

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between
SEIU HEALTHCARE WISCONSIN
and
OAKWOOD LUTHERAN HOMES

Case ID: 440.0021

Case Type: A

(Ellison Grievance)

AWARD NO. 7988

Appearances:

Nicholas Fairweather, Attorney, Hawks Quindel, S.C., 409 East Main Street, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of SEIU Healthcare Wisconsin.

Tom O'Day and Alyssa LeRoy, Attorneys, Husch Blackwell LLP, 33 East Main Street, Suite 300, Madison, Wisconsin, appearing on behalf of Oakwood Lutheran Homes Association, Inc.

ARBITRATION AWARD

On April 21, 2022, SEIU Healthcare Wisconsin (hereinafter referred to as the Union) filed a grievance arbitration request with the Wisconsin Employment Relations Commission. Pursuant to that request and the terms of an applicable collective bargaining agreement that provides for final and binding arbitration of unresolved grievances, the Commission assigned me to serve as arbitrator to decide the instant grievance. A hearing was held in Madison, Wisconsin, on February 8, 2023. The hearing was not transcribed or otherwise recorded. The parties thereafter filed briefs on March 13, 2023, whereupon the record was then closed. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties agreed to the following statement of the issue:

Did the Employer have just cause to terminate Laura Ellison's employment and, if not, what is the remedy?

DISCUSSION

The Employer, Oakwood Lutheran Homes Association, Inc. (hereinafter referred to as Oakwood), is a continuing-care retirement community that provides services to residents 55 years and older, including healthcare, assisted living, memory care, rehabilitation, and apartment homes. Oakwood operates two campuses in Madison, Wisconsin. At all relevant times, the Union has represented certain employees of Oakwood, including the Grievant, Laura Ellison¹, (hereinafter referred to as Ellison).

Ellison worked in various positions for Oakwood from August 2005 until her termination on January 4, 2022. Prior to her termination, Ellison was a Resident Health Assistant. Ellison was usually scheduled to work 30 hours per week; 60 hours per pay period.

This matter arises out of Oakwood's No-Fault Attendance Policy, which led to a Grievance under the collective bargaining agreement (hereinafter CBA) then in place.² Ellison alleges she was terminated without just cause, in violation of Section 34.1 of the CBA. The terms of the Attendance Policy are undisputed. Ellison was aware of Oakwood's Attendance Policy and its requirements.

With respect to just cause as it relates to discharge and corrective actions, Article 34, Section 34.1. of the CBA states:

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 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.

The Memorandum of Understanding states:

The parties agree that the revised attendance policy will be attached to the back of the collective bargaining agreement with language to the effect that employees should check with Human Resources to insure the attached policy is still current. The parties further agree that pursuant to Article 5, Section 5.1 the Employer may modify its attendance policy. The employer agrees that before implementing any changes to its current attendance policy it will provide the Union with thirty (30) days written notice of the intended changes. Upon request by the Union, the Employer will meet with the Union and negotiate over the attendance policy. If the parties are unable to reach an agreement with seven (7) calendar days of the

¹ Ms. Ellison has also gone by Laura Lemon and Laura Johnsrud.

² The Memorandum of Understanding regarding the Attendance Policy was carried over from the CBA in effect March 1, 2019, through February 28, 2021, to the replacement CBA in effect March 5, 2021, through October 31, 2022. As of April 20, 2022, when the grievance was filed, the replacement CBA had not yet been signed.

commencement of the negotiations, the Employer may put the attendance policy into effect. In the event the Union believes the attendance policy is unreasonable, it may skip the grievance procedure and initiate arbitration over the new attendance policy pursuant to Article Seven, Section 7.6.

The Attendance Policy at Oakwood provides in relevant part:

POLICY

Oakwood Village is committed to establishing and maintaining work schedules on a fair and consistent basis and providing opportunities for the staff member and supervisor to jointly manage attendance. The purpose of this policy is to define Oakwood's intent with respect to tracking a staff member's attendance at work and to meet the scheduling and operation needs of the department.

For the purpose of this policy:

- Rolling Attendance Calendar: Points will be calculated/reviewed on a rolling calendar year, meaning points will fall off after 12 months.
- Tracking of Absence Points versus ALLE Points (Arrive Late Leave Early) will be calculated on two separate attendance tracks.

PROTOCOL

Definitions

Absence is defined as failure to be present or in attendance, as scheduled, for a scheduled shift for any reason. A scheduled shift is defined as any shift on a set schedule that includes any extra shifts that have been picked up by the employee, or any traded shifts between employees.

Approved Absence is an absence which will not be chargeable as a point for the purposes of this policy. Staff are expected to follow proper notice requirements in each of the items listed to be considered and eligible for an approved absence. These include:

- Requests for time off (such as pre-scheduled PTO) that have been pre-approved in writing by the supervisor/designee.
- For FMLA-eligible staff: Absences covered by the state or federal Family and Medical Leave Act (FMLA), where requirements for timeliness of request and medical certification are met. Where such requirements are not met, the absence(s) shall remain subject to this policy.
- Authorized bereavement, military, and jury duty leaves of absence.
- Other leaves of absence or time off pre-approved by the department provided the requirements for timeliness of the request and supporting documentation (if applicable) are met.
- Time off covered by Worker's Compensation where documentation has been submitted from the health care provider indicating the staff member is not clear to return to regular or transitional duty.

- Absences where a staff member's position requires replacement staff for that position and the staff member finds his/her own replacement for the full scheduled shift which does not result in additional overtime (either within a pay period or over 8 hours in one day) provided that the required departmental process is followed.
- An occasion where the staff member volunteers to leave or is cancelled off the schedule by management due to low census and/or lack of work.

PROCEDURE

Process for notifying department of need for absence

1. Staff are expected to be at work, on time, dressed and ready to work at their work location, according to department schedules.
2. Staff are expected to follow specific department protocol as soon as they are aware when they are going to be absent.
3. The notification must be made no later than two hours before the start of the Day, PM or NOC shift and in accordance with department procedures.

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Definition/Corrective Action Process for Absence Points

Absence Points is defined as:

- The absence from a scheduled shift in the amount of more than 50% percent of the schedule shift for a single continuous period of time, not to exceed 3 consecutive shifts will be counted as an absence point.

While Oakwood expects that staff will periodically need to miss a regularly scheduled shift due to unforeseen circumstances, corrective action will be given in the following amounts for absence points.

Corrective Action Thresholds based upon number of attendance points during a twelve (12) month rolling calendar period.	Staff that are scheduled 8+ shifts in a two week pay period.	Staff that are scheduled 4-7 shifts in a two week pay period.	Staff that are scheduled on call up to 3 shifts in a two week pay period.
Step 1	4 absence points	2 absence points	1 absence point
Step 2	5 absence points	3 absence points	2 absence points
Step 3	6 absence points	4 absence points	3 absence points
Termination	7 absence points	5 absence points	4 absence points

For staff that switch employment status (per status change form process) in regards to the number of shifts that they work in a pay period, they will be placed at the appropriate level of absence points that is similar to their current status.

If an employee goes ninety (90 days) without receiving an absence point the oldest absence point on the employee's record will fall off.

Absence points and ALLE points are tracked independently and considered separate when determining of level of corrective action.

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Responsibilities of Department Management

Supervisors are responsible for optimal attendance and the resolution of absenteeism. Each supervisor, to reduce number of Absence and ALLE points and maintain good attendance in his/her department is responsible for:

- Notifying the staff member of the departmental procedures regarding expected attendance during the staff member's orientation to the department.
- Developing and maintaining work schedules to meet the needs of the department while ensuring that the needs of the staff and work duties are balanced.
- Maintaining attendance records for all staff in the department, establishing such controls as deemed necessary to carry out this policy, monitoring these expectations outlined above and assuring adequate staff counseling and/or corrective action when warranted.
- Keeping accurate records for all corrective action notices given to a staff member pertaining to violations of this policy.
- Communicating timely with Human Resources regarding questions on how an absence should be recorded under the policy, where there may be the potential need for leave of absence based upon call-in information provided, or other related situations.

It is undisputed that Ellison had a challenging 2021 and suffered from significant health conditions that led to attendance issues. Ellison was eligible for up to 60 hours of Wisconsin FMLA for her health condition, renewable each calendar year. Ellison exhausted her Wisconsin FMLA on or before January 29, 2021. Based on hours worked, Ellison was not eligible for federal FMLA until June 2021. When she did become eligible, Ellison exhausted her federal FMLA by September 2021. Ellison did not receive absence points for her approved absences under FMLA.

On January 2, 2021, Ellison was scheduled to work, but was absent and accrued 1 point.

On January 6, Ellison was scheduled to work, but was absent and accrued 1 point.

On January 13, Ellison was scheduled to work, but was absent for FMLA related reasons. She did not receive an absence point.

On January 15, Ellison was scheduled to work, but was absent and accrued 1 point.

On January 23 through 29, Ellison used FMLA to cover her absences and therefore exhausted her Wisconsin FMLA. No points were assessed.

On January 30, Ellison was scheduled to work, but was absent and accrued 1 point.

On February 3, 2021, based on her accrued absence points, Ellison was issued a 1st Step Corrective Action Form and a 1st Step Warning for accumulating 4 Absence Points. The warning indicated that further accumulation of attendance points may lead to escalation disciplinary action in accordance with the policy, up to and including termination.

On February 9, Ellison was scheduled to work, but was absent and accrued 1 point.

On February 11, Oakwood issued a 2nd Step Corrective Action Form and a 2nd Step Warning to Ellison for accumulating 5 Absence Points. Again, Ellison was on notice that further accumulation of attendance points may lead to escalation disciplinary action in accordance with the policy, up to and including termination.

On February 24 and 25, Ellison was scheduled to work, but was absent and accrued 1 point. The continuous days were counted as one instance under the Attendance Policy for the purpose of Absence Points.

On February 26, Ellison was scheduled to work, but used bereavement leave. She did not receive an absence point.

On February 27, Ellison received a 3rd Step Corrective Action Form and a 3rd Step Warning for accumulating 6 Absence Points. Ellison was once again warned that further accumulation of attendance points may lead to escalation disciplinary action in accordance with the policy, up to and including termination.

On April 23 and 24, Ellison was scheduled to work, but was absent and accrued 1 point. The continuous days were counted as one instance. This was Ellison's 7th Absence Point in the 12-month rolling calendar period. Based on the Attendance Policy, Ellison had accrued enough Absence Points to warrant termination.

Ellison became eligible for federal FMLA in June 2021 and was on leave until September 2021 when she exhausted her federal FMLA. Ellison returned to work on September 6, 2021. At that point, Ellison's oldest absence point on her record had fallen off, in accordance with the Attendance Policy. She therefore had 6 Absence Points.

On November 7, 8, and 10, Ellison was scheduled to work, but was absent and accrued 1 point. The continuous days were counted as one instance. Again, this was Ellison's 7th Absence Point in the 12-month rolling calendar period, and enough Absence Points to trigger termination.

On November 13, Ellison was scheduled to work, but was absent and accrued 1 point. This was Ellison's 8th Absence Point; more than sufficient for Oakwood to terminate Ellison.

On November 15, Oakwood decided to issue a 1st Step Corrective Action Form and a 1st Step Warning for Ellison's accumulation of "6" Absence Points. Testimony and evidence

presented at the hearing established that Oakwood opted to go back to a Step 1 warning and corrective action to give Ellison the opportunity to correct her behavior, as she previously demonstrated that she could come to work as scheduled. Ellison was on final notice that further accumulation of attendance points may lead to escalation disciplinary action in accordance with the policy, up to and including termination.

On November 15-17, Ellison was scheduled to work, but was absent and accrued 1 point. The continuous days were counted as one instance. While the Employer chose to go back to a Step 1 warning, this additional point was Ellison's 9th Absence Point; certainly, sufficient to warrant termination.

On December 11, Ellison was scheduled to work, but was absent and accrued 1 point. By an accurate count, this was Ellison's 10th Absence Point. This could have easily resulted in termination of employment, but Oakwood elected not to do so.

On December 22, Ellison was scheduled to work, was absent, and accrued 1 point. This was Ellison's 11th Absence Point. That same day, Oakwood issued a 2nd Step Corrective Action Form and a 2nd Step Warning to Ellison for accumulating "7" Absence Points. Ellison received another warning that further accumulation of attendance points may lead to escalation disciplinary action in accordance with the policy, up to and including termination.

On January 2-4, 2022, Ellison was scheduled to work, but was absent and accrued her 12th Absence Point. On January 4, Oakwood terminated Ellison for "8" Absence Points. This final accrued Absence Point is disputed because Ellison showed up for work on January 2, but was instructed to return home after failing Oakwood's COVID body temperature screening. Ellison argues that the employer-ordered COVID-related absence should be an exception to the Attendance Policy. Unfortunately, Oakwood's Attendance Policy is a "No-Fault" policy. No-fault attendance policies typically assess points for various attendance occurrences without regard to the reason for the absence. The policy appears generous, and accounts for unforeseen circumstances. Moreover, the reasonableness of the policy has never been challenged by the Union. Thus, the final Absence Point was assessed in accordance with the Attendance Policy.

Oakwood contends that Ellison accumulated sufficient absence points to justify her termination under the Attendance Policy. I agree. Oakwood's decision to terminate Ellison's employment based on her accumulated Absence Points falls squarely within Oakwood's rights under its Attendance Policy, and therefore, just cause has been established. Oakwood has a legitimate business and disciplinary interest in ensuring regular attendance by its caregivers. Oakwood must be able to rely on its staff to show up for scheduled shifts or risk straining the staffing system and jeopardizing the care and service it promises to deliver to its residents. And, while it was undisputed that Ellison was a good caregiver, she was not able to fulfill the role's essential prerequisite—to show up to work when scheduled. After 6 accrued Absence Points, each additional accumulated point thereafter was enough to warrant termination. Not only was Ellison aware of the Attendance Policy, but she also received five written corrective action warnings, each which referenced the progressive discipline that was part of Oakwood's Attendance Policy. Under

the circumstances, Oakwood had just cause to terminate Ellison's employment under its Attendance Policy in the CBA.

Nevertheless, the Union maintains that Oakwood did not have just cause to terminate because the absence it relied upon to support the termination decision was employer-mandated following its screening of Ellison's body temperature as part of COVID prevention protocols. Furthermore, the Attendance Policy predated COVID, and in conjunction with COVID policies, Ellison should not have been assessed an Absence Point for a COVID-related absence. While there was evidence presented that management had the discretion to not assess the final Absence Point, given the multiple opportunities to correct her attendance issues and the repeated forbearance of escalation disciplinary action, Oakwood was well within its authority under the No-Fault Attendance Policy to assess a point and move to termination. Ellison continuously failed to adhere to the Attendance Policy, and accordingly, the termination was for just cause.

Given the foregoing, I conclude that the Employer had just cause to terminate the Grievant. Therefore, the grievance is denied.

Issued at the City of Madison, Wisconsin, this 5th day of June, 2023.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Anfin Jaw, Arbitrator