

IN THE MATTER OF ARBITRATION BETWEEN

HONEYWELL INTERNATIONAL)
"Employer")
AND) FMCS Case No. 0605-55832-7
TEAMSTERS LOCAL NO. 1145) Rane Johnson Discharge
"Union")

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: December 8, 2006; Coon Rapids, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: January 4, 2007

APPEARANCES

FOR THE EMPLOYER: Chuck Bengtson, Labor Relations Manager
Honeywell International
2600 Ridgeway Parkway, MN17-3100
Minneapolis, MN 55413

FOR THE UNION: Martin J. Costello, Attorney
1230 Landmark Towers
345 St. Peter Street
St. Paul, MN 55102
Rane Johnson, Grievant

THE ISSUE

Was the discharge of the Grievant for just cause?

If not, what should the remedy be?

FACTS

Honeywell International, Inc. (“Company” or “Employer”) is a technology and manufacturing corporation, serving customers worldwide with aerospace products and services; control technologies for buildings, homes and industry; automotive products; turbochargers; and specialty materials.

The Company is divided into different geographic operations areas. One of these is the Minneapolis Operations area which has over 1,700 union employees in the city of Minneapolis and surrounding suburbs. The production employees are members of the International Brotherhood of Teamsters, Local No. 1145 (“Union” or Teamsters”).

The Grievant is a 51 year old divorced woman. She graduated from Coon Rapids High School in 1974, and went to work almost immediately for Honeywell with a seniority date of January 23, 1974. She has worked in various capacities for the Company throughout her 32 year career, almost always in assembly. Johnson has never been disciplined for production or misconduct related issues; only absenteeism.

The present matter deals with a termination for unexcused absences which the parties call “lost hours.” Lost hours create other employees to work overtime and may cause the Company to deny vacation bids to other employees or to cancel vacations already scheduled.

The Company operates on a tight schedule with suppliers and customers. Lost hours affect the timing of production lines and can cause either a backlog of parts and materials waiting to be turned into products, or a shortage of products to be shipped to the Company’s customers.

To address lost hours, the Company established the Time and Attendance Policy. The Time and Attendance Policy, in conjunction with the Discipline Policy, provides when and how employees can be disciplined or discharged for unexcused absences from work. The Discipline Policy operates through a demerit system, with a first degree demerit being the lowest level of discipline and a fourth degree demerit being the highest level.

The Time and Attendance Policy includes ways employees can avoid getting lost hours. One of the ways is called “instances.” Each employee has five instances per year when they can take unapproved vacation and not have the time count as lost hours. Other ways of avoiding lost hours involve medical reasons. The Company authorizes medical leave under the Family Medical Leave Act, personal leave for medical reasons, and Weekly Indemnity Leave.

Ranee Johnson (“Grievant”) was hired by the Company on September 13, 1999. She was a Labor Grade 7 Avionics Assembler at the Coon Rapids facility. During her employment with the Company, the Grievant had a series of medical and personal difficulties that contributed to her attendance problems.

In April of 2004, all employee lost hours were reset. Each employee, including the Grievant, started at 0 lost hours. By November of 2004, she used all of her 240 hours of accumulated vacation, had taken over 475 hours of disability/FMLA leave, and had been given

40 hours of disciplinary suspension. She had also accumulated 86.16 lost hours. Grievant was discharged for excessive absences on November 22, 2004.

The Union filed a grievance over the discharge. At the Step 2 grievance meeting, the Company agreed to reinstate the Grievant. Terry Hanson, her supervisor, testified that the Grievant's medical and personal problems were the main reasons she was reinstated. The conditions of Grievant's reinstatement included rolling her lost hours back to 79, giving her a fourth degree demerit, and that she seek treatment for her health problems. The Grievant returned to work on December 6, 2004.

In April of 2005, all employee lost hours were again reset. On May 26, 2005, the Grievant was discharged for a second time for time and attendance problems. She had come late to work four times, and this offense coupled with her previous fourth degree demerit caused the discharge. The Union again filed a grievance over the discharge. During mediation of the grievance, a settlement was reached and the Company again agreed to return the Grievant to work. Hanson testified that the settlement was, again, an accommodation of the Grievant's medical and personal problems. The settlement was written out in agreement form. The Grievant, Union representatives, and Company representatives signed the agreement. It called for the Grievant to continue her treatment and provide documentation to the Company. It also required her to adhere to the department vacation policy and further stated, "The accumulation of 20.37 hours between reinstatement and March 31, 2006 will result in immediate discharge." During the mediation session, the Grievant was advised that her department was on vacation restrictions.

Grievant was to return to work on June 13, 2005. She did not come to work, but called to request vacation time. This was denied due to the vacation restrictions and resulted in her first "instance." She then called in on June 16th, 17th, 22nd and 23rd, using her remaining four instances. Grievant next called in and requested vacation on July 25th and 26th. These were not approved and resulted in her receiving 16 lost hours.

On August 8, 2005, a meeting was held between Hanson, Grievant, and her Union representative. Grievant was informed that she had accumulated 16 lost hours and would be given a written warning. She stated that she thought the time would be covered as FMLA time, and it was decided to wait to see if that determination was made. On August 12, 2005, another meeting was held between Hanson, Grievant, and her Union representative. The 16 hours of lost time accumulated were not covered by FMLA because she had used all of her FMLA time for the year. She was then given the written warning. The Union did not file a grievance over the written warning.

Vacation restrictions for the department were lifted for the week of August 15th through August 19th. Vacation restrictions would resume on August 22, 2005. Grievant's group leader, Dave Wilkerson, testified that he told her personally about the restrictions being lifted for one week only, and that the restrictions would resume on August 22nd.

Grievant took one-half day of vacation on August 15th, and then took August 16th, 17th, 18th, and 19th off as vacation. On August 22nd and 23rd, she called in for vacation when the

vacation quota was full. After confirming with Wilkerson that Grievant had been told the restrictions were lifted for only one week, her vacation was not approved and she was charged 16 lost hours.

On August 24, 2005, Grievant returned to work. She and her Union representatives had another meeting with Hanson. Grievant was advised that she had accumulated 16 additional lost hours. This amounted to 32.01 lost hours since her reinstatement, 11.64 hours more than allowed under the mediation settlement. Hanson informed Grievant she was going to be discharged. Grievant claimed that she did not know the vacation restrictions were only lifted for one week. The Company's position is she had been told the restrictions were only lifted for one week, and further, all other employees had complied. She was then discharged.

In the year prior to her discharge, Grievant had used 224 of 240 hours of her vacation, she had used all of her 680 hours of FMLA leave, she had served 135 hours of disciplinary suspension, and she had accumulated 70.24 hours of lost time.

The Union filed promptly the grievance herein arbitration.

APPLICABLE CONTRACT PROVISIONS

The Employer and the Union are subject to a Collective Bargaining Agreement ("Agreement" or "CBA"), effective February 1, 2002 through January 31, 2007. The Agreement prescribes the terms. Article XIX, Section 7, of the CBA, contains the discharge provisions of the Agreement:

The Company shall have the exclusive right to discipline, suspend, or discharge employees for just cause. In case of a discharge, reasonable notice shall be given to the departmental committee member prior to the discharge. The Union agrees to 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.

Article IX, Vacations, sets the number of days of earned vacation and procedures for requesting time off:

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...shall receive paid vacation time off in accordance with the Vacation Schedule...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.

No other procedures exist for requesting vacation; rather, the Company goes by practice and verbal direction from supervisors.

POSITION OF THE COMPANY

The Company had just cause to discharge the Grievant for excessive absences. Therefore, the grievance should be denied. Article XIX, Section 7 of the labor agreement states, "The Company shall have the exclusive right to discipline, suspend, or discharge employees for just cause."

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 termination decision. This inquiry typically involves two distinct steps. The first 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 by a preponderance of the evidence, the remaining question is whether the level of discipline imposed is appropriate in light of all the relevant circumstances.

Law Enforcement Labor Services v. Steele County, BMS 06-PA-620(2006)(Befort). Arb.

Behavior Warranting Discipline: The discharge of the Grievant should be upheld because she violated the Time and Attendance Policy and the terms of the mediation settlement agreement by accumulating 32.01 lost hours. Many arbitrators have dealt with employee attendance issues:

Arbitrators have long recognized an employer's legitimate interest in controlling employee attendance, even if it involves ultimately discharging employees for excessive absences due to illnesses or injuries. Even though such circumstances may be beyond the control of employees, employers' business interest in being efficient and competitive may warrant the maximum discipline in some cases.

The Company and the Union have previously arbitrated excessive absences/terminations:

Although simply counting absences without consideration for the reason for them can produce results that may seem very harsh and even inhumane, as the Union contends, there is a point at which an employer may justifiably conclude that an employee is simply excessively absent. This is because an employer must have a reliable workforce in order to maintain its own viability for the good of all concerned. The Company's Time and Attendance Policy, by providing that many categories of absence will not be counted against employees and that employees may accumulate a substantial amount of unexcused absences without risking their employment, strikes a reasonable balance between consideration for employees and the Company's own needs.

Honeywell International, Inc. v. Teamsters Local 1145, B-3 (2002)(Bellman, Arb.)

The Company, the Union, and Grievant agreed that the point where termination would occur was the accumulation of 20.37 lost hours. The parties signed a mediation settlement agreement to this effect, Grievant accumulated 32.01 lost hours and was discharged.

Grievant was terminated twice for time and attendance problems prior to the immediate discharge. Each time, the Company considered her medical situation and her personal circumstances and took her back.

During the year prior to her most recent discharge, she used almost all her earned vacation time, 224 of 240 hours; and all of her twelve weeks of FMLA leave; plus she accumulated 70.24 hours of lost time. The normal work year for Honeywell employees is 1,984 work hours per calendar year. In the year prior to her discharge, Grievant was gone 974.24 hours or 49% of the time she was expected to be at work. This time away from work did not include the 136 hours she served in disciplinary suspensions. Clearly, the Company accommodated the Grievant and tried to work with her to address her medical and personal issues.

The Company gave Grievant a second chance and then a third. Rather than choosing to work with the Company to ensure her continued employment, from the moment she was reinstated after her second discharge, Grievant began the process that led to her current termination. She failed to report to work on June 13th, when she was scheduled to return causing her to use one of her instances. She used her remaining four instances within ten days. She tried to use vacation on July 25th and 26th when the vacation quota was full. This caused her to accumulate 16 lost hours and she was given a written warning. After the vacation restrictions were listed for the week of August 15th through 19th, Grievant took the whole week off. She then tried to take vacation on August 22nd and 23rd, when she knew that there were vacation restrictions in force. This resulted in Grievant accumulating 16 more hours of lost time and her discharge.

At the hearing, the Union claimed that the lost hours did not reach the termination threshold because the first two dates she called in should not have been counted as instances. The Union gave no reason the first two dates should not count, however. This argument is barred because the Union never challenged the written warning given to the Grievant for accumulating the first 16 lost hours.

This written warning was given for lost hours accumulated after Grievant's five instances were used. If the Union wanted to challenge the instances, the written warning was that the 16 lost hours may be covered by FMLA. When it was found that she had used all her FMLA leave, the discipline was given and not challenged at the time. Since the Union never raised the issue in the first discipline, it cannot now claim it for the discharge.

Level of Discipline: Having determined that Grievant accumulated excessive absences, the next step is to determine if the level of discipline is appropriate.

The discharge of the Grievant was not excessive, unreasonable, or an abuse of management discretion. The Company, the Union, and Grievant reached an agreement through mediation which "the accumulation of 20.37 hours between reinstatement and March 31, 2006

will result in immediate discharge.” By August 24, 2005, she had accumulated 32.01 lost hours. By operation of the negotiated settlement agreement, the discharge of the Grievant was the appropriate penalty.

The Company acted in accordance with its Time and Attendance Policy. The Company and the Union have arbitrated cases similar to the current matter. In the past, the parties used a single arbitrator to hear all cases. The three arbitrators to serve in this capacity in the last thirty years have all ruled on situations similar to Grievant’s discharge.

In a 1983 award, Arbitrator Christenson upheld a discharge of an employee for an unexcused absence of two days while on a 4th degree demerit. In upholding the discharge he wrote:

[The employee] suffers from asthma and attributes her attendance problem to her difficulty in dealing with her illness. She suggests that she might switch to second shift to help her get to work on time. She also has an ulcer problem which she says was involved in some of her attendance lapses. The T and A record that [the employee] has compiled is ample cause for discharge. The Company has applied progressive discipline in an attempt to get her to correct her problems. Her medical problems, though real, cannot explain the record she has compiled.

In another award, Arbitrator Bellman upheld the discharge of an employee who had been returned to work by a previous arbitration award issued by Arbitrator Christenson with a 4th degree demerit and on the specific condition that she obtain appropriate medical treatment for her clinical depression and follow through with the treatment. After returning to work, the employee accumulated excessive absences and was discharged again. Arbitrator Bellman wrote:

It is not difficult to understand why the Grievant was unable to perform responsibly as an employee. The Arbitrator recognizes that the strong plea made by the Union in her behalf is grounded in humane values and not in disrespect for proper work conduct. It is also noted, based on the Grievant’s conduct subsequent to her discharge, that she now seems to be complying with the conditions of her reinstatement. Nevertheless, given the terms of her reinstatement, the length of her employment by the Company, the Arbitrator cannot conclude that her discharge was without just cause.

In another award Bellman dealt with another employee who had been returned to work after a previous discharge. The employee had been discharged of excessive absences with the final absence occurring when a gas leak threatened his home. Because of the employee’s seniority, the Arbitrator reinstated him without back pay. Upon reinstatement, the employee continued his poor time and attendance and was discharged a second time. In upholding the discharge, Arbitrator Bellman wrote, “Clearly the grievant has not learned, despite his previous discharge and reinstatement, than the must manage his attendance so that when he is compelled by circumstances to be absent from work, he will be able to draw on the Company’s Time and Attendance Policy to cover such a situation.”

Arbitrator Simkin similarly upheld the discharge of an employee who had been reinstated after a prior discharge for time and attendance problems. The employee was reinstated and immediately had more time and attendance problems. He was tardy seven different times and was specifically warned by supervision about his behavior. He was ultimately discharged a second time. In upholding the second discharge, Simkin wrote:

Award No. S-730, in Comment 4, characterized that case as a “last chance” case for reinstatement. Moreover, that case noted that...he must correct his tardiness and absentee record. His failure to do so, the specific supervisory warning on August 11, two times of tardiness almost immediately thereafter, and his total record, provide no sound basis for reinstatement now.

Like these prior arbitrations, depression or other medical reasons may be at the root of Grievant's problem. However, the time and attendance record that she has compiled is ample cause for discharge. The Company has applied progressive discipline, including two previous discharges, in an attempt to get her to correct her problems. She failed to correct her time and attendance problem in spite of specific supervisory warnings and the progressive discipline. Given the terms of the Grievant's reinstatement under the mediation settlement, there was just cause for her discharge and no sound basis exists for reinstatement.

The Union made several claims to sway the Arbitrator and overturn the discharge. The first claim was that the Grievant did not know that the vacation restrictions were only lifted for one week. This claim was refuted by the testimony of Group Leader Dave Wilkerson. Wilkerson, who is also a Union member, credibly testified that he told Grievant personally the restrictions were only lifted for one week, and that they would be reinstated on August 22, 2005. Grievant admitted that she remembers the conversation, but not what was said. Obviously, she has a motive for not remembering the conversation. Wilkerson, on the other hand, does not even work at the Coon Rapids facility any longer, and has no reason to fabricate what was said. In fact, his credibility was strengthened when he testified he did not remember his exact words, but only the substance of what he told Grievant, he stated he did not remember which employee was standing with the Grievant when he spoke with her. Clearly, if someone was going to create a story, they would have all details covered.

The second claim made by the Union was that Grievant was having medical and personal problems; therefore, her excessive absences should be excused. This argument fails to acknowledge the accommodations the Company made during her employment. Grievant was brought back from discharge on two occasions in consideration of her situation. She was given FMLA leave, and she used all 12 weeks each year. In addition, the Company allowed her to use most or all of her vacation during the years before her discharge, even though vacation restrictions were in place. The Company clearly tried to work with the Grievant but it is reasonable to expect the Company to simply pay her for not coming to work. Finally, Grievant, along with her Union, agreed to the threshold for her discharge.

The final Union argument was that the Grievant's long service and her access to her pension should be considered. Pursuant to the Pension Benefit Agreement, Grievant is fully vested in her pension and has not lost this due to her discharge. At the hearing, the claim was

made that Grievant had only two years left to reach the highest pension level. The Union's argument seems to be to have the Arbitrator reinstate Grievant to enable her to reach a higher payment level in the pension plan so she can retire.

This argument to create a bridge to full pension has no merit. If Arbitrators reinstated employees just so they could get a pension, no employee misconduct could ever result in discharge.

Grievant has not learned, despite her previous two discharges and reinstatements, that she must manage her attendance so that when she is compelled by circumstances to be absent from work, she will be able to draw on the Company's Time and Attendance Policy to cover such a situation.

POSITION OF THE UNION

Grievant has a history of serious physical and psychological problems that have caused nearly all of her lost time. She suffered from neck, shoulder, and back pain as early as 1999, had respiratory problems starting in 2000; a wrist injury in 2001; a head injury sustained in a fall from a horse in 2003; multiple injuries to her head and body from a car accident in January 2004; injured ribs and back from a fall on ice in January 2005; concussion and dizziness from a fall from a horse in April 2005; an ongoing history of depression and chronic fatigue dating prior to 2000 and aggravated by her mother's death in 2003 and further aggravated by her divorce in 2004.

She was diagnosed with major depression in September 2003 and again in January 2005 and February 2006. She was treated for chronic fatigue in 2004. Outpatient therapy in November 2004 for depression. With medication, Grievant finally realized some improvement, as noted by her doctor in May 2006.

Prior to August 15, 2005, the Grievant's supervisor, Terry Hanson, told the Grievant's group leader that he was going to relax the amount of vacation people could take in the Coat and Rails Department for the next two weeks, because they were low on work. Grievant said she overheard this conversation but was never formally told of any change in policy. Hanson stated in the investigation, that he told the Committee about relaxing vacation limits, but the Committee denies having been told this by Hanson or anyone else. There had already been a period of frequent changes in vacation policy in reaction to pending layoffs, and these changes had been communicated verbally. Because she had vacation days available, the Grievant took August 15-19, 2005 as vacation days, following the established call-in procedure.

Believing that vacation time was relaxed during the following week as well, and knowing she still had available vacation days, on August 22 and 23, 2005, Grievant called in giving notice that she would be taking these two days as vacation days. No one called her back to inform her that she could not take these days as vacation days, notwithstanding that Hanson had previously informed his crew that he would call people back if their vacation was not granted. When

Grievant returned to work on August 24, 2005, she was informed she would be terminated for missing these two days.

Since Grievant adjustment of medications in the summer of 2006, she has had a remarkable recovery. Her doctor's notes of August, 2006, stated: "Much brighter affect, surprising herself. Pt is working, moved and financial pressures are somewhat less and this heartens her. Pt is close to her daughter and doing well regarding this. This is the brightest this MD has seen Pt, goal-directed and euthymic."

Since January 2006, Grievant has been employed by Twin City Security, which placed her for most of 2006 as a gate guard at Menard's. Her attendance and punctuality have been excellent at Twin City Security. She has been neither tardy nor absent once, as attested to by her current employer: "Ranee [sic] Johnson has been an employee with Twin City Security since January 5th, 2006. During this period to date, Ranee has not been late for any scheduled shift and has not missed any time from her scheduled days."

Although her current position at Twin City Security has alleviated some of the loss, Grievant has nonetheless incurred a reduction in salary, benefits and contractual protections as a result of her termination. Due to the loss of her position at Honeywell, Grievant has had to sell her home, reduce expenses, and take in a roommate.

The severity of this decision is apparent in this case of a 51 year old worker and a 32 year Honeywell employee. Given the severity of the termination and the corresponding burden imposed on the Employer to justify it should be correspondingly heavy.

In discharge cases, therefore, a significant quantum of proof is required to show not only that the grievant did the act alleged, but also that the act justifies discharge. Although just cause has no universally accepted definition, arbitrators often determine the existence of just cause by applying the famous "Seven Tests," as follows:

1. Is the rule under which the grievant was discharged reasonably related to the safe and efficient conduct of the business?
2. Was the rule clearly expressed and effectively promulgated?
3. Did the company conduct a fair investigation into the facts?
4. Do the facts establish the guilt of the grievant?
5. Does the penalty of discharge fit the proven offense?
6. Has the grievant been afforded even-handed disciplinary treatment?
7. Has the employer either condoned such behavior in the past or otherwise entrapped the grievant into believing such conduct was acceptable?

Application of the Seven Tests to this case makes apparent that Honeywell did not have just cause to terminate Grievant. Rather than examine the particular circumstances surrounding the Grievant's absence, the Employer merely counted dates and automatically imposed the maximum penalty. Such a perfunctory assessment of discipline is inconsistent with just cause. Moreover, when the particularized facts surrounding Grievant's absence are fully examined, it is apparent that no discipline is appropriate, much less discharge.

The Employer terminated the Grievant for missing two days of work, without any consideration of the circumstances surrounding her absence, treating the absences with a “strict liability” approach inconsistent with the principle of just cause. An examination of these circumstances reveals that the Grievant should not be deemed in violation of any rule on these dates.

Grievant is essentially a victim of the Employer’s inconsistency and ambiguity regarding vacation time availability. Just prior to August 2005, the Employer had repeatedly changed its policy regarding vacation time in response to reduced workload. The Grievant learned of a relaxation of vacation restrictions, and took time off to which she was entitled pursuant to that vacation policy. Although it is clear the lead person on the Grievant’s shift was required to give notice about any changes in vacation policy, what Wilkerson told Grievant was confusing at best. Indeed, the instructions about taking vacation time in August 2005 that were presented in this hearing were vague. What is clear is that Grievant’s vacation during the week of August 15, 2005 was according to policy and was never the source of any discipline by the Company. But for the two days taken as vacation in the following week, the Grievant would not have been terminated.

Any misunderstanding about vacation policy during the fourth week in August was the result of the Employer’s ambiguity. In fact, the Grievant followed the written procedure and the informal, verbal procedure as she understood it. She gave timely notice each day of her intent to take vacation time, and no one on the Employer’s side sought to correct her. The rule asserted by the Employer as not “clearly expressed and effectively promulgated,” such that the Grievant was “entrapped...into believing such conduct was acceptable,” and, therefore, the Seven Tests for just cause are not satisfied by the facts in this case.

Having created a misperception about the rigidity with which the vacation policy would be applied in August 2005, the Employer had the duty to affirmatively correct the Grievant. Instead, it simply allowed the Grievant to miss the two days in question, and summarily terminated her once she returned to work. The Employer cannot rely on circumstances it created to establish just cause for the Grievant’s termination. The vacation policy was not clearly expressed to Grievant, nor was it effectively promulgated, such that essentially Grievant was entrapped into believing her conduct on August 22 and 23 was acceptable.

The Employer failed to prove that the policy under which it fired Grievant was both reasonable and reasonably applied. Honeywell’s attendance policy attempts to quantify the just cause requirement of the CBA by assigning a numerical level of demerit to a quantity of time lost. The Union does not contend that the Company’s no fault absenteeism policy is per se unreasonable. However, because by strictly adhering to the attendance policy to support terminating Grievant the Employer did not abide by the CBA’s just cause requirement, the attendance policy was unreasonably applied.

Further, because the policy was unilaterally imposed the Union employees by the Employer, it must be strictly construed against the Employer. The CBA Article I, entitled Recognition, establishes the Union as the “sole collective bargaining agency” of the covered

employees. The Employer makes no claim that its quantitative attendance scheme was ever negotiated with or agreed upon by the Union. The Union agrees that the Employer has the right to set a reasonable attendance policy, but rejects the notion that just cause can be thus quantified. Just cause is a concept requiring individualized application to the particular circumstances of each and every grievant's case.

The only way to reconcile a no-fault attendance policy with the parties' contract is to superimpose a de facto just cause requirement upon the attendance policy, to provide for equitable exception to the program's virtually automatic imposition of penalties.

The particular circumstances leading to this accumulation of lost hours and issuance of demerits demonstrates that just cause does not exist to support the discharge of Grievant because the attendance policy or Mediation Agreement under which she was discharged was neither reasonable nor reasonably applied. Grievant's mistaken belief she was on vacation on August 22 and 23, 2005, clearly show why Honeywell's attendance policy must be subject to a just cause review. But rather than consider the unique circumstances to determine whether just cause existed to terminate the Grievant, the Employer simply categorized the August 22 and 23 vacation days as time lost and terminated her.

At a minimum, the Employer was required to interpret the attendance policy to conform to the CBA's just cause requirement. A proper application of the attendance policy in light of the just cause principle to which the Company is bound required assessment of the two days off under all the circumstances. That is, the Employer should have asked whether the two days were properly characterized as time lost because Grievant did not have vacation time to cover the two days; whether discharge for taking two days off furthered the purpose of the attendance policy; whether discharge for taking two days off violated the spirit, as well as the letter, of the mediation agreement; and whether Grievant's two days off caused prejudice to the Employer. Such an analysis would have been an appropriate examination of the circumstances in light of both the attendance policy and the just cause principle. Because the Company failed to do so, its action in terminating Grievant cannot be sustained.

Grievant's termination followed an investigation that was neither full nor fair. The Employer chose to terminate the Grievant solely on the basis of her absence for two days. It did not investigate the reason for her absence, notwithstanding that she called in and announced her absence both days, an act which, according to the Employer, mandated termination. Grievant was aware of the duties under her return-to-work agreement; it strains logic to suggest she would then blatantly violate the agreement. The Grievant tried to explain that she understood these days to be under rules of relaxed vacation time, but the Employer rejected this claim outright.

The well-established principle of just cause is expressly incorporated into the parties' Agreement. The Employer cannot simply dispense with just cause by implementing a no-fault attendance policy that allows termination based on a quantification of misconduct. It is uncontested that prior to 2000, Grievant had an excellent disciplinary history. For 32 years, she provided Honeywell with good and reliable service. Lengthy service for the Employer should operate in Grievant's favor. Years of service to any employer are deposits of good will from which an employee should be allowed to draw. A temporary departure from that history,

especially under the circumstances presented in this case, is insufficient grounds to ignore the lengthy tenure, loyalty, and work record of the Grievant.

The idea of “making the employee whole” is particularly crucial for Grievant, a 51 year old employee with known health issues, who was close to eligibility for optimum pension benefits at the time she was discharged. Grievant's termination has not only denied her income for a period of time while unemployed, it has also denied her several months of valuable time and payments that otherwise would have been credited to her pension. In order to make this Grievant whole, a back pay award must be coupled with an explicit award crediting her with the lost time and wages for the purpose of calculating progress towards vesting in her pension plan, as well as directing the Employer to make the payments to the Grievant's pension that it would have made during the period of time she had been terminated from her position.

Thus, the Arbitrator should find no just cause for termination and direct the Company to make Grievant whole with a back pay and pension-credit award.

DISCUSSION AND OPINION

The term “just cause” as used in the arbitration of discharge cases covers both substantive and procedural, i.e., due process considerations. Substantive just cause refers to the subject matter or charge on which the discharge is based, i.e., the rule of conduct, performance standards or employer policy. Thus, the issue of substantive just cause asks whether the offense, per se, warrants discharge because of its seriousness.

Procedural just cause raises issues of industrial due process protections which employees may enjoy as a matter of contract, law, or arbitral tests of fair play in the employment relationship. The oft-cited, Seven Tests of Just Cause¹ are mainly directed at due process protections and provide a useful guide to analyses of discharge arbitrations.

In reference to the matter at hand, the substantive due process test raises the question of relevant facts – specifically did the Grievant violate the mediated settlement agreement that set the level of 20.37 lost hours as the point where she would be terminated by actually accumulating 32.01 lost hours?

The Company's response to the question of fact recounts the following calculation of lost hours during the period covered by the settlement agreement.: Failure to report June 13 – 1 instance; used remaining four instances in the next 10 days; tried to use vacation on July 25 and 26 when vacation quota was full (16 lost hours); tried to take vacation on August 22 and 23 when vacation restrictions in force (16 lost hours). Result – Exceeded the settlement level of 20.37 lost hours.

The Union argues that the dates of August 22 and 23 should not have been charged as lost hours against the Grievant due to lack of clear and certain notice that these were not available to her as vacation days. This line of argument relates to a procedural challenge by the

¹ Koven, A.M., Smith, S.L., Just Cause: The Seven Tests, BNA Books, Washington, DC (1992).

Union rather than to any assertion that the count of lost hours was substantively incorrect. Thus, on the face of the matter, the Company has presented a prima facie case for substantive just cause. Therefore this review turns to the Union's affirmative defense which is based on claims of certain procedural flaws in arriving at the discharge decision.

The threshold challenge by the Union is to the legitimacy or enforceability of the Honeywell Attendance Policy on the grounds that, in the absence of negotiations and membership ratification, the rule under which the Grievant was discharged lacks force and effect. The short answer to this position can be found in the mediated settlement which reinstated the Grievant to employment after her prior termination for poor attendance.

Obviously, the Union signed off on that mediated settlement which set the back to work condition of the 20.37 lost hours level beyond which final termination would occur. Even in the absence of this negotiated settlement with its attendant conditions, however, nothing in the parties' collective bargaining agreement requires that the Company negotiate the terms of its attendance policies.

It should be observed in this regard that while not required to negotiate the terms of its attendance policy, the Company, of course, remains obligated to apply said policy subject to the just cause requirements of the labor agreement. Any argument that the "no fault" nature of the Honeywell attendance policy is per se arbitrary lacks merit. Comparable no fault attendance policies are now common in industry and have been held to be reasonable by an overwhelming majority of arbitral authority.

It is at this juncture that the procedural issues in this case must be reviewed. Certainly, the Honeywell Attendance Policy fully meets the test of being related to the safe and efficient conduct of the business. It has been truly and incisively stated that even reasonable rules must be reasonably administered, which opens the question of whether those rules were clearly expressed and effectively promulgated in regard to the final two days of lost hours charged against the Grievant.

This determination resides at the heart of this entire case because it was the lost hours on August 22 and 23 which represent the amount of excess time beyond the 20.37 lost hours agreed upon as the limit beyond which termination occurred.

The due process test of clear expression and effective promulgation of the rule, relied on as just cause for discharge when violated, covers the right of an employee to due and timely notice of the consequences of violating such rule. The undisputed facts show that the Company in this case fell well short of meeting the facet of due and timely notice.

In the first instance, the record is unclear as to exactly what former group leader Dave Wilkerson told the Grievant about the status of vacation restrictions projected for the final week of August. Wilkerson admitted on cross examination that he couldn't remember what he told the Grievant at the time but merely the substance of his conversation. He testified that he believed that he conveyed the message that the vacation restrictions were only lifted for one week.

Absent reasonable specificity as to how he expressed this information such as the exact time frame he referenced it cannot be concluded that he gave the Grievant clear and timely notice of her obligation to be at work on August 22 and 23, much less timely warning of the consequences for her failing to do so. In plain fact, the Grievant's subsequent actions demonstrate that she obviously never understood that these dates were not available to her as vacation days nor that she would lose her job for not showing up for work on these days.

The Grievant's confusion over the status of vacation restrictions can be inferred from the fact that she duly notified her supervisor of her intent to use August 22 and 23 as vacation dates. It simply makes no sense that she would do so if Wilkerson had indeed clearly communicated to her that these dates were restricted and thus unavailable for vacation day bid.

Even more to the point, it is inconceivable that the Grievant would have knowingly forfeited a job she'd held for 32 years if she were made to understand that missing the workdays in question meant automatic termination of employment. These facts raise the dispositive question of why neither her supervisor, her group leader, or anyone else in management gave timely warning to the Grievant when she stated her notice of intent to take those two critical days as vacation time that it would cause her to be fired if she did so.

When this crucial question was posted at the hearing of this matter, the entirely inadequate response was that it was not Company policy to notify employees when vacation time they gave notice of intent to take off had not been approved. Supervisor Hanson, however, admitted he had previously told the crew he would notify people if their vacation bid was not granted. He certainly never carried through on this promise in this case.

Perhaps this no-call back policy would have made reasonable sense if it were the case that the Grievant's supervisors were burdened with a heavy volume of calls to notify bidders that the vacation dates they sought had not been approved. When asked if this were the reason for not informing the Grievant that the Company had withheld its approval of her vacation time request, the response was that only some 8 to 10 employees reported to the one supervisor on that shift so the explanation for not notifying the Grievant of the non-approval had nothing to do with the time or effort required.

Rather, the only explanation was that it was never the Company's practice to give notice of either approval or non approval of such vacation bids – the earlier information given to the Grievant that the vacation restrictions had been lifted for only one week sufficed, according to this contention, to place her on notice that she was obligated to work on August 22 and 23. This attempted rationalization misses the mark by a wide margin.

Whatever may have been said by group leader Wilkerson or as mentioned by supervisor Terry Hanson, neither claimed that they had expressly warned the Grievant that she would lose her job if she failed to work the days in question.

The sparse facts showed that of the 8 to 10 employees on her shift in that department, only the Grievant stood to lose her job – after 32 years of service – for missing those fateful two days. Under these circumstances it cannot be said that the Company met even a minimal level of

its obligation for clear and timely notice to the Grievant of the consequences for taking off the two days in question. Accordingly it is, hereby, found that such failure of notice constitutes a fatal defect in procedural just cause.

This review ought not close without comment on the past history of patience and forbearance the Company has afforded the Grievant over the long period of her physical and emotional illness. The Grievant's long struggle with her disabling illnesses appear now to be favorably resolving just when the Employer's patience seems to have run out.

Reinstatement to her former job with reasonable confidence that the Grievant will be able to continue her long record of reliable and productive service can be expected on the basis of her year long record of perfect attendance at her most recent job with a security firm. Medical reports from the Grievant's attending physician firmly bolster the conclusion that Grievant, at long last, has enjoyed a return to health and stands ready, willing, and able to return to faithful service at Honeywell.

DECISION

- Based on the forgoing findings and conclusions, the grievance is hereby sustained.
- The Grievant shall be promptly reinstated to her former position.
- The Company shall make the Grievant whole for all loss of wages and benefits attributable to her discharge, including lost pension credits.
- The Arbitrator retains jurisdiction in this matter for a period of 90 calendar days from issuance of this award for the sole purpose of resolving any dispute over remedy.

2/9/2007
Date

John J. Flagler, Arbitrator