BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MOUNDVIEW MEMORIAL HOSPITAL & CLINICS

and

SEIU HEALTHCARE WISCONSIN

Case 19
No. 71578
A-6508

(Mary Stevens Discharge Grievance)

Appearances:

Nicholas E. Fairweather, Hawks, Quindel, S.C., Attorneys at Law, 222 West Washington Avenue, Suite 450, Madison, Wisconsin, appeared on behalf of the Union.

Troy D. Thompson, Axley Brynelson, LLP, Attorneys at Law, 2 East Mifflin Street, Suite 200, Madison, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Moundview Memorial Hospital & Clinics, hereinafter "Employer," and SEIU Healthcare Wisconsin, hereinafter "Union," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Friendship, Wisconsin, on July 24, 2012. Each party filed a post-hearing brief, the last of which was received August 27, 2012, and the record was closed as of that date.

ISSUES

The parties agreed to the following statement of the issues:

1. Is the grievance procedurally arbitrable?
2. If so, did the Employer discharge the Grievant with just cause?
3. If not, what is the appropriate remedy?

The first issue was answered "yes" during the hearing.

FACTS

The Employer operates a critical access private hospital in Friendship, Wisconsin. The Union is the representative of various non-professional, non-supervisory service and support employees of the hospital, including employees in the maintenance classification. The Employer hired the grievant, Ms. Mary Stevens, in January, 2003, as a housekeeper, a position in the bargaining unit represented by the Union. She was employed as a housekeeper continuously until she was discharged on January 7, 2003.

The Employer has day shift and evening shift housekeepers. It normally assigns two housekeepers per shift. Ms. Stevens was on the evening shift. On the days in dispute, Ms. Stevens started her work day at 3:30 p.m. Ms. Stevens' immediate supervisor was Ms. Viola Walloch. Ms. Walloch is normally is present when the night shift housekeepers come to work, but then leaves shortly after the start of the shift. Night housekeepers are not directly supervised thereafter, but Ms. Walloch remains available by cell phone. The housekeeper position involves general cleaning of assigned areas following appropriate hospital procedures including using cleaning solutions, and mopping. The cleaning work involves the use of only simple machinery.

Ms. Stevens was primarily discharged for the following incident and her conduct in the ensuing investigation. The Employer with the help of contributions established a "meditation room" across from the gift shop. The purpose of the room was to have a place for patients and their families to deal with critical decisions or their spiritual needs. Ms. Hampsen is a volunteer who operates the gift shop across from the meditation room. She was instrumental in its creation. On December 21, 2011, Ms. Hampsen saw Ms. Stevens enter the meditation room and stay in it for an extended period. Ms. Hampsen knocked on the door and entered. She saw Ms. Stevens having a conversation on a cell phone. She asked if Ms. Stevens was "Ok." When Ms. Hampsen left for the day shortly after 4:00 p.m. she saw Ms. Stevens still in the room on her cell phone. She reported this to Ms. Walloch on December 29, 2011.

Ms. Walloch conducted an investigation of the matter. She met with Ms. Stevens on December 29, 2011. Ms. Stevens acknowledged that she did have a phone conversation in the meditation room on December 21, 2011. She stated that the conversation was only a "few minutes." Ms. Stevens remained steadfast in that position that it had been just a "few minutes' throughout the investigation.

During the investigation of the meditation room incident, the Employer discovered that Ms. Stevens had been tardy on three occasions during the same pay period and determined that those tardiness occasions should be an additional basis for discharging Ms. Stevens. Grievant was tardy for work on December 18, by two minutes. She was tardy for work December 24, by one minute. She was again tardy for work on December 2011, by twelve minutes.

Ms. Stevens alleged that at hearing that the first two incidents occurred because of difficulty logging on to new time keeping computer. She alleged the last incident occurred because her identity badge which she was required to have at all times in the facility inadvertently fell off of her clothing while she was driving to work. It took a considerable amount of time for her to realize what had happened and locate the badge.

The background as to the new time keeping system is as follows. Until November 7, 2011, none of Ms. Stevens' duties involved the use of a computer. Ms. Stevens does not have a computer in her home and is fearful of using one. On November 7, the Employer changed its time accounting system for housekeepers. They were now required to log onto a computer and go to a time-keeping program to enter their start time, lunch time, and quitting time. Ms. Walloch trained Ms. Stevens on the use of the computer, but Ms. Stevens continued to have difficulty logging on. Ms. Walloch told Ms. Stevens to have fellow employees or dietary aides help her with the computer. Ms. Walloch promised to provide Ms. Stevens with a detailed instruction sheet, but had failed to do so as of the date of the incidents involved in this dispute. Ms. Stevens successfully logged on to the computer and completed the task of entering her work times on some occasions, but she continued to have trouble on a number of other occasions. Ms. Stevens was not proficient in logging on to the computer as of the date of the incidents in dispute involving tardiness. The Employer measures time worked from the time the employee has successfully entered his or her time in the computer.

The Union filed the grievance January 4, 2012. The parties met to discuss the grievance January 19, 2012. The Employer responded to the grievance on January 20, 2012. The Union faxed and mailed a notice to the Employer on January 24, 2012 stating in relevant part: "Please consider this letter as the union's official notice to arbitrate the Stevens termination grievance." There were no agreements to extend the timelines to file for arbitration. The Union filed a request for arbitration with the WERC on April 2, 2012. The Employer properly objected to the delay as being an untimely request for arbitration. The parties agreed that the grievance was otherwise properly processed to arbitration.

RELEVANT AGREEMENT PROVISIONS

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ARTICLE 21
Discipline

The Hospital will not discipline an employee except for just cause. "Just cause" for discipline includes such things as: 1) Dishonesty, 2) Incompetency, 3) Violation of law in connection with Hospital duties or while on Hospital premises, and 4) Insubordination or failure to carry out a lawful order. **The Union shall receive copies of all disciplinary actions within three (3) working days of the disciplinary action.**

ARTICLE 22
Time Cards

The Hospital is required by law to maintain an accurate record of all time worked by each employee. Swiping someone else's employee identification badge is a form of dishonesty and grounds for dismissal. If an employee's time record is altered either by a supervisor or management personnel, said alteration will be discussed with the employee and adjustments will be corrected on the following paycheck.

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ARTICLE 26
Grievance Procedure

Section 1. A dispute relative to the meaning or application of this Agreement shall be a grievance within the meaning of this Agreement. A grievance must be initiated within fifteen (15) working days that the employee knew or should have known of the events giving cause to the grievance. Working days shall be defined as a day other than Saturday, Sunday or Holiday provided by this Agreement. Grievances may be filed and processed through the procedure outlined herein.

Step 1. Prior to filing a formal written grievance, the employee having a grievance must attempt to meet with the immediate supervisor or the appropriate management representative to attempt to mutually resolve the matter. The employee may choose to be accompanied by a Union Worksite Leader at this or any subsequent step in the grievance procedure. The employee's supervisor shall respond to the grievance no later than five (5) working days after the meeting.

Step 2. If a satisfactory settlement is not reached in Step 1, the employee shall reduce the grievance to writing and present it within five (5) working days following the response in Step 1 to the employee's department head. The department head shall respond in writing to the grievance within five (5) working days.

Step 3. If a satisfactory settlement is not reached in Step 2, the steward, employee and/or Union representative shall present the written grievance to the Administrator within

five (5) working days following the response in Step 2. The Administrator shall convene a meeting to include the employee, Worksite Leader and/or union representative, and such other persons as may be necessary to resolve the grievance, as soon as possible. The Administrator shall provide a written decision within ten (10) working days following the meeting.

Section 2. In the event the grievance (as defined in Section 1) has been timely processed through the above three steps and remains unsettled, the employee or the Union shall have the right at any time within fourteen (14) days, following receipt of the Hospital's Third Step answer to file for arbitration. If notification of arbitration is not received by Registered Mail by the Hospital within fourteen (14) days following the Hospital's answer to Step 3, the grievance shall be considered settled, and the employee and the Union shall have no further recourse over that grievance.

Section 3. The Arbitration Procedure should be as follows:

The party wishing to take the matter to arbitration shall send a written request for arbitration to the:

Wisconsin Employment Relations Commission
1457 E. Washington Avenue, Suite 101
P.O. Box 7870
Madison, WI 53707-7870

The sole authority of the arbitrator is to render a decision as to the meaning or application of this written contract with respect to the dispute. Each arbitration proceeding shall be held at such place and at such time as shall be mutually agreed upon by the Hospital and the Union and if they cannot agree, then the arbitrator shall designate the place and time.

At any time before the commencement of the hearing, either party may demand that the proceedings be recorded by a court reporter, in which case the arbitrator shall make the arrangements to secure the attendance of a court reporter to record all the testimony and all the proceedings. The reporter shall transcribe the notes of the hearings within 20 calendar days from the completion of the hearing, and a copy of the transcript shall be furnished to the arbitrator and the cost will be shared equally by the parties. The cost for other copies of the transcript will be borne by the party requesting the transcript. All witnesses shall be duly sworn. The arbitrator shall have the power to compel the attendance of witnesses and to require either party to produce records or

documents which are pertinent to dispute. The expense of the arbitrator shall be borne equally by both parties. The arbitrator shall render his decision, which shall be final and binding upon all parties, within 45 days following the arbitration hearing. The arbitrator will have no authority to legislate or change or modify or add to the agreement. Any matter beyond the authority of the arbitrator will be returned without decision or action.

Section 4. All grievances will be handled solely in accordance with the Grievance Procedure. Any time limit set forth in this Article 26 may be modified or extended by written agreement between the parties. However, unless thus modified or extended, failure to observe the time limits set forth at any stage of the Grievance Procedure will cause the grievances to be deemed satisfactorily adjusted in the status existing in the last prior stage. A grievance involving the discharge of an employee shall start at Step 3 of the Grievance Procedure. The grievance shall be presented in written form, signed by the employee discharged and the Worksite Leader. In order to be timely, a discharge grievance must be filed by the end of the seventh (7^{th}) day following the date upon which the employee is discharged.

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RELEVANT PORTIONS OF ATTENDANCE POLICY

POLICY STATEMENT/PURPOSE

The hospital must be prepared to meet the demands for service throughout each day, every day of the year. In order to fulfill this obligation, the hospital expects employees to maintain regular and punctual attendance. Every employee is expected to report to work when scheduled and on time. Adherence to this system will allow for early interventions and corrective action to improve attendance.

The attendance standards and procedures outlined in this policy will be used to determine the need and degree of discipline and will be applied consistently to all employees. This policy outlines the responsibilities each employee has in the areas of proper call in procedure, attendance, and punctuality.

In the event of a discrepancy between this policy and the collective bargaining agreement, the terms of the bargaining agreement will govern employees covered by that agreement.

CORPORATE COMPLIANCE

This policy will adhere to all applicable rules and regulations as set forth by Federal and State regulatory agencies as well as all policies.

GENERAL INFORMATION/DEFINITION

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Tardiness: Normally you will be considered tardy if you are not at your workstation and ready to work at the scheduled starting time of your shift. You will be considered to have habitual tardiness if you are tardy two or more times in two successive work weeks.

IMPLEMENTATION/PROCEDURE

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F. Tardiness

An employee will be considered tardy up to one hour post scheduled start of shift time. Beyond that one hour time period will be considered unscheduled absence. Both the tardy time and any unscheduled absence will be recorded and count toward corrective actions.

In cases where a pattern of tardiness indicates noncompliance with guidelines, disciplinary actions may be taken as outlined below:

1. Two (2) times in a pay period or 4 times in 6 months indicates problem: Explain importance of good attendance and problems caused by poor attendance. Attempt to find cause of problem, offer assistance, and mention Employee Assistance Program (EAP) (This is not a verbal warning, but a counseling).

2. Two (2) additional occurrences: Cover reasons as above. This is a verbal warning and is noted in department records.

3. Four (4) additional occurrences: Present a written detailed warning showing dates and length of tardiness. Refer to EAP. Explain suspension (days/hours determined by personnel) may result if there are additional occurrences.

4. Six (6) additional occurrences: Final written warning (with or without suspension)

5. Four (4) additional occurrences (total of 18 occurrences): Meet with Personnel Director or designee to review documentation. If concurrence, termination of employment.

POSITIONS OF THE PARTIES

Employer

The Employer reiterates its argument that the grievance is not arbitrable because the Union did not timely file for arbitration with the WERC within 14 days as required by Article 26. The Union filed for arbitration more than 2 months beyond the deadline.

The Employer discharged Ms. Stevens for just cause. Ms. Stevens' job was a position of trust. She works without direct supervision. Ms. Stevens was aware of the Employer's work rules regarding absenteeism and tardiness and its misconduct policy. Under those policies she was required to arrive at work on time and be ready to work at the start of her shift. She was not allowed to take unauthorized or excessive breaks and she was forbidden to carry a cell phone or make personal calls during her work time. Ms. Stevens was also aware that she was not allowed to use the meditation room at any time. The Employer's rules are reasonable and necessary. Ms. Hampsen observed Ms. Stevens in the meditation room on December 21, 2011, starting between the hours of 3:00 p.m. and 4:00 p.m. She knocked on the door and asked Ms. Stevens if she was all right. She saw Ms. Stevens sitting in a chair using a cell phone. Ms. Stevens acknowledged her and said it would be only a few minutes. However, Ms. Hampsen noted that Ms. Stevens was still in the room when Ms. Hampsen left for the day, a few minutes after 4:00 p.m.

She reported this incident on December 28. The Employer promptly investigated. Ms. Stevens admitted the occurrence, but stated that she was in the room only a few minutes.

In its investigation, the Employer noted that Ms. Stevens had been tardy three times. The occasions were December 18 for two minutes, December 24 for one minute and December 29, 2011, for twelve minutes. Discharge is the only appropriate remedy. The Employer has repeatedly warned Ms. Stevens about her tardiness. She was placed on a performance improvement plan for her tardiness on January 24. She was warned for making excessive calls and making them at unauthorized times on February 1, 2011. She was counseled for carelessness on March 21, and July 8, 2011. She was placed on a two day suspension for the last incident. As a consequence she has reached the discharge stage in the Employer's progressive discipline policy. Any reasonable employee would have been scrupulous in her attendance and obedience to simple, reasonable work rules. The Employer had no reasonable choice but to discharge. The grievance should be denied.

Union

The Employer has failed to show just cause for discharging Ms. Stevens. The Employer based its discharge on the fact that Ms. Stevens used her cell phone allegedly in violation of its rules, but its disciplinary policy had no provision prohibiting personal cell phone possession or use. Ms. Walloch's testimony that she told her housekeepers that they could not have their personal cell phones at work is not corroborated. There is no evidence that Ms. Stevens had notice of any such prohibition. Similarly, Ms. Hampsen testified that the prohibition on employee's using the meditation room was a "gift shop" policy. There is no evidence that anyone told Ms. Stevens that.

The Employer's allegations that Ms. Stevens has been dishonest during the investigation are not true. She indicated that she talked to her daughter for only a couple of minutes. Ms. Hampsen's written statement as to when Ms. Stevens started using the meditation room is also incorrect. It alleges she started at 3:00 p.m. However, Ms. Stevens' shift starts at 3:30 p.m. and she started her shift by cleaning elsewhere for at least 15 minutes. Thus, it is more likely that Ms. Stevens' statement is accurate than Ms. Hampsen's. In any event, Ms. Stevens' statement that she was on only a "couple of minutes" was not intended to be an exact statement of the amount of time, but a statement that it was a short call.

Ms. Stevens' alleged tardiness did not reach the discharge level under the Employer's own written attendance policy. The Employer appears to be counting over a nine year period. This is inconsistent with the stated policy and its objectives. The Employer also did not follow its own policy of providing a detailed warning with the dates and length of tardiness. Moreover, the arbitrator should conclude that Ms. Stevens was not tardy as alleged for the following reasons. The Employer's "Timecard Report" and Walloch's testimony establish that Ms. Stevens' "actual" time worked was regularly rounded down when calculating her wages. In light of this, the Employer's reliance on tardiness incidents of one and two minutes, respectively, as grounds for discharge is inequitable. The finding of tardiness of one and two minutes is questionable in any event because of possible rounding errors. Thus, the tardiness claims for December 18 and December 24 should be disregarded. Ms. Stevens notified her supervisor that she was having trouble running the new time system because it required her to use a computer. She had difficulty entering her time. The Employer did not provide Ms. Stevens enough training on using the computer. The Union asks that the arbitrator sustain the grievance, order her reinstated and made whole for all lost wages and benefits.

DISCUSSION

1. Procedural Arbitrability

I decided the Employer's procedural objection at hearing. The following confirms that ruling. The Employer argued that Article 26, Sections 2 and 3 requires that the Union file a request for arbitration with the WERC within the 14 days, not merely notify the Employer that it wanted to arbitrate the grievance. The Union argued that it is only required to notify the

Employer that it wanted to process the case to arbitration within 14 days. I concluded that the procedure is ambiguous as to whether the Union can notify the Employer that it will request arbitration and proceed to forthwith file a request for arbitration with the WERC or, on the other hand, complete the process of notifying the Employer and also notifying the WERC within 14 days. I concluded that the latter was the correct interpretation, but that the agreement did not necessarily mandate dismissal of the grievance in the event of a delay. I concluded that the better approach was the tolling of any back pay liability from the date they filed with the WERC. As discussed more below, the back pay order herein is reduced for sixty days which is approximately the time from 14 days after January 20, 2012 (February 3, 2012) to April 2, 2012.

2. Just Cause

a. Tardiness

Ms. Stevens did not have another violation of the Employer's attendance policy. Under the Employer's attendance policy an employee has an "occurrence" of tardiness if they are late for work on two or more occasions in a pay period.[1]

The Employer's records show that Ms. Stevens was late during the period in dispute on three occasions. Ms. Stevens asserted that she had difficulty entering her starting time on the two of the three days of tardiness. Those two occasions each involve only a minute or two of tardiness. The circumstances are specified above. I am satisfied that Ms. Stevens was still in the process of learning the new system at the relevant time. Ms. Walloch effectively told Ms. Stevens that the Employer would allow tolerance for the learning process. Two minutes is well within the time Ms. Stevens would have needed to operate the computer. The December 18 and December 24th tardiness occurrences do not count as instances of tardiness under the Employer's own policies.

The Employer's policy requires that there be two tardiness incidents in a pay period to constitute an occurrence of tardiness for discipline purposes. Ms. Stevens has one instance at most. Accordingly, Ms. Stevens did not have an incident of tardiness during the period of dispute.

b. Meditation Room Incident

Ms. Walloch viewed the meditation room phone call as a serious incident for the following reasons. Ms. Stevens was not allowed to be in the meditation room other than to clean it. She was not allowed to have a cell phone with her while she was working. She also was not allowed to have personal calls at other than break times In any event, she was not allowed to have a lengthy phone call on work time.

[1] See, section F.1.

Ms. Stevens testified that the call lasted about only six minutes. Ms. Hampsen's testimony places the call at about a half hour. Her testimony is more believable. I address below the Employer's argument that this and other statements demonstrate that Ms. Stevens is not trustworthy enough to work with the limited supervision involved in this job.

I turn now to the conversation itself. The undisputed fact is that Ms. Stevens received the call from her daughter and did not initiate it. Her daughter called because she was sick and wanted her mother to come home. Ms. Stevens said she might have come home but for the fact that she was the only housekeeper present for the night shift. She knew that Ms. Walloch did not want to have a shift entirely uncovered. There is no way Ms. Stevens could have known in advance that she would receive the call or know how long it would last Ms. Walloch testified that if it was a true emergency, she would not have objected to Ms. Stevens receiving a short call. The collective bargaining agreement protects the employee's right to make decisions about exercising sick leave rights. Accordingly, receiving the call, itself, did not constitute an event for which discipline was warranted.

The length of call is a different story. Work time is for work. Ms. Stevens' testimony indicates that she did not consider limiting the length of the call because it occurred during work time. In this regard, the Employer has a legitimate interest in having employees focus on work during work time. Some form of discipline for the length of time is appropriate.[2]

The issue of carrying a cell phone is unclear. Ms. Walloch testified that she would not have discharged Ms. Stevens for that infraction alone. There are some issues which are unclear as to whether having a cell phone creates medical risks for patients. Ms. Walloch's objective of banning cell phones to avoid having employees use them during working hours has to be balanced with the employees' legitimate need to have a reasonable way of dealing with emergency situations which may require them to take contractual leave. The cell phone use is not a factor supporting discharge in this incident.

This case illustrates the Employer's legitimate interest in not having the meditation room become a substitute for a phone booth or a place for private employee conversations. However, there is no evidence Ms. Stevens or any other employee has ever been counseled or disciplined specifically about the use of the room even though all knew its intended purpose. Although Ms. Stevens generally knew that she was not to use the meditation room, there were a number of ambiguities in circumstances and actual employee practice which left some doubt as to whether she knew she could not use it to receive this specific call. Employees are entitled to at least one warning when they may not understand a rule of this nature. The use of the room does support discipline in the form of a warning, but nothing more serious.

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[2] I note that because the Employer uses a system of rounding down work times entered on its computer system, Ms. Stevens actually was permitted by the Employer to work more than a half hour in that pay period without pay. Thus, Ms. Stevens made up the work time lost in the phone call. This is not a situation in which the employer lost total work time in the period.

The most significant issue arising out of the meditation room incident and Ms. Stevens' response to it is whether she is trustworthy enough to work with indirect supervision. A careful review of Ms. Stevens' testimony indicates that she generally tries to conform to the Employer's expectations, but "bends the rules" at times. Coaching has an effect for a while. A review of her testimony indicates that she does try to be accurate in her testimony, but makes misstatements mostly out of defensiveness. I do not conclude that she is untrustworthy. If I did, the result might well be different. For the reasons expressed above, I conclude that the Employer did not have just cause to discharge Ms. Stevens, but did have reason to suspend her for the length of the call.

3. Remedy

I conclude that the Employer would have had just cause to suspend Ms. Stevens for 30 days. I, therefore, order that she be reinstated and be made whole for all back pay, less that which would equal a 30 day suspension and less the sixty days noted above. For the purposes of the applicability of other provisions of the agreement, the total ninety day period should be treated as a period of suspension. Ms. Stevens will retain her seniority for the entire period. Pursuant to the agreement of the parties, I reserve jurisdiction over issues arising from the specification of the remedy as noted in the award.

AWARD

The Employer did not have just cause to discharge Ms. Stevens. It shall reinstate her to her former position. It shall make her whole for all lost wages and benefits, except that amount which shall constitute a ninety calendar day suspension. I reserve jurisdiction over the issues arising from the specification of remedy if either party requests in writing, copy to opposing party that I exercise that jurisdiction within sixty (60) calendar days of the date of this award.

Dated at Madison, Wisconsin, this 18th day of October, 2012

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

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