

IN THE MATTER OF ARBITRATION BETWEEN

**SEIU Healthcare Minnesota
[Josephine Nyakwara]**

And

**Opinion and Award
FMCS Case No. 61154-3**

AXIS MN, Inc.

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of SEIU Dave
Blanchard, Esq. Director
Legal Affairs SEIU
Healthcare Minnesota St.
Paul, Minnesota

On behalf of AXIS MN, Inc.
Susanne J. Fischer, Esq.
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JURISDICTION

In accordance with the Collective Bargaining Agreement between AXIS MN and SEIU Healthcare Minnesota December 1, 2007-December 30, 2009; and under the jurisdiction of the United States Federal Mediation and Conciliation Service, Washington, DC, the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on January 11, 2010. Post-Hearing briefs were filed by the parties on February 11, 2010. The decision was rendered by the arbitrator on March 10, 2010.

ISSUES AT IMPASSE

The Union states the issue as:

1. Did the employer discharge Josephine Nyakwara without just cause?
2. If so, what is the appropriate remedy? [Post-hearing brief of Union at 8].

The Employer states the issue as:

1. Did the company have just cause to discharge the grievant?
2. If not, what is the remedy? [Post-hearing brief of Employer at 15].

The potentially relevant contractual provisions and policies are:

Article II - Management Rights

Except as specifically regulated by the Agreement, the Employer retains its rights, powers, and authority including but not limited to the right to hire, layoff, promote, demote, transfer, discharge or discipline for cause, to make and require observance of reasonable rules and regulations, direct the work force and the right to determine the materials, means, staffing and type of service to be provided.

Article VII - Termination - Discipline

A. No Discharge Without Just Cause

The employer shall not discipline an employee who has completed the required probationary period without just cause.

B. Discharge - Suspension Notices - Copies to Union

A written notice of any discharge, suspension or written disciplinary warning shall be given to the employee and a copy thereof shall be sent to the Union. The employee may file a written grievance relating to such discharge or suspension, pursuant to Step 2 of the grievance procedure.

Article XX - Miscellaneous

I. Work Load

It has been the philosophy of both parties to keep the shifts filled. If a shift is down on desired staffing, the supervisor/shift coordinator or

program supervisor shall make an effort to fill the openings. In the event there are no volunteers, the supervisor/shift coordinator will work the position that is open.

Employees who have an accommodation and who cannot do a substantial part of their job shall not be counted in minimum levels.

Temporary or pool employees who work at Axis on Ames must be able to perform the full job description.

J. Mandating

No employee shall be mandated unless the home falls below the life safety code ratios of the home. The staff ratios shall not fall below one (1) employee for every eight (8) residents during the hours of 11 pm and 6 am; staff ratios shall not fall below one (1) employee for every four (4) residents for all other hours of operations.

The least senior person on the prior shift on the prior shift in the facility would be mandated to stay with at least a one (1) hour notice if minimums are not met.

When mandated, the employee shall receive two (2) times his/her hourly rate of pay for all time mandated beyond the regularly scheduled hours of the employee. If the employee is mandated on a holiday, the employee shall receive three (3) times his/her hourly rate of pay for all time mandated beyond the regularly scheduled hours of the employee. In no event shall the hourly wages of the employee be stacked or result in the employee being paid wages beyond two (2) times his/her base rate of pay.

AXIS Employee Manual

Attendance Policy.

E. Early Departure. An early departure occurs when an employee leaves the shift (with approval or direction from the supervisor or Coordinator) prior to the scheduled end of the shift.

- An early departure without appropriate approval is considered a voluntary resignation.

Employee Breaks

Employees may take one 15 minute break for every four (4) hours worked. Breaks must only be taken at times when they do not interfere with individual support needs and when staffing is otherwise

adequate. Only one person may be on break at a time. If the employee chooses and the supervisor approves in advance, the two 15 minute breaks may be combined for one 30-minute break in eight (8) hours. As break time is paid, employees may not leave the premises during breaks.

Note: No breaks may be taken between 5 a.m. and 9 a.m. without supervisor approval.

One person is allowed to be on break at a time. Staff are to eat meals on your break(s). It is currently acceptable to have pop, kool-aid, water, coffee, tea - nonalcoholic beverages - during your shift, in the house. If a problem arises in which people are not picking up after themselves, this will be reevaluated.

All ordering, collecting money for ordered food, paying for and consumption of delivered food all need to happen during break.

Staff who are on duty alone must have the phone on and with them while on break. If the break is interrupted, it may be resumed at another opportunity.

FINDINGS OF FACT

1. On July 15, 2009, Josephine Nyakwara, a four year Direct Support staff person for AXIS MN at one of its care and support facilities for those with mental and physical disabilities, was terminated. On July 27, 2009, the union filed a grievance on behalf of Ms. Nyakwara.

2. AXIS MN wrote a "Termination Summary: Josephine Nyakwara"

[Employer exhibit #12] which stated in full:

Josphine Nyakwara's employment at AXIS MN, Inc. was terminated on 7/15/09 for willful misconduct. Josephine was a direct support staff at Glenhill. The people living in this home have significant intellectual disability, with physical disabilities and medical needs. They require assistance for all aspects of their care.

On July 12, 2009 HCK, another direct support employee at Glenhill reported to her supervisor via email that Josephine had left the premises 30 minutes before the end of her shift. The Director of

Program Services Ellen Hill checked Josephine's timecard for that date and saw that Josephine had not punched out at the end of her shift. Ellen Hill called Josephine and asked her what time she had left her shift. Josephine told Ellen that she had left at 7:45 a.m. Ellen asked her who had given her permission to leave early. Josephine told Ellen that she did not request permission to leave early and did not report it to anyone. She also failed to communicate her time of departure via email to her supervisor as is required when someone forgets to punch out. She made no attempt to contact her supervisor or the manager on call to explain her departure, nor did she communicate the incident in any way after that.

HCK was re-interviewed and was certain that Josephine had left at 7:30 a.m. Josephine continued to claim it was 7:45 a.m.—an unapproved early departure in either case—however her timecard was modified to show a 7:45 a.m. departure.

On 7/15/09, Dave Saumweber and the HR Director Star Papenguth met with Josephine, who was accompanied by union steward Barb Dickson. Josephine's employment was terminated based on the fact that Josephine had left the premises without permission in direct and willful violation of two policies that prohibit this behavior. Furthermore, her supervisor had specifically addressed this issue with her in person and in writing (on a document she signed) on April 29, 2009.

She reiterated that she had made not attempt to seek permission to leave, that she made no attempt to communicate her departure to a supervisor and did not punch out.

Josephine claimed that she was tired from working additional hours the previous day and decided to leave early. She did not attempt to contact her supervisor because she believed that he was out of town. She did not attempt to contact the supervisor that was covering for him (Jenny Magistad) and made no attempt... She has access to all these phone numbers and has used them in the past.

Josephine's employment was terminated due to violation of the break policy (attached) and the attendance policy (attached). Josephine has

been trained in both of these policies and she has unlimited access to them via Easy AXIS.

3. The position of the employer is that AXIS MN, Inc. is an agency that provides support for people who have developmental disabilities. AXIS and its employees provide direct care services in group homes to vulnerable adults who are physically, mentally and/or medically fragile. AXIS is extremely conscious of the need to maintain a safe environment for its clients, who require 24-hour supervision. Because of this AXIS has instituted numerous safety, supervisory and care policies and procedures to ensure its direct support staff understand and are trained regarding their obligations. AXIS requires its employees to remain on the premises at all times during regularly scheduled work shifts. The AXIS break policy provides that "employees may not leave the premises during breaks." The reason is that the "employee has to be within earshot of being called back from their break or interrupting their break to come provide support if its needed for someone." [Testimony of Nancy Turner, co-owner and founder of AXIS Tr. 23]. AXIS attendance policy provides that employees are expected to comply with the provisions of the policy regarding reporting absences and tardiness, and provides consequences for violations of the policy. To ensure adequate staffing and supervision, the attendance policy provides that an "early departure without approval is considered a voluntary resignation." [Company exhibit 3B.] At times, it is permissible for an employee to leave the shift early, but only if the employee has received permission from the supervisor [Testimony of Nancy Turner Tr. 24-25]. Generally, permission can be sought and approval given by the employers supervisor or one who covers for the supervisor. If the employee can not reach his/her supervisor or a covering supervisor, then the employee can call the manager on call, although typically the manager on call should be called in emergency

situations, not scheduling, which is usually not an emergency. [Testimony of Nancy Turner Tr. 26]. Axis considers leaving early to be a serious violation of its policies, its expectations, and its obligations to its clients to provide outstanding service. Ms. Nyakwara received appropriate training on attendance and time card policies. In the past, Ms. Nyakwara has left her work shift without permission and subsequently received a specific directive that she is not to leave the premises or leave early without permission. In January 2009, Ms. Nyakwara had requested a variance to her schedule allowing her to leave early everyday from her shift that ended at 8 a.m. The company could not accommodate her request because a night shift employee is required to stay until 8 a.m. to assist with morning duties for the clients, and the schedule two employees to overlap between the night shift and the morning shifts in order to meet the clients' needs. In consideration of Ms. Nyakwara's request, Mr. Saumweber, her supervisor, gave Ms. Nyakwara the opportunity to leave early Thursdays subject to specific conditions because two residents typically left the house by 6:30 a.m.

On April 18, 2009, Ms. Nyakwara left the house without permission during her work shift to pick up a friend who had loaned Ms. Nyakwara her car because Ms. Nyakwara had car troubles. She advised her co-worker, Holly Kranbeck, that she was leaving and would be back before 7:30 a.m. so that Ms. Kranbeck could take clients to an event. Before Ms. Kranbeck could say anything, Ms. Nyakwara left the house. Ms. Nyakwara returned to the house about 7:30 a.m. Ms. Nyakwara told Ms. Kranbeck that she absolutely had to leave at 8 a.m., but Ms. Kranbeck told her it would take about a half hour to take the client to a specific place. When Ms. Kranbeck returned about 8:10 a.m., Ms. Nyakwara did not leave until 8:15 a.m. on April 18. Because Ms. Nyakwara had not sought permission from her supervisor, did not want to help, and did not notify her supervisor before

she left her work shift, she lost a half point on her attendance points for leaving the premises without permission.

On May 30, 2009, Ms. Nyakwara received an unsatisfactory performance review. According to AXIS policy, when a replacement can not be found then the employee on duty is mandated to stay until a replacement arrives or they receive permission to leave the facility. Ms. Nyakwara had a personal obligation the next morning and was not happy about being mandated to work an additional shift. She called the manager on duty at 12 midnight and complained about her coworker calling in sick and that she did not want to be mandated to work. Ms. Nyakwara was told that mandating was the policy. Because her behavior interaction with the manager on call was inappropriate, she was given a written "unsatisfactory performance review" for failing to follow the company's professional behavior policy "regarding verbal and nonverbal messages that are, spoken in a calm tone of voice, and direct and to the point." [Union exhibit #23].

Despite her supervisor's directive and the attendance policy that prohibits leaving early, on July 12, 2009, Ms. Nyakwara left her shift early without permission. After Mr. Saumweber met with Ms. Nyakwara in April 2009, when he gave her the specific directive that she could no longer leave early, nevertheless she left early on July 12, 2009. On July 12, 2009, Ms. Nyakwara left early before her shift ended at 8 a.m. There is no dispute that she left early. It is disputed whether she left at 7:30 a.m. as reported by Ms. Kranbeck [Union exhibit #6]; or whether she left at 7:45 a.m. as asserted by Ms. Nyakwara.

Ms. Nyakwara had worked her regular shift on July 10-11, 2009 from 10 p.m. to 8 a.m. When she came into work she learned that Holly Kranbeck had called in sick and could not find a replacement. This meant that Ms. Nyakwara would be mandated to work longer than her regular shift. Ms. Nyakwara testified she could not find a replacement on the weekends and management had tried but

was unsuccessful. Ms. Nyakwara worked the mandated shift from 8 a.m. to 2 p.m. on July 11, after that she went home for four hours and returned again on July 11, to work the 6 p.m. shift which she had previously agreed to work. Again on July 11, she worked her regular overnight shift from 10 p.m. to the morning of July 12, 2009. Ms. Nyakwara made the decision herself that she would leave early from her shift on the morning of July 12, 2009. Although she could have requested permission from Ms. Jenny Magistad, a supervisor working at another facility, she did not do so. Mr. Saumweber was on vacation during this time and Ms. Magistad was covering for him. Ms. Nyakwara never advised Ms. Magistad that she had left early instead Ms. Nyakwara emailed Ms. Magistad at 10:08 p.m. to ask Ms. Magistad to put her time in stating that she had "started at 6 p.m. and finished Sunday morning for the shift." [Company exhibit #14]. Ms. Nyakwara did not tell Ms. Magistad she had left early. Ms. Nyakwara testified that she did not punch out and she knew that "Holly would communicate it to Jenny" that she had left early because they were related and lived together. Tr. 145. Ms. Kranbeck reported to Mr. Saumweber and Ms. Papenguth, Director of Human Resources for AXIS, that Ms. Nyakwara had left her shift at 7:30 a.m. on July 12, 2009.

Since Mr. Saumweber was on vacation, Ms. Papenguth forwarded the report that Ms. Nyakwara had left early to Ellen Hill, Program Director. The supervisor or the program director typically investigates potential discipline. Ms. Hill talked directly to Holly Kranbeck to find what time Ms. Nyakwara had left work on July 12, 2009. Ms. Kranbeck reported that Ms. Nyakwara left at 7:30 a.m. Ms. Hill checked Ms. Nyakwara's timecard and found that she had worked until 8 a.m. Ms. Hill then interviewed Ms. Nyakwara and asked her what time she had left her shift. Ms. Nyakwara responded she left at 7:45 a.m. Ms. Hill asked if Ms. Nyakwara had permission to leave early and Ms. Nyakwara replied "no", but she left because she was tired. Ms. Nyakwara, when asked why she didn't get permission, said that

Mr. Saumweber was on vacation and she had previously gotten into trouble for calling the manager on call. Based on these facts, Ms. Nyakwara was terminated for intentionally violating the early departure policy after she had been specifically directed to not leave her shift early. [Post-hearing brief of the Union at 13].

Basically the employer contends:

- A. Ms. Nyakwara's discharge was for just cause and the grievance should be denied in its entirety. To the extent that Ms. Nyakwara's testimony conflicted with that of company officials, Ms. Nyakwara lacks credibility, requiring that all factual issues be resolved against her and in favor of AXIS.
- B. AXIS had just cause to terminate Ms. Nyakwara because she was insubordinate in purposefully leaving work without permission. Her discharge is supported by just cause based on her violation of company policy and the explicit instruction of her supervisor. Leaving the work site early on July 12, 2009 is just cause for termination. Ms. Nyakwara's actions should not be excused because she worked extra hours. While there is no dispute that Ms. Nyakwara worked a lot of hours even perhaps an excessive number of hours from July 10-12, 2009, This cannot excuse her action in failing to seek permission to leave early. The number of hours would certainly have been a factor in deciding whether she could leave early in addition to considering the needs of the residents, but to make the decision to leave without even seeking permission is a form of "self-help" that simply cannot be tolerated in this work environment in which she cares for vulnerable adults. [Post-hearing brief of Union at 22-23]. Simply because no resident was harmed cannot excuse Ms. Nyakwara of her violation of the rules. The company was free to discharge Ms. Nyakwara without first instituting other forms of

discipline. No one in this employment arena, the care of vulnerable adults, would dispute the policy that failure to follow directions not to leave early without permission is an offense subject to discipline and, under these circumstances, discharge. Leaving ones assigned vulnerable clients is a serious infraction justifying termination, especially after being explicitly instructed not to leave early. *Id.* at 27.

4. The position of Union is that Ms. Nyakwara, after working for almost 33 hours straight with almost 30 of those hours being directly related to providing direct patient care for AXIS MN, was terminated by the employer without considering any of the mitigating factors surrounding this situation involving her. Further, the employer performed a sham investigation into the matter. During her employment with AXIS, Ms. Nyakwara had received no corrective actions except for one. Further it is undisputed that because of the actions of Ms. Holly Kranbeck calling in sick for her Saturday shift, it created unforeseen circumstances for Ms. Nyakwara. The employer was not able to produce one single piece of evidence or testimony that would show Ms. Nyakwara had not completed all of her work assignments prior to requesting from her co-worker to leave 15 minutes early after being up for almost 33 straight hours. Put simply, the punishment of termination is too severe for the nature of the conduct.

The basic contentions of the Union are:

A. The employer lacked just cause to terminate Ms. Nyakwara. The employer's decision to terminate Ms. Nyakwara is inconsistent with the traditional tests of just cause. Ms. Nyakwara should not have been terminated for leaving a short time period prior to the completion of her shift that she had reason to believe was an acceptable past practice used by staff, after having been mandated to work additional shifts. Ms. Nyakwara was not given notice that she would be terminated for leaving early, especially after working nearly 30 hours straight and completing

all her scheduled duties. Termination was simply too severe a penalty for the nature of the conduct in light of the mitigating factors. And the employer denied Ms. Nyakwara procedural due process by failing to properly interview her and therefore denied her the opportunity to explain the basis for her belief that she had a right to leave the premises after being mandated earlier in her shifts.

Past practice indicates that employees can and do leave early after having been mandated to pick up extra shifts without needing the supervisors permission. Ms. Barb Dixon testified in detail that she had personally witnessed other staff members who had left early after she had reported to the facility for her 6 a.m. start of shift. Ms. Dixon testified it was not unusual when staff had been mandated to believe that they could leave prior to the completion of that shift.

Further a non disciplinary deducting of a half point for violating employer early departure policy is not a proper forewarning to Ms. Nyakwara that leaving 15 minutes early after working nearly 30 hours would in fact result in her termination. The discharge was not reasonably related to the seriousness of the conduct. No resident was harmed or placed at risk. Ms. Nyakwara had completed all her responsibilities toward the residents when she left 15 minutes early. While other employees may have been terminated for leaving early, none of the had the same mitigating circumstances that Ms. Nyakwara had in her situation. Even the cursory view of the disciplinary documents of other employees reveals that their conduct was more serious. One employee left in the middle of the night and was arrested. Another employee left in the middle of a shift and when a supervisor called and asked why, she simply replied, "I quit." The others did not notify fellow staff and left the premises during a shift for an unspecified amount of time without giving a reason. Another employee recently arbitrated his termination and the arbitrator found that the employer had failed to show just cause for the termination and has

ordered that that employee be reinstated back to his position with AXIS. None of these other instances have any bearing on Ms. Nyakwara case.

Ms. Nyakwara has a number of mitigating factors, which weigh against termination. The amount of time she left was minimal. She had completed all of her work duties and she made sure that the well being of the residents was taken care of. She inquired with her fellow coworker if it would be okay to leave early and no issues or concerns were raised. Ms. Nyakwara explained that she was extremely exhausted after working such a long stretch of hours. It is undisputed that there were no issues caused by her leaving her shift early that morning.

Further, the employer has denied Ms. Nyakwara due process. The employer did not conduct a full and fair investigation before imposing discipline and the employer did not give Ms. Nyakwara an opportunity to be heard in her own defense. Ms. Turner and Ms. Papenguth testified that neither of them spoke to Ms. Nyakwara prior to making their decision to terminate her. On its face the termination is based almost exclusively on a phone call to Ms. Ellen Hill who investigated the matter. At no point before or after the termination did the employer properly interview Ms. Nyakwara or give her an opportunity to explain her actions.

Ms. Nyakwara should be made whole in every respect, including back pay and benefits from the termination date to the present.

DECISION AND RATIONALE

The strong policy reasons against leaving early are understandable and justifiable. Providing direct support for those with mental and physical disabilities requires presence and attention. As a consequence, AXIS MN has chosen to strictly interpret the attendance policy, i.e. "an early departure without appropriate approval is considered a voluntary resignation." [AXIS Employee Manual].

"There is no dispute that Ms. Nyakwara worked a lot of hours, even perhaps an excessive number of hours from July 10-July 12, 2009, but that can not excuse her action in failing to seek permission to leave early" [Post-Hearing brief of Employer at 22]. Ms. Nyakwara worked her regular shift from 10 p.m. to 8 a.m. on July 10-11, 2009. She then worked a mandated shift on July 11 from 8 a.m. to 2 p.m. because her coworker called in sick and Ms. Nyakwara could not find a replacement. Ms. Nyakwara then went home for 4 hours and needed to take care of her daughter. She got no sleep. She then returned to work on July 11 and worked from 6 p.m. to 10 p.m. a shift she had previously agreed to work several days before. Then she continued to work her regular shift on July 11 to July 12 from 10 p.m. to 8 a.m. By her own admission, after she had made sure that all the patients were dealt with, she told her coworker she was very tired and needed to leave early. Ms. Nyakwara testified she left at 7:45 a.m. on July 12, 2009. Her coworker testified she left at 7:30 a.m. Ms. Nyakwara forgot to punch out and later asked a coworker to punch out for her.

There is no question that Ms. Nyakwara had completed all of her assigned work before she left 15 minutes or 30 minutes early on July 12, 2009. The question becomes is the penalty too severe considering the mitigating factors.

No harm was rendered to any resident. While previous employees had been terminated for leaving early, the facts were much more egregious in those cases. Ms. Nyakwara had been awake from 10 p.m. on July 10 through 7:45 a.m. on July 12. She'd had four hours at home where she took care of her daughter and was not able to sleep. Upon her return to work at 6 p.m. on July 11 she worked until 7:45 a.m. [Testimony of Ms. Nyakwara] or 7:30 a.m. [Testimony of Ms. Nyakwara's coworker].

Article VII A - No discharge without just cause states: "The employer shall not discipline an employee who has completed the required probationary period

without just cause." "Without notable exception, arbitrators emphasize the word 'just' in the term [just cause] compelling employers to tailor discipline to the individual and not only to the misconduct. They see 'just cause' as job security language that requires penalties to be corrective rather than punitive. Under such interpretation, the ultimate question in a discharge dispute is not whether the misconduct warranted the penalty, but whether the aggrieved employee deserved the penalty for committing the misconduct" *Clow Water Systems Co.*, 102 Lab. Arb. 377, 378 (Arbitrator Dworkin, 1994). It is the function of an arbitrator in interpreting a contract provision which requires "just cause" as a condition precedent to discharge to not only determine whether the employee involved is guilty of a wrong-doing, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and would appeal to a reasonable and fair-minded person as warranting discharge. See *Riley Stoker Corp.*, 7 Lab. Arb. 764, 767 (Arbitrator Platt, 1947). Most arbitrators will change a penalty if it is clearly out of line with generally accepted standards of discipline. See, Elkouri & Elkouri, *How Arbitration Works* 6th ed. 960 (BNA 2003).

Considering all the mitigating factors such as the "excessive number of hours", the lack of sleep, the need to care for her child at home, the penalty is simply too severe. While the strong policy reasons for not leaving early are understandable, the mitigating factors lead to the conclusion that there is not "just cause", as required by the contract to uphold a termination under these facts. While the arbitrator understands management's determination not to give a less severe penalty, nevertheless a full and proper investigation would have revealed that leaving early under these facts should not have led to termination. Even the employer agrees in its post-hearing brief that "perhaps an excessive number of hours" were worked from July 10-12, 2009.

Based on the above reasoning, it is held that Ms. Nyakwara is reinstated but she will be penalized for a one-day suspension without pay for leaving early and not following the exact procedure required in the AXIS Rules. In all other respects she must be made whole including back pay and benefits from the termination date. There will be a set off for unemployment compensation and any other payment for work she has done since termination.

Date: March 10, .2010

Joseph L. Daly
Arbitrator