

**IN RE ARBITRATION BETWEEN:**

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**SERVICE EMPLOYEES INTERNATIONAL UNION, SEIU, LOCAL 113**

**and**

**ABBOTT NORTHWESTERN HOSPITAL**

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**DECISION AND AWARD OF ARBITRATOR  
FMCS CASE #'s 070725-58829-3 & 070725-58830-3**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**February 5, 2008**

**IN RE ARBITRATION BETWEEN:**

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SEIU, Local #113,

and

**DECISION AND AWARD OF ARBITRATOR  
FMCS #'s 070725-58829-3 & 070725-58830-3  
Barry Washington grievance matter**

Abbott Northwestern Hospital,

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**APPEARANCES:**

**FOR THE UNION:**

Brendan Cummins, Miller & O'Brien  
Nicole Blissenbach, Miller & O'Brien  
Barry Washington, grievant  
Leah Lindeman, contract organizer  
Sheron Armstrong

**FOR THE EMPLOYER:**

Brian Benkstein, Felhaber, Larson, Fenlon & Vogt  
Jan Halverson, Felhaber, Larson, Fenlon & Vogt  
John Matis, Director of Nutrition Services  
Jeff Vandersteen  
Jean Reinardy

**PRELIMINARY STATEMENT**

The above matter came on for hearing on November 30, 2007 at the Federal mediation and Conciliation Service in Minneapolis, Minnesota. The parties submitted written post hearing Briefs, which were dated January 11, 2008 at which point the record was considered closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from March 1, 2003 through February 28, 2006. Article 2(B) provides for submission of disputes to arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The Parties stipulated there were no procedural issues and that the matter was properly before the arbitrator. The matter involved two cases consolidated for hearing with the same grievant.

**ISSUES PRESENTED**

The issues in the two separate cases as determined by the arbitrator are as follows:

Whether the Employer had just cause to issue a written warning dated April 26, 2007 to the grievant for attendance issues? If not what shall the remedy be?

Whether the Employer had just cause to issue a final written warning to the grievant for sleeping on the job on or about April 29, 2007? If not what shall the remedy be?

## ATTENDANCE GRIEVANCE - PARTIES' POSITIONS

### EMPLOYER'S POSITION

The Employer took the position that there was just cause to issue a written warning to the grievant for poor attendance pursuant to the Employer's attendance policy in effect for the Dietary department and for having more than six absences in a rolling calendar year. In support of this the Employer made the following contentions:

1. The grievant was hired in May 2002 as a Dietary Aide in the Nutrition Department. His work record has been far from exemplary and he has several prior disciplinary notices on his record including a prior discipline in June of 2005 wherein he received a 3-day suspension for contributing to a disruptive workplace environment.

2. The instant matter involves the grievant's attendance. The Employer had an older attendance policy, Employer Exhibit 15, whereby absences which trended in excess of six for a twelve month period are considered excessive and would be subject to discipline. The Employer asserted that the grievant raised problems with the old policy and that he and his supervisors in fact discussed making some changes in it to clarify it. The new policy, Employer Exhibit 7/Union Tab 8 provides that "absences, will be tracked, on the sixth occurrence within a revolving year, an action plan will be given within the month of the occurrence. On the seventh occurrence within a revolving year corrective action will occur and each thereafter." Both policies were so-called "no-fault" policies and treated absences as "occurrences" under the policy.

3. Pursuant to the policy, on the 6<sup>th</sup> occurrence in a rolling calendar year, the employee is given an action plan to assist the employee in getting to work on time. The grievant had a 6<sup>th</sup> occurrence in December 2006. According to the policy he was given an action plan by his supervisor dated December 18, 2006. See Employer Exhibit 6. At that time, the grievant's supervisor made it clear to the grievant that any further absences would result in discipline pursuant to the attendance policy. The grievant signed the action plan and fully understood the consequences of further absences.

4. The grievant missed another day on January 3, 2007 but was essentially given a break and no additional discipline was meted out at that time. He could have been given a warning at that time but due to a minor procedural error the grievant did not receive any discipline at that time. The Employer asserted that they spoke with the grievant about his absence on January 3, 2007 approximately one week later but did not give him formal discipline as they could have.

5. The grievant again missed work on March 3, 2007. This constituted an 8<sup>th</sup> occurrence in a rolling calendar year and as such was subject to a written warning.

6. The Employer asserted that the facts are virtually undisputed. The grievant had more than six occurrences in a rolling year. It does not make any difference why he was absent; all that matters under the terms of the attendance policy is that he was. The Union has not raised an issue with the validity of the policy. The grievant missed work in March of 2007 and was given a written warning by the clear terms of the policy.

7. The Employer argued most strenuously that the action plan does not start people from scratch as the Union contends and that the action plan is to place people on clear notice that they are close to getting discipline for attendance problems and to help them avoid those problems in the future. The action plan does not erase prior occurrences. The Employer asserted that such would be an absurd result in that every time someone got to the 6<sup>th</sup> occurrence they would be given an action plan and go back to zero. The policy clearly calls for discipline upon a 7<sup>th</sup> occurrence. Here the grievant actually had 8.

8. The Employer supported its action in giving the grievant a second written warning based on the history of prior discipline here. The grievant was given a suspension in June of 2005 and a written warning in June 2006 for violation of the respectful workplace policy. The Employer asserted that a second written warning was thus appropriate here.

9. The Employer asserted that there is nothing in Article 14 of the labor agreement prohibiting or limiting its right to mete out this discipline in this circumstance. Article 14 provides in relevant part that “in the event an employees attendance becomes a concern, the employee and the manager will meet together to discuss the circumstances surrounding the employees attendance prior to the start of the corrective action process, and after such discussion(s), they will develop an ongoing plan for improvement.” This mandates the action plan and that was done in December 2006 as noted above. Beyond that the Employer argued there is no limitation other than the standard just cause provision in Article 14 (A). Here there was ample cause for a second warning given the clear violation of the attendance policy and the grievant’s prior record.

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 written warning under these circumstances. In support of this position Union made the following contentions:

1. The Union noted that the grievant is a steward and has a good work record as a diligent and loyal employee. He has been with the Employer for over 5 years and works very hard and by all accounts is quite good at his job.

2. The Union further asserted that the Employer skipped a step in the progressive discipline process here and that the grievant should have been given at most an oral warning for the absences involved here.

3. The Union further asserted that the Employer has not given clear notice to the grievant or to the rest of its employees of what is expected under the various attendance policies throughout the Employer’s workplace. The Union noted that the various departments have many different policies regarding attendance resulting in a patchwork quilt of policies that are difficult for anyone to know. The Union alleged that the treatment of the dietary aides is thus different from other bargaining unit members insofar as attendance is concerned and that they are subject to disparate treatment as a result.

4. The Union acknowledged that the grievant did have an action plan and did have six occurrences under the attendance policy as of December 2006. The Union argued however that when he missed work on January 3, 2007 it was for a very valid reason, i.e. to take the victim of a violent crime to Court, and that the Employer did not simply miss this. The Union alleged that they made a conscious decision to cut the grievant a break due to the validity of the reason for the absence and in fact tore the absence up when the grievant informed them of why he was gone.

5. The Union further argued that when he missed work on March 3, 2007 due to a flat tire he should have been given an oral warning only and not a second written warning. The March 3, 2007 absence should have been treated as the 7<sup>th</sup> occurrence giving rise to the very first type of discipline in the attendance policy, an oral warning. The essence of the Union's claim is that discipline under the attendance policy is to be treated separately from other sorts of disciplinary actions and that the 7<sup>th</sup> occurrence gives rise to only a verbal warning.

6. The Union pointed to the various other policies in place throughout the Employer's workplace that would have called for only an oral warning under these very same circumstances and argues that consistency requires that the grievant be subject to this as well. At most the Union claims that this should have been an oral warning only pursuant to the progressive disciplinary policies in place for other employees similarly situated and within the bargaining unit.

The Union seeks an award of the arbitrator sustaining the grievance and ordering the Employer to remove the written warning from the grievant's personnel file.

#### **MEMORANDUM AND DISCUSSION – ATTENDANCE GRIEVANCE**

The facts were for the most part undisputed and fairly straightforward. The grievant is a Dietary Aide working for Abbott Northwestern Hospital. He was hired in 2002. His record shows that he is a good worker and does a good job when at work. There were no issues regarding his job performance per se.

The grievant's disciplinary record overall however is not exemplary. The evidence showed several prior disciplinary warnings and a suspension for matters unrelated to the attendance issue involved here. This was put in by way of background but does become germane to the question of the degree of discipline to be assessed in this matter.

The facts giving rise to the instant grievance record were relatively clear. The Employer's attendance policy in place during most of the absences involved in this matter dated 7-2-06 provided "Absences, which trend in excess of six absences for a twelve-month period are considered excessive and will be subject to discipline." It further provided "following progressive discipline, an employee may be terminated for repeated absences and tardiness."

The evidence was not completely clear on this point but showed that the parties discussed this policy and its apparent lack of clarity about what it meant and that it was changed in January of 2007. The new policy had many of the same provisions but provided "Absences, will be tracked, on the sixth occurrence within a revolving year, an action plan will be given within the month of the occurrence. On the seventh occurrence within the revolving year corrective action will occur, and each thereafter."

There is no evidence on this record that any absences on a person's record prior to the promulgation of the new policy would be excused or disappear. Neither was there any evidence that the slate gets wiped clean after the 6<sup>th</sup> occurrence. In fact the evidence was quite to the contrary. After the 6<sup>th</sup> occurrence the contract and the policy clearly calls for an action plan.

The labor agreement at Article 14 (D) provides "in the event an employee's attendance becomes a concern, the employee and the manager will meet together to discuss the circumstances surrounding the attendance prior to the start of the corrective action process, and after such discussion(s) they will develop an ongoing plan for improvement."

Clearly the action plan called for in these documents was done in December 2006. Clearly too the grievant had six absences under the policy between 3-17-06 and 10-28-06. See Employer Exhibit 5. The evidence further showed that the incidences listed in Employer Exhibit 5 were absences not merely tardies or late arrivals and were properly considered “occurrences” under the policy.

Moreover, the Union did not challenge the authority of the Employer to promulgate the attendance policy nor of the applicability of that policy to the grievant’s situation. The evidence thus showed that he had six absences as of December 2006 and was properly placed on the action plan.

The evidence also showed that the grievant was made aware of the fact that he was on the verge of corrective/disciplinary action as of that point. Mr. Matis testified credibly that he informed the grievant that any further absences would result in corrective action. Moreover, the disciplinary notice the grievant received on 6-07-06, Employer Exhibit 8, clearly informed him that “Progressive discipline will be followed for any further performance or *attendance issues* up to and including suspension or termination.” (Emphasis added).

The evidence further showed that the grievant was absent on January 3, 2007 when he took a friend to testify in Court. No disciplinary action was taken at that time. There was some dispute about why no discipline or corrective action was taken at that time but on this record that is a moot point.

Even assuming that the Employer “threw out” the January 3, 2007 absence, the grievant was again absent on March 3, 2007. There was no evidence to suggest that the Employer was essentially going back to zero occurrences as the result of the failure to take progressive disciplinary action after the January 3, 2007 incident. This action, while inconsistent with the progression of discipline called for in the attendance policy, did not abrogate the clear message the grievant had been sent only a few weeks before during the discussions with his supervisor regarding the action plan.

Even without the January 2007 occurrence the March 3, 2007 occurrence constituted a 7<sup>th</sup> occurrence under the policy subjecting the grievant to disciplinary action. On these facts there is no question that corrective action was called for under the clear terms of the policy and the clear messages sent to the grievant about his attendance problem. The question is what level of discipline is called for under these circumstances.

The Union claims that only an oral warning should have been given since the March absences was in effect the 7<sup>th</sup> such absence, not the 8th. The Union argued that since he was not given any discipline in January the Employer must somehow have excused that or simply erased it from their record since the absence was for a valid reason. Even assuming that to be true, the evidence did not support the claim that the attendance policy is somehow separate from the progressive disciplinary scheme in place here. There is nothing to suggest that attendance issues are on a separate disciplinary track. If the grievant's overall record calls for a more severe progressive discipline given the overall record then there is nothing in the contract or the policy to negate that.

The Union asserted that some of the attendance policies in place for other departments call for a specific progression of discipline and that these are somewhat inconsistent throughout the employer's place of business. Indeed, the evidence showed that there are different attendance policies in place for different sorts of jobs. There was nothing to suggest a limitation on the employer from promulgating different policies for different departments and jobs that have differing requirements for attendance. As is the case in many large employees with many varying job positions with very different job descriptions, the question of attendance may also vary with the job. Moreover, there was nothing on this record to suggest that there was a violation of the contract by placing differing requirements for attendance in different departments.

The Union argued that these manifold policies make for inconsistent enforcement and creates confusion among the workers, many of whom are in the same bargaining unit, as to what the requirements are. There was nothing to suggest inconsistent enforcement or inconsistent application of those policies with respect to the bargaining unit members in the Dietary Department. There was thus insufficient evidence to sustain the claim that there is an inconsistent application of these policies with respect to the unit members within the Dietary Department.

The Employer argued that the grievant's overall record, including several prior disciplinary matters, including a 3-day suspension, called for more than a simple oral warning. The evidence did show that the grievant has several prior disciplinary issues on this record albeit not for attendance problems. As noted above however, there is no requirement that attendance and other job related or disciplinary issues be separate for purposes of imposing progressive discipline.

The question thus is whether there was justification for the imposition of the second written warning under these circumstances. There was. The record shows that the grievant received a prior written warning on 6-07-06 and a 3-day suspension in June of 2005. These prior disciplinary matters were still part of the grievant's record pursuant to Article 14(E) (requiring the removal of discipline more than 24 months old) as of March 2007. Under these circumstances a second written warning was appropriate.

Accordingly, given the clear facts showing that the grievant had more than six occurrences under the terms of attendance policy and given the prior record the attendance grievance must be denied.

## **FINAL WRITTEN WARNING - PARTIES' POSITIONS**

### **EMPLOYER'S POSITION**

The Employer took the position that the grievant was found sleeping on the job during a time when he was not supposed to be on break at a location where he knew he was not supposed to be on April 29, 2007. The Employer further took the position that given the grievant's past record he was appropriately issued a final written warning. In support of this position the Employer made the following contentions:

1. The Employer asserted that on April 29, 2007 the grievant was observed by not one but two separate people sleeping in the Dietary Office. Mr. Vandersteen, a Morrison employee, observed the grievant with his head down eyes shut sitting at a desk in the Dietary Office. He called the grievant's name and initially got no response at all. Finally he shouted the grievant's name who then startled awake, stood up mumbling something incoherent and stumbled out of the office.

2. The Employer further introduced testimony from Ms. Reinardy who also saw that the grievant was asleep in the office at a time when he should have been working.

3. The Employer further argued that the grievant's break time was nowhere near when he was observed sleeping and that he should have been at work when he was observed sleeping in the office.

4. Further, the Employer asserted that the Dietary Office is not an approved break area and that the grievant should not have been there even if he was on break. The Employer pointed to the discipline given to another employee and noted that she was specifically told she was to take breaks in the skywalk café, McDonald's spice café or the L113 break room. The grievant, as the steward should have known about this and should therefore have known that the Dietary Office was not and never has been an approved area for breaks.

5. The Employer responded to the allegation that the grievant needed to take a break to deal with his back pain and acknowledged that the grievant does have a work related back injury but that he was not authorized to take a break at that time or in that place. The Employer continued to allege that the grievant was simply sleeping on the job and was appropriately disciplined.

6. The Employer argued finally that the degree of discipline was appropriate give the grievant's work record. The Employer pointed to the past history, some of which was discussed in the previous grievance, as well as the discipline he had just been given for the attendance issues and argued that under the progressive disciplinary policy and the grievant's somewhat poor record, a final written warning was appropriate.

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

## **UNION'S POSITION**

The Union took the position that the grievant was sleeping on the job and therefore insufficient just cause for discipline here. In support of this position the Union made the following contentions:

1. The Union asserted that the grievant was not sleeping as the Employer alleged. The grievant has a low back injury he sustained at work and was under doctor's restrictions at the time. He was suffering from back pain that he found he could alleviate by sitting in a chair with his head down. The Union argued that this was all he was doing when he was in the Dietary Office that day.

2. The Union asserted that the Dietary Office is frequently used by employees to take their breaks and that this practice is well known by everyone in the department including management.

3. The Union further contended that breaks are frequently fluid in this department and that there is no "set" time to take breaks. Employees take their breaks at irregular times and different places and the Union pointed to the acknowledgement of even Employer witnesses who acknowledged that they do. The grievant alleged that the Dietary Office was close and had the right kind of chairs and tables he needed to ease his back pain. He asserted that his back was giving him trouble due to the work he was doing that day.

4. The Union introduced testimony from another employee who worked with the grievant on the day in question and who verified the practice of taking breaks in the Dietary Office. She further testified that it is common to take breaks at irregular times and that employees frequently take breaks as their workload allows. She indicated that she and the grievant were working together that day and that she was familiar with his schedule that day. She testified that they both took their break at approximately 10:35 a.m. She went outside to smoke a cigarette and the grievant headed toward the Dietary Office. When she returned at approximately 10:55 a.m. the grievant was already back at work in the kitchen.

5. The Union further alleged that there might well be some personal animus between Ms. Reinardy and the grievant due to an incident involving a defective toaster a few weeks prior to this incident. In that incident a toaster in the kitchen was smoking and the grievant reported that it needed to be replaced. He and Ms. Reinardy got into a heated conversation about this and the grievant alleged that she got angry, raised her voice to him and pointed her finger in his face and indicated that he “was out of here” or words to that effect. He took that as a direct threat to his job and to his position as a Union steward since he was asserting that health and safety of the unit members dictated that the toaster be replaced so as not to present a fire danger.

6. The essence of the Union’s claim is thus that the grievant was not truly sleeping but rather resting his back during his break time. The Union further alleged that despite the Employer’s protestations to the contrary, employees take breaks at irregular times and that they frequently take them in the Dietary Office. That was all that was happening here and the grievant did nothing wrong.

The Union seeks an award on this matter sustaining the grievance and expunging the grievant’s record of the final written warning.

## **MEMORANDUM AND DISCUSSION – FINAL WRITTEN WARNING GRIEVANCE**

Here the facts diverged greatly on virtually every material issue. There was no agreement on whether the grievant was sleeping or not nor was there agreement on whether the Dietary Office is used by employees for their breaks. There was not agreement on whether employees take breaks at irregular times depending on workload and the day.

On the first question of whether the grievant was sleeping, the Employer put on two witnesses who indicated they observed the grievant sleeping in the Dietary Office on April 29, 2007. Mr. Vandersteen indicated that Ms. Reinardy called him in to observe the grievant in the Dietary Office on that date where he saw the grievant with his head down on a desk with his eyes shut. He called to the grievant by his first name but got no response. He alleged that he was standing only a few feet from the grievant and that it was clear that the grievant could have heard him if he had been awake. He then testified that he shouted the grievant's name again and that when he did so the grievant startled and awoke. His testimony was that the grievant mumbled something and then got up and left the office.

Mr. Vandersteen further testified that he had seen the grievant take his breakfast break earlier in the day. It was not however clear why he would have recalled such a minute detail about another employee's whereabouts or breaks before the incident in the Dietary Office however. It was further not completely clear why he would have kept track of the grievant's breaks even during the day or that it was his responsibility to do so. There was thus some lack of evidentiary foundation and probative value for this testimony.

Ms. Reinardy also testified that she saw the grievant sleeping in the Dietary Office and that she then found Mr. Vandersteen to have him witness the grievant asleep. She gave credible testimony that Mr. Vandersteen called the grievant's name but he did not respond. Only after Mr. Vandersteen shouted his name did the grievant appear to startle. He then got up and left the office.

The grievant told a somewhat different story. He indicated that he was in the Dietary Office and went there to rest his back. The evidence showed clearly that he has a documented back injury and was under medical restrictions at the time. He further provided credible testimony that his back was sore that day due to the work activity and that he went on break to rest it. The grievant testified that he was able to find a comfortable position to stretch his back by sitting in a chair with his head down and that he did so to ease the pain in his back.

He denied being asleep and alleged that there was ambient noise in the room and simply did not hear Mr. Vandersteen call his name the first time. He indicated that Mr. Vandersteen was by the door, which was further away than Mr. Vandersteen and Ms. Reinardy indicated they were from him. He further testified that he was startled by Mr. Vandersteen shouting at him because he yelled so loudly. When he got up he saw that it was time to return to work and that he simply did that without speaking to anyone directly at that point. Why he did not respond when he heard his name was unclear but it was clear that he did not but simply left the office and returned to work.

The determination of whether the grievant was truly asleep is certainly a difficult one; as is any proposition wherein one party says, "yes, you did," to which the other responds with "no, I didn't." Here though the evidence viewed as a whole shows that it is entirely plausible that the grievant dozed off for a few minutes while he was in the Dietary Office. The two Employer witnesses gave credible and consistent testimony about what they say that showed that the grievant was clearly sitting in a chair with his head down resting on the table. Ms. Reinardy apparently also spoke to the other employees who were in the office that day at least one of whom indicated that they also saw the grievant with his head down as alleged. Those witnesses did not testify however so this evidence was hearsay and therefore of little probative value.

Certainly though there was no evidence to contravene what the Employer's witnesses said other than from the grievant himself. There was some minor dispute about whether his head was facing down or to the side but that was not strictly germane to the question of whether he was asleep or not.

The grievant's actions once his name was shouted showed that he quite likely was asleep or at least in a state of semi-consciousness at that moment. Having said that however, the question to be answered here, i.e. whether there was just cause for some discipline requires further analysis. The fact that he may have been dozing does not end the inquiry.

The next question is whether he was taking an unauthorized break either in time or in an unauthorized break such that it appeared that he was indeed sleeping on the job. On these facts there was insufficient evidence to sustain the Employer's claim.

The Employer asserted that the Dietary Office is a business office and that employees are not supposed to take breaks there. The Employer further asserted that this rule is well known to the employees, including the grievant and that people simply know that the Dietary Office is not a place to take breaks. Doing so is disruptive to the work that is going on there and the office is small so any people there who are not working get in the way of those who are.

The Employer introduced a disciplinary notice given to another employee in the Nutrition Department from March 8, 2007. That employee was also accused of sleeping in the Dietary Office and was given a written warning for doing so. Part of the written warning was a statement that the Dietary Office is not an approved break area. Based on this notice the Employer alleged that the grievant should have known that the Dietary Office was off limits as a break room and that he should not have been in there for that purpose.

There was however no direct evidence that the grievant was placed on notice, even though he is one of the stewards for this unit, that the employee was even given that warning. There was no evidence that he was even involved in that disciplinary matter. The grievant testified that he had no such knowledge.

Moreover, there was considerable evidence that the employees do in fact use the Dietary Office either as a break room or that they are frequently there for non-work related purposes or that they initially go there for work purposes but essentially hang around it for other purposes.

There was further evidence to show that there is no formal policy regarding this nor any sort of formal notice to the employees about it other than by word of mouth or through statements made during employee orientation. There was even evidence to support the Union's claim that supervisory employees are well aware that employees take breaks or are in the Dietary Office for non-work purposes and that in many cases no adverse consequences or discipline results. The Employer alleged that on occasion during regular employee meetings they emphasize that the Dietary Office is not an approved break room.

That may be true but it is in stark contrast to the evidence that shows that the employees use it for that very purpose on occasion and that no discipline results. It is axiomatic that where there is lax enforcement of a rule such laxity undercuts the claim that strict enforcement should result now without some very clear notification to the employees that the prior practice must not stop. This too must be coupled with stricter enforcement of that rule. That was simply not shown to be the case here.

The evidence as a whole shows that while on occasion the Employer makes statements that the Dietary Office is not an approved break room, in fact the practice is that the employees frequently do take breaks there or are there for non-work purposes. The evidence showed that for the most part, people are aware of this practice and that in most cases no adverse consequences result. Given these facts, there was merit to the Union's claim that the Dietary Office is frequently used for breaks and that the grievant had a legitimate expectation that he could use it to get some relief of his back pain that day for a short time.

On the question of whether he should have been there at that particular time, the evidence also supported the Union's claims. The Employer argued that the grievant was not on an approved break time and thus should not have been taking his break then irrespective of where he took it. The Employer argued that he was essentially just loafing and was thus sleeping when he should have been working. The evidence again showed that there is no formalized time for breaks and that employees do in fact take breaks at irregular times depending on the work load on any particular day.

Ms. Anderson testified credibly that she worked with the grievant that day and that they worked until approximately 10:35 when they both went on a break. She went outside to smoke and testified that she believed the grievant was going to the Dietary Office to rest his back. When she returned approximately 20 minutes later she found the grievant already in the kitchen working. While there was some allusion by Employer witnesses to the question of whether the grievant took more than his allotted number of breaks that day there was simply insufficient evidence to establish that. There was also the unrefuted evidence that the grievant was under doctor's order to "change position as needed" as of the time of this incident. This fact alone would not compel the rule that the grievant simply be allowed to do nothing while at work, but it certainly provided additional support for the claim that the grievant was simply resting his back at that time. The evidence considered as a whole shows that the grievant was on a break resting his back in an area that frequently is used by employees for breaks. On these facts there was insufficient evidence to establish a work rule violation justifying discipline.

Finally, even though it is likely not necessary given the above finding to reach it, there was no evidence to suggest that the incident was motivated by any personal animus by Ms. Reinardy. It was clear that there was a disagreement between the two during the "toaster incident" a few weeks before April 29, 2007 and that the two exchanged some heated conversation about it. There was nothing to suggest that she fabricated any of her story in an effort to have the grievant disciplined.

As noted above, there was insufficient evidence to establish a work rule violation for this incident and the grievance must therefore be sustained. The grievant's record shall be expunged of the final written warning.

**AWARD**

The attendance grievance, FMCS # 070725-58829-3 is DENIED.

The final warning grievance, FMCS # 070725-58830-3 is SUSTAINED. The grievant's record is to be expunged of the final written warning in the matter.

Dated: February 5, 2008

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Jeffrey W. Jacobs, arbitrator