**IN THE MATTER OF THE**
**VOLUNTARY ARBITRATION**
**BETWEEN**

THE COUNTY OF [redacted]
[redacted] ([redacted]),

Employer,

-and-

Gr: Attendance Policy/[redacted]-15A-09
Log No: A22624-[redacted]-10

MICHIGAN AFSCME, COUNCIL 25,
LOCAL [redacted]

Union.

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**ARBITRATION OPINION AND AWARD**

APPEARANCES

[redacted] Analyst
Labor Relations Division
Dept. Of Personnel/Human Resources
[redacted] Building
[redacted] Floor
[redacted] MI [redacted]

William L. Harper
Staff Specialist
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**ISSUE**

IS THE ATTENDANCE POLICY AT THE [redacted]
BEING UNREASONABLY ADMINISTERED,
AND IF SO, WHAT SHOULD BE THE REMEDY?

On November 2, 2009, the Local challenged the [redacted] January 7, 2008 Attendance Policy, stating:

| | |
|---|---|
| Nature of Grievance: | Includes but is not limited to denial & violation of CBA Articles 2.01, 2.03. 11.01, 11.02, 25.08, 25.21, 25.22B, & 25.24. |
| Statement of the Facts: | The [redacted] unilaterally imposed Attendance Policy continues to be grossly unfair, overly punitive, prohibitive, inconsiderate, and mean-spirited in its application. Discipline is being issued in some cases w/o regard to previously submitted documentation and/or circumstances that the alleged infractions should not be charged to grievants. When discussed prior to its Jan., 2009 implementation none of the Union's input or suggestions were even considered. This Attendance Policy is totally inconsiderate to this workplace where the majority of the employees consistantly (sic) average 60 hour work weeks. The 2 year progressive discipline liability renders this policy virtually impossible for redemption before suspension or termination. Past [redacted] policies have allowed six months for reversion. |
| Disposition Requested: | For grievants to be made whole from disciplines under this policy. Also, permit bi-lateral input on a fair & equitable policy. |

In its brief, the Union defined its issues as follows:

ISSUE

Has the [redacted] Facility (Employer) applied its attendance policy #3.5 of January 7, 2008 in a reasonable process to employees represented by AFSCME Local [redacted] (Union)?

Did the Employer violate the reasonableness of the Policy when the Employer counted consecutive absences (days) as individual offenses rather than one (1) offense?

Was it reasonable for the Employer to require an employee go discipline free for two years before reverting to the beginning of the disciplinary steps?

If the above is found not to be reasonable, what should be the appropriate remedy?

The Employer challenged consideration of the issue involving consecutive days being considered separate offenses in a reply to the Union's post-hearing brief. It maintained that this issue was raised for the first time in the Union's brief. The Union asserts that the issue was raised previously, and that it can be properly considered.

An arbitration hearing was held on August 4, 2010. Testifying for the Union was [redacted], Committe person. Testifying for the Employer were: [redacted], retired Director and [redacted], Operations Administrator. Post-hearing briefs were submitted by the parties.

**BACKGROUND**

The [redacted] has issued attendance rules since 1997. The Union has for the first time challenged the January 7, 2008 changes to the policy. The present policy states, in part:

[redacted] COUNTY DEPARTMENT OF
[redacted] AND [redacted]
POLICY MANUAL / OPERATIONAL GUIDE

Chapter: Personnel (Revised) I | Subject #: 3.5
Page: 1 of 1
Subject: Attendance | Previous Issued: July 22, 2005

I. Policy

[redacted] Facility is committed to ensuring the safety and security of residents and staff. Regular and prompt attendance is an essential job duty of all [redacted] Facility ([redacted]) employees.

II. Procedures

Supervisors/Managers should monitor employee absences and tardies as provided by the applicable collective bargaining agreements, the [redacted] County Civil Service Rules, and [redacted] policies.

The employee is responsible for taking all necessary steps to secure approval for absences or tardies prior to being off duty. In addition to the approved leave of absences defined in the applicable collective bargaining agreements, the [redacted] County Civil Service Rules and [redacted] policy manual, approved absences may include:

- Absences and tardies taken pursuant to a previously approved request for leave under the Family and Medical leave Act;

- Paid absences with medical documentation;

Three and/or more unapproved absences and/or tardies during a two (2) month. cycle (i.e.. Jan/Feb. March/April.etc.) shall be considered an offense and such violation of the policy may result in disciplinary action up to and including termination as outlined in the schedule of discipline set forth below.

- Disciplinary Steps:

| | |
|---|---|
| First Offense | Oral Reprimand |
| Second Offense | Written Reprimand |
| Third Offense | (1) day Suspension/ Intervention recommendation |

| | |
|---|---|
| Fourth Offense | (5) days Suspension |
| Fifth Offense | Termination |

Signature of the
Executive Director: /s/____ Revised Date: January 7, 2008

The Union contends that it is unfair under the policy to consider each day of a consecutive absence as a separate occurrence. Further, it maintains that under prior attendance policies, an employee reverted back to a zero status after being discipline-free for six month. The Union believes that a one year reversion would be fair. However, it contends that the administration's intent to apply a two year requirement would be unreasonable.

The County argues that it has the management right to establish attendance rules for the [redacted] The County further maintains that the Union has failed to show specific instances where there has been an unreasonable application of the attendance rules.

The Employer suggests that employees have a significant amount of overtime, and that some call-off on their regular shift, in order to work overtime at time and one-half. The County emphasizes that under Article 11.3 it can look back two years to impose discipline.

The Employer denies that applying the policy during the fireworks is unfair, since employees know in advance that there could be a traffic problem, and that they are therefore able to adjust the time that they leave for work accordingly.

The County emphasizes that state law requires minimum staffing at the Facility, and that when an employee calls off, he or she must be replaced through overtime. This is said to cause a morale problem for the employees who do not abuse the Attendance Policy, and excessive cost to the Facility.

[redacted] testifies that attendance problems are caused by the excessive amount of overtime required at the [redacted], with employees working 60 hour weeks. He notes that the Attendance Policy is not reasonable in light of this workload.

Mr. [redacted] contends that a one year look-back as previously utilized would be reasonable, but that the two year plan would not be reasonable.

Mr. [redacted] asserts that employees should not be disciplined on the day of the fireworks, since it is so difficult to drive to work due to the traffic. Mr. [redacted] adds that because of short-staffing, there is an excessive amount of overtime.

Mr. [redacted] the former administrator, testified that there has been an ongoing problem with staffing at the [redacted] He noted that the licensing for the Facility is put at risk, when there is inadequate staffing.

The former director notes that under the policy, medical documentation will excuse an absence, and that pre-approved medical absences are not counted. He also notes that FMLA approved absences are not counted under the policy. Mr. [redacted] contends that there has not been a great amount of discipline under the existing policy.

Mr. [redacted] said that less than 5% of the employees represent an attendance problem. The number of employees who have been terminated or have received a five day suspension is less than 1%, according to Mr. [redacted]

Mr. [redacted] said that excessive absences lowers morale among those employees who do report to work.

[redacted], the current administrator, testified that the Attendance Policy is required to maintain staffing at a level for the Facility to retain its state license. Mr. [redacted] said that he

monitors discipline resulting from attendance violations on a case-by-case basis. Mr. [redacted] says when he evaluates the need for discipline, he does consider the amount of overtime.

Mr. [redacted] notes that some employees volunteer for overtime and that not all overtime is mandated. The administrator contends that failure of an employee to show up on time, causes another employee to stay over, which is a "morale killer."

The administrator states that there are currently six staffing vacancies. He adds that the number of employees under the discipline program for attendance is 15% of the workforce. Mr. [redacted] added that the number of repeat offenders is only seven or eight employees.

Mr. [redacted] says that he needs for the Attendance Policy to remain intact in order for the Facility to retain its license. He denies that the policy is designed to obtain the termination of employees.

## PERTINENT CONTRACT PROVISIONS

ARTICLE 8 - MANAGEMENT RIGHTS

8.01

> The management of the County and its departments is vested in the County Executive. The Employer possesses the exclusive right to manage the affairs of the County, including but not limited to the right to: establish starting and quitting time; establish the size of work crews; assign days off, annual leave and regulate other forms of leaves as may be provided for in this Agreement; select the manner in which employees shall be reduced in classifications in the interest of layoff; and prescribe reasonable rules for just cause disciplinary actions. The Employer recognizes that supervision is necessary when work is being performed. However, the level of supervision shall be determined by the Employer.

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ARTICLE 11 - DISCIPLINARY PROCEDURE

11.01

Employees shall not be subject to any form of discipline except for just cause. If the Union determines to appeal any disciplinary action other than oral and written reprimands, it shall file a grievance in accordance with Article 10.

* * *

11.13

When initiating a disciplinary action on a current charge, the Employer shall not take into consideration any prior discipline if the employee has been free of documented disciplines for 24 months from the date of the last prior discipline.

* * *

**DISCUSSION**

The first question to be addressed is whether the consecutive day issue raised by the Union in its brief can be considered in the award. The Employer contends that the issue was raised for the first time in the Union's brief and that it is being deprived of an opportunity to address the issue at the arbitration hearing. The Union insists that Mr. [redacted] testimony touched on the issue, as well as the fourth step answer in reference to the [redacted] grievance, No. [redacted]-61-608.

The consideration of the consecutive day issue in the answer to the [redacted] grievance, did not put the employer on notice that it had to address that issue in this matter with testimony and argument. This case and the [redacted] matter are separate grievances, although they were both addressed at the fourth step.

While the County may have known about the [redacted] matter, it had no reason to believe that it had to address the consecutive day issue with testimony at the arbitration hearing in this matter, or with argument in its brief. There was no mention of the consecutive day issue in the Union's opening statement and it was not specifically addressed in the grievance.

Therefore, it would be unfair and improper to address the consecutive day issue, when the Employer has not had an adequate opportunity to respond with testimony, evidence and argument. However, the Union is free to raise the consecutive day issue as a defense to an attendance discipline case in the future, as it did in the [redacted] case. A decision on the consecutive day issue will necessarily have to deferred.

The next issue, which is properly considered, is whether it is unreasonable to require an employee to go discipline-free for two years before returning to the start of the discipline process. The Union asserts that a one year reversion process would be reasonable.

The evidence shows that the Employer is concerned about having adequate staffing in order to preserve its license with the state. It is also concerned that excessive absences by a few employees has caused a morale problem for the majority of employees who are discipline-free.

Insofar as the contract permits discipline to be considered for two years, it is not per se unreasonable for the Attendance Policy to require two years before an employee reverts back to the beginning of the program. It should be emphasized that pursuant to the Attendance Policy, paid absences with medical documentation and FMLA absences are exempted from discipline.

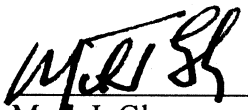
That said, the director has stated that he will evaluate discipline on a case-by-case basis. If application of the two year look-back program is unfair in a particular case, or otherwise contrary to just cause, it cannot be properly utilized. Therefore, a challenge can be made to an individual

discipline based upon the two year look-back. Moreover, if in the future it appears that the two year look-back is subjecting employees to an excessive or unreasonable amount of discipline, this can be challenged.

The policy has not otherwise been shown to be unreasonable on its face, or as applied.

**AWARD**

The consecutive day issue regarding discipline is not properly considered at this time, but is preserved for considered in an individual discipline case, should that occur. The two year look-back provision is not per se unreasonable, but again may be challenged in an individual case, or if, in the future, it appears that the two year provision is contrary to just case and is unreasonable, it can be challenged by the bargaining unit. The remainder of the policy was not shown to have been per se unreasonable.



Mark J. Glazer
Arbitrator

November 3, 2010