IN THE MATTER OF ARBITRATION BETWEEN

LUND'S FOOD HOLDINGS, INC.,	)	**ARBITRATION AWARD**
Employer,	)	
and	)	**WICKLANDER DISCHARGE GRIEVANCE**
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 789,	)	**FMCS Case No. 070613-57533-3**
Union.	)	

Arbitrator:	Stephen F. Befort
Hearing Date:	September 14, 2007
Post-hearing briefs received:	October 20, 2007
Date of decision:	November 20, 2007
	APPEARANCES
For the Union:	Roger A. Jensen
For the Employer:	Douglas R. Christensen

INTRODUCTION

United Food and Commercial Workers, Local 789 (Union) is the exclusive representative of a unit of non-supervisory food service workers employed in the St. Paul metropolitan area by Lund Fund Holdings, Inc.. (Employer). The Union brings this grievance claiming that the Employer violated the parties' collective bargaining agreement by discharging Chad Wicklander without just cause. The grievance proceeded

to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer discharge the grievant for just cause? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 10

DISCHARGE

A. No employee shall be discharged except for just cause.

FACTUAL BACKGROUND

The Employer is a full-service grocer operating a number of Lunds and Byerly's stores in the Twin Cities area. The grievant - Chad Wicklander - is a six-year employee working in the classification of a meat wrapper. From April 2006 until his discharge on April 30, 2007, Wicklander worked at the Ford Parkway Lunds store in St. Paul.

The Employer issues an Employee Handbook to each employee that sets out various rules and expectations related to employee job performance. The Handbook generally states that employees are expected to comply with time and attendance requirements and that discipline may result for a failure to do so.

The Employer also has promulgated a more specific set of Attendance Guidelines. The Guidelines define an "absence" as an event which results in an employee missing an entire shift, while a "tardy" is a late start or late return from a break. The Guidelines set out the following management parameters for addressing attendance violations that occur in a rolling twelve month period:

Absence	Tardy	Action
6th absence	10th tardy	Initial consultation
8th absence	12th tardy	Performance Improvement Plan (written)
10th absence	14th tardy	Suspension (one-day)
12th absence	16th tardy	Termination

The Guidelines also state that "these guidelines are intended to be an administrative guide only; management discretion must be applied to all situations." Although the Attendance Guidelines are not distributed to employees, Wicklander acknowledged at the hearing that he was aware of the Guidelines provisions.

It is undisputed that Wicklander had significant time and attendance problems while working at the Ford Parkway store. At the arbitration hearing, the Employer introduced evidence depicting 22 break, tardy, and attendance violations between April 30, 2006 and April 30, 2007. This record did not include tardies of five minutes or less. The Union submitted evidence suggesting that Wicklander should be assessed only for fifteen attendance violations (two absences and thirteen tardies) during the rolling twelve month period ending on April 30, 2007. Jennifer Christensen, Business Agent for Local 789, provided testimony urging that the following seven incidents cited by the Employer should be discounted:

> 4/30/06 – tardy should fall off as outside rolling 12 month period;
>
> 6/11/06 – Wicklander allegedly obtained permission to leave a shift early from the manager on duty because of illness;
>
> 7/7/06 – Alleged tardy not recorded on attendance calendar;
>
> 11/10/06 – Wicklander received permission to use a personal leave day to attend a funeral even though it was not covered by the funeral leave provision of the collective bargaining agreement; and

Three break-time violations should not be counted because they were not generally monitored for other employees.

Over the course of that year, the Employer issued the following attendance-related discipline to Wicklander:

7/7/06 – verbal warning for tardiness

9/4/06 – written warning for tardiness

11/7/06 – written warning for violation of break policy

11/27/06 – one-day suspension for violation of break policy

12/13/06 – two-day suspension for violation of break policy

2/3/07 – one day suspension for tardiness

The February 3, 2007 suspension also was accompanied by a written warning that included the following statement: "Chad, this is the last chance to turn your work performance around. Any reoccurrence will result in loss of employment."

Wicklander committed two additional violations of the attendance policy prior to his discharge. On February 7, 2007, Wicklander missed work because his child was ill and his day care provider was unwilling to provide care under the circumstances. In spite of the February 3 last chance warning, Linda Welle, the General Manager of the Ford Parkway store, decided not to discharge Wicklander on the basis of this absence.

For the next two and one-half months, Wicklander had a clean attendance record. This streak ended on April 30, 2007 when he reported 87 minutes late for a morning work shift. Wicklander testified that he mistakenly thought that he was scheduled to work the 2:00 p.m. to 10:00 p,m. shift and did not realize his mistake until his supervisor, Greg Zeipelt, called him at home. Employer witnesses testified that the schedule had been posted two weeks in advance.

The Employer terminated Wicklander on April 30, 2007. In a termination letter addressed to Wicklander on that date, Store Manager Ken Atzmiller stated as follows:

> This letter is being presented to you today to advise you of your termination of employment effective immediately for excessive absences/tardiness.
>
> Today's tardy of more than 90 minutes combined with your tardiness and absences exceed our attendance guidelines. You have received three suspensions related to time and attendance and have not modified your behavior to meet our expectations.
>
> Your conduct is unacceptable and in conflict with many of our most basic work guidleines. Dependability is important to our business and is needed to help insure that we keep with our work guidelines.

POSITIONS OF THE PARTIES

Employer Position:

The Employer contends that it had just cause to terminate the grievant for time and attendance deficiencies. The Employer points out that Wicklander was aware of company attendance expectations and policies. Nonetheless, Wicklander repeatedly failed to comply with company rules and received a series of progressive disciplinary steps including four warnings, three suspensions, and a last-chance admonition. According to the Employer, the fact that Wicklander failed to correct his behavior in spite of these disciplinary measures indicates that the further application of progressive discipline would have been fruitless. By the Employer's count, Wicklander had amassed 22 violations of the Employer's Attendance Guidleines by April 20, 2007 which exceeds the Attendance Guidelines stated grounds for discharge. Finally, the Employer claims that it has not acted disparately in discharging Wicklander under these circumstances.

Union Position:

The Union maintains that the Employer's discharge decision is not supported by just cause under the circumstances of this case. The Union asserts that seven of the alleged time and attendance incidents recorded by the Employer should not be counted against the grievant with the result that the remaining tally of fifteen violations does not constitute grounds for termination under the Employer's Attendance Guidelines. The Union additionally argues that even if some discipline is warranted, the ultimate sanction of discharge is excessive for two reasons. First, the Union argues that the Employer acted disparately in discharging Wicklander while not taking similar action with respect to several other employees with similar or worse records. Second, the Union contends that Wicklander was making significant improvement in correcting his time and attendance problem as evidenced by the fact that he went more than two and one-half months prior to April 30, 2007 without a single break, tardy or attendance problem.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* Elkouri & Elkouri, HOW ARBITRATION WORKS 948 (6th ed. 2003). Both of these issues are discussed below.

A. The Alleged Misconduct

It is clear that the grievant has not met the Employer's time and attendance expectations. The Employer put Wicklander on notice of the importance of arriving at work when scheduled as a crucial component of the Employer's customer service philosophy. Wicklander, nonetheless, continued to accrue numerous time and attendance violations during his period of work at the Ford Parkway store despite four warnings and three suspensions given in an attempt to correct such behavior.

The Employer claims that Wicklander violated the Attendance Guidelines on 22 occasions from April 30, 2006 to April 30, 2007. The Union argues that the facts and circumstances warrant a finding of only 15 violations. Based upon a review of the record and the parties' respective arguments, I conclude that Wicklander committed a total of 19 violations over the rolling one-year period ending on April 30, 2007. I reach this conclusion by crediting each of the employer's alleged violations with the exception of the three following incidents:

> 4/30/06 – This initial tardy should not count under the Attendance Guidelines since it falls off as outside the rolling 12 month period as of April 30, 2007.
>
> 6/11/06 – Wicklander's testimony that he obtained permission to leave this shift early due to illness from the manager on duty was not refuted by any other evidence in the record; and
>
> 11/10/06 – Wicklander received permission to use a personal leave day to attend a funeral on this day even though it was not formally required by the funeral leave provision of the collective bargaining agreement. Since Wicklander was approved to use paid leave, this absence should not count as a negative incident for purposes of the Attendance Guidelines.

The evidence submitted by the Employer, accordingly, clearly establishes that Wicklander committed serious and repeated violations of the Employer's time and

attendance policies. This misconduct certainly establishes the foundational basis for some sort of disciplinary sanction.

B. The Appropriate Sanction

The employer points out that a total of 16 absences and/or tardies in a rolling 12 month period is the general benchmark established by the Attendance Guidelines for termination. Although the standards set out in the Guidelines were not established through collective bargaining, the Guidelines appear to constitute a reasonable work rule not inconsistent with the parties' collective agreement. Wicklander's 19 violations of the Attendance Guidelines in this instance, accordingly, evidences a presumptive basis supporting the Employer's discharge decision.

The Union, nonetheless, convincingly has demonstrated two ameliorating factors in this case that make a lesser disciplinary sanction appropriate. First, the Union produced documentary evidence through the testimony of Business Agent Jennifer Christensen showing that several other employees with attendance records similar to or worse than that of Wicklander were not terminated. This evidence shows, for example, that three other employees amassed more than 30 time and attendance violations each during calendar year periods encompassing 2006, yet received no more than suspensions in the range of one to three days. As stated in Elkouri & Elkouri, HOW ARBITRATION WORKS 995-96 (6th ed. 2003):

> It generally is accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner, all employees who engage in the same type of misconduct must be treated essentially the same. . . .

In this instance, the undisputed evidence in the record is to the effect that the discipline that the Employer imposed on Wicklander is not consistent with the treatment of other similarly situated employees.

Second, the record demonstrates that Wicklander was making important strides to correct his time and attendance problems during the period prior to his discharge. Although it is admittedly true that Wicklander's attendance record over the course of the year preceding April 30, 2007 was quite poor, he appears to have made a concerted effort to improve performance following the February 3 last chance warning. Following the February 7, 2007 day care problem, Wicklander experienced no additional time and attendance missteps until the shift snafu of April 30, 2007. This represents a violation-free period in excess of two and one-half months. This stands in marked contrast to his earlier record and suggests that the Employer's progressive discipline may have had its intended effect.

In light of these two ameliorating circumstances, the termination should be reduced to a significant suspension. The grievant, however, should understand that this second chance likely is conditioned upon a future pattern of good behavior. If significant time and attendance problems should reoccur, his continued employment will be in serious jeopardy.

AWARD

The grievance is sustained in part and denied in part. The Employer had just cause to discipline the grievant, but the sanction is reduced to a suspension of ten (10) days without pay. The Employer is directed to reinstate the grievant and to make him whole for any resulting loss in pay and benefits less any compensation earned in

mitigation. The Employer also is directed to correct the grievant's personnel files to reflect this determination. Jurisdiction is retained for a period of sixty (60) days from the date of this award to address any remedial issues as may be necessary.

Dated: November 20, 2007

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Stephen F. Befort
Arbitrator