

IN THE MATTER OF THE ARBITRATION BETWEEN

HONEYWELL INTERNATIONAL, INC)	
)	
“EMPLOYER”)	FMCS NO. 07-0228
)	
And)	
)	
TEAMSTERS LOCAL 1145)	RICHARD R. ANDERSON
)	ARBITRATOR
“UNION”)	SEPTEMBER 12, 2007
)	

APPEARANCES

EMPLOYER

Chuck Bengtson, Attorney
Heather Besikof, Senior Human Resources Generalist Golden Valley Facility
Bob Stromberg, Supervisor Golden Valley Facility
Helen Moore, Disability Benefit Administrator Golden Valley Facility
Terry Clapp, Former Human Resource Manager Golden Valley Facility

UNION

John G. Dillon, Attorney
Martin J. Costello, Attorney
Robin Redgate, Grievant
Louie Miller, Vice-President Teamsters Local 120
Pam Reynolds, Area Chief Steward Golden Valley Facility
Tom Grabinski, Union Welfare & Safety Director

JURISDICTION

The hearing in above matter was conducted before Arbitrator Richard R. Anderson on July 24, 2007 in Minneapolis, Minnesota. Both parties were afforded a full and fair opportunity to present its case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on July 24, 2007. Post-Hearing Briefs were timely received from both parties on August 25, 2007. The record was then closed and the matter was taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement that was effective from February 1, 2002 through January 31, 2007, hereinafter the Agreement.¹ The language in Article XVI [GRIEVANCES] of the Agreement provided for the filing, processing and arbitration of grievances. A new grievance procedure was adopted for grievances that arose on or after August 8, 2005, the date the Union was placed in temporary trusteeship by the International Brotherhood of Teamsters (IBT), replacing the original Article XV language in the Agreement.² The grievance procedure followed in this matter is from the amended version of Article XV. Step 4 of this Article defines the jurisdiction of the Arbitrator and establishes the Arbitrator's sole decision-making authority.³

¹ Joint Exhibit No. 2. A new Agreement was ratified on January 22, 2007 effective February 1, 2007 through January 31, 2010. Joint Exhibit No. 1.

² The Letter of Agreement was executed by the Employer on March 27, 2006 and on April 11, 2006 by the Union. Joint Exhibit No. 2.

³ The parties stipulated to the jurisdiction and authority of the Arbitrator.

THE ISSUE

The parties stipulated that the issue was, "Whether the Employer had just cause to discharge Robin Redgate in violation of Article XIX, Section 7 of the Agreement; and if not, what is an appropriate remedy?"

BACKGROUND

Honeywell International, Inc., hereinafter the Employer, is a diversified technology and manufacturing leader, serving customers worldwide with aerospace products and services; control technologies for buildings, homes and industry; automotive products; turbochargers; and specialty materials. It has several facilities in the Minneapolis/St. Paul, Minnesota area. The only facility involved herein is located in Golden Valley, Minnesota. Teamsters Local 1145, hereinafter the Union, represents approximately 1,700 production and maintenance employees at its Minneapolis/St. Paul facilities, and has so since the 1940's. The bargaining unit is set forth in Article I [RECOGNITION].

Robin Redgate, hereinafter the Grievant, was discharged on August 31, 2006 for violating the Employer's Time & Attendance (T&A) Policy.⁴ On September 1, 2006, the Union filed a grievance protesting her discharge.⁵ A Step 2 meeting was held on September 14, 2006, which resulted in the Grievance being denied by the Employer. On October 17, 2006, the Union moved the grievance to Step 3⁶ and after denial, moved it to arbitration.⁷ Thereafter, the Union filed for arbitration with the Federal

⁴ Joint Exhibit No. 5.

⁵ Joint Exhibit No. 6

⁶ Id., p. 3.

⁷ Id., p.4.

Mediation & Conciliation Service (FMCS).⁸ On January 2, 2007, the undersigned Arbitrator was notified by Memorandum from Union Counsel Martin J. Costello that I had been selected as the neutral Arbitrator in this matter.

The parties stipulated that there were no substantive or procedural issues with respect to the timely processing of the grievance pursuant to Article XV; and that the matter was properly before the undersigned Arbitrator for final and binding resolution.

RELEVANT CONTRACT PROVISIONS

ARTICLE IV — MANAGEMENT RIGHTS [New Agreement]

Section 3. *Without prejudice to the Company's managerial right to design and implement work rules, the Company shares its decision not to alter the terms of the 2006 A-2 Attendance Policy to be more restrictive during the term of this 2007-2010 Agreement.*

ARTICLE IX — VACATIONS

Section 1. *Employees who accumulate less than one (1) year of seniority on or before June 1 of the then current year and who have completed their probationary period on or before June 1 of the then current year; shall accrue vacation credit at the rate of 5/6 day (for this purpose a day shall equal eight (8) hours for full-time employees, and for part-time employees the average daily hours worked during the 52 week period defined in Section 2 below) for each calendar month in which they actually report for work on at least ten (10) days. Vacation pay under this Section 1 shall be computed by multiplying the total number of hours of accrued vacation credit by the straight-time hourly rate the employee received during the last full payroll week prior to June 1 of the then current year.*

An employee who has accumulated one year or more of seniority on or before June 1 of the then current year and who earns wages (including vacation pay) in less than 18 weeks during the 52 week period defined in Section 2, below, shall be eligible to receive paid vacation time off under the provisions of this Section.

Section 2. *This Section 2 shall cover employees who have accumulated one or more years of seniority on or before June 1 of the then current year and who have earned wages in at least eighteen (18) weeks during the 52 week period defined in Subsection B, below. Such employees shall receive paid vacation time off in*

⁸ Exact date is unknown.

accordance with the Vacation Schedule, provided they meet the eligibility requirements of this Section 2. In addition to the paid vacation time off set out in the Vacation Schedule, an employee, who meets the eligibility requirements of this Section 2 and who on the June 1st following the current year would be entitled to an increased amount of paid vacation under the Vacation Schedule because of an increase in his or her accumulated uninterrupted seniority, shall receive 1/12 of such increased amount for each month between the employment anniversary date on which his or her accumulated uninterrupted seniority entitled him or her to an increased amount of paid vacation under the Vacation Schedule and the next June 1st. Such paid vacation time off may be taken, at a time approved by the Supervisor after the employment anniversary date on which the employee became eligible for the increased amount and the following June 1st,

ARTICLE XV.— GRIEVANCES

Section 1. A grievance is any controversy between Company and the Union (or between the Company and an employee covered by this Agreement) as to (1) interpretation of this Agreement, (2) a charge of violation of this Agreement, or (3) a charge of discrimination involving wages, hours or working conditions resulting in undue hardships.

Section 2.

Step 3. Grievances referred to Step 3 shall be discussed between the Business Agent of the Union and the Director of Labor Relations or their delegated authority. If settlement is not reached within five (5) working days after the grievance has been referred to this Step 3, the grievance may be referred in writing to arbitration (Step 4). The written request for arbitration shall be sent to the Director of Labor Relations and shall clearly state the issues involved together with the relief sought. If the grievance is not referred to arbitration (Step 4) within twenty (20) working days after the disposition by the Director of Labor Relations or his or her delegated authority has been delivered to the Union, the settlement set forth in the disposition shall be final and binding.

Step 4. Not less than ten (10) working days shall elapse from the date of written request for arbitration before a grievance, including discharge cases, shall be arbitrated; provided the parties may mutually agree to exceptions to this provision of Step 4.

It is agreed that the requesting party must request in writing from the Federal Mediation Conciliation Service (FMCS), a regional arbitration panel of no less than seven (7) names, within seven (7) working days from the date of its written notice requesting arbitration. Representatives of the Union and the Company will meet either in person or via teleconference to select an arbitrator. In the event the parties cannot agree on an arbitrator, the choice shall be made by the

alternate strike method. The person whose name is not struck shall be named as arbitrator. The determination of who goes first shall be on a rotation basis. Each party shall have the right once on each arbitration case to request a new panel from the FMCS. After a case on which the arbitrator is empowered to rule hereunder has been referred to him, it may not be withdrawn by either party except by mutual consent.

An arbitrator for a particular hearing shall be notified by the parties of the mutually agreed upon time and place for the hearing. Each party may submit pre- and post-hearing briefs to the arbitrator, which state the position of the parties and furnish to the arbitrator any arguments in support thereof. If either party submits briefs or other written arguments to the arbitrator prior to, during, or following the hearing, the other party will be furnished with copies of such material simultaneously with its being furnished to the arbitrator.

The authority of the Arbitrator shall be limited solely to the determination of the questions as submitted in Step 3, provided that the Arbitrator shall refer back to the parties without decision any matter not a grievance under Section 1 of this Article or which is excluded from arbitration by the terms of Section 3 herein.

The Arbitrator shall have no power to add to, or subtract from, or modify, any of the terms of this Agreement, or any agreement made supplementary hereto.

The Company and the Union shall set the time and place of hearing. Hearing dates will be subject to the approval of the Arbitrator. The Arbitrator's decision shall be final and binding upon the Company, the Union and employees within the bargaining unit. The expense and fees of the Arbitrator shall be borne jointly by the Company and the Union.

ARTICLE XIX — LAYOFF. TRANSFER AND DISCHARGE

Section 1. The Company shall have the exclusive right, except as otherwise provided in this Agreement, to lay off and transfer employees for lack of work or other legitimate reason and to discharge employees for just cause.

Section 7. *The Company shall have the exclusive right to discipline, suspend, or discharge employees for just cause. In case of discharge reasonable notice shall be given to the departmental committee member prior to the discharge. The union agrees a protest of discharge will be barred unless presented in writing under Step 2 of Article XV, Section 2, within five (5) working days after discharge of an employee. The Company agrees to make its final decision within five (5) working days after the written protest is submitted to the Company.*

OTHER DOCUMENTS.

RELEVANT ATTENDANCE POLICY PROVISIONS [Effective February 1, 2006]

POLICY

Absenteeism is expensive, disruptive, and places an undue burden on co-workers and the Company. An important measure of an individual's job performance is the ability to be regularly present and to arrive on time for all scheduled work shifts including accepted overtime.

The policy is intended to encourage regular and timely attendance and to provide a process so that absenteeism problems are treated consistently, objectively, and uniformly.

This Attendance Policy is a no-fault policy and supercedes all previous policies regarding time and attendance.

PRACTICE

A. *Scheduled work is defined, for purposes of this policy, as time where the supervisor is anticipating that the employee will be at work. Thus, arrangements that are made in advance between a supervisor and an employee to allow the employee to deviate from the normal work schedule, such as an agreement to flex that day's working hours (come in late and then work late) or attend off-site training, shall not be deemed a violation of this policy. While there are other circumstances where such an agreement will alter the normal scheduled work shift, in all instances of deviation there must be advance agreement between the supervisor and the employee or the time lost will be subject to this policy.*

B. *An employee who is absent from scheduled work or accepted overtime, for any reason, is required to notify their immediate supervisor, department manager, or designated call in number, as applicable, within 30 minutes after the start of their shift. Any employee who fails to call within 30 minutes after the start of their scheduled work shift will be subject to progressive discipline.*

C. *An employee's lost hours will be tallied on a rolling twelve (12) month period. The following consequences will normally apply based on cumulative hours lost in the immediately preceding 12-month period:*

<i>Cumulative Hours Lost</i>	<i>Company Response</i>
<i>32</i>	<i>Oral counseling</i>
<i>41</i>	<i>Written reprimand</i>
<i>48</i>	<i>Three (3) day unpaid disciplinary suspension</i>

56	Ten (10) day unpaid disciplinary suspension
60	Discharge

E. When an employee is absent and unavailable to receive any discipline which results from lost hours, the employee will be subjected to all discipline appropriate for the full period of absence. A disciplinary meeting will be held with the employee upon their return to work.

H. The following is an all-inclusive listing of situations where an absence from a scheduled work shift or accepted overtime shall not count as hours lost. All other absences under this no-fault policy shall be deemed subject to the consequences herein.

1. Paid medical leave of absence, a.k.a. Weekly Indemnity, including the days required to qualify for the paid medical leave of absence and any time off authorized under State Worker’s Compensation law.

EXAMPLE A: An employee calls in ill on Tuesday, Wednesday, Thursday, Friday and Monday of the second week, continues to be too ill to work for the remainder of that second week and returns to work on the next Monday (third week). This employee provides the required Weekly Indemnity forms documenting proof of a qualifying disability for this entire period of absence. This employee is placed on a paid medical leave of absence commencing with the eighth calendar day of absence. This employee accumulated no lost hours for this specific period of absence since paid medical leave of absence, including the days required to qualify for Weekly Indemnity, does not count as lost hours.

EXAMPLE B: An employee calls in ill on Tuesday, Wednesday, Thursday, Friday and returns to work on Monday of the next week. This employee provides documentation of illness for this entire period of absence but the absence does not qualify for Weekly Indemnity nor FMLA. Because this employee is not otherwise excused, they accumulate lost hours for all scheduled work hours and accepted overtime to which the employee had committed.

3. Authorized time off under Family Medical Leave Act or Americans with Disabilities Act, including when an employee misses time that is covered by an intermittent FMLA certification. A request by an employee to receive vacation pay for FMLA time off will be granted if such a request is made on the first day returning to work after the FMLA time off. Even if one uses vacation time, the time shall be charged against the total amount of FMLA leave available.

8. Vacation

I. Where an employee’s absence/tardy is subject to an exception noted in H above but reasonable documentation is requested by the Company to confirm the exception, it shall be the responsibility of the employee to produce such

documentation. In those instances, a reasonable period of time, normally three (3) business days, shall be afforded to the employee to gather and produce such documentation. During this period, the employee shall be allowed to continue to work. An employee's failure to produce the requested documentation within a reasonable period of time shall nullify the exception and the absence/tardy shall be subject to the consequences herein.

RELEVANT FACTS

The following are facts that this Arbitrator deems relevant to the determination of the instant issue. The Employer has a no-fault T&A Policy that was unilaterally adopted. During negotiations for the latest Agreement, the parties discussed the Employer's T&A Policy. The only item the Union sought during negotiations was that the Policy not be changed from its existing form during the term of the new Agreement. In recognition of this, a new section was added to a Management Rights provision. Section 3 states, *"Without prejudice to the Company's managerial right to design and implement work rules, the Company shares its decision not to alter the terms of the 2006 A-2 Attendance Policy to be more restrictive during the term of this 2007-2010 Agreement."*

The parties refer to unexcused absences as "lost hours". Under the progressive discipline schedule contained in the T&A Policy, employees who accumulate 32 lost hours are subject to oral counseling. More than 41 lost hours results in a written warning, 48 or more lost hours results in a three-day suspension, 56 or more lost hours results in a 10-day suspension, and over 60 lost hours results in discharge.⁹

The T&A Policy includes many ways employees can avoid getting lost hours. One way involves receiving excused absences for medical reasons. Two medical reasons are Family Medical Leave Act (FMLA) leave and Weekly Indemnity (WI) leave. Each of

⁹ Joint Exhibit No. 4.

the aforementioned leaves require a doctor's certification for approval. FMLA leave is mandated by federal law and provides employees with up to twelve weeks (480 hours) of unpaid leave in each twelve month "rolling" period. Each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks that had not been used during the immediately preceding 12-month period. For example, if an employee has taken eight weeks of leave during the past 12-month period that began on February 1, 2005, a maximum of four weeks of leave could be taken before February 1, 2006. If an employee used the four weeks, he/she would not be entitled to any additional leave until February 1, 2006. Beginning on February 1, 2006, the employee would be entitled to an additional leave so long as the total leave did not exceed 480 hours in any 12-month period.

When an employee requests FMLA leave, they are given a packet containing the necessary request forms to be filled out by the employee's medical provider as well as information on the FMLA.¹⁰ Thereafter, the leave is either approved, denied, or a request for more information is made to the employee's medical provider. Once the FMLA leave is approved, the Law requires employers to keep track of the hours of leave taken, and provide, upon employee request, the dates and hours of leave that they have taken. Testimony disclosed that each time FMLA leave is taken, an employee is sent a letter either approving or not approving the leave along with a leave form showing previous total hours used plus the hours involved in the current request.

¹⁰ Employer Exhibit No. 7

WI leave is another way employees can avoid lost hours. It is a short term disability leave that pays 55% of the employee's regular wages for up to 26 weeks.¹¹ An employee must be disabled due to illness or injury and unable to work for periods longer than seven consecutive days in order to be eligible. Employees requesting WI are sent an application packet containing a WI information letter, forms that the employee and the employee's treating doctor must fill out and FMLA leave information.¹² The information letter advises employees on what is required to approve a paid WI leave and advises them that WI and FMLA leave run concurrently. When an employee has a qualifying medical condition and the forms are completed properly and returned to the Disability Benefits Department, the paid leave can be granted, denied, or, just as with FMLA leave, a request for more information can be made. Once the information is received, the employee can be approved or denied WI leave.

Vacation time is another situation where an employee can avoid lost hours. Vacation entitlement and procedures are covered in Article IX of the Agreement. The Vacation Schedule determines how much vacation time an employee is entitled to. Supervisors approve any vacation time requests.

Helen Moore, Disability Benefits Coordinator for the Golden Valley facility, and Tom Grabinski, the Health and Safety Director for the Union, testified about the interaction of approved vacation leave and WI. When an employee is on vacation and becomes injured or ill, the employee can request that WI forms be sent to them. If the medical condition disables the employee from work and the absence lasts at least eight days,

¹¹ Employer Exhibit No. 8.

¹² Employer Exhibit No. 9.

the employee's vacation leave will then be changed to WI from the date the employee initially made the WI request.

The Grievant was initially employed by the Employer on October 9, 2000.¹³ During her tenure, the Grievant had a history of work absences primarily due to an injury that caused head, back and neck problems. She applied for and was granted WI leave on at least six occasions between September 2003 and September 2004.¹⁴ She also applied for and was granted FMLA leave three times beginning in November 2003.¹⁵ In May 2005, the Grievant applied for and was granted intermittent FMLA leave for back pain medical treatment.¹⁶ She renewed this intermittent leave request in May 2006, which was also granted.

As stated above, the Grievant was first granted intermittent leave in May 2005. She then used 388 hours of the 480 hours by December 2005. During March 2006, she had exceeded the 480 hours maximum, which resulted in her being charged lost hours under the T&A Policy. Whenever the Grievant took FMLA leave, she was given leave authorization forms. As stated earlier herein, each leave form has a section showing both the number of hours taken on the specific date in question and the total number of hours used during her current FMLA rolling year. In addition, the Grievant frequently spoke with Moore, either in person or over the telephone. Evidence disclosed that the Grievant spoke with Moore, either on the telephone or in person, approximately 26 times from January 1st through August 29th. Moore testified that some of the calls were

¹³ The Grievant was laid off for most of the year beginning in early 2001.

¹⁴ Employer Exhibit No. 15.

¹⁵ Employer Exhibit Nos. 10, 11 and 12.

¹⁶ Leave taken during separate periods due to a single illness or injury. It may include periods of an hour or more or leave taken for several days or weeks.

to notify her that she was taking FMLA leave while others were for information. Each time that the Grievant requested information on her FMLA hours, Moore testified that she provided her with the number of hours she had taken.

After the Grievant ran out of FMLA leave in March 2006¹⁷, she began to accumulate lost hours under the T&A Policy. By April 18th she had accumulated 65:48 lost hours and was given a 10-day suspension.¹⁸ The Union filed a grievance and argued that the Grievant had not received progressive discipline (3-day suspension) pursuant to the T&A Policy.¹⁹ The 10-day suspension was reduced to five days following a grievance settlement.²⁰ In addition, the grievance settlement established conditions under which the Grievant could receive future discipline. The agreement listed her existing lost hours at 65:48. If she accumulated 73:48 lost hours, she would receive a 10-day suspension and would be discharged at 77:49 lost hours. The settlement further stated, *“If Ms. Redgate is not available for progressive discipline due to continued absences she will be subject to the appropriate level of discipline based upon her earned lost hours”*. A leave authorization form was copied to the Grievant on May 22nd that showed she had used 446 hours and 12 minutes of FMLA leave time. Another leave authorization form was copied to the Grievant on June 7th that showed she had taken a total of 478 hours and 12 minutes of FMLA leave. This left the Grievant with less than two hours of FMLA leave available for her.

¹⁷ Hereinafter, all dates refer to 2006 unless otherwise indicated.

¹⁸ Employer Exhibit No. 2.

¹⁹ Union Exhibit No. 6.

²⁰ Employer Exhibit No. 3 and Union Exhibit No. 8.

The Grievant applied for vacation on June 14th for Thursday June 15th and Friday June 16th.²¹ The Grievant testified that she applied for vacation because she did not want to accrue any lost hours. According to the Grievant, she had an ear infection and needed to see her doctor. She was subsequently diagnosed with a bi-lateral ear infection and given antibiotics. On Monday, June 19th, while still out of work recovering from her ear infection, the Grievant testified that she had a flare up of her head, back and neck condition. She then called in and left a voice mail message saying she was taking the day off as FMLA leave. However, the Grievant did not have enough FMLA leave available to cover the whole day since she had exceeded the allotted 480 hours of FMLA leave. This information was given to the Grievant in a letter dated June 22nd from Moore along with a copy of the leave authorization form that listed a summary of hours taken during the instant period and the total number of hours used during her current FMLA rolling year.²² As a result, she was charged with 4 hours and 12 minutes of lost hours.²³ The Grievant then took Tuesday the 20th, Wednesday the 21st and Thursday the 22nd off as vacation days. According to the Grievant she took the vacation days because she was still recovering from her ear infection. She ultimately returned to work on Friday June 23rd.

The Grievant testified that when she returned to work she spoke with another employee about her recent lost hours. During the discussion, the other employee told her to try to get the absences covered under WI. The Grievants subsequently requested WI forms on June 26th in an attempt to get her vacation time retroactively

²¹ Union Exhibit No. 10

²² Employer Exhibit No. 12 p. 13.

²³ Employer Exhibit Nos.4, 5 & 6. Union Exhibit No. 12.

converted to WI.²⁴ In this request, the Grievant's doctor listed the reason that she needed WI leave was an ear ache.²⁵ The Grievant's request to retroactively convert her vacation time to WI leave was denied in a letter from Moore dated June 28th.²⁶ The letter stated,

*Dear Robin Redgate,
We have received your claim for a medical leave of absence. However, to be eligible for a Weekly Indemnity leave, you must be totally disabled for 8 consecutive days. A review of your Time and Attendance record indicates that you chose to take paid vacation for the dates of 6/15, 16, 20, 21 & 22/06. When determining waiting periods for Weekly Indemnity, paid vacation is considered to be days worked. For that reason, you are not eligible for a Weekly Indemnity leave for the dates of 06/15/06 to 06/23/06.*

Your FMLA eligibility has already been responded to for the date of 6/19/06.

Any lost hours, resulting from this decision should be discussed with your Operations Leader immediately upon receipt of this letter.

If you have any questions, please call me at 763-954-4013.

Moore testified that the Grievant was not disabled from work according to the information provided by the doctor; and, therefore, she did not qualify for WI leave.²⁷ Moore stated that vacation taken before filing for WI cannot be retroactively changed to WI after the fact. The Grievant, however, could have requested WI forms while she was on vacation; and if she qualified, WI leave would be retroactive to the day she first requested the forms. Grabinski testified somewhat similarly. Moore also testified that it was a practice for at least the 28 years she handled WI requests that vacation hours used could not be retroactively applied to WI. This is because, as her letter to the

²⁴ Union Exhibit No. 13.

²⁵ Union Exhibit No. 11.

²⁶ Employer Exhibit No. 14 and Union Exhibit No. 14.

²⁷ The Employer's denial of WI leave is the subject of a pending grievance, which is not being decided herein.

Grievant stated, vacation days are considered days worked; and WI only applies to days not worked because of a disability.

One May 8th the Grievant had requested vacation for July.²⁸ The Grievant took this vacation with Mr. Stromberg's permission on July 13th and 14th. It was later determined that the Grievant did not have any vacation time to use; therefore, the time was counted as lost hours. After recognizing that the Employer had made a mistake in allowing the Grievant to take vacation time that she did not have, the Employer decided not to hold these lost hours against her. The Employer actually counted the lost hours; however, it then proportionately increased the Grievant lost hours allowed by settlement agreement from 73.48 to 85.48 before imposing a 10-day suspension and 77.49 to 89:49 before imposing discharge. This Employer action was conveyed to the Grievant through Stromberg.²⁹

On August 1, 2006, The Grievant called Moore and Stromberg and left voicemails stating she was taking eight hours FMLA leave. Since the Grievant only had six hours of FMLA leave available, she accumulated two lost hours. By June 19th, the Grievant was 3.48 hours away from a 10-day suspension. The additional two lost hours on August 1st put her 1.48 hours away from a 10-day suspension. This information was conveyed to the Grievant in a letter from Moore dated August 1st.³⁰ On August 29th the Grievant left a voicemail with Stromberg and Moore stating she was taking eight hours FMLA leave. Again, the Grievant had used all her FMLA leave and none was available for her to take resulting in her accumulating eight more lost hours. As in the past, she

²⁸ Union Exhibit No. 7

²⁹ The Grievant denies that Stromberg told her this.

³⁰ Employer Exhibit No. 12 p. 14.

was informed by Moore in a letter dated August 29th that she had exceeded her FMLA hours.³¹ The eight lost hours then put the Grievant at 80 accumulated lost hours calculated under the settlement agreement and 92 accumulated lost hours calculated under the amended agreement. On August 31st, the Grievant was discharged because she had exceeded the settlement agreement lost hours discharge threshold of 77.49 lost hours or the recalculated 89.49 lost hours in the “amended” settlement agreement.

The Grievant testified that on July 31st, August 1st, 28th and 29th, she called and left voice messages with Stromberg and Moore telling them that she was taking FMLA leave on those days. No one ever called her back. She also testified that during the period August 2nd through August 29th, she went to Moore’s office many times and also called requesting to know how much FMLA leave she had left. According to her, Moore said that she would get back to her, but never did. The Grievant also testified that at one point, exact date unknown, Moore informed her that if she ever got low on FMLA leave she would let the Grievant know, which she never did.

Moore testified that whenever the Grievant (or any other employee) took FMLA leave, she would send her and her supervisor a leave authorization form (Employer Exhibit No. 12) that indicated how much FMLA leave she had used during the current 12-month rolling period as well as the days and hours taken during the most recent leave period.³² If the employee was out of FMLA leave, she would so inform them by letter. Moore also testified that it was an employee’s

³¹ Employer Exhibit No. 12 p. 15.

³² The form does not indicate upcoming captured leave.

responsibility to keep track of their own FMLA hours; however, when requested, she would give them this information. Finally, she testified that if the Grievant inquired into her available FMLA leave during the period July 31st through August 28th, she would not have the information readily available; but would have gotten back to her.

Evidence adduced at the hearing disclosed that the Grievant had a history of attendance problems that began shortly after she was hired. This resulted in various forms of discipline.³³ She received a written warning on September 4, 2001 for attendance problems. On May 19, 2003, she received another written warning for attendance problems. On June 12, 2003, she received a first degree demerit followed by second and third degree demerits for previous absences. Following the parties agreement on June 19, 2003, the discipline was reduced to a first degree demerit. On November 10, 2003, the Grievant received another written warning for attendance problems, which was revoked per a grievance resolution. On February 21, 2005, she was issued a second degree demerit for creating discord and lack of harmony in the work place. This action together with a previous second degree demerit resulted in termination.³⁴ She was reinstated without back pay per a grievance settlement. She was again disciplined and terminated in April 2006 for attendance problems and subsequently reinstated pursuant to the aforementioned settlement agreement.³⁵

POSITION OF THE EMPLOYER

³³ Employer Exhibit No. 16.

³⁴ It is not known when and for what conduct the predecessor second degree demerit was issued.

³⁵ Although the record is not clear, the Grievant had to have incurred prior discipline in order to reach the termination stage.

The Employer's position is that it had just cause to discharge the Grievant. The Employer argues the following:

- The Grievant violated the terms of the May 2006 settlement agreement by accumulating 92 lost hours.
- Discharge was appropriate because the Grievant was not available to receive the progressive discipline of a 10-day suspension for exceeding 85.48 lost hours. The settlement agreement specifically stated that, *"If Ms. Redgate is not available for progressive discipline due to continued absences she will be subject to the appropriate level of discipline based upon her earned lost hours"*.
- The Union argues that the Grievant's vacation time in June should have been converted to WI. The Union claimed that she only took vacation time in the first place to "cover" herself because she didn't know if she would qualify for WI leave. This line of reasoning must fail for two reasons. The Grievant did not call in and request WI leave at any time during her vacation, rather on June 19th, the date when she earned lost hours, she called in and requested FMLA not WI. The Grievant is also very familiar with the process for obtaining WI leave, having applied for this leave six times in her six years of employment.
- The discharge of the Grievant was not excessive, unreasonable or an abuse of management discretion. Arbitrators have consistently upheld the Employer's T&A Policy and the manner in which it is enforced. Arbitrators have also consistently upheld discharges in situations similar to the Grievant's.³⁶ The Grievant was disciplined numerous times for violating this Policy and failed to

³⁶ The Employer in its Brief cited numerous Arbitration Awards.

correct her behavior. In May of 2006, she was terminated and then brought back with T&A restrictions. The Grievant was returned to work in spite of her T&A problems and even given a higher threshold for termination (89.49 lost hours) versus other employees (60 lost hours).

- The Union and the Grievant claimed that it was too difficult to track her FMLA hours. It was, however, the Grievant's responsibility to keep track of her available FMLA hours. She knew she had limited FMLA hours available after she entered into the settlement agreement in May 2006, yet she failed to keep track of her available hours as evidenced that she continued to apply for FMLA leave when she had none. In August 2006, she was well aware that she was close to exhausting her FMLA leave hours and contacted Moore frequently to confirm her hours taken.
- The Grievant throughout her tenure has demonstrated that she is unwilling to adhere to her T&A responsibilities. She had been repeatedly disciplined yet failed to correct her attendance problems. In fact after the settlement agreement was entered into, her attendance problems became worse. Clearly, her absences adversely affected the operations of the Employer.

POSITION OF THE UNION

It is the Union's position that the Employer did not have just cause to discharge the Grievant. The Union argues the following:

- The Employer wrongfully and arbitrarily denied the Grievant WI benefits in June 2006. This caused the Grievant to be forced to use vacation time in order to

avoid lost hours. Moore denied the Grievant's claim for WI leave because it was an Employer policy not to approve WI leave when vacation time was used. Grabinski testified that WI leave does not cover an illness occurring during vacation time. The Grievant, however, did not become ill while she was on vacation. Rather, she used vacation time to cover an illness-related absence. At the hearing Moore gave a further excuse for denying the WI benefit in that she did not believe the Grievant's doctor (Dr. Price) was in fact a medical doctor. When during cross-examination Moore was shown the medical documentation that the Grievant had submitted with her claim that clearly disclosed that the initials M.D. appeared after Price's name on the form, she testified that she did not believe that "just an ear ache" was sufficient to disable the Grievant. This conclusion was made despite Dr. Price's confirmation that the Grievant was disabled for eight days.

- If the Employer had not wrongfully refused to grant the Grievant WI leave, she would have had five days of vacation to cover her absences in July and August and would not have accumulated any lost hours during those months.
- Termination was too severe a penalty in light of the Employer's denial of WI leave. Even if the Employer justifiably denied WI leave and charged the Grievant with eight lost hours in July and August, the Employer still failed to prove just cause for termination because it was obligated to suspend her under the terms of the settlement agreement before it terminated her.

- Thus, the Employer failed to follow progressive corrective discipline required by the settlement agreement. The termination was too severe a penalty in light of its denial of WI leave. Even if the Employer justifiably denied WI leave and charged the Grievant with eight lost hours in July and August, the Employer still failed to prove just cause for termination because it was obligated to suspend her under the terms of the settlement agreement. The Employer then unilaterally changed the settlement agreement with respect to the number of lost hours required for discipline. Neither the Grievant nor the Union were ever informed of this action. The Employer was obligated under the settlement agreement to apply progressive discipline in that the Grievant should have received a 10-day suspension before being terminated.
- Finally, the mitigating factor that the Grievant's absences were largely due to her medical condition, which the Employer was well aware of. Thus, if some discipline is warranted a 10-day suspension would have been appropriate.

OPINION

The issue before the undersigned is whether the Employer had just cause to discharge the Grievant. This issue presents a well-settled two-step analysis: first, whether the Grievant engaged in activity which gave the Employer just and proper cause to discipline her; and second, whether the discipline imposed was appropriate under all the relevant circumstances. It is the Employer's burden to show that the Grievant engaged in conduct warranting discipline and that the appropriate discipline was termination.

In a discharge case, where just cause is the standard, a significant quantum of proof is required to show not only that a grievant engaged in the misconduct alleged, but also that the misconduct justified discharge. In this matter, it is whether the Employer was justified in disciplining the Grievant when she violated the terms of the settlement agreement by incurring too many lost hours; and whether this conduct, per se, satisfies the just cause standard warranting discharge.

When the particularized facts surrounding the Grievant's discharge are fully examined, it is apparent that discharge was appropriate. In May 2006, the parties and the Grievant entered into a settlement agreement following her discharge and the subsequent filing of a grievance. This settlement agreement established new lost hour parameters before the Grievant could be disciplined. Under the Employer's T&A Policy an employee could receive a 10-day suspension for 56 lost hours and be discharged for accruing 60 lost hours. Under the terms of the settlement agreement the Grievant could receive a 10-day suspension for accruing 73.48 lost hours and discharged if her total lost hours reached 77.49. The parameters were raised 12 hours to 85.48 and 89.49 respectively, after the Grievant was assessed 12 lost hours for taking vacation time in July for which she had no vacation hours available.

It is abundantly clear from the evidence that the Grievant incurred sufficient lost hours in violation of the parties' settlement agreement to justify discipline. The Union argues that the Grievant should have received WI leave for being absent in June 2006 because of a medical condition that lasted eight days. In essence, the Union is asking this Arbitrator to determine whether or not the Employer erred in denying the Grievant this leave. This issue is not before me; rather it is the subject of a separate grievance,

and I have no authority to countermand the Employer's denial action. In view of this, it is clear that I cannot restore any lost hours associated with the Grievant's WI leave denial.

The Union also argues that the Employer unilaterally amended the settlement agreement by changing the number of lost hours required for discipline. Whether this is true or not is irrelevant since the Grievant's accumulated lost hours exceeded the number of hours warranting discipline whether calculated under the terms of the settlement agreement or under the lost hours subsequently expanded by the Employer.

The Grievant was well aware of the terms of the settlement agreement. She knew at the time the settlement agreement was entered into that she had accumulated 65.48 lost hours, and that eight more lost hours would result in a 10-day suspension and 12 more lost hours in discharge. The Grievant was also well aware of both the Employer's T&A Policy and the use of FMLA leave. When she took FMLA leave on August 1st, she was apprised by Moore of her available FMLA leave and knew how many lost hours she had left (1.48) as of August 1st before she would be disciplined. Even assuming arguendo that Moore failed to return her calls, which is highly unlikely, it was the Grievant's responsibility to keep track of her available FMLA leave. Knowing in early August that she had exhausted her available FMLA leave and only had 1.48 hours of lost hours remaining before she was susceptible to discipline under the terms of the settlement agreement, you would think that the Grievant would be extra diligent in ensuring that she had sufficient leave available before she attempted to use FMLA leave.

In view of the forgoing, I find that the Grievant incurred sufficient lost hours under the terms of the settlement agreement to justify discipline. Having so found, the issue of appropriate discipline must now be examined. The Union argues that the Employer failed to apply progressive discipline before it discharged the Grievant and should have issued her a 10-day suspension before discharging her. This argument must fail. When she accrued eight lost hours on August 29th, she exceeded both the 10-day suspension and discharge lost hour thresholds of the settlement agreement. The settlement agreement by its terms recognized the possibility that the two lost hour thresholds could be reached in a single occurrence wherein it states, *"If Ms. Redgate is not available for progressive discipline due to continued absences she will be subject to the appropriate level of discipline based upon her earned lost hours"*.

Throughout the Grievant's tenure, she had repeated T&A problems that resulted in various forms of discipline. The Employer has given her many opportunities to correct this behavior even agreeing to rescind her discharge in May 2006, and giving her higher threshold lost hour parameters than other employees receive under its T&A Policy before being subject to discipline. Yet she failed to respond and violated the settlement agreement. Under all of the circumstances herein, I find that discharge was the appropriate discipline herein.

AWARD

It is hereby ordered that the grievance in the above entitled matter be and hereby is denied for the reasons set forth in this Decision.

Dated: September 12, 2007

Arbitrator

Richard R. Anderson,