BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

SEIU HEALTHCARE WISCONSIN

and

OAKWOOD LUTHERAN HOMES ASSOCIATION, INC.

Case ID: 440.0012
Case Type: A

AWARD NO. 7938

(Middleton Grievance)

Appearances:

Nicholas Fairweather, Attorney, Hawks Quindel, S.C., 222 W. Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of SEIU Healthcare Wisconsin.

Jon Anderson, Attorney, Godfrey & Kahn S.C., 1 East Main Street, Suite 500, P.O. Box 2719, Madison, Wisconsin, appearing on behalf of Oakwood Lutheran Homes Association, Inc.

ARBITRATION AWARD

SEIU Healthcare Wisconsin (hereinafter referred to as the Union) and Oakwood Lutheran Homes Association, Inc. (hereinafter referred to as the Employer) were parties to a collective bargaining agreement that provided for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the instant grievance. A hearing on that grievance was held in Madison, Wisconsin, on November 18, 2016. The hearing was not transcribed. The parties filed briefs and reply briefs whereupon the record was closed on January 27, 2017. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate Section 34.1 of the collective bargaining agreement when it discharged the grievant? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2013 – 2015 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 25 – UNPAID LEAVES OF ABSENCE

25.1 Family and Medical Leave (FMLA). The Employer will continue its practice of granting Federal and/or State FMLA leaves to eligible Staff members as required by applicable law.

* * *

ARTICLE 34 – DISCHARGE AND CORRECTIVE ACTION

34.1 Just Cause. The Employer may discharge or suspend a Staff member for just cause. If requested, a Work Site Leader will be called in when a Staff member meeting may result in disciplinary action up to and including discharge. If a bargaining unit member is denied a Union representative for an investigatory meeting in which he or she is entitled to Weingarten rights, no discipline will be issued regarding that incident.

34.2 Corrective Action. When a Staff member has worked twelve (12) consecutive months without receiving a formal documented corrective action notice, with the exception of physical, verbal or emotional abuse, neglect or altercations, such notice or prior notices shall not be used in any further disciplinary action, evaluation, suspension, or discharge.

34.3 Timeliness. All corrective action notices shall be given within seven (7) calendar days, excluding Saturdays, Sundays and HTSDs from when the department head (in the department in which the Staff member works) completed her/his investigation of the infraction. If notices are not given within this time frame, they shall be dismissed.

34.4 Union Notification. A copy of all corrective action notices shall be forwarded to the Work Site Leaders at each campus as identified by the Union Staff Representative, and to the Union Staff Representative via email or fax at the SEIU HCWI Madison office within five (5) calendar days of the Staff member receiving the corrective action.

BACKGROUND

Oakwood Lutheran Homes Association, Inc. is a faith based, continuing care retirement community. It provides services to older residents in the form of independent living apartments, assisted living, memory care, and skilled nursing facilities. The Employer has two campuses. There is a West campus known as Oakwood Village University Woods and an East campus known as Oakwood Village Prairie Ridge. The employee involved in this grievance worked on the East campus (Prairie Ridge).

The Union represents the service and maintenance employees employed by the Employer at its East and West campuses in Madison, Wisconsin. There are about 30 job classifications in the bargaining unit. One of the classifications in the bargaining unit is Housekeeper.

* * *

For many years, the Employer has had an attendance policy. According to an undated memorandum of understanding on the last page of the collective bargaining agreement, the attendance policy is attached to the collective bargaining agreement. The Union has never grieved the Employer's attendance policy.

The Employer's attendance policy is a "no-fault" attendance policy. No-fault attendance policies typically assess points for various attendance occurrences without regard to the reason for the absence. Under the Employer's attendance policy, absences due to workers compensation, federal Family Medical Leave Act (FMLA) and Wisconsin Family Medical Leave Act (WFMLA), among other reasons, are not counted as occurrences for corrective action purposes. However, if FMLA or WFMLA standards are not met, leave may be denied and counted as an occurrence under the policy.

Under the Employer's attendance policy, employees who accumulate certain numbers of occurrences in a rolling 12-month period of time are disciplined. The policy defines an occurrence as "the absence from a scheduled shift or consecutive scheduled shifts, not to exceed three days." The point thresholds where employees receive discipline are designed to accommodate what the Employer believes to be "normal" absenteeism and prevent what the Employer believes to be "excessive" absenteeism. The Employer's attendance policy specifies the following progressive disciplinary sequence for violating the policy: If an employee has 6 occurrences during a rolling 12-month period, they will receive a verbal warning; if an employee has 8 occurrences during a rolling 12-month period, they will receive a written

warning; if an employee has 9 occurrences during a rolling 12-month period, they will receive a second written warning; and if an employee has 10 occurrences during a rolling 12-month period, they will be terminated. Under the Employer's policy, employees can, over time, have certain occurrences wiped clean.

The record indicates that the Employer frequently disciplines employees for violating the attendance policy. For example, in the roughly 3-year period from 2013 to September, 2016, the Employer issued about 370 corrective actions (i.e. discipline) to employees for attendance infractions at the East campus (Prairie Ridge). In the same time period, the Employer issued 110 corrective actions (i.e. discipline) to employees in the Prairie Ridge housekeeping department for attendance infractions. Five were dismissals with the remainder being a second written warning or less.

While the attendance policy says that an employee is to be terminated after 10 occurrences, the record shows – and the Employer acknowledges – that there were 13 instances in 2014 and 2015 where that did not happen. Of these 13 instances, 10 of the employees worked in the dining department and 3 worked in nursing. Other than their department though, it is unclear from the record whether these 13 employees worked at the East campus or the West campus. The Employer avers in their brief that "many" of the 13 employees worked at the West campus. The record shows that after the Employer learned of the inconsistency in the dining department, the supervisors there were retrained on administering the attendance policy. None of the 13 instances where an employee was not terminated for having 10 occurrences took place in the East campus housekeeping department. Said another way, at the East campus housekeeping department, there are no instances where an employee had more than 10 occurrences and was not discharged.

* * *

This case involves a housekeeper at the East campus who was terminated for excessive absenteeism. According to the Employer, she violated the Employer's attendance policy.

Housekeepers are responsible for cleaning the facilities' common areas and resident rooms. The position requires a substantial amount of physical activity, including lifting, carrying, reaching, and walking.

* * *

Darlene Middleton worked as a full-time housekeeper for the Employer from 1992 to September 30, 2015. She worked at the West campus for 10 years and the East campus for 13 years. Middleton was aware of the Employer's attendance policy and its requirements.

The record shows that in 2011, 2012, and 2013, Middleton applied for and was granted FMLA and WFMLA for unspecified serious health conditions. These serious health conditions did not involve her back. Since Middleton applied for FMLA and WFMLA in those three years, it can be surmised that she knew how to apply for such leave.

Middleton has long had attendance issues. For example, in the 2-year period between 2011 and 2013, she received about a dozen verbal and written warnings for her attendance (i.e. the first two levels of discipline under the Employer's attendance policy).

Then, in the 2-year period between September 2013 and September 2015, she received 17 second written warnings for her attendance (i.e. the last level of discipline under the Employer's attendance policy before termination). Specifically, she received a second written warning on September 18, 2013; October 11, 2013; November 20, 2013; February 10, 2014; May 7, 2014; June 5, 2014; July 4, 2014; September 2, 2014; September 19, 2014; October 24, 2014; November 21, 2014; February 20, 2015; May 12, 2015; June 1, 2015; June 23, 2015; July 10, 2015; and September 3, 2015. Under the Employer's attendance policy, an employee can be at the second written warning stage more than once as prior occurrences drop off the rolling attendance calendar. More specifically, if an employee goes 90 days without receiving an occurrence, the oldest occurrence on the employee's record is removed. Middleton's supervisor, Sandra Knudtson, met with Middleton each time she gave her (i.e. Middleton) a second written warning for violating the Employer's attendance policy and told her the Employer's expectations and the consequence of her failure to improve. Each corrective action listed on the side margin the basis for the conclusion that the corrective action was warranted under the terms of the attendance policy. On all of the corrective actions relevant here, Middleton signed the form and checked a box which stated: "I understand and AGREE with the corrective steps taken." When Knudtson had all of these meetings with Middleton to give her a second written warning for her attendance, Middleton gave Knutson a variety of reasons for her absences. None of the reasons related to a back condition. Middleton did not request or apply for FMLA or WFMLA leave to cover any of the absences just noted.

It is set against this background that the following occurred.

FACTS

Middleton injured her back doing yard work at home on Sunday, September 20, 2015.[1] Middleton was scheduled to work the 6:00 a.m. to 2:30 p.m. shift for the following Monday through Friday workweek (i.e. September 21, 22, 23, 24, and 25). On Monday, September 21, Middleton called her supervisor (Sandra Knudtson) and left her a voicemail message; the message was that her back hurt and she would be absent from her shift. On Tuesday, September 22, Middleton called Knudtson and reported that she would be absent. On Wednesday, September 23, Middleton again called in to report her absence for that day. Later that day, Middleton left Knudtson a message which said she was also going to be absent Thursday and Friday, and would be able to return to work on Monday, September 28, without any medical restrictions. Middleton was absent for the remainder of her shifts that week (i.e. Thursday, September 24, and Friday, September 25). Thus she was absent that entire week.

[1] All dates hereinafter refer to 2015.

Middleton was scheduled to work on Monday, September 28, and she returned to work on that date. Prior to going into work though, Middleton called Knudtson at approximately 6:00 a.m. and asked her if she was going to be terminated; she requested from Knudtson that, if she was going to be terminated, she be terminated before she reported to work. Knudtson, who was off work that day, responded that she would review Middleton's attendance situation when she returned to work the next day (Tuesday, September 29). Knudtson also told Middleton that she could contact Human Resources (HR) if she wished. Following her phone call with Knudtson, Middleton reported to work. Immediately upon reporting to work, she went into the HR office where she asked Jaime Benton (the HR manager for the East campus) if she was going to be terminated and, if she was, she asked that she be terminated prior to working her shift. In response, Benton told Middleton that the Employer would be reviewing her attendance record prior to making any decisions about corrective action and that until that happened Middleton remained an employee and would be paid for her work until a decision was made. During this meeting, Middleton did not tell Benton that she (Middleton) planned to request FMLA leave for her absences the week of September 21–25.

The next day, Tuesday, September 29, Middleton reported to work as usual and performed her usual job tasks during her shift. Additionally, she did the following. First, she went to the Employer's HR office and asked Emilie Knutson (an employee in that office) for the paperwork to file for FMLA leave. Knutson gave her that paperwork and, in doing so, told her that if she filed for FMLA leave, she needed to provide a completed certification form from her health care provider supporting her request to use FMLA leave for a serious health condition. Middleton later took the papers to her doctor and asked the doctor to complete them and fax them to the Employer. Second, Middleton gave Knudtson a doctor's return-to-work/release slip. The reason Middleton did that was because she had been absent more than three consecutive, scheduled days, and she knew that under the Employer's attendance policy staff members absent more than three consecutive, scheduled days must present a doctor's return-to-work/release slip to their supervisor. The note, dated September 23, said in pertinent part: "Please excuse [Middleton] from work/school due to a medical condition from 9/21/2015 through 9/25/2015. [S]he may return to work on 9/28/2015 with no restrictions." The note provided no other information.

After getting Middleton's return-to-work/release slip, Knudtson reviewed Middleton's attendance and corrective action record with Benton. Afterwards, they determined that prior to Middleton's absences during the week of September 21, Middleton was at the second written warning step of the Employer's corrective action process (with a second written warning notice having been issued on September 3). That corrective notice said, in pertinent part, that Middleton "will move to the next step C/A [corrective action] up to and including termination" if her attendance did not improve. Then they determined that Middleton's 3-day absence from September 21 to September 23 constituted one occurrence and her 2-day absence from September 24 to September 25 constituted a second occurrence. These two occurrences put her at 10 occurrences within a rolling 12-month period.

The next day – Wednesday, September 30 – Knudtson and Benton met with Middleton and terminated her employment for violating the attendance policy (specifically, having

10 occurrences in a rolling 12-month period). After she was told she was fired, Middleton told Knudtson and Benton that she planned to file for FMLA leave to cover her absences the week of September 21 – 25. Middleton also told them that the day before (i.e. Tuesday, September 29) she had asked Emilie Knutson for the applicable FMLA paperwork and Knutson had given it to her. Benton replied that Middleton did not have any FMLA certifications on record at the time, but the Employer would review any information that was provided related to the FMLA leave request that Middleton planned to file. Benton then told Middleton that her termination would stand for now, subject to reconsideration if Middleton's request for FMLA and/or WFMLA leave was approved.

On October 5, Middleton's health care provider faxed a completed FMLA certification form to the Employer. The completed form indicated that the medical provider treated Middleton for "low back pain, tender to palpation" on September 23 and that the condition commenced on September 20. The report also contained the following responses about Middleton's "low back pain":

- Middleton's condition had a probable duration of one week;
- No episodic flare-ups were anticipated;
- Middleton was not referred to any other health care provider for evaluation or treatment of her low back pain;
- Middleton would not need follow-up treatment appointments because of her condition;
- No medication was prescribed other than over-the-counter ibuprofen; and
- The beginning and ending dates of Middleton's condition were September 20 through September 28.

The medical provider recommended "ice, rest, gentle stretches [and] no work until September 28, 2015."

The Employer treated this completed certification form as a request for FMLA/WFMLA leave to cover Middleton's absences the week of September 21. After considering the responses therein, the Employer determined that Middleton's condition did not constitute a "serious health condition" as that phrase is defined in the FMLA and WFMLA and, consequently, did not approve her request for FMLA leave to cover her absences the week of September 21. Notice of the denial of FMLA leave was provided to Middleton on October 7.

Middleton subsequently filed two grievances, one regarding denial of her FMLA leave request and another regarding her termination from employment under the Employer's attendance policy. A meeting was held with Middleton and her union representative on October 22 to discuss her grievances. During the meeting, Benton reviewed and confirmed the information provided in Middleton's medical certification form. Specifically, Middleton confirmed that she had not been prescribed any medication, that she did not receive any referrals for additional treatment or evaluation, and that she had not had any follow-up appointments scheduled. Benton also asked whether any of that information had changed between October 5,

when the certification was completed, and October 22. Middleton responded that it had not. Thus, Middleton did not dispute any of the information provided in the certification. At the end of the meeting, Benton made two findings: first, she reaffirmed the denial of Middleton's FMLA leave request for the week of September 21; and, second, since the FMLA leave request for that week was denied, occurrences were assessed against Middleton under the Employer's attendance policy for her absences that week, and she was terminated for accumulating 10 occurrences.

The Union subsequently filed a complaint with the Wisconsin Equal Rights Division challenging the Employer's denial of FMLA leave to Middleton. The complaint was reviewed and ultimately a determination of no probable cause was issued. That determination – which means that no probable cause exists to conclude the Employer violated the law – was not appealed.

The Union did not appeal the FMLA grievance to arbitration.

The discharge grievance was appealed to arbitration.

DISCUSSION

The parties stipulated that the issue to be decided here is whether the Employer violated Section 34.1 of the collective bargaining agreement when it discharged Middleton.

The section of the collective bargaining agreement just referenced says that "[t]he Employer may discharge or suspend a Staff member for just cause." This language obviously subjects employee suspensions and discharges to a just cause standard.

The threshold question is what criteria are going to be used to determine just cause. The phrase "just cause" is not defined in the collective bargaining agreement, nor is their contract language which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. While there are many formulations of just cause, one commonly accepted approach consists of addressing these two elements: first, did the employer prove the employee's misconduct, and second, assuming the showing of wrongdoing is made, did the employer establish that the discipline which it imposed was commensurate with the offense given all the circumstances. That's the approach I'm going to apply here.

As just noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee's misconduct. In making that call, I'm first going to address what Middleton did.

What Middleton did can be so succinctly put: she missed a week of work, specifically the five-day period of September 21-25, 2015.

Sometimes, when an arbitrator is reviewing an employee's discipline for missing work, the arbitrator gets to make a subjective determination about his/her view of the seriousness and consequences of the attendance infraction.

That's not the case here. That's because the Employer has adopted a no-fault attendance policy. The Employer's policy – like many no-fault attendance policies – assesses points for various attendance occurrences without regard to the reason for the absence. Under the Employer's attendance policy, absences covered by the FMLA and WFMLA are not counted as occurrences for corrective action purposes. That means that absences covered by the FMLA and/or WFMLA are not chargeable for corrective action purposes.

Not surprisingly, the Union attempts to cast this case as a FMLA or WFMLA case. There are several problems with doing that though. First, the record shows that the FMLA grievance was not appealed to arbitration; just the discharge grievance was. Second, the record also shows that the Union challenged the Employer's denial of Middleton's FMLA leave request by filing a complaint with the Wisconsin Equal Rights Division. That agency subsequently reviewed the Employer's determination that Middleton was not entitled to FMLA for her absences on September 21–25. After doing so, that agency found there was no probable cause to conclude the Employer violated the law by its actions. That determination was not appealed.

Notwithstanding the foregoing, the Union invites me to address the FMLA matter anew. While I could duck the matter on the grounds that the decision has already been made, it is expressly noted that both sides addressed it in their briefs. That being so, I've decided to address the question myself of whether Middleton's absences from September 21–25 qualified for FMLA leave.

In order to qualify for FMLA leave, Middleton's absences for the week in question had to constitute a "serious health condition." That phrase is defined in § 103.10(1)(g), Stats., as a disabling physical or mental illness, injury, impairment or condition involving (1) inpatient care in a hospital, nursing home, or hospice; or (2) outpatient care that requires continuing treatment by a health care provider. Middleton was not under inpatient care during any time relevant to this case, so the first prong in this definition is inapplicable here. It is the second prong (i.e. the outpatient care prong of the definition) that is relevant to her claim.

In Middleton's case, she was seen on an outpatient basis by her medical provider on September 23. Afterwards, Middleton's medical provider supplied a completed FMLA certification form to the Employer. In that form, the medical provider opined that Middleton's "low back pain" had a probable duration of one week and no episodic flare-ups were anticipated. Additionally, he did not order any follow-up visits with him and did not order referrals for her to be seen by any other health care provider subsequent to that September 23 visit. Additionally, the medical provider did not prescribe any medication other than over-the-counter ibuprofen. Finally, he recommended "ice, rest, gentle stretches [and] no work until September 28, 2015."

In order to qualify as a "serious health condition" under the WFMLA, there must be direct, continuous, and first-hand contact by a health care provider subsequent to the initial

outpatient contact. In this case though, there was none of the foregoing. Specifically, there was no continuing treatment, no supervision, no follow up, and no first-hand contact which serves to qualify Middleton's low back pain as a serious health condition. Additionally, at the October 22 grievance meeting, the Employer asked Middleton if anything about her medical condition had changed. Middleton responded that nothing had changed.

After considering the responses contained in Middleton's completed certification form, I reached the same conclusion as the Employer did (to wit: that Middleton's medical condition the week of September 21 did not qualify as a "serious health condition" within the meaning of the WFMLA). It follows from that finding that Middleton's absences the week of September 21–25 were not covered by the FMLA or the WFMLA.

Since Middleton's absences that week were not covered by FMLA or WFMLA, the Employer could count those absences as occurrences under the Employer's attendance policy. When the Employer did that they assessed the five days of absences as two separate occurrences. After those occurrences were added to the other occurrences which Middleton had already incurred, it was significant for this reason: it put Middleton at 10 occurrences within a rolling 12-month period.

The next question is whether having 10 [attendance] occurrences qualifies as misconduct. As was noted earlier, in some cases, the arbitrator gets to make a subjective determination as to whether a certain attendance infraction qualifies as misconduct. Here, though, I don't get to make that call. That's because the Employer's attendance policy addresses that point. That policy deems 10 occurrences in a rolling 12-month period to be an unacceptable level of attendance. Said another way, the policy mandates that that number of occurrences constitutes misconduct.

* * *

Having so found, the focus now turns to the second part of the just cause analysis being used here (namely, whether the Employer established that the penalty imposed for this misconduct was appropriate under all the relevant facts and circumstances).

The penalty which the Employer imposed, of course, was discharge.

I've decided to begin my discussion on this point by noting that when Middleton was absent the week in question, she was already at the second written warning level (on the attendance policy's progressive disciplinary sequence). That's the last level of discipline before termination. Also, for the purpose of context, Middleton had been at that level for two years. During that time period she received 17 second written warnings for her attendance. While 17 second written warnings can be characterized many ways, it suffices to say that Middleton had received plenty of warnings about the consequences of her poor attendance.

While normally progressive discipline is just one of the factors that an arbitrator reviews when considering the overall appropriateness of the discipline imposed, in this case, those traditional factors do not carry the day. Instead, what carries the day here is the discipline

specified in the Employer's attendance policy. The attendance policy explicitly says that employees who have 10 occurrences in a rolling 12-month period will be terminated.

Given that plain language in the Employer's attendance policy, one would expect the Employer to be uniform and consistent across all departments in imposing punishment at the final step of the attendance policy's disciplinary sequence. Specifically, one would expect that all employees who have 10 occurrences in a rolling 12-month period are discharged when that happens.

Alas though, that is not the case. The record shows that in 2014 and 2015, there were 13 instances at the Employer where that did not happen and employees who had 10 or more occurrences were not discharged. Not surprisingly, the Union hangs its proverbial hat on same and claims that Middleton was subjected to disparate treatment because she was discharged while those 13 employees were not.

In addressing this point, I'm first going to comment on whether 13 instances are sufficient to establish the existence of disparate treatment. My response can be simply stated: yes.

The disparate treatment just noted obviously undercuts the strength of the Employer's case. It turns what could have been a proverbial slam-dunk case for the Employer into a case that is less than a slam-dunk.

Since there were 13 instances at the Employer in a recent two-year period where an employee had 10 occurrences and was not discharged, the question that I wrestled with was whether Middleton was entitled to the same treatment. Rhetorically speaking, was she entitled to be treated the same way as those 13 employees and not be discharged?

If some of those 13 instances had occurred in the department where Middleton worked (i.e. housekeeping), my response to that question would have been in the affirmative.

However, all 13 instances where the employee had 10 or more occurrences and was not discharged occurred in the dining and nursing departments. Middleton had nothing to do with either of those departments though. Thus, none of what I'm hereafter going to call the "exceptions" occurred in her department. In my view, that's significant.

It's also significant that the Employer's attendance policy has existed for many years. Insofar as the record shows, it was administered in a uniform and consistent fashion across all departments until exceptions occurred in 2014 and 2015. When those exceptions occurred, the bulk of them were in one department (i.e. dining). The Employer's HR office was apparently unaware of the exceptions in the dining and nursing departments until the Union brought them to the Employer's attention during the processing of this grievance. The record shows that upon learning of same, the Employer took steps to ensure that there would be no more exceptions in those departments by retraining supervisors on administering the attendance policy.

Based on the above, I have concluded that the exceptions in the dining and nursing departments where employees were not discharged when they had 10 occurrences can be distinguished from Middleton's situation. As previously noted, Middleton did not work in either of the two departments where the exceptions occurred. In her department – housekeeping – every single employee who had 10 occurrences was discharged. There is no question that Middleton knew that. She also knew on September 28 that she had reached the level of 10 occurrences and that termination was the next step. She therefore anticipated that she would be terminated. That's why when she talked with Knudtson and Benton that day she asked that she be terminated before her shift started (rather than after working a full shift). Her own conduct confirms that she knew what the consequences of her absences would be. Since Middleton was treated exactly as the Employer's attendance policy says employees will be treated when they have 10 occurrences in a rolling 12-month period, the discipline imposed by the Employer passes arbitral muster.

In light of the above, it is my

AWARD

That the Employer did not violate Section 34.1 of the collective bargaining agreement when it discharged the grievant. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 14th day of April 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Arbitrator