

**FEDERAL MEDIATION AND CONCILIATION SERVICE  
UNITED STATES GOVERNMENT  
UPPER MIDWESTERN REGION**

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**Honeywell International, Inc.,**

**Employer,**

**and**

**International Brotherhood of Teamsters  
Local No. 1145,**

**Union.**

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**GRIEVANCE ARBITRATION  
FMCS Case No. 060921-59970-7  
(Wanda Olson Grievance 05-130)  
ARBITRATOR'S AWARD**

ARBITRATOR:	Rolland C. Toenges
DATE OF GRIEVANCE:	December 7, 2005
DATE OF HEARING:	August 30, 2007
RECEIPT OF POST HEARING BRIEFS:	October 23, 2007
DATE OF AWARD:	January 23, 2007

**ADVOCATES**

**FOR THE EMPLOYER:**

Chuck Bengtson, Labor Relations Manager  
Honeywell International, Inc.

**FOR THE UNION:**

John G. Dillon, Attorney  
Hughes & Costello

Martin J. Costello, Attorney  
Hughes & Costello

**WITNESSES**

Donna M. Bistodeau, TGP Supervisor  
Teri Kent, Health Services  
Terri Skrien, Human Resources Manager  
Helen Sigmeth, Occupational Health Nurse

Wanda L. Olson, Grievant  
Thomas Grabinsky, Welfare Director  
James A. Reichert, Attorney

**ALSO PRESENT**

Vicki Hansen, Local 1145

**ISSUE**<sup>1</sup>

**Was discharge of Wanda Olson for just cause? If not, what should be remedy?**

**JURISDICTION**

The matter at issue, regarding discharge of Wanda Olson, came on for hearing pursuant to the Collective Bargaining Agreement between the Parties. The Grievance Procedure applicable to the instant matter<sup>2</sup> defines a “Grievance” as follows:

“Article XV, Section 1. A grievance is any controversy between the Company and the Union (or between the Company and an employee covered by this Agreement) as to (1) interpretation of this Agreement, (2) a charge of violation of this Agreement, or (3) a charge of discrimination involving wages, hours, or working conditions resulting in undue hardships.

The applicable Grievance Procedure provides for the arbitration of grievances, which cannot be settled between the parties:

“Article XV, Section 2, Step 3. Grievances referred to Step 3 shall be discussed between the Business Agent of the Union and the Director of Labor Relations or their delegated authority. If settlement is not reached within five (5) working days after the grievance has been referred to this Step 3, the grievance may be referred in writing to arbitration (Step 4). The written request for arbitration shall be sent to the Director of Labor Relations and shall clearly state the issues involved together with the relief sought. If the grievance is not referred to arbitration (Step 4) within twenty (20) working days after the disposition by the Director of Labor Relations or his or her delegated authority has been delivered to the Union, the settlement set forth in the disposition shall be final and binding.

Article XV, Section 2, Step 4. Not less than ten (10) working days shall elapse from the date of written request for arbitration before a grievance, *including discharge cases*, shall be arbitrated; provided the parties may mutually agree to exceptions to this provision of Step 4.

It is agreed that the requesting party must request in writing from the Federal Mediation Conciliation Service (FMCS), a regional arbitration panel of no less than seven (7) names, within seven (7) working days from the date of its written

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<sup>1</sup> The Parties jointly stipulated to the issue statement.

<sup>2</sup> Joint Exhibit #3.

notice requesting arbitration. Representatives of the Union and the Company will meet either in person or via teleconference to select an arbitrator. In the event the parties cannot agree on an arbitrator, the choice shall be made by the alternate strike method. The person whose name is not struck shall be named as arbitrator. The determination of who goes first shall be on a rotation basis. Each party shall have the right once on each arbitration case to request a new panel from the FMCS. After a case on which the arbitrator is empowered to rule hereunder has been referred to him, it may not be withdrawn by either party except by mutual consent.

An arbitrator for a particular hearing shall be notified by the parties of the mutually agreed upon time and place for the hearing. Each party may submit pre- and post-hearing briefs to the arbitrator, which state the position of the parties and furnish to the arbitrator any arguments in support thereof. If either party submits briefs or other written arguments to the arbitrator prior to, during, or following the hearing, the other party will be furnished with copies of such material simultaneously with its being furnished to the arbitrator.

The authority of the Arbitrator shall be limited solely to the determination of the questions as submitted in Step 3, provided that the Arbitrator shall refer back to the parties without decision any matter not a grievance under Section 1 of this Article or which is excluded from arbitration by the terms of Section 3 herein.

The Arbitrator shall have no power to add to, or subtract from, or modify, any of the terms of this Agreement, or any agreement made supplementary hereto.

The Company and the Union shall set the time and place of hearing. Hearing dates will be subject to the approval of the Arbitrator. The Arbitrator's decision shall be final and binding upon the Company, the Union and employees within the bargaining unit. The expense and fees of the Arbitrator shall be borne jointly by the Company and the Union.

Article XV, Section 3. It is agreed that the following shall not constitute issues for arbitration: (a) supervision and direction of the working force, (b) schedules of production, methods and processes of manufacturing, (c) the terms of a new agreement." [Emphasis Added]

The applicable Collective Bargaining Agreement<sup>3</sup> (Article XIX, Sections 1 and 8) provides conditions for discharge of employees:

"Article 22, Layoff, Transfer and Discharge. Section 1. The Company shall have the exclusive right, except as otherwise provided in this Agreement, to lay off and transfer employees for lack of work or other legitimate reason and *to discharge employees for just cause.*

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<sup>3</sup> Joint Exhibit #2.

Article XIX, Section 7. *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 a 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 with five (5) working days after the written protest is submitted to the Company. [Emphasis Added]

The Parties Selected Rolland C. Toenges as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter.<sup>4</sup>

The Arbitration hearing was conducted as provided by the terms of the Collective Bargaining Agreement and the Federal Mediation and Conciliation Service. The Parties were afforded full opportunity to present evidence; testimony and argument bearing on the matter in dispute and to cross-examine witnesses. All witnesses were sworn under oath.

Both Parties submitted comprehensive post hearing briefs received by the Arbitrator on October 23, 2005.

The hearing record was held open for 30 days pending reply briefs or any further submission by the Parties. Being none, the hearing was closed effective December 23, 2007.

No request was made for a stenographic record of the hearing. The Parties stipulated that there are no procedural objections and the matter is properly before the Arbitrator for decision.

### **BACKGROUND**

Honeywell International, Inc. (Employer) is a diversified technology and manufacturing corporation serving customers worldwide with aerospace products and services. These products and services include, control technologies for buildings, homes and industry, automotive products, turbochargers and specialty materials.

The Company ranks among the nations largest and is divided into different geographic operation areas. The different operation areas function as relatively independent units. One of these is the Minneapolis Operations Area where the instant grievance matter arose.

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<sup>4</sup> Union Exhibit #35.

The Employer operates in a global market and is under increasingly competitive pressure to maintain its presence in the local area. Due to a wide variety of business factors over the years, the number of employees has shrunk from over 20,000 to approximately 4,000.

Approximately 1,700 of the employees are unionized, including the grievant named in the instant matter. The unionized production employees are members of the International Brotherhood of Teamsters, Local No. 1145 (Union). The Union and Employer have a lengthy collective bargaining history.

The Collective Bargaining Agreement (CBA) relevant to the instant grievance is that in effect from February 1, 2002 through January 31, 2007.<sup>5</sup> In early 2006, the Parties negotiated a new grievance procedure, supplanting that appearing in the aforementioned Agreement, which applied to any and all grievances that arose on or after August 8, 2005.<sup>6</sup> Therefore, this new Grievance Procedure<sup>7</sup> applies to the instant grievance matter, which arose in December 2005.

In addition to the terms and conditions of employment covered by the CBA, the Company has established an Hourly Policies and Procedures Manual for the Minneapolis area. The Manual contains the Discipline Policy.<sup>8</sup> The Discipline Policy uses a demerit-based system that provides when and how employees can be disciplined. The Hourly Policies and Procedures Manual also includes a Time and Attendance Policy, that addresses unexcused absences (lost hours).<sup>9</sup> The Policy sets forth a progressive discipline schedule based on the number of hours lost.

The Company has established the above reference Policy as a means to manage “lost Hours.” The Company views “lost hours” as detrimental to the efficiency of operations and having a negative effect on employee morale. Employees who fail to appear for work as scheduled have the effect of inconveniencing other employees by requiring them to work unexpected hours and reducing their opportunity to use accumulated leave benefits.

The Company has a “Weekly Indemnity Leave Benefit,” that is similar to short-term disability compensation. Disabled employees who are unable to work are eligible after seven days of disability and can be required to undergo an examination by a Company selected medical authority as a condition of receiving benefits. The benefit is 55% of the employee’s regular wage for up to 26 weeks. Employees that exhaust their Weekly Indemnity Benefits can then become eligible for the Company’s Long Term Disability benefit.

Employees who suffer a work related disability are also covered by the Minnesota Worker’s Compensation Act (Act). Generally speaking, the Act provides an employee

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<sup>5</sup> Joint Exhibit #2.

<sup>6</sup> Joint Exhibit #3.

<sup>7</sup> Joint Exhibit #3

<sup>8</sup> Employer Exhibit #5.

<sup>9</sup> Employer Exhibit #4.

with payment for medical expenses, retraining and two-thirds of their salary for missed work. If the Company denies an employees claim for benefits under the Act, there is an appeal procedure to resolve any disputes.

If the Company denies an employee's claim under the Act, the Company policy and practice provides for the employee to receive benefits under the Company's Weekly Indemnity leave program.

Wanda J. Olson (Grievant) was employed by Honeywell on April 7, 1998 as an assembler in the Golden Valley Plant.<sup>10</sup> In 2001 she experienced a shoulder injury and was off work for some time. The Grievant had surgery on her shoulder and on September 4, 2003 returned to work at the Honeywell Stinson Plant with permanent physical restrictions regarding lifting and frequency of movement.<sup>11</sup> The Grievant was to lift no more than 10 pounds continuous, no more than 19 pounds frequently and no more than 29 pounds occasionally. The Grievant was also limited to occasional reaching at and above shoulder height, but could grip/grasp on a continuous basis. These physical limitations were within the requirements of her job. Her last visit to her physician for the 2001 shoulder matter was September 3, 2003.<sup>12</sup>

On June 14, 2005, the Grievant claimed a sensation in her right shoulder when pushing a "pinch" cart.<sup>13</sup> The Grievant was put on light duty and finished her shift on this date.<sup>14</sup>

On June 15, 2005 the Grievant reported an injury to her supervisor and was directed to see the Occupational Health Nurse at 2:30 p.m. on June 16, 2005. The Grievant did not keep the appointment with the nurse but worked an 8-hour shift.<sup>15</sup>

On June 16, the Grievant worked a 12-hour shift, including overtime.<sup>16</sup>

On June 17, 2005, Dr. Frank B. Norberg, Orthopedic Surgeon, examined the Grievant. Dr. Norberg had previously treated the Grievant, most recently in September 2003. Dr. Norberg ordered an MRI and placed her on a lifting restriction of one to five pounds with her right hand.<sup>17</sup> The MRI indicated mild supraspinatus and infraspinatus tendinosis. The Grievant chose to use her paid leave (vacation) for the period June 17 through July 17, 2005, even though she was approved for disability leave.

The Employer arranged a meeting with the Grievant and Union Representatives on June 21, 2005 to discuss return to work options.<sup>18</sup> Based on a re-evaluation on June 19, 2005,

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<sup>10</sup> Employer Exhibit #11.

<sup>11</sup> Employer Exhibit #10.

<sup>12</sup> Union Exhibit #7.

<sup>13</sup> Employer Exhibit #11.

<sup>14</sup> Union Exhibit #24.

<sup>15</sup> Employer Exhibit #11.

<sup>16</sup> Employer Exhibit #11; Union Exhibit #24.

<sup>17</sup> Union Exhibit #8; Employer Exhibit #

<sup>18</sup> Employer Exhibit #11.

Occupational Health Nurse, Helen Sigmeth, issued the Grievant an “Authorization to Return to Work” effective June 29, 2005, in accordance with the restrictions noted by the Grievant’s physician on June 17, 2005.<sup>19</sup>

On July 18, 2005, Dr. Norberg reported that the MRI showed no evidence of cuff tearing but indicated some fraying of her anterior and superior labrum. There was no evidence of acute changes or abnormalities from her previous study.<sup>20</sup> Dr. Norberg recommended she remain off work for two weeks and ordered physical therapy. The physician also ordered some laboratory tests and scheduled her to be seen again in two weeks.

From July 17, 2005, the Grievant received a “Weekly Indemnity Benefit” of \$411.29.<sup>21</sup> The Grievant was paid this benefit from July 17, 2005 through October 27, 2005.

On August 1, 2005 the Grievant saw Dr. Norberg again. Although the Grievant reported diffuse pain, there was no finding of skin changes or swelling. The laboratory findings indicated normal CBC and sedimentation rates. She had borderline high C-reactive protein of 0.6 mg/dL and a normal quantitative rheumatoid factor. Dr. Norberg’s plan was to have her see a neurologist to rule out a neurologic cause for pain and to have her continue physical therapy. Dr. Norberg’s immediate plan was to have her return to work with restrictions. If no neurological disorder were present, Dr. Norberg would release her to work with minimal restrictions.<sup>22</sup>

On August 28, 2005 the Grievant saw Dr. Jagdeep Kohli of Noran Neurological Clinic. Dr. Kohli ordered an MRI scan which was performed at Noran on August 2, 2005.

On September 2, 2005, Dr. Norberg referred the Grievant to Dr. Paul Biewin to see if he had any further input. Dr. Norberg suggested work hardening and indicated that he had nothing more to offer the Grievant. Dr. Norberg stated that the Grievant could return to her previous level of work activities with her permanent restrictions.<sup>23</sup>

On September 2, 2005, Helen Sigmeth, the Company’s Occupational Health Nurse, authorized the Grievant to return to work with the restrictions ordered by Dr. Norberg.

On September 8, 2005, the Grievant returned to work but only worked some six hours as she alleged recurrence of severe pain. The next day, the Grievant reported in ill and did not report to work thereafter.<sup>24</sup>

On September 16, 2005, the Grievant saw Dr. Nathan Norquist, of Health Partners Family Practice in the Coon Rapids Clinic, for a third opinion as neither the Employer

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<sup>19</sup> Employer Exhibit #10; Union Exhibit #9.

<sup>20</sup> The physician’s reference is to a minimal partial thickness cuff tear for which the Grievant had been treated previously.

<sup>21</sup> The weekly benefit was offset partially by the Grievant’s earning from September 8, 05.

<sup>22</sup> Union Exhibit #13.

<sup>23</sup> Union Exhibit #14.

<sup>24</sup> Employer Exhibit #11.

nor the Grievant's health plan would authorize treatment with Dr. Biewin or a work hardening/conditioning program.

Dr. Norquist's evaluation of the results of Dr. Kohli's examination was that there was no nerve root impingement causing her right shoulder symptoms. The Grievant requested that Dr. Norquist provide a work note stating that she cannot use her right arm in her work until her shoulder has been rehabilitated. Dr. Norquist provided the requested note stating no work use of her upper extremity/arm until further evaluation in one month and ordered continued physical therapy. Dr. Norquist also prescribed pain medications.<sup>25</sup>

On October 14, 2005 and again on November 14, 2005, Dr. Norquist extended the above referenced treatment regimen.<sup>26</sup>

On October 18, 2005, Terri Kent of the Employer's Health Services notified the Grievant of a "Fitness for Duty" exam scheduled for her on October 24, 2005.<sup>27</sup> The notice specified that undergoing the exam was a condition of continuing "Weekly Indemnity Leave."<sup>28</sup> The Grievant failed to appear for the exam.

On October 24, 2005, the Grievant was again notified but failed to appear for a "Fitness for Duty" exam scheduled for her on October 27, 2005<sup>29</sup>. The notice included a statement that a condition of eligibility for "Weekly Indemnity Leave" is the requirement to appear for a "Fitness for Duty" exam when required by the Employer. The notice also included a warning that, "Failure to attend this appointment, your Weekly Indemnity leave will expire and hours could be considered lost time and will be subject you to the penalties prescribed for lost time."<sup>30</sup>

On November 23, 2005 the Employer notified the Grievant that her leave had expired effective October 27, 2005, causing her to have accumulated more than 90 lost hours.<sup>31</sup> The notice informed the Grievant that she was discharged immediately for having more than 90 lost hours, which is a violation of the "Time and Attendance Policy."<sup>32</sup>

On December 7, 2005, a grievance was filed by the Union alleging that the Company was in violation of Article XIX, Section 7, of the CBA by discharging the Grievant without "just cause." The remedy sought was reinstatement of the Grievant without loss of wages and benefits.<sup>33</sup>

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<sup>25</sup> Union Exhibit #16.

<sup>26</sup> Union Exhibit #22; Employer Exhibit 15.

<sup>27</sup> Employer Exhibit #21; Union Exhibit #19, A.

<sup>28</sup> Union Exhibit #5; Employer Exhibit #18.

<sup>29</sup> Employer Exhibit #22; Union Exhibit #19, B.

<sup>30</sup> Employer Exhibit #8, Honeywell Minneapolis Weekly Indemnity Plan Description, Section L.

<sup>31</sup> Union Exhibit #23; Employer Exhibit #8.

<sup>32</sup> Union Exhibit #4,A; Employer Exhibit #4.

<sup>33</sup> Union Exhibit #26: Employer Exhibit #9.

Following filing of the Grievance, the Parties processed it to Step 3 of the Grievance Procedure without reaching a settlement. The matter was then advanced to Step (4) of the Grievance Procedure, which brings the matter to the instant arbitration proceeding.<sup>34</sup>

### **EXHIBITS**

#### **EMPLOYER EXHIBITS:**

1. CBA effective January 31, 2007.
2. CBA effective January 31, 2002.
3. Letter of Agreement regarding arbitration dated March 27 and April 11, 2006.
4. Factory Human Resources Policies and Procedures, issue No. 5.
5. Factory Human Resources Policies and Procedures, issue No. 10.
6. Honeywell Personnel History Wanda Olson (attendance and tardiness).
7. Honeywell Weekly Check – Wanda Olson, 5/6/05 through 11/23/05.
8. Notice of discharge to Wanda Olson, dated November 23, 2005.
9. Grievance documents – Wanda Olson discharge.
10. Authorization to Return to Work – Wanda Olson, September 4, 2003.
11. Record of events regarding Wanda Olson’s injury and absence from work.
12. Incident Investigation Form – Wanda Olson’s injury of June 14, 2005.
13. Return to Work Form – Wanda Olson, September 2, 2005.
14. Authorization to Return to Work – Wanda Olson, September 2, 2005.
15. Activity Plan/Work Ability – Wanda Olson, October 4, 2005 by Health Partners.
16. Finding and Order of Workers Compensation Hearing, dated November 3, 2006.
17. Notice of Benefit Payment, Total Temporary Disability. Wanda Olson, 11/03/06.
18. Honeywell Minneapolis Weekly Indemnity Plan Description, April 1, 1995.

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<sup>34</sup> Union Exhibits #30, 31; Employer Exhibit #9.

19. Employee Information document regarding Weekly Indemnity Plan benefits.
20. Weekly Indemnity Pay Sheet – Wanda Olson, July 18, 2005 to October 27, 2005.
21. Letter to Wanda Olson regarding fitness for duty exam, dated October 18, 2005.
22. Letter to Wanda Olson regarding fitness for duty exam, dated October 24, 2005.
23. Leave record for Wanda Olson – March 26, 2004 to November 22, 2005.
24. Honeywell- Employee Leave Report – Wanda Olson, November 22, 2004 to November 22, 2005.

UNION EXHIBITS:

1. CBA – Effective January 31, 2002.
2. Letter of Agreement regarding arbitration dated March 27 and April 2006.
3. Honeywell Website Information (A, B, C, D).
4. Honeywell Factory Human Resources Policies and Procedures: Attendance (A, B)
5. Honeywell Weekly Indemnity Plan Description.
6. Honeywell Seniority List, Grievant Wanda Olson – p. 21.
7. Dr. Norberg's prior work restrictions for Grievant dated September 2003.
8. Dr. Norberg's medical records of Grievant regarding re-injury dated: June 17, 05.
9. Honeywell disability Leave Authorization for June 17, 2005 through June 29, 05.
10. Dr. Nordberg's medical records of Grievant regarding re-injury dated: July 18, 05.
11. Honeywell Disability Leave Authorization for July 18 through September 8, 05.
12. Orthopedic Rehabilitation Specialists record dated: July 26, 2005.
13. Dr. Norberg's update, August 1, 2005.
14. Dr. Norberg's update and referral to Dr. Biewin dated: September 2, 2005.
15. Time and Attendance report. Grievants's September 8, 2005 attempt to work.

16. Dr. Norquist's examination of Grievant dated: September 16, 2005.
17. NovaCare Rehabilitation progress reports dated: 9/23/05 and 10/12/05.
18. Dr. Norquist's medical update of Grievant dated: October 14, 2005.
19. Honeywell requests for Weekly Indemnity exam dated: 10/18//05 and 10/24/05.
20. Honeywell Disability Leave Authorization for July 18 through October 27, 2005.
21. NovaCare Rehabilitation Progress report dated: November 9, 2005.
22. Dr. Norquist's medical update of Grievant dated: November 14, 2005.
23. Employer's November 23, 2005 Termination Notice.
24. Honeywell Individual Time and Attendance Report.
25. Honeywell missing hours tally.
26. Grievance No. 5-130.
27. NovaCare Rehabilitation Progress report dated: December 7, 2005.
28. Dr. Norquist's medical update of Grievant dated: December 12, 2005.
29. NovaCare Rehabilitation Patient Discharge Summary dated: December 14, 2005.
30. Union's Move To Arbitration dated: January 26, 2006.
31. Employer's Step 2 Response dated: February 5, 2006.
32. Dr. Norquist's medical updates of Grievant dated: 2/14/06 and 2/17/06.
33. Grievant's Worker's Compensation Findings and Order from hearing on 10/3/06.
34. Company's Weekly Indemnity Payments to Grievant: 7/6/05, 9/20/05 & 11/1/05.
35. Memorandum Appointing Arbitrator Rolland C. Toenges, dated October 26, 06.
36. Worker's Compensation Claim Flow Chart.

### **POSITION OF THE PARTIES**

THE EMPLOYER SUPPORTS ITS CASE WITH THE FOLLOWING:

- The Company had “just cause” to discharge the Grievant for excessive absences.
- The Grievant failed to attend a fitness for duty evaluation and consequently violated the Time and Attendance Policy by accumulating excessive “lost hours.”
- The Company accommodated the Grievants’ first failure to attend a fitness for duty evaluation and arranged a second, which the Grievance also failed to attend.
- The Grievant was advised when notified to attend the fitness for duty evaluation that failure to do so would result in “lost hours” and the penalties associated therewith.
- The Union’s argument that, because the Grievant prevailed in certain aspects of the Worker’s Compensation Appeal, she should also prevail in the instant case is misplaced.
- The issues regarding Workers Compensation benefits are closed. The instant matter concerns the Grievant’s refusal to comply with the conditions of the Weekly Indemnity Benefit Policy, resulting in excessive “lost time.”
- Arbitrators avoid harsh, absurd, or nonsensical results such as the Union is suggesting in the instant case. If the Grievant were to be returned to work one and one half years after her discharge, the next case might involve an employee gone for five, ten or 20 years.
- The Union’s basic argument for the Grievant not wanting to participate in the Weekly Indemnity Benefit program is to avoid possible tax complications; an argument contradicted by the Union’s own Health and Welfare Director, Tom Grabinsky.
- Grabinsky testified that any employee who has a Worker’s Compensation claim denied by the Company goes on Weekly Indemnity Benefits to cover any time they miss from work. The employee remains on Weekly Indemnity Benefits until the Worker’s Compensation matter is resolved.
- Grabinsky also testified that employees who do not get time they miss from work covered are subject to the penalties for “lost hours.”
- The Grievant knew she needed to get her “lost hours” covered because she went on Weekly Indemnity Benefits in June when she first began losing work time.
- The Grievant’s apparent “difficulty with taxes issue” did not cause her any concern during the five months she received the benefit before her discharge.

- The Grievant's raising of the tax issue appears to simply be a convenient after-the-fact rationalization for her refusal to attend the fitness for duty evaluation.
- The advice of the Grievant's attorney to not attend the fitness for duty evaluation was bad advice and had the effect of trading her job for a possible future Workers Compensation payment.
- Realizing his mistake, the Grievant's attorney's testimony for the Union in the instant case is an attempt to cover his mistake.
- The Union's argument to retroactively convert the Grievant's "lost hours" is flawed and must fail.
- The Union needs to be reminded of the longstanding arbitration maxim states, "When a matter reaches the arbitration stage circumstances often have changed. It is necessary to keep in mind that the issue is the validity of the decision at the time it was made."
- At the time of the Grievant's discharge, the Time and Attendance Policy's exception for Worker's Compensation did not apply to her, as the outcome of the Worker's Compensation appeal was unknown.
- Clearly, the decision to discharge the Grievant was valid and appropriate at the time and continues to be valid today.
- The Union's argument urging the Arbitrator to apply Company Policy to the Grievant, now a non-employee, is opposite what the union argued in the arbitration of Honeywell v. Teamsters Local 1145, FMCS 06-0504 (2007)(Anderson, Arb.) The Union argued, and the Arbitrator agreed, that the grievant in the referenced case did not have an employment relationship with the Company and therefore was not subject to its rules, regulations and policies.
- The Grievant's relationship with the Company is even more remote than that of the grievant in the above referenced case who was "an inactive" employee.
- Discharge of the Grievant is not excessive, unreasonable or an abuse of management discretion. The Grievant violated the Time and Attendance Policy by accumulating excessive "lost hours," the consequence of which is discharge.
- In discharging the Grievant for excessive "lost hours" the Company acted in accordance with its Time and Attendance Policy that is applied to all employees.
- In that the Company's Time and Attendance Policy is applied to all employees, it is not arbitrary, capricious, or discriminatory.

- Arbitrators in past cases involving medical issues and the Time and Attendance Policy have ruled in cases similar to the instant matter.
- Arbitrator Bellman ruled on several cases involving medical issues and the Time and Attendance Policy. In one case Bellman upheld discharge of an employee that submitted medical information in an untimely manner. In another case Bellman upheld the discharge of an employee who failed to attend a Company requested medical evaluation in a timely manner.
- Arbitrator Christenson also dealt with medical absences. Christenson upheld the discharge of an employee who missed work because of medical reasons and was not sufficiently responsive to the Company's request for his return to work.
- Arbitrator Simkin also handled medical absence discharges. Simkin upheld the discharge of an employee on maternity leave who failed to return to work after her leave was extended and did not inform the Company of any reason.
- Arbitrator Simkin upheld the discharge of an employee with a Worker's Compensation covered injury who was terminated for "lost hours" who failed to respond to Company requests for medical evidence supporting his absence.
- Like in the aforementioned cases, the Grievant's attempt to use her Worker's Compensation finding to cover her "lost hours" is untimely and should be rejected.
- In the past and instant hearing, the Union's has argued that the Time and Attendance Policy was not negotiated and therefore should not be applied to Union members. The Union had the opportunity to bring up changes as it felt necessary in recent negotiations but only sought to keep it unchanged.
- Arbitrator Sharpe in T.Marzetti Co. v. Teamsters Local 284, 91 LA 154 (1988) (Sharpe, Arb.) stated "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 illness 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."
- Arbitrator Bellman in Honeywell International, Inc. v. Teamsters Local 1145, B-3 (2002) (Bellman, Arb.) stated in part that "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, but there is a point at which an employer may justifiably conclude that an employee is simply excessively absent. . ."

- Arbitrator Bellman in Honeywell International, inc. v. Teamsters Local 1145, B-44 (2004) (Bellman, Arb.) found that the Company's Time and Attendance Policy is enforceable, even though not negotiated as it is reasonable as applied in particular cases, is very long-standing, consistent, and well known practice. This practice amounts to an agreement allowing the Company to act as it did.
- Arbitrator Flagler in Honeywell International v. Teamsters Local 1145, B-44 (2004) stated in part, ". . . nothing in the parties collective bargaining agreement requires that the Company negotiate the items of its attendance policies. . . the Company of course remains obligated to apply said policy subject to the just cause requirement of the labor agreement. . . Comparable no fault policies are now common in industry and have been held to be reasonable by an overwhelming majority of arbitral authority."
- Arbitrator Befort in Honeywell International, Inc. v. Teamsters Local 1145, FMCS 0605-56317-7, (2007) Befort, Arb.) found that the Employer having unilaterally promulgated the Policy does not mean that it is of no import. "An employer generally has the right to establish reasonable work rules so long as they are not inconsistent with law or the collective agreement. In this instance, the Policy is a reasonable response to ongoing attendance problems. As such, the Policy is a valid gloss on the contract's just cause standard and properly informs arbitral analysis."
- As can be noted in the foregoing, the Company's Time and Attendance Policy has been repeatedly supported as valid and the Union's argument to the contrary should be rejected as frivolous.
- The Grievant has been treated exactly like other employees who exceed 90 lost hours; therefore her discharge should be upheld.

#### THE UNION SUPPORTS ITS CASE WITH THE FOLLOWING:

- The Grievant cannot be discharged for lost work time covered by Workers Compensation.
- The Grievant's absences resulted from an on-the-job injury and were protected under Minnesota's Worker's Compensation Act (Act) and were specifically excluded under the Company's Attendance Policy.
- The Company's refusal to accept the Grievant's injury as covered by Workers Compensation was overturned by a Compensation Judge of the Office of Administrative Hearings.
- The Company should not have charged the Grievant with lost time.

- The Company pursued the Grievant's absence as covered by its Weekly Indemnity Benefit, even though the Grievant made it clear she was claiming Workers Compensation and didn't want the indemnity benefit.
- The Company discharged the Grievant for having over 160 hours of lost time, all of which was when she was under temporary disability.
- Even though the Grievant was given a return to work release by her physician on December 12, 2005, the Company's position was that she was not eligible to return to work as she had been discharged on November 23, 2005.
- Honeywell unilaterally implemented its extra-contractual Attendance Policy. It was not negotiated with the Union and the Union did not agree to it.
- The Employer's Attendance Policy specifically provides that the following does not count as "lost hours:"
  - "Time off authorized under State Workers Compensation law."
  - "Time lost due to a work related injury or illness post MMI if the employee provides adequate documentation upon return to work that the time would have been compensable as worker's compensation prior to the employee reaching MMI."
  - Time off when the employee is sent home by the medical department due to "physical injury occurring while at work."
  - Time lost for attending State Workers' Compensation hearing.
- The instant matter involves a difference of opinion about whether the Grievant's injury was covered by the Act. It is not a misconduct or absenteeism case and it should never have been prosecuted under Honeywell's Attendance Policy.
- If the Grievant's injury was job-related under the Act, as the Union contends, her resulting time off the job was protected under the express terms of the Act, the Company's Attendance Policy and the CBA.
- The Grievant's injury was found covered under the Act by the Minnesota Compensation Court and was compensable. The Company did not appeal.
- Accordingly, the Grievant's "lost hours" under the attendance policy must be retroactively converted to protected time off under the terms of the Attendance Policy and the Grievant must be reinstated and fully compensated.
- The Company imposed the most extreme form of discipline (discharge) and assumes the burden of proof in two areas:

- Whether the employee committed an offense warranting discipline; and
  - Whether the act, if proven, justifies discharge.
- “Just Cause” is a qualitative concept, incapable of quantification under either the Company’s Policies or any other formula.
- Arbitrators often determine the existence of just cause by applying “seven tests:”
  - Did the employee have reasonable notice of the rule or conduct violated?
  - Was the rule or order reasonable?
  - Was an investigation conducted?
  - Was the investigation fairly conducted?
  - Was there reasonable proof that a violation occurred?
  - Was the rule or order applied uniformly and consistently?
  - Was the penalty in keeping with the seriousness of the violation?
- “Just Cause” exists only if every one of the first six factors is established and there is no evidence of entrapment or previous condoning of the same behavior.
- Because a reasonable order and proof are lacking in the instant matter, the penalty is not supported by the circumstances. The Company has not met its burden of proof.
- Application of the seven tests to the instant case makes it absolutely clear that the Company did not have “just cause” to terminate the Grievant.
- An examination of the circumstances surrounding the Grievant’s absence shows that the Company did not establish that the Grievant was properly terminated under the Attendance Policy.
- Under the particularized facts surrounding the Grievant’s absence, no discipline is appropriate, much less discharge, because the Grievant should not have been charged “lost hours” under the Attendance Policy.
- The Company is bound by the Worker’s Compensation Court Order of November 3, 2006, which found that the Grievant’s “lost hours” for the period June 17, 2005 through December 12, 2005 was due to her injury at the Company.

- The Company's position in the instant proceeding is merit less, especially in light of the fact that it did not appeal the Worker's Compensation Court Order.
- The Company's discharge of the Grievant while she was effectively seeking benefits under the Act violates Minn. Stat., Section 176.82, prohibiting retaliatory discharge of an employee seeking such benefits.
- An employer who discharges or threatens to discharge an employee who is seeking benefits under the Act is liable in a civil action for damages, including attorney fees, costs and punitive damages. These damages are separate from the benefits that might later be found to be owed to the employee.
- The Company has also violated Minn. Stat., Section 176.82, subd. 2 by refusing to offer the Grievant continue employment when such work is available within her restrictions.
- Arbitrator Berquist address the very issue presented in the instant case in Oaklawn Health Care Ctr. and United Food & Commercial Workers Union, Local No. 653, 95-2 Lab. Arb. Awards (CCH) Sec. 5329 (Berquist 1995). As in the instant case, involved was a no-fault absenteeism policy. The employee was charged with an "occurrence" under the attendance policy when she was off work due to an on-the-job injury. The arbitrator concluded that absence from the job due to a work related injury was not to be counted as an "occurrence" under the absenteeism policy and found that the discharge was not for "just cause."
- Berquist further reasoned that "The Minnesota Worker's Compensation Statute . . . prohibits an Employer from discharging an employee because the employee sought workers' compensation benefits, . . . Charging an occurrence under the absenteeism policy for an absence due to a work-related injury may conceivably be construed as constituting a violation of this statute by in effect threatening to discharge or obstructing the employee in the exercise of his rights under the Workers' Compensation Statute. . . In addition, if workers' compensation absences were counted as occurrences under the absenteeism policy, the effect would be to substantially deter the employee from exercising his employment workers' compensation rights under Minnesota Statutes because of the fear and threat of discipline and possible termination under the absenteeism policy of the Employer.
- In Mirro Co. and United Steelworkers of Am., Local 649, 01-1 Lab. Arb. Awards Sec. 3771 (Graf 2000) the Arbitrator sustained the grievance where the employee was sent home due to a medical condition, indicating it would not count as an absence, and then used the absence as grounds for termination.
- In Accord Excel Corp. and United Food Workers Local 540, 95 LA 1069 (Shearer 1990) the Arbitrator found that the employer had violated the contract by

terminating an employee who was undisputedly off work on a work-related injury for which she was receiving worker's compensation benefits.

- The reasoning cited in the above referenced cases applies in the instant matter. It is a violation of the public policy expressed in the Act to retaliate against employees by charging them with an absence due to a workplace injury where the employee is covered by the Act.
- The Company's discharge of the Grievant for "lost hours" during the period she was recovering from her workplace injury covered by the Act violated the anti-retaliation provision of the Act. For this reason the discharge did not comport with "just cause."
- The Company also violated the express terms of its own Attendance Policy when it discharged the Grievant. The Policy specifies when absences shall not be counted as "lost hours:"
  - (1) Paid absences, including the days required to qualify for the paid medical leave of absence and any time off authorized under State Workers Compensation law;
  - (2) Time lost due to a work related injury or illness post MMI if the employee provides adequate documentation upon return to work that the time would have been compensable as worker's compensation prior to the employee reaching MMI.
  - (13) Employees sent home by the medical department for reason of physical injury occurring while at work;
  - (20) Time lost attending a State Workers Compensation hearing.

The Worker's Compensation Court has determined that the Grievant was injured while at work; that she timely filed a Workers' Compensation claim (which the Company denied), and that her "lost hours" were actually authorized, compensable, and due to a physical injury occurring while at work. Additionally, the Court found that the Grievant was disabled due to this work-related injury during the entire time the Employer charged her with "lost hours." The Company did not appeal the Court's findings, which are therefore final.

Discharge of the Grievant violated "just cause" and return-to-work provisions of the CBA. Article IV, Section 2 of the CBA addresses the return to work of a worker who suffers permanent partial occupational disability:

- In the event, the Minnesota Worker's Comp Division, under the provisions of the Minnesota Worker's Compensation Law, determines that an employee has suffered a permanent partial occupational disability which

was caused by an illness or accident occurring while the employee was at work, the Company and the Union shall agree upon the job assignment of such employee when he or she returns to work.

The above language applies to the instant case. Nothing in the Agreement says that an aggravation of such a permanent partial occupational disability will remove the protection of Section 2.

Under the CBA, the Company must meet with the Union to discuss an appropriate job assignment when the Grievant returns to work. Therefore, the discharge of the Grievant is without “just cause.”

The Company’s entire defense is irrelevant because a court has determined that the Grievant’s work-related injury was covered by the Act and the Company’s own policy is that an absence covered by the Act is not to be counted as “lost hours.”

When the Company decided the Grievant was no longer eligible to receive Weekly Indemnity benefits, the only option available was to simply stop payments, not treat her time off as “lost hours.”

The Company cannot circumvent the Act’s protections, the CBA return-to-work provisions, and its own Policy exceptions to “lost hours” by ceasing the Grievant’s Weekly Indemnity Benefits.

Even if the Arbitrator finds “just cause” for discipline, discharge is too severe a penalty. The Parties have stipulated that the Arbitrator’s authority extends to designing a remedy appropriate to the particularized facts of the instant case.

The Arbitrator should exercise discretion. If the Arbitrator finds that the Grievant committed some misconduct for which discipline is warranted, he should modify the extreme penalty of discharge to an appropriate level of discipline, such as a warning, or at worst a suspension.

The Arbitrator should find no “just cause” for discharge and direct the Company to make the Grievant whole for her economic losses, seniority, and all benefits and rights under the CBA.

## **DISCUSSION**

Generally the facts in the instant case are not in dispute. Therefore the Arbitrator will forego a detailed analysis of witness testimony.

A threshold issue in the instant case is whether the Grievant’s “lost hours,” from the time she failed to appear for the scheduled medical evaluation on October 27, 2005 until

November 23, 2005, constitute “just cause” for discharge. Even if these “lost hours” do constitute “just cause,” is the discharge in violation of provisions of the Minnesota Worker’s Compensation Act and the Company’s own Policies and Procedures.

The Arbitrator does not view the Company’s denial of the Grievant’s Worker’s Compensation claim for the June 14, 2005 claimed injury to be a critical factor in reaching a decision in the instant case. Denial is a right employers have under the Act and there are appeal procedures established to resolve these differences as was demonstrated in the instant case and earlier case involving the Grievant in 2001-2003.

The record shows that the Grievant should have been familiar with the appeal procedure under the act. The Grievant’s Worker’s Compensation claim from 2001 -2003 proceeded essentially in the same manner as the instant situation. The Grievant was represented by an attorney in the 2001–2003 case and was represented by this same attorney in the instant case.

Also in the 2000-2003 case, the Grievant received Weekly Indemnity Benefits as she did in the instant case. The Grievant’s lack of interest in Weekly Indemnity benefits was tempered by her experience in the 2001-2003 case where the intermingling of the Weekly Indemnity benefit with her Worker’s Compensation benefits created complications with her income taxes.

The record shows that payment of the Weekly Indemnity Benefit is standard procedure in situations such as that experienced by the Grievant and this provision is administered in a uniform and consistent manner.

Union Witness, Thomas Grabinsky, testified that, “If an employee is off work and the employees Worker’s Compensation claim is denied, the employee goes on Weekly Indemnity Benefits, then on LTD, if they have it - if not on long term disability.”

Grabinsky testified that he is the Union’s Health and Welfare Director and has been employed by Honeywell for over 34 years.

Grabinsky testified that the Grievant called him in September 2005 and said she had not received a check since June. Grabinsky testified that he contacted Helen and Teri and told them that the Grievant was complaining she was not getting checks. Teri said not enough data.

Grabinsky testified that, “If Worker’s Compensation is denied, I tell employees to, (1) Fight the denial; (2) Get on Weekly Indemnity Benefits, and (3) Get an attorney to handle the Worker’s Compensation claim.”

Grabinsky testified that, “If an employee didn’t take the Weekly Indemnity Benefits, he would tell them that they could get into trouble because of lost hours.”

Grabinsky testified that, “Company has right to fire employees for lost hours and has the right to require employees to see the Company doctor.”

Grabinsky testified that he thinks the Grievant was handled different that previous cases and told Helen and Teri that the Grievant’s injury should be Worker’s Compensation. However, on cross-examination, Grabinsky testified that he “Don’t really know what happened [injury] and his opinion is speculation.”

The record also provides an indication of why the Grievant’s Worker’s Compensation claim was denied and why the Company scheduled her to be evaluated by its own physician.

The Grievant’s work record shows a history of work absences and tardiness. On June 6, 2002, the Grievant was issued a First Degree Demerit for excessive tardiness. She had four unexcused tardies with a thirty-day period.<sup>35</sup> On March 30, 2004, the Grievant was issued a written warning for the accumulation of 40 lost time hours as of March 16, 2004.<sup>36</sup> On September 7, 2004, the Grievant was issued a written warning for the accumulation of 40.0 hours of lost time as of August 9, 2004. Before the warning was issued, the Grievant incurred a First-Degree Demerit for 60 hours of lost time as of August 11, 2004.<sup>37</sup>

Grabinsky testified that the, “ Grievant is injury prone which results in high costs for medical treatment and lost time. This hurts the Company’s safety record and reflects poorly on safety for the department and other workers.”

Grabinsky testified that, “No one has told me that there is a grudge against the Grievant, but [I] could tell there is doubt about the legitimacy of her Worker’s Compensation claim.”

The record shows that at the time of the June 14, 2005 incident, the Grievant’s job could be performed within the physical limitations previously established on September 4, 2003. On June 14, 2005, when the Grievant reported the injury at issue, she was pulling the pinch cart where the handles are at waist level and no outstretched reaching is required, which was within the 2003 physical limitations. Even though the physical requirements of the Grievant’s task at the time of her reported injury on June 14, 2005 were within the previously established restrictions, the Grievant claimed the June 14, 2005 injury was from her old injury at the Golden Valley Plant.<sup>38</sup>

When the Grievant reported the injury to her supervisor on June 15, 2005, an appointment was made for her to see the Company’s Occupational Health Nurse the following day, June 15, 2005. The Grievant did not appear for the appointment, but

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<sup>35</sup> Employer Exhibit 6, page 3.

<sup>36</sup> Employer Exhibit 6, page 2.

<sup>37</sup> Employer Exhibit 6, page 1, and Employer Exhibit #23.

<sup>38</sup> Employer Exhibit #11.

worked the full shift that day. The following day (June 16, 2005) the Grievant worked a 12-hour shift, including overtime.

On June 17, 2005, the Grievant saw Dr. Norberg, the Orthopedic Surgeon, who had treated her for her injury in 2001–2003 and established the physical limitations in effect since September 2003. Dr. Norberg ordered an MRI and placed a one-month limitation (June 19 – July 19, 2005) on use of her right hand of one to five pounds and no extension of her elbow more than six inches from her side.

On June 21, the Company called a meeting with the Grievant to arrange her return to work. The Company concluded Dr. Norberg's restrictions could be accommodated, but the Grievant was wearing a sling on her right arm.

On June 22, the Company contacted Dr. Norberg to clarify the need for the sling and was informed that the Grievant does not need to have arm in sling.<sup>39</sup>

On June 29, the Grievant was told to return to work. The Grievant responded that she was taking vacation and holiday leave and would return to work on July 18, 2005, after her vacation.<sup>40</sup>

On July 18, 2005, the Grievant again saw Dr. Norberg who had reviewed her MRI and found no evidence of acute changes or abnormalities from her previous (2003) study. Dr. Norberg ordered laboratory tests, physical therapy and took her off work for two weeks (July 18 – August 1, 2005).<sup>41</sup>

On July 28, 2005, the Company filed a First Report of Injury report for the Grievant's June 14, 2005 injury, per advice from Sedgwick Claims Company, its Worker's Compensation Administrator.<sup>42</sup>

On August 1, the Grievant again saw Dr. Norberg. Dr. Norberg found the laboratory tests results were essentially normal and noted that, "There is a question of some symptom magnification." Dr. Norberg referred the Grievant for a neurologic consultation to rule out a neurologic cause for pain and problems. Dr. Norberg noted that if nothing was found, "I will release her to work with minimal or no restrictions."<sup>43</sup>

On September 2, 2005, The Grievant saw Dr. Norberg again. Dr. Norberg noted that the report from the Neurologist showed no signs of neurologic deficit or problems. Another MRI ordered by the Neurologist confirmed the findings of the MRI Dr. Norberg had ordered the previous month. Dr. Norberg noted that he has nothing else to offer the Grievant and the Grievant's pain "would not be explained by shoulder pathology." Dr. Norberg scheduled an appointment with a Dr. Biewen to see if he had any further input.

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<sup>39</sup> Employer Exhibit #11.

<sup>40</sup> Employer Exhibit #11.

<sup>41</sup> Union Exhibit #10.

<sup>42</sup> Employer Exhibit #11.

<sup>43</sup> Union Exhibit #13.

Dr. Norberg suggested work hardening and would then allow her to resume her previous level of work activities and return to her permanent restrictions.<sup>44</sup>

On September 8, 2005, the Company called a meeting with the Grievant to arrange her return to work with current restrictions. The Grievant worked some six hours on September 8, 2005 and left work complaining of pain. The Grievant called in sick the next day and did not return to work thereafter.<sup>45</sup>

On September 16, 2005, the Grievant saw Dr. Nathan R. Norquist of Health Partners Family Clinic in Coon Rapids. (The Grievant did not see Dr. Biewen as he is an out of network provider and not covered by the Grievant's health plan). Dr. Norquist noted that the Grievant was seeing him for a third opinion regarding her right shoulder.

Dr. Norquist noted, during the Grievant's September 16, 2005 visit, that she was requesting, "a work note stating that she cannot use her right arm in her work until shoulder has been rehabilitated." Dr. Norquist provided the Grievant with the note she requested, scheduled her for physical therapy and prescribed pain medication. The Grievant was to see Dr. Norquist again after several visits with her physical therapist to evaluate the ability to start reducing the work limitations with her right arm.<sup>46</sup>

On October 14, 2005, the Grievant saw Dr. Norquist again. Dr. Norquist noted that, "She reports that there has been slight interval improvement in her right shoulder pain with the use of physical therapy. She does not feel that it would be safe for her, however, to resume her normal work at this point, she suspects that she would have a relapse of her symptoms if she were to start using her arm for another month. . . ." Dr. Norquist ordered continuing with the work conditioning [physical therapy] program, ordered refill of pain medications and scheduled a follow-up visit in one month.<sup>47</sup>

On October 18, 2005, the Company scheduled the Grievant for a fitness for duty evaluation with Dr. Thomas Jetzer, MD of Occupational Medicine Consultants, on October 24, 2005. The letter included a notice that the evaluation was a requirement to continue the Weekly Indemnity Leave. The Grievant did not make the appointment.<sup>48</sup>

On October 24, 2005 the Company again scheduled the Grievant for an evaluation with Dr. Thomas Jetzer, on October 27, 2005, as she had not appeared for her October 24, 2005 appointment. The notice included the same caution that appeared in the first letter, but also added, "I expect that you will keep this appointment or you call and notify me. Failure to attend this appointment, your Weekly Indemnity leave will expire and hours could be considered lost time and will be subject you to the penalties prescribed for lost time." The Grievant did not appear for the appointment.<sup>49</sup>

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<sup>44</sup> Union Exhibit #14.

<sup>45</sup> Employer Exhibit #11.

<sup>46</sup> Union Exhibit #16.

<sup>47</sup> Union Exhibit #18.

<sup>48</sup> Employer Exhibits #11 & #21.

<sup>49</sup> Employer Exhibits #11 & #22.

On November 14, 2005, the Grievant again saw Dr. Norquist. Dr. Norquist, based on a request from the Grievant's physical therapist, extended the work restrictions for an additional month, continued physical therapy and scheduled a follow-up visit in one month.<sup>50</sup>

On November 23, the Company notified the Grievant that her leave had expired effective October 27, 2005 (in accordance with the warning she was given in the Company letter of October 24), having caused her to accumulate more than 90 lost hours resulting in her immediate discharge, in accordance with the Company's Time and Attendance Policy.<sup>51</sup>

Although both Parties submitted documents into the record that refer to events that occurred after the Company's decision to discharge the Grievant, the Arbitrator will follow the universally accepted practice of making the determination of "just cause" based on what was known or occurred up to the date of the discharge decision, November 23, 2005.<sup>52</sup>

A critical issue in the instant case is whether the Company's action to schedule the Grievant for the medical evaluation with its Occupational Medicine Consultant was reasonable considering what was known at the time. The Arbitrator finds in the affirmative.

First there is a question of whether the injury reported by the Grievant on June 14, 2005 was an aggravation of her previous shoulder injury or a "new" injury. Although the Grievant claimed it was a result of her previous injury, a careful review of the findings of Dr. Norberg, the Neurologist, the MRI, Laboratory tests and Dr. Norquist do not support a re-injury to the Grievant's shoulder. Further, a careful review of the findings raises question of what, other than the Grievant's statements, support any injury.

Dr. Norberg could not find a physical, chemical or neurological explanation of the Grievant's pain and referred the matter to another physician for any further input. The MRI showed no change in the Grievant's shoulder from what had previously existed. The chemical tests were essentially normal. Dr. Norberg stated the Grievant's pain "would not be explained by shoulder pathology." In addition, Dr. Norberg noted on August 1, 2005, under IMPRESSION: "There is a question of symptom magnification."

Dr. Norquist's notes indicate that he essentially provided the Grievant with the diagnosis and treatment plan that she requested. "She is requesting . . . a work note stating that she cannot use her right arm in her work until shoulder has been rehabilitated." "She does not feel that it would be safe for her, however, to resume her normal work at this point, she suspects that she would have relapse of her symptoms if she were to start using her

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<sup>50</sup> Union Exhibit #22.

<sup>51</sup> Employer Exhibit #8.

<sup>52</sup> Elkouri & Elkouri, *How Arbitration Works*, Fifth Edition, pp. 454. "As a general rule, whether an employer had just cause for discharge depends on the information it had at the time of discharge. Post discharge evidence is usually irrelevant."

arm without any limitations. She would like to continue on physical therapy for another month. . .”

Based on the above referenced medical information, the Arbitrator finds that it was reasonable for the Company to seek additional medical evaluation.

The Union, in its post hearing brief, referenced the seven conditions of “just cause” that many Arbitrators follow in making this determination. The Arbitrator will now examine each of these conditions in relation to the instant case.

### **Was the rule or order reasonable?**

As noted above, the Arbitrator finds that the Company’s decision to further investigate the medical condition of the Grievant to be reasonable, considering the medical information that existed at the time.

The Arbitrator also finds the Company’s Time and Attendance Policies reasonable, considering the importance attendance has on operating efficiency, and employee morale. It is noted that a number of other Arbitrator’s who have had the occasion to make such a determination on this Company’s Time and Attendance policies have found likewise.<sup>53</sup>

The testimony of Union Witness Grabinsky underscores the importance of good attendance in noting that the Grievant being injury prone “. . . results in high costs for medical treatment and lost time. This hurts the Company’s safety record and reflects poorly on safety for the department and other workers.”

The Union raises the point that the Company’s Time and Attendance Policies were unilaterally established and not negotiated. It is a well-established and common practice for employers to establish reasonable rules and regulations for employee attendance, provided they do not conflict with laws or the terms and conditions of the CBA.<sup>54</sup>

The Union also raised the point in its post-hearing brief that for “just cause” to exist, there must be an affirmative finding by the Arbitrator in the first six of the following tests. The Arbitrator routinely applies these tests in discharge cases:

### **Did the employee have reasonable notice of the rule or conduct violated?**

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<sup>53</sup> See arbitration cases referenced on pages 14 and 15 of this decision.

<sup>54</sup> Elkouri & Elkouri, *How Arbitrations Works*, Fifth Edition, pp 764. “It is well established in arbitration that management has the fundamental right unilaterally to establish reasonable plant rules not inconsistent with law or the collective agreement. Thus when the agreement is silent on the subject, management has the right to formulate and enforce plant rules as an ordinary and proper means of maintaining discipline and efficiency and of directing the conduct of the working force. In addition, management has the right unilaterally to establish reasonable work rules including rules governing attendance. . . “

The record contains considerable evidence that the Grievance should have known the consequence of accumulating excessive “lost hours.” The Company letter sent to the Grievant on October 24, 2005, specifically warned her that, “Failure to attend this appointment, your Weekly Indemnity leave will expire and hours could be considered lost time and will subject you to the penalties prescribed for lost time.”

The record shows that the Grievant had knowledge of the consequences associated with lost hours as she has received several warnings and demerits for having accumulated excessive lost hours. The record shows she was issued a First Degree Demerit in June 2002, two Written Warnings in 2004, and First Degree Demerit in 2004.

**Was an investigation conducted?**

The record shows that there is no dispute that Grievant failed to attend a scheduled medical evaluation appointment on two separate occasions, the latter of which started the accumulation of lost hours.

**Was the investigation fairly conducted?**

There is no evidence in the record that indicates unfairness in the investigation.

**Was there reasonable proof that a violation occurred?**

There is no dispute that the Grievant failed to attend the scheduled medical evaluation appointments and did not report for work thereafter or make arrangements for some form of approved leave.

**Was the rule or order applied uniformly and consistently?**

The record indicates that the Time and Attendance Policies are applied uniformly and consistently and no evidence was introduced to the contrary. This finding is supported by the testimony of Union Health and Welfare Director Thomas Grabinsky, who testified as to the advice he gives employees which is referenced earlier in this Award.

**Was the penalty consistent with the seriousness of the violation?**

In the instant matter, the penalty of discharge for accumulation of over 90 lost hours is set forth in the Company’s Time and Attendance Policy and is applied in a uniform and consistent manner to all employees subject to the policy.<sup>55</sup> There is no evidence that exceptions have been made to enforcement of the Policy and the Arbitrator is reluctant to interfere with the uniformity and consistency with which the Policy is applied.

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<sup>55</sup> Employer Exhibit #4, Section G.

The seriousness of the Grievant's action is underscored by considering the possibility that had the Grievant attended the scheduled medical evaluation, the matter of Worker's Compensation coverage might have been resolved much earlier and without need of appeal. If the Company's Occupational Medicine Consultant found sufficient evidence to support the Grievant's claim, the considerable time and expense involved in the Worker's Compensation Court appeal process would have been avoided to the benefit of the Grievant, the Company and the State.

The Union raised a number of additional objections to the Grievant's discharge in its post hearing brief, which are summarized and addresses below:

**The Grievant's absences resulted from an on-the-job injury and were protected under Minnesota's Worker's Compensation Act and were specifically excluded under the Company's Attendance Policy.**

At the time of the Grievant's discharge, the matter of whether the injury was covered under Worker's Compensation was not yet established. The Company denied worker's Compensation coverage for the injury claimed by the Grievant. It was not until the Worker's Compensation Court order nearly one year later, November 3, 2006, that the matter of coverage was established.

**The Company pursued the Grievant's absence as covered by its Weekly Indemnity Benefit, even though the Grievant made it clear she wanted her absence treated as Worker's Compensation.**

The record shows that placing an employee on Weekly Indemnity Benefits is standard procedure when the Employer denies an employee's claim of work injury. The standard application of this procedure was explained in the testimony of Union Health and Welfare Director, Thomas Grabinsky noted earlier in this Award.

**Even though the Grievant was given a return to work release by her physician on December 12, 2005, the Company's position was that she was not eligible to return to work as she had been discharged on November 23, 2005.**

As the Arbitrator noted earlier, the Arbitrator's determination of "just cause" for discharge of the Grievant on November 23, 2005 is being determined on the basis of the events and information known at the time of the discharge action. Accordingly, if the Arbitrator finds the Company did not have "just cause," the above objection is moot. If the arbitrator finds there was "just cause" and the appropriate penalty is discharge, the above objection is also moot.

**The Employer's Attendance Policy specifically provides that the following does not count as "lost hours." (Although the Union listed four items under**

this objection all but the following is addressed under other objections or is not relevant due to when it occurred).

**Time off when the employee is sent home by the medical department due to “physical injury occurring while at work.”**

The record shows that the medical department did not send the Grievance home. When the Grievant notified her supervisor of the claimed injury, the supervisor arranged an appointment for the Grievant with the Company’s Occupational Health Nurse, but the Grievant did not show for the appointment and worked her regular shift that day and the next.

**The Company is bound by the Worker’s Compensation Court Order of November 3, 2006, which found that the Grievant’s “lost hours” for the period June 17, 2005 through December 12, 2005 was due to her injury at the Company.**

As noted earlier, the Arbitrator’s determination of “just cause” for the Grievant’s discharge is based on events and information known at the time of the discharge action on November 23, 2005. The validity of the Grievant’s Worker’s Compensation claim was not yet established at the time of her discharge.

There is nothing in the Worker’s Compensation Judge’s Findings and Order that indicates it is to have any effect on the Grievant’s November 23, 2005 discharge for absenteeism. The Worker’s Compensation Judge noted in his findings that, “The employee was terminated by the employer for absenteeism in late November 2005. Although she filed a Grievance in this regard, I cannot find she had a reasonable expectation of returning to work with the employer . . . .” [Emphasis Added]

The Grievant’s misconduct was her refusal to cooperate in the Company’s effort to obtain another medical evaluation. Her refusal to attend the medical evaluation had the secondary effect of her being subject to discharge for excessive absenteeism (an unexcused absence of more than 90 hours).

**The Company’s discharge of the Grievant while she was effectively seeking benefits under the Act violates Minn. Stat. Section 176.82, prohibiting retaliatory discharge of employee seeking such benefits. The Company has also violated Minn. Stat., Section 176.82, Subd. 2. by refusing the Grievant continued employment.**

A charge under the above referenced statute is a matter of civil law under jurisdiction of the courts and not under the purview of the instant arbitration proceeding.

The question of whether the Company's motivation to discharge the Grievant was to prevent her from seeking Worker's Compensation Benefits, or in retaliation for her seeking such benefits, is an appropriate matter of inquiry in determining whether the Grievant was discharged for "just cause." However, the Arbitrator does not find sufficient evidence in the record to support such a conclusion.

The Arbitrator, as noted earlier in this Award, finds that a careful review of the events and medical information associated with the Grievant's claim of injury on June 14, 2005, raises sufficient question to warrant further inquiry. The Company was attempting to do this by scheduling the Grievant for a medical evaluation with its Occupational Medicine Consultant. The Grievant's failure to cooperate in the evaluation placed her in an unauthorized leave status. Under the Time and Attendance Policy, the number of "lost hours" called for her discharge. By not discharging the Grievant, the Company would be in violation of the Policy that the record shows has been applied in a uniform and consistent manner.

As the Arbitrator noted earlier in this Award, it is possible that, had the Grievant participated in the medical evaluation, the time and expense involved in the Worker's Compensation Appeal might have been avoided. It is also possible that the findings of the Worker's Compensation Appeal Judge's might have been different.

It is noted that the Judge's finding of a preponderance of evidence supporting the Grievant's claim was essentially based on the Grievant's testimony. The Company denied primary liability on the contention that, ". . .she sustained a temporary aggravation at most and that some of her claims are therefore not compensable."<sup>56</sup> However, "The Employer presented no witnesses to refute the employee's testimony. . ."<sup>57</sup> It is reasonable to speculate that, without any evidence from its own medical authority, the Company was without basis to present a challenge.

## **FINDINGS**

The Arbitrator finds that the Grievant was discharged for "just cause" in accordance with terms and conditions of the CBA and the widely accepted application of the term.

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<sup>56</sup> Employer Exhibit #16; Union Exhibit #33, pp. 5, Memorandum.

<sup>57</sup> Employer Exhibit #16; Union Exhibit #33, pp 6 Memorandum.

The Grievant violated the Time and Attendance Policy as a consequence of failing to appear for the medical evaluation scheduled by with the Company's Occupational Medicine Consultant. Penalties under the Time and Attendance Policy are specified and applied in a uniform and consistent manner to all employees. Accordingly the penalty prescribed for the Grievant's violation called for her discharge.

The Grievant's failure to undergo the medical evaluation scheduled by the Employer was very serious as the outcome of the evaluation could have altered events thereafter with a significant impact on the time and expense of all parties affected.

The Arbitrator's Award is based on events and information in existence at the time of the Grievant's discharge on November 23, 2005. This Award is not intended to address post discharge events and issues.

### **AWARD**

**The grievance is denied. The Grievant was discharged for just cause.**

### **CONCLUSION**

The Parties are commended on the professional and though manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 23<sup>rd</sup> day of January 2008 at Edina, Minnesota.

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ROLLAND C. TOENGES, ARBITRATOR