

**IN THE MATTER OF ARBITRATION
BETWEEN**

SUPERVALU INC.,

Employer,

**BMS Case No. 07-RA-0130
(Schrader Discharge)**

and

**Opinion and Award
October 21, 2008**

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 120,**

Union.

**A. Ray McCoy
Arbitrator**

Appearances

For the Employer

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Jurisdiction

The arbitrator has jurisdiction pursuant to Article 16 (Arbitration) of the Parties' collective bargaining agreement. Article 16 reads in pertinent part:

“The Arbitrator shall have jurisdiction and authority only to interpret and apply the express provisions of this Agreement. The Arbitrator shall not have authority to alter, amend, subtract from, add to, or otherwise modify any of the terms of this Agreement. The Arbitrator's decision, rendered in writing, shall be final and binding upon the Employer, Union and employee(s).” (Agreement between SuperValu Inc. and Teamsters Local No. 120, June 1, 2005 through May 31, 2010, Article 16.04, p. 17, Hereinafter “Agreement”)

The Union filed the grievance on June 15, 2006. The Parties notified the arbitrator of his selection by letter dated March 20, 2008. The Parties selected July 28, 2008 for the hearing. The hearing was held on that date at the offices of the Employer located in Hopkins, Minnesota. The Parties had a full and fair opportunity to present their cases including the introduction of documents and the examination of witnesses. At the close of the hearing, the Parties elected to submit post-hearing briefs. The arbitrator received the briefs as agreed with a post mark of September 19, 2008. The record was closed on that date.

Issue

The Union, in its post-hearing brief, first said: “There are two questions presented in this case: first, whether a simple quantitative analysis of absences accumulated under the Employer's Attendance Policy suffices; and second, whether an employee may be terminated for just cause when the Employer knows that the employee is on FMLA-covered leave and the employee is subsequently recertified.” The Union, in its opening statement at the hearing said: “The issue in this case is whether SuperValu had just cause to terminate the grievant and, if not, what is the appropriate remedy.” (Tr. 46, lns. 20-22) The Employer, in its post-hearing brief said the issue is whether the Grievant violated the attendance policy and, if not, what is the appropriate remedy. This is similar to its opening statement of the issue at the hearing. There the Employer said: “The Company believes the proper framing of the issue is whether the grievant accumulated 11 absences in a rolling 11-month period under the Company's attendance policy.” (Tr. 5, lns. 22-

24)

Findings of Fact

The Employer, SUPERVALU, is a national distributor of groceries and perishable products with a primary distribution center located in Hopkins, Minnesota. The Hopkins distribution center operates 24 hours, seven days a week. There are at least three shifts staffed by approximately 900 bargaining unit members employed at the Hopkins facility. Teamsters Local 120 represents those bargaining unit members. The Grievant served as a warehouse worker on the third shift (11:00 p.m. to 7:00 a.m.).

The Parties' relationship is primarily defined in the Agreement effective at all times relative to this case. In addition, the Employer has reserved the right to develop and administer work rules and other policies that govern the conduct of the employees that are not in conflict with the Agreement. For example, the Employer has developed an attendance policy as well as a policy designed to comply with the requirements of the Family Medical Leave Act (FMLA).

The Attendance Guideline as it is called has a purpose statement that reads as follows:

“Good attendance and punctuality are essential functions of every job at SUPERVALU. Absenteeism and tardiness reduce the efficiency of our business operations, cost SUPERVALU and its customers money, and force others to do the work of absent or tardy colleagues. SUPERVALU INC. Has created this guideline to: (a) Encourage employees to work their scheduled work days, including overtime; (b) Ensure that employees who do not perform these essential functions understand the consequences of their actions. (c) provide a means for progressive discipline and termination of employees who fail to meet the Company's attendance and punctuality expectations. The Attendance Guidelines take into account that unforeseen events and illnesses happen to everyone, and provide ample accommodation for such events. Employees only receive discipline after their attendance is deemed unacceptable, and employees will receive several notices before termination occurs. However, the Attendance Guidelines are “no fault,” meaning that if the absence is not “excused” under the definition below, the reason for the absence is irrelevant. It is essential, therefore, that employees use and track all absences carefully, so when an unforeseen event does occur, it will not jeopardize their job.” (Joint Ex. 4, p. 1)

The Employer sent the Attendance Guideline with the above-quoted statement of purpose to all SUPERVALU employees by letter dated June 6, 2005. The Attendance Guideline was also posted at the plant for employees to read and familiarize themselves with its contents. Following

the 2005 revisions to the policy, the Employer continued to discuss the problems it was struggling with as a result of absenteeism. For example, in its Weekly Bulletin, dated August 17, 2005, the Employer wrote:

“SUPERVALU received many retailer complaints on Sunday and Monday this week due to late loads and poor customer service. These calls stemmed from a significant number of employee absences on Sunday. More than 60,000 cases were picked late, and we ran more than six hours behind on deliveries. We also had to force overtime.” (Employer Ex. 1, hereinafter “Er. Ex. ___)

On August 30, 2005, the Employer sent out an “URGENT BULLETIN” which led with the headline “Weekend Absenteeism Reaching Critical Levels.” (Id at p. 2) The Bulletin included the following message.

“Excessive weekend absenteeism during the past few Sundays, including August 28, has caused significant disruption in service to our retailers. This has caused considerable inconvenience and expense for our retail customers and certainly goes against our business mission to serve them better than anyone else can . . . As an employee of SUPERVALU, you have an important responsibility: to report for work every shift to which you are assigned. When you call in with limited notice or simply do not show up, all of us - your co-workers, this DC and our retailers - are left in a precarious and unnecessary position.” (Id.)

Between June 14, 2005 and October 12, 2005, the Grievant’s attendance record shows that he compiled 20 absences, five of which were labeled no show, no call. In addition, the Grievant was late four times during the same period. The Grievant has sought to have 14 of those absences excused as falling under the Employer’s FMLA policy. The record shows that the Employer did not approve any of them. (Er. Ex 3, Union Ex. 6, hereinafter U. Ex. _)

The Employer’s Weekly Bulletin dated October 19, 2005 announced a decision reached as a result of a Teamsters/SUPERVALU Step 4 Panel meeting regarding discipline for unacceptable attendance that applied to all warehouse employees including the Grievant. The announcement said:

“In the decision, all incidents of absence prior to the new attendance guideline implementation on June 12, 2005, are removed from SUPERVALU’s records. All occurrences accumulated on and after June 12, 2005, shall remain in the records; the discipline level will correspond with these occurrences. Those employees who have accrued 10 or more occurrences since June 12 will be placed at the Final

Written Warning level. The next step of discipline for these employees will be termination.” (Er. Ex. 5, See also Er. Ex. 4)

Pursuant to that Step 4 agreement, the Grievant’s record reflects that as if October 21, 2005 he was given a final written warning and his total number of absences was held at 9 (nine). The Grievant did not have any questions after reviewing his attendance record on that date. (Er. Ex. 6) The Grievant was absent from work beginning January 22, 2006 until January 26, 2006. On February 1, 2006, the Employer provided the Grievant with the FMLA preliminary designation and health care provider certification forms. (Er. Ex. 7) The preliminary designation form reads in part:

“The Company has preliminarily designated your requested absence as Leave under the Family Medical Leave Act of 1993 (“FMLA leave”). Upon completion of the medical certification process and final approval of the leave by Supervalu, this leave will be counted against your annual FMLA leave entitlement of twelve (12) weeks of unpaid leave . . . If you do not qualify for leave under FMLA or a state leave law, your leave will be administered under other SUPERVALU policies or an applicable collective bargaining agreement.” (Er. Ex. 7)

The preliminary designation informed the Grievant that he had fifteen (15) days to return the certification to the Employer. The Grievant returned the certification form dated February 7, 2006. (Id.) The Grievant’s health care provider said that the Grievant’s 2003 surgery following a motorcycle accident in 2002 that left him with a talus fracture, led to his current symptoms which are consistent with achilles tendinitis. (Er. Ex. 7) The Grievant’s health care provider could not provide a date when the Grievant’s current condition started and could not say how long it might last.

The Grievant’s health care provider wrote on the certification form that he recommended physical therapy 2-3 times per week for a period of 4-6 weeks and that the Grievant might need to be absent from work to attend the therapy sessions. The health care provider also said that it would not be necessary for the Grievant to take work only intermittently or to work less than a full schedule as a result of the medical condition. (Id at p.2) As a result of the Grievant submitting this certification the Employer counted his January 2006 absences as excused. (See, e.g., Er. Ex. 3)

The Grievant's record shows that the next time he was absent was April 23, 24 and 25, 2006. The Grievant requested FMLA leave for those days and again for missing work on June 4, 5, 7, 8, 11, 12 and 13, 2006. The Employer contracts with a company called Broadspire to administer certain aspects of its FMLA policy. Broadspire sends out notices regarding the need for certification from the employee's health care provider and reminders to make sure certifications are returned in a timely manner. (See, e.g., Er. Ex. 8, 9 & 10) Broadspire mailed a notice to the Grievant at his address on file with the Employer dated April 24, 2006. The notice gave the Grievant until May 9, 2006 to return the completed certification form and reminded him that failure to do so could result in denial of his request to have his absences excused under the FMLA policy. (Er. Ex. 8) Broadspire also sent a notice to the Grievant dated May 2, 2006 reminding him of the May 9 deadline to return his completed certification form. (Er. Ex. 9) The Grievant did not return the form by the May 9, 2006-deadline. As a result, the Employer did not approve the Grievant's absences between April 24, 2006 and June 13, 2006 as FMLA covered. Without those absences being excused, the Grievant exceeded the limit of unexcused absences and having received his final warning was terminated as June 14, 2006. The termination letter was sent to the Grievant's home address via certified and regular mail. (U. Ex. 7) The address was the same used by Broadspire to send word to the Grievant regarding his need to complete the medical certification form.

The Grievant received the letter sent by his Employer informing him that his employment was terminated. The Grievant went to the Employer's human resources department to discuss his FMLA leave the very next day. The Employer informed the Grievant that it was too late to get the recertification completed and that the decision to terminate him was final. The Grievant insisted that he be provided the certification form. The Employer provided him with the form and the Grievant took it to his health care provider who completed the form on June 15, 2006. The doctor who completed the form wrote that the Grievant "continues to have intermittent severe ankle pain and function loss." (Er. Ex. 13) The doctor also wrote that it was not possible to predict when the Grievant would be unable to work. The doctor said it "depends on any given workday or day to day activity." Finally, the doctor wrote that the Grievant could return to work without restriction immediately. (Id) The Employer refused to consider the completed

recertification form and informed the Grievant that it would not change its decision to discharge him for failing to complete the recertification form in a timely manner.

Positions of the Parties

Employer's Position

1. The Employer's attendance policy is reasonable and not in conflict with the parties' labor agreement.
2. Violation of the attendance policy is just cause for discharge. Absenteeism causes significant problems. Employees have been alerted to the problems as well as the complaints from customers. The Employer has also notified employees in weekly bulletins that absenteeism leads to a loss of business and that continued loss of business could result in the loss of jobs.
3. The Grievant has the burden of proving that he was eligible for Family Medical Leave Act protection for his absences beginning in April 2006.
4. The Grievant was not eligible for FMLA protection because he failed to comply with the Employer's policy and Federal law.
5. The Employer has the right to seek a recertification of an employee illness to which the FMLA applies. The law permits the Employer to require employees to obtain subsequent recertifications of eligibility on a reasonable basis citing 29 U.S. C. _ 2613 (e).
6. The law permits the Employer to require recertification monthly. In this case more than sixty days had passed since the last recertification of the Grievant's condition.
7. The recertification on file in February 2006 stated that the Grievant was not incapacitated from working, did not require intermittent leave and that the only time off that might be needed would be 4-6 weeks for physical therapy.
8. The original certification period expired and the Employer had the right to request an additional certification.
9. The Grievant's claim that he did not receive the recertification request is not credible.

10. The Grievant admitted that the recertification request was properly addressed and that he was receiving other mail at that address during the same period of time. The presumption that a properly mailed document was received should be honored.
11. The Grievant was not entitled to more than 15 days to return the recertification form. The Grievant was required to make diligent and good faith efforts to return the recertification. The Grievant is only entitled to additional time if he made the good faith diligent effort and getting the recertification was impractical under the circumstances. The Grievant took no steps to seek the recertification until he learned of his termination.
12. An employee who fails to comply with and establish his eligibility for leave under the FMLA policy is not entitled to have his absences excused even if the absences are due to a serious medical condition.
13. The Grievant failed to meet his burden of proving that his absences in April, May and June of 2006 were caused by a serious health condition.
14. The Grievant's certification dated February 9, 2006 cannot be used to explain his absences in April, May and June of 2006. That certification explained absences that took place in January 2006. That certification clearly stated that the Grievant was able to perform his work and that it was not necessary for him to miss work intermittently or work on a reduced schedule. It did say that the Grievant might need to miss some work during a 4-6 week period to attend physical therapy. The Grievant did not miss any work to attend physical therapy, see a doctor, or seek any kind of treatment at all after February 2006.
15. The Grievant's June 15, 2006 certification does not indicate that the Grievant needed to miss or was excused from work on any of the dates at issue in this case. The certification does not indicate when the condition commenced, does not indicate that the Grievant had attended any doctor or physical therapy appointments since February 2006, does not indicate that the Grievant had taken any medication for his condition and does not excuse the prior absences. The certification simply said the Grievant could return to work without restriction right away.
16. The Grievant was required to provide the Employer with a medical provider's assessment

that his medical condition prohibited him from working on the days he missed between April 23 and June 2, 2006.

17. The Employer is not required to obtain a second opinion. The Employer is allowed to treat an untimely certification as non-existent. By the time the Grievant provided the medical certification the Employer had properly terminated his employment under the attendance policy.
18. The Employer's decision to discharge the Grievant was proper under any applicable standard.
19. The discharge is proper given the language of Section 13.01 of the parties' agreement. That section defines certain offenses that the parties have agreed shall be grounds for immediate termination. It also states that employees can be terminated for violating work rules not in conflict with the labor agreement.
20. The Grievant was aware of and understood the Employer's attendance and FMLA policies. The policy was mailed to each employee. The Grievant understood the Employer's concerns about absenteeism and the importance of showing up when scheduled to work. The FMLA policy is posted at the plant, widely known and frequently used by the Grievant and other employees. The Grievant acknowledged his responsibility to read and become familiar with the policies and work rules.
21. The Employer properly counted the Grievant's absences after April 24, 2006 as unexcused. The Grievant knew based on past experience and Final Warning that his absences were not automatically excused any time he used the word FMLA to describe the absence. The Grievant knew or should have known that all of his absences were being held in a pending status during the 15-day period he had to return the completed recertification form. He knew that if he did not return the recertification his absences would be counted as unexcused.
22. The employer has enforced its attendance and FMLA policies consistently. The prior arbitration decisions regarding the Employer's enforcement of the attendance policy demonstrates that the policy is reasonable and applied even-handedly. No exception can

be made for the Grievant without destroying the integrity of these policies and no exception is warranted on the facts of this case.

Union's Position

1. The Grievant was discharged without just cause and must be reinstated.
2. The Employer imposed the most extreme form of discipline available on Grievant.
3. The Employer has merely applied a quantitative formula, the no-fault attendance policy, to the Grievant's case.
4. Just cause has qualitative requirements.
5. Application of just cause principles will show that this case is not one of excessive absenteeism, but rather one of the Employer improperly revoking Grievant's FMLA leave and retroactively converting protected absences into occurrences under the no-fault attendance policy.
6. The Grievant did not commit misconduct. He was validly on FMLA leave, did not return the recertification form by the date required but got the form in before any prejudice could possibly have resulted to the Employer.
7. Just cause requires individualized consideration of the particular circumstances of each and every grievant's case.
8. The attendance policy is not a substitute for just cause.
9. The Employer's attendance policy is not determinative, but rather subservient to the collective bargaining agreement and the application of the just cause principle requires an individualized examination of the particular circumstances under which the Grievant accumulated the points resulting in his termination.
10. The attendance policy is an attempt not only to properly set guidelines for attendance, but also to improperly quantify just cause to discipline and ultimately to terminate. The Union agrees that the Employer has the right to set a reasonable attendance policy. The Union rejects the notion that just cause can be thus quantified into an 11-point no fault policy.
11. The arbitrator should superimpose a just cause requirement on the Employer's attendance

policy, in order to reconcile it with the Agreement's just cause requirement. This would be in accord with every arbitration decision ever considering this issue under this Agreement.

12. Just cause is therefore a qualitative concept, incapable of quantification. The Grievant's point total must be only the start and not the end of the just cause analysis. The Daugherty test of just cause when applied to this case shows that the Employer did not meet the standard.
13. The Daugherty test requires (1) notice, (2) reasonable rule or order, (3) investigation, (4) fair investigation, (5) proof, (6) equal treatment, and (7) penalty. Failing any one of these test means that just cause was lacking.
14. In this case, the application of the rule in question is not reasonable, a fair investigation is lacking and the penalty is not supported by the circumstances. Therefore just cause cannot be shown and the Grievant should not be terminated.
15. The Employer asserted no other grounds to support its decision than the fact that the Grievant accumulated 19.5 points under the attendance policy. The Employer did not assert any other grounds such as employee misconduct that justify discharge.
16. The Grievant did not hold his attendance obligations in disregard. He was a good employee who suffered from a severe medical condition that unavoidably pulled him from his workplace. The Grievant was on valid, certified FMLA intermittent leave when the Employer disqualified him and retroactively converted what had theretofore been FMLA-excused occurrences into unexcused absences, assessed attendance points and fired him.
17. Every one of the Grievant's occurrences under the attendance policy were acquired when the Employer unfairly and illegally removed the Grievant from FMLA by converting excused absences to unexcused absences. Nothing in this arbitration has demonstrated that the Grievant, having faced these challenges could not or would not resume his performance level with the Employer.
18. The Employer's termination of the Grievant did not take into account the facts regarding how the Grievant reached the point total he had at the time of discharge. The Grievant

was already qualified for FMLA leave, his absences were protected, the Employer requested recertification and he was ultimately recertified.

19. It is especially unfair that the Employer retroactively denied FMLA and assessed the Grievant occurrences under the attendance policy. The mere request for recertification does not automatically cancel FMLA leave. The failure to provide a FMLA recertification form does not retroactively invalidate previously approved FMLA leave.
20. The Grievant was not fired for exceeding the 11 points under the Employer's no-fault attendance policy, rather, his termination was caused by his failure or inability to obtain recertification within the time period specified by the Employer. If the Grievant had gotten the recertification a short time earlier all of the absences in question would have been protected and excused under the no-fault policy and he never would have been fired. The Employer acted unreasonably by refusing to accept the recertification when the Grievant produced it one day later. The Employer cannot use a bureaucratic snafu to terminate an FMLA-covered employee.
21. The Employer decision was also unreasonable because the Grievant suffered from a serious medical condition and his absences on April 23, 2006, May 24 and 25, 2006 and June 4, 5, 7, 8, 11, 12 and 13, 2006 should have been covered under FMLA and therefore excused. The Grievant's doctor said the Grievant continues to have intermittent severe ankle pain and function loss and that the condition will be a lifelong problem of variable frequency.
22. The FMLA regulation gives the employee additional time to get the recertification if it is not practical to do so under the particular circumstances despite the employee's diligent good faith efforts. The Grievant could not get the recertification because he did not receive the Employer's notice telling him he needed to do so. The Grievant further had not control over the fact that his doctor had moved. When he did receive notice that he needed recertification he did so immediately.
23. The Grievant should have been granted more time to get the recertification.
24. If the Employer was dissatisfied with the recertification it could have asked for another or

- invoked its right to an independent medical examination. Having done neither it waived its right to object and is estopped from rejecting the recertification.
25. The Employer improperly failed to provide FMLA leave for Grievant's injury related occurrences. The Grievant gave notice that he would be absent from work due to his ankle injury and its treatment. The Employer granted the leave, thereby conceding that the Grievant's injury constituted a serious medical condition. The Grievant was subsequently denied FMLA leave solely because he could not provide recertification from his doctor within the time frame dictated by the Employer. Even assuming the Employer had the right to rescind certification, the Employer cannot retroactively assess points for occurrences otherwise previously covered by FMLA. Termination of FMLA coverage, if it occurs at all, must be prospective.
 26. Just cause was lacking because the Employer did not investigate. The Employer blindly imposed discipline when it learned the Grievant had accrued a predetermined number of points. Imposition of the no-fault attendance policy in this manner, without investigation of any kind, violated the principle of just cause.
 27. The severe penalty was not justified. Another arbitrator held that it would be unjust to terminate a grievant who was less than diligent in obtaining recertification. The penalty should be a warning, or at worst a suspension.
 28. Individual justice to this Grievant, the future relationship between the Union and the Employer, and the long-term welfare of everyone involved require that the Grievant be returned to work.
 29. The Grievant should be reinstated with full back pay or at worst a suspension.

Opinion

The Just Cause Standard

Given the Parties' ongoing dispute as to the standard to be applied in determining whether the Employer's application of the Attendance Policy to a Grievant violates the Agreement, it is important to address that issue before going further. The Employer, while not conceding that a just cause standard should be applied to its decision to discharge the Grievant

pursuant to the attendance policy, acknowledged that several arbitrators have done so. The Union has challenged the Employer's application of the Attendance Policy to bargaining unit members at least four times since the policy was revised and made effective in June 2005. All of those cases were decided in 2007. The record in this case shows that four different arbitrators have in fact used a just cause standard to review the Employer's decision to discharge pursuant to the Attendance Policy.¹ At the hearing, the Employer said:

“The contract does not contain a just cause provision. It states in Article 13 that violation of company rules not inconsistent with the labor agreement is grounds for discharge.” (Tr. 6, lns. 4-8)

¹ See In re: SuperValu Inc. and Teamsters Local 120, BMS No. 06-RA-1073 (Anderson, 2007 at p. 19) Arbitrator Anderson said: “The Union is correct that just cause is the acceptable standard of review among arbitrators even where the contract language is silent on this standard.” See also, In re: SuperValu Inc. and Teamsters Local 120, BMS No. 06-RA-1074 (Gallagher, 2007 at p. 11) Arbitrator Gallagher said: “...I conclude that the parties have, by their past consistent use, adopted a just cause standard for discharge that has become contractually binding.” Arbitrator Bard also agreed that the just cause standard is “implicit in this Collective Bargaining Agreement.” In re: SuperValu Inc. and Teamsters Local 120, BMS No. 06-RA-1240 at p. 24) Finally, Arbitrator Daly, framed the issue to be decided saying: “Since the Attendance Policy is not a substitute for “just cause”, the question then is whether [the Grievant's] failure to obtain the necessary recertification within a reasonable time as required by the FMLA and the Attendance Policy is “just cause” for termination.” SuperValu Inc. and Teamsters Local 120, BMS No. 07-RA-0129 at p. 12)

The Employer continues to maintain that the Agreement permits discharge if the bargaining unit member violates a work rule not inconsistent with the labor agreement.² The arbitrator finds that Article 13 of the Agreement does not shield the Employer's discharge decisions from scrutiny by way of the "just cause" standard. Article 13 merely provides the reason for the Employer to act. Whether that act is supported by "just cause" must be the question that follows. When a bargaining unit member commits a work rule violation and that work rule is not inconsistent with the Agreement, then the Employer has reason to issue discipline. Whether that discipline meets the "just cause" requirements would be determined based on a review of the facts and circumstances as a whole. Arbitrator Gallagher reached the same conclusion.

"I agree with the Union that the grievant is entitled by contract to have his discharge judged under the just cause standard. Nevertheless, for the following reasons, I conclude that the Employer had just cause to discharge him. It would be inconsistent and unfair to apply selectively the just cause standard and the Policy's standards – eliminating, under just cause principles, the arguably excusable occurrences on September 21 and 22, 2005, and on December 29, 2005, yet still require the Employer to apply the Policy's disciplinary thresholds and its beneficial expungments from the grievant's attendance record. ***The basis for determining whether the grievant's attendance gave the employer just cause to discharge him should be his entire record.***" (Emphasis added., In re: SuperValu Inc. and Teamsters Local 120, BMS No. 06-RA-1074 (Gallagher, 2007 at p. 21)

Given the prior awards on this point and past practice, it is surprising that there remains any level of resistance to the notion that "just cause" is simply a reality, and a long-standing one at that, of the Parties' collective bargaining relationship. This arbitrator recognizes "just cause" as a concept implied in all collective bargaining agreements. The bargaining relationship is weakened whenever the Employer refuses to have its decisions to discipline scrutinized by way of the "just cause" standard.

² Article 13.01 reads: "Drunkenness, dishonesty, insubordination, or repeated negligence in the performance of duty, unauthorized use of or tampering with Employer's equipment, unauthorized carrying of passengers; ***violations of Employer's rules which are not in conflict with this Agreement***; falsification of any records; or violation of the terms of this Agreement shall be grounds for immediate discharge." (Emphasis added. Agreement at p. 14)

Framing the Issue

As noted above, the Parties took slightly different approaches to framing the issue. That is not surprising given their differing perspectives regarding the application of the “just cause” standard. The Employer believes it is sufficient to simply ask whether the Grievant violated the attendance policy by accumulating 11 points during a rolling 11 month period. If the arbitrator finds that the record supports that fact then the discharge should be upheld. On the other hand, the Union believes that to be the beginning of the inquiry.

“Just cause is therefore a qualitative concept, incapable of quantification. The Grievant’s point total must be only the start - not the end - of the Arbitrator’s analysis of [the Grievant’s] termination.” (Union Post-Hearing Brief at p. 13)

As stated above, the arbitrator believes that the issue requires an examination of all of the facts and circumstances related to the Grievant’s conduct and the Employer’s Attendance Policy and application of that policy to the discharge decision in this case. Therefore, the issue can be generally stated as whether the Employer had just cause to terminate the Grievant and if not, what is the appropriate remedy. All of the various ways that the Parties framed the issue can be accommodated by this general statement and the application of the just cause standard.

Just Cause Analysis as Applied to this Grievant

The Union argues that the proper just cause analysis is the application of the well-established “seven tests” of just cause as first enunciated by Arbitrator Carroll R. Daugherty. Daugherty’s tests examine (1) notice, (2) reasonable rule or order, (3) investigation, (4) fair investigation, (5) proof, (6) equal treatment and (7) penalty. According to the Union, if the Employer does not meet any one of these tests, then just cause does not exist to support the discipline.

The Union acknowledges that arbitrators do not necessarily approach their analysis of “just cause” by applying this test. This arbitrator does not apply the seven tests in every discharge/discipline case although its usefulness in some cases is recognized. Here, it seems just as useful to focus on the Parties’ established practices, prior relevant arbitration awards, the particular work rule and the circumstances surrounding the application of the attendance policy

to this Grievant. The seven tests can prove to be distracting in situations, such as we have here, where the record demonstrates that the relevant circumstances leading up to the Parties dispute are most useful in determining “just cause.”

For example, the Union argues that the Employer failed to conduct a fair investigation. However, conducting an investigation under these circumstances would lend nothing to the Employer’s understanding of the Grievant’s situation that was not already known. Furthermore, it would represent waste by creating an unnecessary step that the Attendance Policy already addresses. The Attendance Policy is designed and administered to collect factual information that informs the Employer’s decisions regarding discipline. When an employee is absent on three(3) occasions, the policy calls for that employee to engage in a consultation with the Employer. The consultation provides the employee with additional notice of the Policy and its requirements, an opportunity to explain his/her difficulties and to work with the Employer to turn things around before they get worse.

Upon five (5) or more absences, the Policy requires the Employer to give the employee a verbal warning. Once again, notice and an opportunity for the employee to ask questions, explain, seek help and correct the problem are available. Moreover, the Employer collects another piece of evidence, namely that the consultation did not work. Upon seven (7) or more absences, the employee receives a written warning. At this stage, the Union should have concrete information enabling it to assist its member with correcting the attendance issues, challenge the Employer’s information or process and/or ask questions and provide additional information that might have a bearing on the particular employee’s situation.

Finally, when an employee accumulates nine (9) or more absences, the Employer issues a final written warning. The final written warning is not unlike a last chance agreement. At this stage the Union and the employee know that they are on thin ice. The employee’s record reflects the fact that he or she has ignored the consultation, verbal and written warning and is simply not responding or taking sufficient steps to turn things around. This is the most plausible conclusion given that the Policy also provides for excused absences that do not count toward the eleven (11) absences that lead to discharge.

In this case, the Grievant, before we examine the dispute regarding what the Union

describes as the Employer's revocation of excused absences, was already at the Final Written Warning stage. An investigation, under these facts, would necessarily have to focus on why the employee did not return the recertification form when asked to do so. Here, the Grievant testified that he never received the form and therefore was unaware that he needed to be recertified. The arbitrator finds that the Grievant's testimony lacks credibility. The Grievant's testimony that he received mail from other sources at the only address he provided his Employer but did not receive the notices sent to him by Broadspire is simply unpersuasive. Secondly, it is important to keep in mind that all of the Grievant's conduct takes place in a workplace atmosphere where the attendance problem is so significant that the Employer has described it as being at a crisis level from time to time. In addition, the Employer has made clear its need to tackle this problem by every means available to it in order to avoid having the attendance problem undermine its business.

The Union has processed four grievances through arbitration within the last year and reached agreement on another set of attendance disputes that resulted in the reduction in occurrences for numerous members of the bargaining unit. The Grievant must have been oblivious to the day to day conversations in the workplace or absent not to understand that attendance was a critical issue requiring his attention and diligence with regard to the Policy requirements. This is especially true since the Grievant was already at the final warning stage.

In this atmosphere and given the Grievant's work record, it is unbelievable that he had no idea of his responsibilities or that this matter required his urgent attention. With all of the information at the Employer's disposal it would be unthinkable to impose an additional requirement of investigating the Grievant's failure to return the recertification form. The Grievant's responsibility is to make sure that the need for his absences is clearly proven to the Employer by complying with the terms of the Attendance and FMLA policies. Arbitrator Daly similarly concluded that the Grievant has the responsibility to make every effort to comply with the recertification process and absence some extraordinary circumstances his failure to do so can result in discharge.

“The Company had a right to seek recertification and under the law, Mr. Hall (the grievant) needed to submit the completed recertification form within 15 days. Broadspire twice extended the deadline for Mr. Hall to return the completed

recertification form. Mr. Hall did not return any paperwork to the Company until the arbitration hearing - almost a year after his termination. While there may be certain circumstances in which an Employer must provide the employee more than 15 days to return the completed recertification form, that time is not without limits or constraints. ***An employee must exercise diligent, good faith efforts and submit the completed certification form as soon as reasonably possible under the particular facts and circumstances.***”(Emphasis added., SuperValu Inc. and Teamsters Local 120, BMS No. 07-RA-0129 at p. 13)

Imposing a requirement of further investigation in light of the record, nature of the problem and the opportunities available to the Grievant would serve no useful purpose in terms of analyzing “just cause.” Arbitrator Bard reached a similar conclusion in response to the same argument presented by the Union in that case.

“The Union has argued that the Company “blindly” imposed discipline without adequate investigation of the facts but this argument is simply not supported by the record. There has been no showing that there were relevant facts unknown to the Employer that might have affected its decision which would have been uncovered by further investigation. The Grievant had ample opportunity on a number of occasions to follow proper procedures and submit evidence to support his claim of entitlement to FMLA leave and did not follow them. Far from being prejudicial to the Grievant, the Company gave him every reasonable opportunity to substantiate his claims in a timely manner. The Company even granted him FMLA leave retroactively for his September absences . . . An Employer must be allowed to administer reasonable attendance rules and apply the FMLA even-handedly to run its business efficiently and treat all of its employees equally. The Employer did not violate the Collective Bargaining Agreement when it terminated the Grievant’s employment. (In re: SuperValu Inc. and Teamsters Local 120, BMS No. 06-RA-1240 Pp23-25)

The Union also asserts that it was unreasonable not to permit the Grievant to submit the recertification form one day after the Employer’s decision to discharge him. Here again, the Union is asking the arbitrator to find just cause lacking because the Grievant failed to fulfill his obligation under the Policy and because the Employer should have given him a break, a second chance or ignored his negligence. Under certain circumstances it might be unreasonable to say an employee missed a deadline and therefore should not be terminated. However, the context of this case, makes clear that reasonableness needs to be determined in the broader context of the

issue the Attendance Policy is designed to address rather than merely considering the time frame in which the Grievant was able to return the form.

As was noted in one of the previous arbitration cases, the attendance issue is absolutely critical for the Employer's financial health. The loss of customers is real. With anywhere from 30% or more of the employees making some kind of claim that they are entitled to FMLA leave, the Employer needs a process that is fair, applied equitably but also gets to the end of the road quickly with as little burden as possible.

To ask the Employer to provide second, third and fourth chances to comply with a requirement that the Grievant is aware of but takes no steps too secure until after realizing he his employment has come to an end creates an unworkable process. It was not unreasonable for the Employer to ignore the recertification brought in after the Grievant learned he had been discharged. As stated above, the Employer sent notice of the need for recertification and a reminder before the deadline. The Grievant failed to respond just as he failed to respond to the Final Warning he received in October 2005. The Grievant had submitted a certification form for absences that took place between January 22, 2006 and January 26, 2006. That was the only certification on file with the Employer. That certification covered the Grievant's absences during that time frame only.

In order for the Employer to administer both the Attendance Policy and the FMLA policy, the employee needs to follow through with his/her responsibility to provide the needed information. Here the Grievant failed to do so. He actually made no attempt to figure out his obligations under the FMLA policy until after his termination. He felt it was sufficient to simply call into the automated phone system and punch in the dates he would be absent and to label those absences as FMLA leave. From the Grievant's perspective he felt that doing so represented approval. Of course, this would ignore the fact that the certification form he completed in January specifically said his informing the Employer of his absences and belief that he is entitled to FMLA leave is simply the first step or a preliminary step. The next is to provide proof. For the Grievant to sit at home and believe that he has to do nothing more but to call in and announce that he is entitled to FMLA defies logic but also means the Grievant did not read any of the Policies and procedures which he was obligated to read and understand. During the meeting held

to provide the Grievant with his final warning, he had no questions regarding the application of the Attendance Policy to him suggesting he understood how things worked.

The Grievant had applied for FMLA leave in 2005 and his requests were denied. But for the Step 4 settlement reached between the Union and Employer, the Grievant would have surpassed the critical 11 point total leading to discharge before any of the absences at issue in this case. For the Union to argue that the Grievant should have been given another chance, it has to ignore the chances given the Grievant already, the need for closure on these cases, the critical nature of the attendance problem with which the Employer is struggling and the lack of effort on the part of the Grievant and other bargaining unit members to take their responsibility seriously. It is interesting to note, that the Parties' Agreement contains the following language:

“The Union agrees to cooperate in correcting inefficiencies of members which might otherwise necessitate discharge.” (Agreement, Article 25, Section 25.02 at p. 20)

If ever a situation cried out for Union cooperation, this one certainly does. The bargaining unit members in general and the Grievant in particular obviously need education from someone they will listen to with regard to both the challenge facing the Employer and the need to change what appears to be a generalized lack of diligence on their part in responding to request for information that will help them retain their jobs.

A brief examination of the other arbitration cases dealing with this Attendance Policy will demonstrate this point more clearly. Arbitrator Daly concluded that the Grievant in that case understood the Family Medical Leave policy, the policy was posted at the distribution center and was widely known and frequently used by the employees. He went on to say that on a day to day basis, approximately 25% of the bargaining unit employees are using or seeking use of the FMLA. (Id at p. 12)

With so many employees seeking the use of this Policy and with those cases reaching arbitration with Grievants who testify or explain that they simply did not receive a notice or did not know what they were supposed to do, the arbitrator can only conclude that the word needs to come from the exclusive representative in order for the members to respect and act on it. In any event, it can hardly be claimed that the Employer applied the Policy unreasonably to this Grievant. You might imagine if we considered reasonableness more narrowly and looked only at

the fact that the Grievant brought the certification form in one day late, we might find the Employer's refusal to accept the recertification to be unreasonable. Here, however, the full examination of the record, the Parties' history on this issue and the seeming lack of response from bargaining unit members in terms of addressing this problem, demonstrates that the Employer did indeed behave in a reasonable manner when it refused acceptance of the certification form and retroactively disallowed the FMLA requested leave.

It is important to note that the certification that was finally produced by the Grievant did not excuse his absences in April, May and June 2006. That certification said that no one could predict when the Grievant would suffer an episode of pain in his ankle that might require him to miss work. It did not say that the days he was absent in April, May and June were the result of his ankle injury. After the fact, there is no way to know and the burden the Union wishes to impose on the Employer with regard to those absences is unreasonable. What the Union wants is for the Employer to say anytime the Grievant misses work and calls in requesting FMLA leave that it should link it back to the first FMLA leave granted the Grievant following his ankle injury. Again, to do so would be to place the Employer in the untenable position of letting the employee decide when he would come to work and when he would not.

There would be no way to prove why he wasn't present. The Attendance Policy and the FMLA policy would have no meaning at least as applied to the Grievant. The Grievant's post-termination certification said he could return to work without restriction. There was no recommendation or treatment plan even though the condition was considered chronic and lifelong.

The so-called recertification if accepted would have told the Employer nothing about the absences that had already taken place for which the Grievant wanted the FMLA excuse and more importantly they would not have helped looking forward. The FMLA policy does not exist to establish a carte blanche approach to staying away from the workplace for bargaining unit members. It should be used specifically for the purpose it was intended less the image created in the minds of bargaining unit members is that it is a tool to be exploited for the sole purpose of avoiding discipline under the Attendance Policy.

The Union also claims that the Employer knew the Grievant was on approved FMLA

leave and should not have retroactively disapproved those absences which placed the Grievant beyond the critical number of eleven (11) absences. First, the Grievant was not on approved FMLA leave. The Grievant received approved FMLA leave for his late January 2006 absences. He did not receive approval for the absences at issue in this proceeding because he did not return the recertification form until after his termination.

Secondly, the Grievant suffers from periodic episodes of pain, swelling and stiffness in his ankle as a result of the injury he received in a motorcycle accident in 2002. It is impossible to predict when the Grievant will need to miss work because no one can predict when the episode will take place. The Grievant, therefore, is asking that for the life of his employment, he be permitted to be absent from work on any scheduled work day and to have that absence excused. As Arbitrator Anderson said:

“In reality, the Grievant is seeking an award allowing him to be late or miss work whenever he alleges that he has a headache. The Employer considers attendance to be an important and essential job function and is unwilling to grant this accommodation. Allowing the Grievant or any employee to be absent from work for alleged headaches without having secured advanced physician authorized medical approval would create an unmanageable attendance policy, and further exacerbate the already high rate of absence that plagues the Employer. Finally, there is no evidence that the Agreement or state or federal law requires such an accommodation.”(In re: SuperValu Inc. and Teamsters Local 120, BMS No. 06-RA-1073 at p.23)

Here as well, the Grievant is asking the Employer to allow him to count his absences in July 2006 as automatically approved because he received approval for absences in the past. The arbitrator’s read of the FMLA policy and certification form is that when an employee informs the Employer that he or she is or will be absent due to a serious medical condition that approval of FMLA leave follows when that employee submits appropriate support for the requested leave. Here, the Grievant informed the Employer that he wanted his absences excused under the FMLA policy but failed to follow through and show that the serious medical condition led to those absences. Even if the late certification was accepted, it was wholly insufficient to support the absences that led to the Grievant reaching that critical 11-point limit.

Considering all of the circumstances, the Attendance Policy and its application to this Grievant are reasonable. Finally, the Union argues that the Employer’s fails the Daugherty just

cause test because the penalty was too harsh. The Union asks the arbitrator to consider Arbitrator Daly's decision in the Hall case as the proper result on this point. Arbitrator Daly chose to reduce the penalty of discharge to suspension.

“On the other hand, Mr. Hall did, in fact, suffer from a severe medical condition, i.e., knee injury which caused recurring swelling, inflammation and pain. Mr. Hall could not control his physician's requirement for an MRI examination. Eventually he did obtain a doctor's report showing this, “illness, injury, impairment” that involves a “period of incapacity.” Eventually Mr. Hall did obtain a medical report showing he has a serious health condition which requires “a regime of continuing treatment under the supervision of his healthcare provider.” But Mr. Hall did not carry his burden of proving this and the Employer properly concluded that without the recertification forms, Mr. Hall was excessively absent, especially based on his past history. However, the severe penalty of discharge was not justified taking into account the reality of the medical condition. The medical condition qualifies for FMLA leave. But Mr. Hall did commit disciplinable misconduct by not taking into account the need to move with reasonable speed to fulfill his burden of proof under FMLA. His past record of discipline and attendance problems made it reasonable to move with all deliberate speed to get his medical condition certified so he would qualify for FMLA leave. He did not act in a reasonable and timely manner under the facts of this situation.” (Id at p. 13-14)

The arbitrator finds that based on the foregoing discussion of this particular Grievant that the two cases are different on a couple of critical points and therefore warrant different results. Arbitrator Daly appears to have had concrete medical information in the record that allowed him to find that Grievant did have a severe medical condition requiring a treatment plan under the supervision of a doctor or other health care provider. In this case, the Grievant's health care provider did not find a need for a treatment program of any kind. Although the doctor checked the “chronic condition requiring treatment” section of the form he did not recommend a treatment plan. The Grievant was obviously not suffering from severe ankle pain on June 15, 2006 when he saw his doctor to get the recertification form filled out. The Grievant did not receive any treatment on that date and acknowledged that he had not had any treatment even that recommended by his other doctor in February 2006 which was a 4-6 week period of physical therapy. The Grievant needs no regular treatment and the doctor did not recommend a treatment plan. What the doctor said was there was no way to tell how often or whether the Grievant would be incapacitated due to his condition. The doctor theorized that the Grievant might be incapacitated on any given day depending on his day to day activity. The doctor then wrote that

the Grievant could return to work without restriction and therefore without accommodations. At least, as in the case before Arbitrator Daly, when there is an ongoing treatment plan, the Employer is in a better position to receive up to date information regarding an employee's status. With a regular treatment plan, more detailed information regarding the nature of the serious medical condition as well as the implications for the employees ability to obtain appropriate certification showing that absences are necessary exist. A chronic condition requiring no treatment does not match the definition of a chronic condition that requires the Grievant to be absent from the workplace.

Nothing in the tardy recertification suggest the Grievant's injury amounted to serious medical condition. One does not have to be a doctor to see that the recertification provides absolutely no evidence that the Grievant was incapacitated on the days he was absent in April, May and June 2006. The Union mistakenly argues that the Grievant's absences were approved FMLA leave. That is clearly not accurate. The absences were pending FMLA approval. The Grievant needed to return a recertification form showing that he was indeed suffering from a chronic medical condition requiring treatment in April, May and June 2006. The Union is also incorrect in claiming the Employer revoked approved leaves or excused absences and converted them to unapproved ones or unexcused absences. Actually, what the Employer did was to convert pending FMLA leaves to unexcused absences when the Grievant failed through his own lack of due diligence to secure the necessary proof.

The fact that the Grievant brought a completed recertification form after being terminated cannot form the basis of a decision to reduce the discipline in this case. This is especially true when you consider the nature of the information provided on the form. The Grievant still failed to justify his absences. Even if the Employer had accepted the form, it does not follow that the absences that placed the Grievant over the top would have been excused.

The Grievant was at the final warning stage and knew that termination was right around the corner. The work record of the Grievant, in other words, does not provide support for the notion that the discipline was too severe. The length of employment also doesn't operate as a mitigating factor in this case given the Grievant's lack of due diligence over the course of that employment to comply with the attendance requirements of the job.

This arbitrator is not opposed to reducing the discipline when the record evidence supports such a position. Here, there is nothing in the record that warrants altering the discipline imposed on the Grievant. Finally, given the totality of the circumstances facing the Employer with regard to the attendance crisis, the prior arbitration awards and the seeming lack of response from bargaining unit members, the arbitrator recognizes the Employer's legitimate need to put an end to these cases by removing employees from the workplace who continually and habitually refuse to comply.

Award

IT IS HEREBY ORDERED that the grievance be dismissed.

Respectfully submitted

A. Ray McCoy
Arbitrator

Dated: October 21, 2008