

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME, COUNCIL 5**

and

IMMANUEL ST. JOSEPH'S HOSPITAL – MAYO HEALTH SYSTEM

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 07-03262

JEFFREY W. JACOBS

ARBITRATOR

November 1, 2007

IN RE ARBITRATION BETWEEN:

AFSCME Council 5,

and

**DECISION AND AWARD OF ARBITRATOR
FMCS CASE 07-03262
Shirley Wiemern grievance matter**

Immanuel St. Joseph's Hospital – Mayo Health System,

APPEARANCES:

FOR THE UNION:

Tom Burke, Staff Representative
Shirley Wiemern, grievant

FOR THE EMPLOYER:

Paul Zech, Esq., Felhaber, Larson, Fenlon & Vogt
Jamie Shallock, Former Operations Mgr. with Sodexo
Tara Buboltz, HR Generalist
Farrukh Bashir, Dir. Environmental Services

PRELIMINARY STATEMENT

The matter came on for hearing on September 25, 2007 at the Country Inn and Suites Hotel in Mankato, Minnesota. The parties presented testimony and documentary evidence at that time after which the evidentiary record was considered closed. The parties submitted post hearing Briefs dated October 16, 2007.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from September 1, 2005 through December 31, 2006. Article 17 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The Parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

Whether the Employer had just cause to terminate the grievant? If not what shall the remedy be?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The Employer took the position that there was just cause to terminate the grievant for her failure to appear for work as directed and for excessive absenteeism as well as her overall work record. In support of this the Employer made the following contentions:

1. The grievant is a relatively short-term employee, having worked for the Employer for approximately 3 years. In that time, she has accumulated several disciplinary warnings regarding her spotty attendance and failure to show up for work on time as directed. She was hired in March 2004 and by August 2005 received a first warning regarding her attendance. This was not grieved.

2. In May of 2006 she received a verbal warning regarding spreading rumors about co-workers. The grievant was talking to her co-workers about other co-workers sexual behavior. This too was not grieved.

3. In May of 2006 her long-time boyfriend, not her legal husband, became ill with heart trouble and other ailments. She asked for and received FMLA leave on the premise that her "her significant other" was her husband. He is not and she was not therefore eligible to receive FMLA leave for "family member" as her significant other was not legally married to her at the time and never has been. Despite the fact that the FMLA did not mandate it, the Employer granted her this leave.

4. By August of 2006 the Employer discovered that her significant other was not her legally married husband and still they went out of their way to help the grievant out, as her significant other was having continued health problems and required constant care.

5. The Employer altered the grievant's shift to make it easier for her to take care of her significant other. The Employer noted though that her "regular shift did not always include Tuesdays off, as will become an issue later. The Employer pointed to several shifts where the grievant was required to work Tuesday such that it was not a valid assumption on her part that she would always have those days off.

6. Even though the Employer knew that her significant other was not her legally married husband, they continued the FMLA leave for her after August 2006. However, by late December, her supervisor noted that the FMLA leave would be expiring and so contacted the grievant to arrange a return to work time.

7. The grievant checked with HR to verify the date her FMLA would expire and contacted the grievant by phone to advise her of that fact and to determine a date for her return.

8. The Employer and its witnesses maintained that it was very clear that they had agreed to January 22, 2007 as her return date. The Employer's witness even called her after the initial conversation to again verify that she would return on January 22nd.

9. January 22nd came and the grievant did not appear for work. The supervisor, frustrated by this time, contacted HR to have them contact the grievant that week, which they did, to find out why she had not appeared for work as he had expected. It was only at this time that the grievant claimed that she had understood her return date to be January 29th, not the 22nd, as he had previously thought and verified with her.

10. The Employer began the process of terminating the grievant during the week of January 22nd but acknowledged that it was even willing to allow the grievant to return on the 29th. Several conversations between HR personnel and the grievant during the week prior to that verified this.

11. Early in the morning of January 29th the supervisor received a call that he was certain came from the grievant indicating that once again, she would not be in to work as she had previously promised. She called in at approximately 6:55 a.m. that day to advise the supervisor that she was leaving Rochester, Minnesota with her significant other and would "be in around 11 or 11:30." The Employer noted that the rule is that anyone calling in sick for a day of work must call in at least 2 hours prior to the shift but in this case she called in about half an hour prior to the shift.

12. The Employer argued in response to the grievant's claim that she did not make that particular call that this is simply not credible. Moreover, she did make a call to the Employer and the clear testimony is that she indicated she would be in that day. She never showed up.

13. Again, 11:30 on January 29th came and went and the grievant did not appear for work. Neither did she appear for work on the 30th as she was scheduled to. Repeated attempts to reach her went unanswered on both her home and cell phones.

14. Finally, on Wednesday January 31st she appeared for work. By this time however the Employer had had enough and moved to terminate her employment for the failure to appear or provide any reason for her failure to do so.

15. In addition to the argument that normal just cause standards should support a termination under these circumstances, the Employer pointed to a very specific provision of the labor agreement that it asserted clearly requires her termination. Article 14 Section 3 provides that "If the employee fails to report for work as scheduled, or to furnish the hospital with a justifiable excuse within twenty four (24) hours thereof, such failure to report for work shall be conclusively presumed to be a resignation from the service of the Hospital and terminate for such employees' seniority and employment." The Employer asserted that this provision creates a presumption that the grievant simply resigned from her employment and further asserted that she failed to provide any reasonable excuse for her failure to show up at any time during the week of January 22nd or on the 29th as she promised she would. Neither did the grievant provide any excuse for her failure to be at work on the 29th as promised, even if one assumes her story to be true. Further, there was no excuse whatsoever for the grievant's failure to appear on the 30th. The Employer asserted that she simply quit this job due to her continued failure to appear even when she said she would be there.

16. The Employer asserted that this specific provision compels the result here since the grievant did not appear for work on several occasions and failed to provide any reasonable explanation for why she did not appear on the 22nd.

17. Moreover, even if one assumes that there was a reasonable misunderstanding about whether the grievant was to appear on January 22nd, she admitted she knew she had to appear on January 29th. She did not appear on the 29th and provided no explanation why she did not. The Employer argued that there is little question that even if one assumes a misunderstanding about the 22nd, there was no such misunderstanding about the 29th – the grievant should have been at work and provided no reasonable excuse her failure to appear that day.

18. Moreover the grievant simply failed to appear for work even if one accepts her date of return and then failed to call or show up the next day assuming she was off that day. There was no rational basis for that assumption. As noted above, her schedule did not always have Tuesday off yet she failed to call or appear for work.

19. Finally, there was no reason for the Employer to have been so accommodating of her needs to be away from work and suddenly change all of that in January. The supervisor indicated that he could not have been clearer with her about returning to work following the end of her FMLA leave and even extended that beyond its official expiration date.

20. The essence of the Employer's case is simply that the grievant abandoned her job by repeated failure to appear for work or to call in. Given her long history and her lack of credibility, she should be considered to have resigned under Article 14. In the alternative, there was ample just cause to terminate her under standard disciplinary rules.

The Employer seeks an award of the arbitrator denying the grievance in its entirety.

UNION'S POSITION:

The Union's position was that there was not just cause for the grievant's termination and that the grievant did not abandon her job as alleged. In support of this position Union the made the following contentions:

1. The grievant has a fairly clean record despite one warning for attendance and one for the rumors noted by the Employer. In fact her evaluations have been exemplary and she is a hard working and loyal employee whose job performance is quite good.

2. In May of 2006 her significant other developed serious and ongoing health problems and literally had to be in the ER 108 times over the course of the next year.

3. The Employer accommodated her need to be with him and allowed her time off. The Employer granted her request for FMLA even after it was well aware that her significant other was not legally married to her. They had however been together for over 21 years and the Employer knew this and granted the leave. There was no “fraud” or deception of any kind here.

4. In January 2007 the grievant and her supervisor discussed the end of the FMLA leave and discussed her return to work. Nothing was ever sent to her in writing. The grievant maintained vehemently that she understood the tentative return to work date to be January 29th, not January 22nd. She maintained that she would not have said the 22nd as she already knew that she needed to be in Rochester at the Mayo Clinic with her partner for more medical treatment and testing. She claimed that she would not have returned to work only to have to leave a day or two later to be in Rochester.

5. The Union also claimed that when the HR person contacted her during the week of January 22nd, the grievant immediately explained that it was her understanding she was to return on January 29th. There was no clear directive to return to work even then, rather only an admonition that she get in touch with her supervisor to coordinate her return. She in fact tried to get in touch with him several times but he did not return her calls.

6. The grievant and the Union further claimed that she made repeated attempts to contact the supervisor during the latter part of January and that she left multiple messages with him to advise him of her status but that those calls went unanswered.

7. She intended to return to work on January 29th but, as had happened before, the medical appointments ran long and they were not discharged from Mayo until the morning of January 29th.

8. The grievant called the supervisor and left another message before 7:00 a.m. on the 29th advising him that they were still in Rochester and would be home around 11:00 or 11:30 a.m. that day. The grievant denied saying that she “would be in at 11:00 or 11:30” and denied that the taped voice mail message they played at her termination hearing was even hers. She claimed it was a male voice.

9. Further, the Union asserted that the grievant did not appear for work the following day, a Tuesday, because it was her understanding ever since she had been placed on days in July of 2006, that her regular day off was always Tuesday. She then appeared for work on Wednesday January 31, 2007 and was greeted by her supervisor with essentially open arms and a statement to the effect that he was glad to see her back at work. Hours later she was told she would be fired.

10. The Union pointed to several provisions of the labor agreement in support of the claim for reinstatement. Article 13 section 5 provides that “All requests for leaves of absence shall be in writing. Such requests shall indicate a tentative date of return subject to the maximum period authorized for the particular leave.” Here all the grievant did was to indicate a tentative date of return for January 29th. That was always subject to the vagaries of the medical treatment her partner was receiving. The Employer was well aware of this and the parties long ago dispensed with the requirement that these requests be in writing.

11. Moreover, the Union points to the rest of the sentence relied upon by the Employer from Article 14 as follows: “If the employee fails to report for work as scheduled, or to furnish the hospital with a justifiable excuse within twenty four (24) hours thereof, such failure to report for work shall be conclusively presumed to be a resignation from the service of the Hospital and terminate for such employees’ seniority and employment.” The Union pointed to the provisions allowing the employee to provide reasonable excuse for the failure to return to work and argued that in this case, the grievant did just that since she was in Rochester at a medical appointment.

12. Further, the Union argued that the grievant was ill and could not have appeared at work on January 22nd because she was in the ER. The Union produced a medical record verifying this.

13. Finally, the Union argued that the Employer should have sent her something in writing indicating when the leave was to expire and setting forth a clear expectation regarding her return to work. The long history of these events shows that the Employer and the grievant had an arrangement that allowed a very flexible return to work for her and that she had in the past believed that she could be in to work but later found she could not due to medical issues. The Employer always accommodated those and never tried to assert that she quit at those times. At the very least the Employer owed the grievant a clear unmistakable notice that this time, among all the other times, if she did not appear at some appointed hour the Employer would drop the Sword of Damocles through the top of her head, figuratively speaking of course.

14. The essence of the Union's argument is that the grievant did not abandon or quit her job. She tried repeatedly to stay in touch with her Employer and fully expected that she would be treated as she had in the past with a flexible return date.

The Union seeks an award of the arbitrator sustaining the grievance and ordering the Employer to reinstate the grievant to her former position with all accrued back pay and contractual benefits.

MEMORANDUM AND DISCUSSION

The Employer is a health care facility located in Mankato, Minnesota. The grievant was hired in March 2004 as a housekeeper. A review of her evaluations showed that her job performance, when she is there, is generally quite good. She has two previous disciplinary issues. The first is a written warning on her record for attendance problems in August 2005. The second was a disciplinary notice for spreading an unfounded rumor about co-workers and some sexual innuendo related to that. These did not form the basis for the determination of just cause for the events leading to the termination in January 2007 but were introduced to support the claim that termination was appropriate as a remedy.

The issue that precipitated the instant matter, however, started in May 2006 when the grievant's long time significant other, Bill, began having health related issues. These were apparently varied in nature and were quite serious. He was in and out of hospitals and emergency rooms literally dozens of times over the course of the next year or more. The grievant testified that he had been in ER's some 108 times over the course of a little more than a year.

Throughout these many illnesses and consequent absences from work by the grievant, the Employer worked with her to try to accommodate her sometimes erratic and unreliable schedule. The Employer never challenged the fact that Bill had a serious medical condition and that he was required to be in hospitals and doctors' offices as many times as the grievant claimed he did. Neither did the Employer ever challenge the legitimacy of the grievant's need to be with him during these visits nor of the need for her to be with him to recover and to take care of him during the many times he experienced flare-ups or other aggravations of this condition.

The Employer alleged that the grievant was less than truthful about the nature of this relationship and claimed that he was "her husband," leading the Employer to believe they were legally married when they were in fact not. The evidence showed however that she never intentionally hid the fact that she and Bill were not legally married. For purposes of this hearing, the legal niceties of whether she and Bill were legally married are not strictly germane. The evidence did show that the grievant requested and was granted FMLA leave to take care of Bill. Even after the Employer learned that the grievant and Bill were not legally married it did nothing to cancel the FMLA leave and in fact continued it for her for several months after learning of this fact. The evidence did not show that this was the basis of the discharge action here.

The evidence further showed an extraordinary effort made by the Employer to accommodate the grievant and that her direct supervisor "went the extra mile" to keep in touch with the grievant and to provide what both parties termed a "shoulder to cry on" at times. The Employer moved the grievant to a day shift, which made it easier for her to be with Bill at the times he needed care the most.

The operative events that led to the Employer's action occurred in late December 2006 and early January 2007. The grievant's supervisor noted that the grievant's FMLA leave would end soon, i.e. sometime in mid-January 2007. He confirmed with Human Resources that this was the case and then attempted to contact the grievant to determine a return to work date. She had been off work for several months as of this time. The evidence showed that the grievant was in contact periodically with the Employer through her supervisor mostly throughout the late summer and fall of 2006 and even indicated on occasion that she might be in to work. This apparently never occurred however and the Employer continued to simply carry her on leave status.

The evidence about the multiple conversations between the parties and the multiple attempts to reach each other in the first 3 weeks of January regarding the grievant's return to work were confusing at best. The evidence did show that sometime on or about January 15, 2007 the grievant's supervisor contacted her to find out when she would be back to work. The parties differed greatly about what was said during this conversation. The supervisor was convinced that they had agreed that the grievant would be back on January 22, 2007, a Monday, even though her FMLA leave would apparently expire a few days earlier than that. He again granted this extension in order to accommodate the grievant and the difficulty she was having in her personal life. He kept notes of the conversation indicating January 22nd as the return date. He testified that he called her on January 16th to discuss return to work issues and took a note that he again confirmed she would be in on the 22nd. He put her on the schedule for the 22nd. This was not given to the grievant; she was simply placed on the schedule for that day. The Employer introduced this to reiterate how strongly the supervisor felt about the 22nd as the return date.

The grievant on the other hand was equally as adamant that she did not agree to the 22nd but rather the 29th, the following Monday. She indicated, and the evidence in fact supported, that she knew she had to be with bill in Rochester at the Mayo Clinic on the 25th for medical tests and treatment. She testified quite strenuously that she would not have agreed to return on the 22nd since she knew she would have to turn around and take several days off in that week.

At any rate, she did not appear for work on January 22nd as the supervisor, at least, thought she would. He contacted Human Resources regarding what to do. Someone from HR contacted the grievant on the 23rd and advised her that the Employer expected her to be at work on the previous day and to inquire why she did not appear as scheduled. The grievant indicated that she had understood she was to return on the 29th and expressed some surprise in this conversation that she was expected to be there on the 22nd. The HR person did not indicate at that time to the grievant that she would be disciplined but indicated that “she needed to discuss this with her supervisor” to get the return date straightened out, or words to that effect.

There was some indication that the grievant attempted to call her supervisor immediately after this and left him a message indicating that she would try him again to discuss the return date. The two did not connect and the grievant did not appear for work at any time during the week of January 22nd through the 26th, 2007. The Employer began termination proceedings during the week of January 22nd but never indicated to the grievant that this was afoot.

In the meantime, the grievant went to Rochester on January 25th to attend the medical tests with Bill. She testified that she understood that she could be back to work on January 29th, since the tests were scheduled to end on Sunday the 28th and that Bill was due to be released from the hospital that afternoon. This would have allowed time to get to Mankato, Minnesota Sunday and to get to work the following day. She indicated that this was her intention all along. Apparently things did not work out that way and Mayo kept Bill until early Monday morning but did not let them know that until later in the day on Sunday.

Once again the events of the morning of January 29th were the subject of a complete disagreement between the parties. At some point someone left a message on the supervisor’s voice mail indicating something to the effect that “they were running late in Rochester and that they would be in later that day possibly around 11:00 or 11:30.” This was received a few minutes before 7:00 a.m. The grievant was due to start at 7:30 a.m. and she thought a half hour notice was sufficient.

The Employer's rules apparently call for a 2-hour notice but this again was not the basis of the termination; it was that she failed to show up again on the 29th. The grievant claimed that she did not leave that message and indicated that her message was that she would be home around 11:00 or 11:30. She did not indicate a start time at work and testified that she thought it would be OK not to come that day as the Employer had always accommodated her need to be with Bill in the past.

She did not appear for work on January 29th. She provided a copy of the ER visit that she was actually ill that day and was at the emergency room, at this facility oddly enough, and was unable to come to work due to her own illness. This was not communicated to the Employer until well after the fact however, arguably not even until the day of the hearing.

She did not appear for work on Tuesday January 30th either claiming that she believed it was her regular day off and she was not on the schedule. The grievant did not claim that her illness for the previous day prevented that and claimed only that she thought she was off that day anyway so there was no need to go to work. She was in fact on the schedule but did not know that, as she was not given a copy of it. She did not contact the Employer to verify this but simply assumed it, thus giving some cogency to the old saying about such assumptions.

As noted herein, there were many attempts by the respective parties to reach other, or at least allegedly, by home, phone, voice mail, cell phone and otherwise. There was some evidence submitted by the grievant from her cell phone records that she indeed did try on multiple occasions to leave messages for her supervisor. She testified she never got calls back but there was evidence to show that several attempts to reach her were made by the Employer without apparent success.

Neither is there any actual record of the actual calls made to or from the grievant's home phone (the Employer did not produce any cell phone records from any of the calls made to the grievant) nor of the infamous voice mail from the morning of the 29th. What we are left with diametrically opposing stories about who called whom, when and what was said.

The grievant finally did appear for work on Wednesday January 31st. She testified that her supervisor greeted her openly and warmly and essentially told her he was glad she was back at work. The Employer's witnesses told a somewhat different story and indicated that they were in fact surprised to even see her. The grievant was terminated later that day.

As one can imagine, the parties presented this case very differently and cited the same contract clauses but urged very different results based on them. There are several very distinct points of interest in this case. These will be dealt with in order.

Dealing with the week of the 22nd first, it was apparent that there was a failure to communicate and that nobody was "at fault" for it. The parties simply did not clearly communicate when the return to work date was. While the Employer's witness was quite clear in his mind that he had communicated this to the grievant, it was equally apparent that the grievant felt that she had not told him the 22nd but rather the 29th. This was supported by the subsequent fact of the prearranged medical appointment on the 25th that made it unlikely the grievant would not have agreed to a January 22nd start date. There was further no evidence that she was ordered to appear for work on the 22nd but rather that this was an informal discussion about a tentative return date, as had been the case many times before.

Moreover, when the HR person contacted her on the 23rd, there was again no clear order to return to work at a particular time or date. The admonition given to the grievant was that she call her supervisor to discuss it. The evidence showed that the grievant attempted to do so on several occasions but that the two did not connect.

She then went to Rochester on the 25th for the medical appointments with the understanding that she would be back in time to appear for work on the 29th. Thus, the failure to appear for work during the week of the 22nd does not on this record provide sufficient support for her termination under either a just cause standard nor the provisions of the contract cited by the parties herein. There was simply a lack of clarity about the expectations here with respect to this grievant under those circumstances.

The real issue turns on the events of the week of January 29th. As noted above, it was difficult at best to sort out what exactly was said by whom on the morning of the 29th. The evidence showed that the grievant did call in sometime early in the morning of the 29th to indicate that she would not be at work, at least not on time. It would seem unlikely that two people would call in at the same time and both indicate they would be back around 11:00 or 11:30 that same day. There was no recording of the phone conversation available at the hearing and again both parties presented very adamantly held testimony about this conversation. The Employer's witnesses testified credibly that they believed it was the grievant and that she said she would be in, meaning in to work, later that same day. The grievant indicated only that she said she would be home but never indicated she would be in to work. There was no further contact between the parties that day.

As noted above, Article 14 Section 3 provides that "If the employee fails to report for work as scheduled, or to furnish the hospital with a justifiable excuse within twenty four (24) hours thereof, such failure to report for work shall be conclusively presumed to be a resignation from the service of the Hospital and terminate for such employees' seniority and employment." The Employer asserted that this provision creates a presumption that the grievant resigned from her employment and further asserted that she failed to provide any reasonable excuse for her failure to show up at any time during the week of January 22nd.

The Union asserted that this provision allows the employee to provide reasonable excuse for the failure to appear for work and alleged that she did just that. She indicated that she could not be there during the week of the 22nd as she had medical appointments to attend. Further, these appointments ran long and she was not able to get to work on the 29th. She never indicated that she would be there when she called in that morning. The Union asserted that there was thus reasonable excuse for the failure to come in on the 29th since she was returning from a medical appointment in Rochester.

Moreover, as noted above, there was some evidence to suggest that the grievant herself was actually ill that day and could not make it in. She produced an ER slip for January 29, 2007 indicating she was seen by a doctor that day. Based on the record as a whole, the grievant provided a reasonable excuse for why she did not appear on January 29th, albeit by a very slim margin.

Next there is the question of the 30th. It was clear that she did not appear and her excuse was that she did not believe she was scheduled that day. The Employer argued that there was no excuse whatsoever for her failure to appear on the 30th. She simply assumed she did not have to be there but the Employer asserted that this part of her story fell apart very rapidly and very thoroughly upon examination. The Employer asserted that she simply quit this job due to her continued failure to appear even when she said she would be there.

The Employer's argument is that there was no reasonable basis for her to believe she would be off that day as her schedule changed frequently even after the change to days in July of 2007. The Employer's argument on this point was well taken. There was insufficient evidence to suggest that she could simply assume without checking that she would always be off on Tuesday. Moreover, there was no evidence to suggest that she checked with anyone to make certain she was off.

She did appear for work on January 31st however and while there was some dispute about whether she was welcomed with open arms, it is apparent that she was terminated that same day for her continued failure to appear for work. The question now is whether, based on this record, termination is appropriate.

There is an old saying in labor relations that today's favors become tomorrow's demands. That was probably never truer than in this case. The Employer granted many such favors to the grievant in a justifiably good-hearted attempt to accommodate the difficulties she and Bill were having with his health. No Employer should ever be penalized for this. Nether however should an employee be terminated without some reasonable warning that if certain conduct continues they will be fired or at the very least that they are on termination's doorstep. This was never truer than in this case either.

In a different case the grievant's actions would be intolerable. The record revealed that she was not at work for months and that several times she would indicate that she might be in but did not appear. This pattern repeated itself several times and the grievant was led to believe, justifiably or not, that the Employer would continue to work with her and continue to give her the extraordinarily flexible schedule she apparently had.

The simple fact is that for months the Employer gave the grievant every reason to believe that they would continue this. As noted above, there were many failed attempts by both parties to reach each other by phone and somehow the communication was never very clear. There was also never anything done in writing that might well have cut through a great deal of the confusion created by these multiple phone messages and occasional conversation.

Incumbent in the notion of industrial discipline and discharge is the question of whether the employee is placed on clear notice that a certain course of conduct is likely to get them disciplined or fired. Arbitrators and commentators have for decades noted the requirement that the employee's must be placed on some sort of clear notice of what they are not supposed to do; the transgression of which will get them into trouble. In this case, while these are unique facts indeed, that requirement applies just as in any other – notice had to be given to the grievant that this time it would be different and that she had to get to work by a certain date and time was absolutely required.

Having said that it is probably not necessary to post some sort of notice on the wall telling employees that they need to show up for work once in a while in order to preserve their continued employment status. Certainly, regular attendance is a pre-requisite for a good work record and, depending on how regular it is, poor attendance can be the basis for severe discipline in appropriate cases. There should be no surprises there. Here however, it is precisely because of the history between the grievant and the Employer that a clearer notice to her of the precipice over which she was apparently standing was required.

As noted above, in a different case, this grievant's actions would have been tantamount to a request to be fired. Here however the facts are very different. There was not the sort of clear notice to her on these very unique facts that she was on termination's doorstep in any of the conversations or voice messages to her in December and January.

It is clear that the Employer felt terribly frustrated due to the grievant's failure to show up for work. It was clear they started termination proceedings internally during the week of January 22nd. It was clear that they had been more than gracious to her throughout the months since Bill's illness the spring before and had been quite accommodating to her including granting a FMLA leave when they may not have been legally required to. All of that is true and all of that cuts both ways under these odd circumstances.

The grievant was under the impression that she was somehow OK and, more to the point, was never told that her employment was in jeopardy. Certainly, without the history in this particular case of the Employer and the grievant working with her schedule the way they did, there would be little question that if she simply did not show up for days on end when directed to, she would have been fired. Here these very unique facts dictate a different result.

The grievant was able to show a reasonable excuse for failing to appear for work on the 29th as provided for in the labor agreement. While she had no reasonable excuse for why she did not appear on the 20th this alone should not justify termination under these unique facts. She made an invalid assumption about her schedule and should have checked with the employer about it. On these facts however, this type of thing had apparently happened before without these kinds of dire consequences. Accordingly, there is insufficient evidence to support her termination even though the grievant's actions were viewed with a critical eye when it came to the remedy to be imposed on this record.

The next question is what remedy to impose. Given the facts here, a reinstatement with full back pay and accrued benefits would be manifestly unfair. To do so would be to penalize the Employer for being so accommodating to her. Moreover, this grievant needs a very clear message that in order to retain her employment in the future she needs to either show up for work as directed or to provide a very clear and clearly communicated reasonable excuse for the failure to do so.

While the arbitrator cannot impose future conditions on the parties, this decision should serve as a clear warning that further failure to appear for work as and when directed may well result in the termination of her employment.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant shall be reinstated to her former position with the Employer within 5 business days of the date of this award but without back pay or reinstatement of accrued contractual benefits.

Dated: November 1, 2007

Immanuel St. Joseph's and AFSCME.doc

Jeffrey W. Jacobs, arbitrator