the time factor in #9. I agree with my supervisor’s assessment for the last six months for obvious reasons, but do not understand why she said “8 to 9 months”.

Section B

2. **Areas of Improvement:**

I believe my supervisor is confusing health issues with interest and motivation, although I can see how someone would view the last six months in that fashion. When you are physically and mentally ill on a fairly continuous basis, it is hard to appear interested or motivated simply because your (sic) struggling with your health. With the exception of the last six months health issues, I have never lost my interest, desire, and motivation to give my best to the veterans I serve.

My supervisor's improvement list contains good and usable ideas that I am already using to make me more efficient.

At the Grievant's July review meeting, Brookens and Kramer also discussed with the Grievant the possibility that he may need to think about making a disability claim if his health issues continued to interfere with his ability to work. Both supervisors also told the Grievant that he should let them know if they could help in any way that would create a more facilitative work environment. The Grievant said he would think about that question and consult with his doctor to determine if there was anything that might help. Subsequent to the meeting, the Grievant told Brookens that he needed a lamp for his workspace to cut down on the glare from his computer screen, which caused him to have headaches. The Grievant was provided a lamp for his workspace.

Over the next ninety days, the Grievant's job performance improved dramatically. Brookens testified at hearing that the Grievant missed very few days of work, was keeping daily logs as requested, and generally was "greatly improved". Also, between July and October of 2010, the Grievant took only a couple days of leave. Kramer testified at hearing that the Grievant had made progress on organizing his desk, that his energy and motivation were back, that he was maintaining a daily log as requested, and that he was generally going "above and beyond" in his work. She stated that even though not every criticism of the Grievant's performance had been addressed, those shortcomings were understandable given that the Grievant was only in VSO on a part-time basis. The Grievant testified at hearing that July was the first time in 2010 that he had really started to feel better. He finally felt healthy enough to do his job.

In mid-October of 2010, Kramer and Brookens gave the Grievant his ninety-day follow-up review. For his CSA ninety-day evaluation, the Grievant received a rating of "good" or "good+" for every performance category, and he received an "A" for his overall performance rating. Brookens added to the evaluation the following written comment:

[The Grievant] has made great strides in improving his performance. If he can continue as he has in the past 90-days there does not seem to be any need for improvement.

She also wrote:

[The Grievant] has done a complete 180 degree turn around since the performance evaluation on July 14, 2010. He has taken the suggestions made during that evaluation and put each of them into practice as requested.

Because [the Grievant] is only in the agency ½ days I would like to continue with the Daily Logs as it helps me keep abreast of what he's able to do in his position and where I can facilitate further support or possibly make alterations to job duties in the future.

The Grievant added to his CSA ninety-day evaluation the following written response:

I have appreciated the chance to show I am fully recovered from my head injury and it feels great being back to normal again. I expect to excel from this point forward

In the Grievant's ninety-day VSO evaluation, Kramer wrote the following with regard to the quality of the Grievant's work:

[The Grievant] has been on top of everything given to him. He has made no mistakes and has gone out of his way to ensure that the work being done is accurate, neat and timely. He has even gone above and done extra steps to try and help our clients with research and phone calls to the Department of Veterans Affairs to get answers.

She also wrote the following with regard to the Grievant's initiative:

His energy and motivation has improved vastly. He does things without being told and does them with great care.

Further, she wrote the following comment with regard to his dependability:

[The Grievant] has turned things around the last 90 days and has become dependable again. I recently was away for a week for a CVSO Conference and did not worry about how and if tasks were being completed during my absence.

Under the "areas of improvement" section, Kramer made the following observation:

[The Grievant] has accomplished everything that was required and asked of him the last 90 days. He just needs to continue on with his outstanding performance.

Kramer also stated the following, under the "supervisor comments" section of the evaluation form:

Please note that if the performance level should become less than satisfactory, the department head has the right and will do a performance evaluation prior to the next annual evaluation.

The Grievant added the following written response to this evaluation:

I appreciate the improved evaluation. I'm glad to finally be fully recovered from my head injury. I look forward to continuing to work + achieve at a high level.

Then, starting in early November of 2010, the Grievant began calling in sick on a fairly regular basis again. He reported dealing with various medical issues, such as nausea, headaches, and backaches. Also starting in early November of 2010, Brookens and Kramer began to notice another decline in the quality of the Grievant's work. Brookens testified at hearing that the Grievant was "right back to where he was before". She observed that there were files sitting on his desk for a long time with no action taken on them and that his desk had again become cluttered and disorganized. Kramer observed that the Grievant seemed sluggish and tired, that he was again leaving piles of work around, and that he stopped producing the daily logs he had been asked to maintain. During this period of time, in November and December of 2010 and January and February of 2011, Brookens was leaving notes in the Grievant's office mailbox regarding errors she observed in his work. She would typically make a notation on a screen print attempting to highlight a perceived error. She did not often have or take the opportunity to discuss these matters with the Grievant in person.

In February of 2011, the Grievant attended a wedding. Upon returning home from the event, the Grievant's son had stacked a set of chairs they had provided for the wedding at the bottom of a flight of stairs at the Grievant's house. As the Grievant was walking down that set of stairs, he tripped on a pair of his daughter's shoes and fell into the chairs and hit his head. That fall resulted in another concussion for the Grievant. He testified that this one was not as severe as the first concussion, but the event did cause a set-back of many months in his recovery and a reemergence of the same post-concussive symptoms he had experienced before. The Grievant took family medical leave from February 9, 2011, through March 3, 2011.

In February of 2011, Brookens and Kramer decided that the Grievant should be fired. They needed the County's personnel committee to approve the Grievant's discharge, and the issue was placed on the agenda for the personnel committee meeting of March 1, 2011. At the March 1 meeting, the personnel committee approved the Grievant's discharge. The personnel committee never met or communicated with the Grievant regarding these matters.

On March 2, 2011, the Grievant returned from family medical leave. When he arrived at work that morning, Brookens told the Grievant that he needed to go over to VSO to see Kramer. Brookens did not tell the Grievant why he needed to go to VSO; she only stated that she would be over in a minute. Once the Grievant, Kramer, and Brookens were together, Brookens told the Grievant he was being fired. At that point, Brookens gave the Grievant two essentially identical letters, one from CSA and one from VSO, which stated the following:

As of Tuesday, March 2, 2011 your services as a Clerical II employee for this agency are no longer required. This decision is based primarily on continual performance issues.

Your employment is terminated immediately and you will be required to turn in your keys to your Department Head and clear out all your personal belongings upon receipt of this letter.

Your final paycheck, including wages through March 2nd, will be mailed to you on the County's next regularly scheduled payroll date. In addition information regarding your 401(k) and COBRA benefits will be sent to you in a separate letter.

Please sign below to show that you have been notified in person and have received a copy of the same.

Beyond the discharge letters, there was no specific information conveyed to the Grievant by Kramer or Brookens verbally as to why he was being discharged. After the Grievant was presented with the letters, he was told to pack his things and leave. Prior to receiving this news at the meeting with Brookens and Kramer, the Grievant did not know the purpose of the meeting, and he had not asked a Union representative to be present.

Pursuant to the process set forth in the Agreement, the Union grieved the discharge, which grievance led to the present proceeding.

ISSUE

The parties stipulated to the following statement of the issue to be heard:

When terminating [the Grievant], did the County violate the just cause standard of the Agreement? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 6 - DISCIPLINE AND DISCHARGE

- 6.01 **Just Cause:** The Employer shall not suspend, discharge or otherwise discipline any non-probationary employee without just cause.
- 6.02 **Progressive and Corrective Discipline:** Disciplinary actions are actions taken by the Employer relating to the employee's behavior or performance on the job in an effort to improve such behavior or performance. Therefore, it is understood that any disciplinary action shall be progressive and corrective. The parties recognize that notwithstanding the above, there may be circumstances under which disciplinary action may be taken without regard to the normal progression.
- 6.03 **Notice:** In the event of discipline or discharge, the Employer shall provide the employee with a written notice of discipline or discharge, indicating the reason for the action taken. A copy of said notice shall be

provided to the Union within five (5) working days of the issuance of the discipline.

- 6.04 **Representation:** Any employee covered by this Agreement who is summoned to a meeting with representatives of the Employer for the purpose of determining facts which may be used for discipline or discharge, or for the purposes of administering discipline, shall, upon request, be entitled to Union representation.

DISCUSSION

The Agreement between the County and the Union requires the County to have “just cause” for any disciplinary action, including discharge. The principle of just cause requires an employer to have some demonstrable reason for imposing discipline, and the reason must concern the employee’s ability, work performance, conduct, or the employer’s legitimate business needs. *The Common Law of the Workplace*, Theodore J. St. Antoine, Ed. (1998), at §6.5, pp. 164-165. Importantly, in the context of the present proceeding, the burden is on the County to affirmatively show that it had such a reason.

The Discharge Letters

The first matter to be addressed here is related to the termination letters given to the Grievant on the day of his discharge. The Agreement between the parties expressly provides that, in the event of a discipline or discharge, the County is to provide to an employee “written notice of discipline or discharge, indicating the reason for the action taken”. As the Union points out, this contractual requirement is consistent with basic concept of due process, which requires that an employee who is being disciplined is entitled to notice of the charges against him.

The discharge letters provided to the Grievant indicated only that the decision to fire him was based “primarily on continual performance issues”. Moreover, the record establishes that beyond that written statement there was no additional explanation provided to the Grievant by Brookens, Kramer, or anyone else for that matter, as to the reason for his discharge. Such detailed explanation from the County did not come until the arbitration hearing in this matter. The Union’s position is that, in light of the contractual requirement for “notice” and “reasons”, as well as the requirements of due process, the information provided to the Grievant upon his discharge was inadequate. The Union argues that the County cannot now, in arbitration, put forth specific instances of wrongdoing to meet the just cause standard when the Grievant never before had an opportunity to hear, let alone respond to, those allegations. Further, the Union takes the position that the County cannot now assert that the Grievant’s discharge was based on his attendance record, when the discharge letters only referenced “performance” issues.

As to the Union's latter position, I disagree with the contention that, because the discharge letters only refer to "performance" issues, the County cannot raise the Grievant's absenteeism as a basis for his discharge. Theoretically, and as is abundantly evident in this case, one's ability to perform one's job is inextricably linked with one's ability to show up for work. I view any distinction in this case between these two phenomena to be a matter of semantics.

Moving onto the Union's other contention, it is fair to acknowledge that the discharge letters provided to the Grievant by Brookens and Kramer were about as non-specific as they could have been. In the particular circumstances of this case, however, I find that the general reference to "continual performance issues" was an adequate explanation, under the applicable contractual requirement and from a due process point of view, of the reason for the Grievant's discharge. This finding is based on the conclusion that, in the approximately eight months leading up to his discharge, the Grievant received detailed explanation regarding the performance problems that led to his discharge. Specifically, in the July of 2010 review of the Grievant's performance, the Grievant received many pages of explanation regarding the aspects of his performance with which his supervisors had been dissatisfied. Then in the October of 2010 review, the Grievant's supervisors outlined with additional specificity the way in which his performance had improved and what expectations they had going forward. During the first six months of 2010, the Grievant's supervisors also had conveyed to the Grievant repeatedly that his absences from work were having a detrimental effect on CSA and VSO operations. Although Brookens and Kramer had told him at first during this time period that he should not come in if he wasn't feeling 100 percent, they later began to make statements to the contrary such as, "you've got to get in here", "you need to be here", "you need to be working", and "the work has piled up". Such statements, which the Grievant identified as having placed "pressure" on him, must have done so because they conveyed to the Grievant that his persistent absenteeism was a problem.

Then, after a ninety-day period of dramatic improvement, the record establishes that from November of 2010 until his discharge in early March of 2011, the Grievant was again making mistakes, not getting his work done, leaving his desk cluttered, not completing daily logs, and calling in sick on a regular basis. My review of the record persuades me that these were exactly the problems for which the Grievant had been criticized in the first half of 2010. The Grievant must have been able to make a connection between his reemerging problems in late 2010 and early 2011 and the serious dissatisfaction his supervisors had expressed just months before during the evaluation phase.

Beyond that, the Grievant was given some specific notice in late 2010 and early 2011 of renewed concern with his performance. The record shows that in the four months leading up to the Grievant's discharge, Brookens was placing in his office mailbox documents that had notations intended to indicate for the Grievant that his performance was sub-par. The Grievant asserted at hearing that the notation of errors in that manner was not uncommon. It is also established that Brookens for the most part did not make a point to follow-up on these notes with face-to-face communications. Thus, the Grievant claims that the notations did not signal a

significant problem in his mind. Given the fact that the same performance failures had been so heavily criticized in the mid-2010 evaluations, however, these notations should have caught his attention.

Moreover, despite the very general identification in the discharge letters of the reason for the Grievant's termination, the record does not support a conclusion that there was any actual confusion on the Grievant's part as to why he was being fired. The Grievant testified that he was "shocked" at his discharge meeting. He never stated, however, that it was because he did not understand *why* he was being fired. Nor did he apparently ever ask Brookens and Kramer why he was being fired or indicate to them that he did not understand the reasons for their decision. The County certainly could have been more communicative with the Grievant regarding the basis for his discharge. Because of everything the Grievant had been through with regard to his performance shortcomings during the eight months leading up to that event, however, it is fair to conclude that the Grievant in fact did not have to guess at the reasons for why it occurred.

Progressive Discipline

Article 6 of the Agreement between the County and the Union also requires that "any disciplinary action shall be progressive and corrective". It is undisputed that prior to the Grievant's discharge he had never been the subject of a disciplinary action as a County employee. The Union argues that the County's termination of the Grievant's employment should be overturned also because it violated the Agreement on this basis.

Article 6 further provides, however, that notwithstanding the progressive discipline requirement set forth therein, "there may be circumstances under which disciplinary action may be taken without regard to the normal progression". In my view, given the appearance of such a qualification, the analysis of this issue must be driven by the policy reasons underlying the principle of progressive discipline. The primary object of progressive discipline is to ensure that an employee has sufficient notice of wrongdoing to be able to conform his or her conduct to employer expectations. *The Common Law of the Workplace*, Theodore J. St. Antoine, Ed., (1998) at §6.7, p. 172. Thus, the question here is whether the information the Grievant had leading up to his discharge gave him the ability to understand the County's expectations of him as an employee, the opportunity to conform his conduct to those expectations, and general notice that a failure to do so could lead to discharge, even though he had not received any prior formal discipline. I find that it did.

As discussed, I read the evaluations of July and October of 2010, as well as the various documents with corrective notations provided to the Grievant in late 2010 and early 2011, as providing very specific notice to the Grievant that his performance was inadequate and how it needed to be improved. Even before the evaluations occurred, however, the Grievant seems to have sensed on his own that his level of performance was sufficiently inadequate to potentially merit discipline. The Grievant testified at hearing that, not knowing in mid-2010 that evaluations had been mandated for all County departments and employees, he asked a Union

representative to accompany him to his July evaluation meeting because he thought his job performance had gotten him in trouble:

I actually thought it was due to my absences, and you know, the times where I worked that I wasn't as sharp as I needed to be. I wasn't 100 percent.

There is some suggestion by the Union that the Grievant's performance problems and the County's criticism of those problems in the first half of 2010 cannot properly be considered as a step in the progression leading up to his discharge because the Grievant was recognized in his October, 2010 ninety-day review as having successfully addressed those problems. In fact, the Grievant received an "A", the highest performance rating possible, in his two ninety-day follow-up evaluations. The reason I find this contention to be unpersuasive is because, as discussed, after the positive ninety-day review in October the Grievant almost immediately began to have exactly the same problems as before. The ninety-day period after the July review was the Grievant's chance at corrective action. The County was justified in concluding that it was not adequate for the Grievant to have improved for almost exactly ninety days before another relapse. The County was also justified in concluding that the Grievant was not starting, at that point, with a clean slate.

Under this same line of thinking, I disagree with the Union's position that the Grievant was subject to delayed discipline or double jeopardy when he was discharged in March for errors he committed and for which he was criticized in the months prior to that. Specifically, the Union argues that the County cannot give the Grievant notes pointing out errors he committed in November and December of 2010 and January and February of 2011 and then later decide to fire him for those same errors. The Union contends that the Grievant is either being punished twice for the errors (once through a note and once through discharge) or that the County is changing its mind about not having formally discharged the Grievant for those errors and is deciding to do so months after the fact. I am persuaded, on the contrary, that County had just cause to discharge the Grievant because it drew the conclusion, based on cumulative observations, that the Grievant's work habits were not going to improve.

There is much debate in the record before me as to whether the Grievant was specifically told that he could be fired if his performance and attendance did not improve. Brookens testified that she and Kramer specifically told the Grievant at the July evaluation that he could be fired if the expectation set forth in the evaluations were not met. Kramer testified that she told the Grievant at the July evaluation that he was "walking on thin ice". The Grievant denies ever having been told that he could be disciplined for his poor performance. Also, the Union points out that the warnings Brookens and Kramer assert they gave are not reflected in the evaluations or any other written document provided to the Grievant. I tend to credit Kramer's very specific recollection of having used the words "thin ice" with the Grievant regarding the potential negative consequences he was facing. Beyond the specific words used, however, I also believe that the Grievant should have understood from the overall situation that he was in a perilous situation. His absences were quite high, many aspects of his job performance were being criticized, his job simply wasn't getting done, and he had been

subjected to two evaluations in ninety days just months earlier because of the same issues. All of these factors should have put the Grievant on notice that his job was at risk.

Absenteeism

The County in this case has introduced much evidence concerning the Grievant's record of absences. In addition to its contention addressed above that absences cannot be considered because of the allegedly limited scope of the discharge letter, the Union argues that this evidence also cannot be considered in a just cause analysis because the Grievant's absences were covered either by the sick leave benefit provided for in the collective bargaining agreement, by approved family medical leave, or by approved periods of leave without pay.

The Union's position with regard to this point, however, goes against the tide of well-established arbitral principle. Excessive sick leave, even when taken for legitimate, excused illness or injury, can be the basis for discharge from employment. *See*, Elkouri & Elkouri, *How Arbitration Works*, 6th Ed, 2003, at 796-797, and cases cited therein, HUSKY OIL Co., 65 LA 47 (1975) and cases cited therein; SOUTH CENTRAL BELL TELEPHONE Co., 65 LA 482 (1975), and cases cited therein. This principle applies even where an employee is using a sick leave benefit that has been earned at the bargaining table by a union and accumulated by the employee. CITY PRODUCT CORPORATION, BEN FRANKLIN DIVISION, 65 LA 148 (1974) ("Sick leave days that employees accumulate are not earned employee benefits and their use is dependent upon implied duty of employees to attend work on a regular basis.") The rationale underlying the principle has been articulated as follows:

It is implicit in any employee-employer relationship that the employee agrees to be present on the job when scheduled to work. If he is repeatedly absent, for the most valid of reasons, then the company is not obligated to continue his employment.

PACIFIC MARITIME ASSOCIATION, 70 LA 422 (1978). While it is not expected that employees will never be absent, there is a generally recognized need to balance an employee's personal problems against the operational needs of the employer:

No Employer can operate properly without assurance that its employees will, within reason, report regularly for work. Consideration that may be due an employee for his long service and sympathy ... for his physical condition cannot outweigh the needs and rights of the Employer.

UNION CARBIDE CORP., 46 LA 195 (1966). *See also* MONSANTO Co, 76 LA 509 (1981), CLEVELAND TRENCHER Co., 48 LA 615 (1967) ("Efficiency and the ability to compete can hardly be maintained if employees cannot be depended upon to report or work with reasonable regularity.")

The question, therefore, is not whether the Grievant's absences were taken under some contractual leave benefit or otherwise excused, and it is not whether the Grievant violated a specifically established attendance policy. The question is whether the Grievant's absences were "excessive", and I have no alternative but to conclude that they were. The record shows that the Grievant was absent for approximately 100 hours of January of 2010, 55 hours in February, 30 hours in March, 30 hours in April, 75 hours in May, 100 hours in June, and 21 hours in July. By the time of his July, 2010 review, which was nine months into the Grievant's annual employment cycle, the Grievant had been absent often enough that he had exhausted all of his vacation and sick time, and his supervisors were raising the possibility that he might need to seek disability leave from his position.

In statements made by the Grievant in response to his July review, he recognized that his absenteeism was sufficiently excessive as to affect his ability to do his job. He stated:

Obviously, if a person misses many days in any given month and it is of an intermittent nature, the work load just keeps getting bigger and harder to keep up with.

Further, he explained:

The desire to take initiative and be proactive in completing tasks is present in me. However, when one is as physically and mentally unable to function as I have been for much of the last six months, it becomes very difficult to have the energy to be successful.

While the record shows that the Grievant managed to improve his attendance during the ninety-day period between July through October of 2010, he began to take leave on a regular basis again in November of 2010. His absences increased through late 2010 and early 2011 until he had another head injury in February of 2011 and was able to work only three days that month. By mid-February of 2011, four months into his annual employment cycle, the Grievant again had used all of his leave benefit time. At that point, he was not eligible for family medical leave because, due to his rate of absences, he had not worked the threshold number of hours in the preceding year to qualify for such leave under the law. If he continued to take leave without pay, the Grievant was facing the prospect of not being eligible for a full-time health care benefit and having to pay a pro-rated share of the cost of his health insurance premium.

Moreover, the record establishes that the Grievant's excessive leave tendencies were not isolated to 2010 and early 2011. Brookens testified that the Grievant had taken a fair amount of leave in 2008 and 2009, as well. Even if he reportedly was not taking as much leave in those years as he would later in 2010, he took enough to drain his leave bank during those periods of time as well. This is a very long period of excessive leave use for the County to have endured.

Under the concept of excessive absenteeism, it is generally recognized that intermittent leaves impose a greater burden on an employer than extended absences. Elkouri & Elkouri, *How Arbitration Works*, 6th Ed, 2003, at 797. Intermittent leaves do not permit continuous coverage of a vacancy. Rather, the employer is faced with constant uncertainty over the need to accommodate an absence. Here, the Grievant's absences were largely intermittent. Indeed, the Grievant indicated in testimony that intermittent reoccurrence is the trademark of both irritable bowel syndrome and post-concussive syndrome. Further, the record establishes that the Grievant's supervisors faced constant uncertainty over the need to accommodate these absences. When the Grievant called in sick on any given morning or began a longer-term medical leave, he frequently was unable to indicate to Kramer and Brookens how long he would be out. Sometimes when the Grievant left a telephone message indicating that he was sick and would not be coming in, he would say something like, "I'll try to see you tomorrow". Sometimes, if the Grievant had merely left a telephone message indicating that he was sick and would be out, Brookens and Kramer would call his house to ask how long he would be gone, and the Grievant was not always able to answer or return their calls.

The evidence before me further indicates that the Grievant's absences had an actual impact on CSA and VSO operations. The CSA is regulated by performance funding and by state and federal regulations that require child support matters to be handled within specific periods of time. When the Grievant was absent from his CSA job, someone else had to take care of orders and suspense matters. Because of the difficulty of operating the KIDS system, it was not possible to simply hire a temporary employee to handle the Grievant's work. On some occasions, Brookens had to do the work, and this prevented Brookens from performing aspects of her own job. The County also had to contract with another county for use of an employee who was familiar with the KIDS system to do the Grievant's work.

The VSO was smaller than CSA and was arguably even more impacted by the Grievant's absences. Kramer testified that she decided it was appropriate to discharge the Grievant from his position at VSO because she determined that her office could not function with an employee who was unreliable about showing up for work. Kramer did not have another employee to rely on, and she was not able to be present all the time. Even the Grievant, in his own testimony, identified specific ways in which his absences were affecting VSO operations. The Grievant was responsible for producing minutes generated in a Veterans Service Commission. When Kramer discovered that the minutes for the December, 2010 meeting were not finished in the week before the February, 2011 meeting, Kramer had to put together the minutes herself. The Grievant testified that he typically does the minutes the week before the meeting, but that he was not able to do so because he was out sick during that period of time. Similarly, in response to the assertion by the County that the Grievant had erred in late 2010 and early 2011 by failing to handle a veteran's dentures grant, the Grievant responded as follows:

If I hadn't gotten hurt and ended up being out, in essence, for most of a month, it would have been taken care of because I would have followed up with those people.

The Grievant's response to his July, 2010 evaluation is also peppered with statements revealing ways in which his absences had prevented him from completing the tasks for which he was responsible.

The Union points out that it was expected in VSO that Kramer and the Grievant would cover for each other. Indeed, Kramer was also away for some period of time in 2010 due to illness, and the Grievant covered for her absence as he was required to do. Such an expectation, however, did not obligate the County to accept the need to provide coverage for any number of absences. As has been said, "the employer is not an insurer of all misfortunes which may befall its employees". MONSANTO CO., 76 LA 509 (1981). At some point, when the absences became excessive, the obligation became too burdensome, giving the County just cause to terminate the Grievant's employment.

Work Performance

The degree to which the Grievant's performance on the job suffered in the few months leading up to termination and provided just cause for his discharge is the focus of much evidence in this case and a point of serious contention between the parties. Brookens, for example, asserted that the Grievant was beginning to manifest performance problems in December of 2010, such as the failure to enter court orders into the KIDS system within the 24-hour statutorily mandated time period; the Grievant points out that the CSA office was in chaos in December of 2010 as a result of a number of bumpings that were going on, which caused the Grievant's job responsibilities and work location to change in significant ways. Brookens testified that the Grievant was not as prepared as he should have been during this same period of time to start a new income withholding task that had been assigned to him; the Grievant asserts that the CSA employee who had been doing the work before had a poor attitude and refused to train him. Where the County asserts the Grievant had a problem handling suspense reports on timely basis, the Grievant asserts that Brookens never gave him a suspense report quota, the State did not have a suspense report standard, and it was simply difficult to get to them every single day. The County asserts that the Grievant was spending long periods of time doing small amounts of work; the Grievant argues that the County lacked the necessary understanding of his notation system to appreciate his level of productivity and that they never asked him about it. The County criticized the Grievant for not continuing to do his daily work logs as he had been requested to do even after October of 2010; the Grievant contends that there was no formal process for letting a supervisor know what work needed to be done, and that if he had known the work logs were so important he would have done a better job of maintaining them. The County contends that the Grievant failed to process a veteran's dentures grant paperwork in a timely manner; the Grievant asserts that he was operating under a thirty-day time frame that was most appropriate for that type of grant. The County asserts that the Grievant failed to order flags and flag-holders for the VSO as he should have in January of 2011; the Grievant argues that the office had many flags in storage and, because they weren't used until Memorial Day, plenty of time to order more if necessary. The County criticizes the Grievant for failing to complete the minutes for the Veterans Service Commission; the Grievant asserts that he wasn't worried about that task because he knew

Kramer would cover for him. With regard to the general assertion that the Grievant was making a lot of mistakes in CSA, the Grievant recounted that Brookens noted in an email message that “we all make mistakes”; he contends that normally mistakes were simply pointed out and corrected, as a matter of routine.

Despite the Grievant’s many explanations, I am persuaded that deficiencies existed in his performance in late 2010 and early 2011 and legitimately contributed to the County’s decision to terminate his employment. First, contrary to the Union’s assertion that the County merely wanted to get rid of the Grievant because of his persistent use of sick leave, there is no evidence that suggests to me that Brookens and Kramer fabricated these performance deficiencies for this or any other reason. They did not have to. The Grievant’s performance issues appear to have been an unavoidable result of his need to take so much leave. Second, it is not a stretch to conclude these alleged performance issues were actually occurring in late 2010 and early 2011, when one observes that they came up in exactly the same way as the issues Brookens and Kramer testified had plagued the Grievant in the period of time leading up to his unsatisfactory July, 2010 evaluation. It is undisputed that in November of 2010 the Grievant began to call in sick again with some regularity, reporting symptoms of nausea and headaches, as he had done before. Kramer testified that the Grievant seemed sluggish during this period of time. Presumably, the Grievant’s health was again declining, and he was beginning to suffer in the same way he had earlier that year. Presumably those health issues were again affecting the Grievant’s ability not only to be physically, but also mentally present at work.

In the same manner that the Grievant defended himself at the arbitration hearing against the criticisms relating to his performance in the last four months of his employment, the Grievant also wrote three pages of comments defending himself against the criticisms contained in his July, 2010 evaluation. Yet in his hearing testimony the Grievant seems to have willingly acknowledged that the criticisms that had been raised back in July of 2010 were actually warranted:

My comprehension skills were affected. My ability to concentrate was affected. This is a job that you need to really zero in on. As [Brookens] likes to say, be spot on, and I really didn’t feel that way. I didn’t have the energy to complete tasks. I felt exhausted most of the time. Headaches were still there, which made it really hard to concentrate at all. So yeah, I was struggling to function daily.

While it is natural for the Grievant, at both his evaluation and at the arbitration hearing, to have defended himself against criticisms of his performance – it is only human to do so, particularly when one’s job is at stake – it is fair to conclude that the County’s criticisms in both instances were legitimate and that the underlying performance problems contributed in a justifiable manner to the County’s decision to terminate the Grievant’s employment.

Conclusion

The outcome here is not a finding that the Grievant was a malingerer. The record before me really does not call into question the legitimacy of his need to be absent from work. Further, historically and during his period of good health from July through December of 2010, by all accounts the Grievant was a competent, hard-working employee. The County has shown, however, that the Grievant's absences were sufficiently excessive and his performance on the job sufficiently compromised for a sufficiently long period of time, that it had just cause to terminate his employment. Moreover, the evidence establishes that despite his technically clean disciplinary letter, the Grievant had enough of a chance to understand his employer's expectations and to take corrective action prior to his discharge, and despite the abbreviated nature of his discharge letters, the Grievant had enough information to know why he was being fired.

Having considered the foregoing record as a whole, the undersigned makes the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 25th day of April, 2012.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator

DLC/gjc
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