

IN THE MATTER OF THE ARBITRATION BETWEEN

TEAMSTERS, LOCAL 120,	)	MINNESOTA BUREAU OF
	)	MEDIATION SERVICES
	)	CASE NO. 06-RA-1074
	)	
Union,	)	
	)	
and	)	
	)	
SUPERVALU, INC.,	)	DECISION AND AWARD
	)	OF
Employer.	)	ARBITRATOR

APPEARANCES

For the Union:

Katrina E. Joseph  
Martin J. Costello  
Hughes & Costello  
Attorneys at Law  
1230 Landmark Towers  
345 St. Peter Street  
St. Paul, MN 55102-1216

For the Employer:

Jonathan O. Levine  
Michael Best  
& Friedrich, L.L.P.  
Attorneys at Law  
Suite 3300  
100 East Wisconsin Avenue  
Milwaukee, WI 53202-4108

On December 1, 2006, in St. Paul, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by discharging the grievant, Roderick O. Victrum. Post-hearing briefs were received by the Arbitrator on January 14, 2007.

## FACTS

The Employer operates a wholesale food distribution business throughout the United States. The Union is the collective bargaining representative of about 800 non-supervisory employees of the Employer who work at its Distribution Center in Hopkins, Minnesota, in classifications such as Driver, Warehouse Employee and Maintenance Mechanic. The Union and the Employer are parties to a labor agreement, effective by its terms from June 1, 2005, through December 1, 2010.

The grievant was hired by the Employer on October 10, 1998. He worked at first as an Order Selector, and in 2002, he became a Fork Lift Operator after obtaining his license to operate a fork lift truck. He remained in that classification until he was discharged on April 2, 2006, for poor attendance in violation of the Employer's attendance policy. At the time of his discharge, he worked Sunday through Thursday on the third shift, from 11:00 p.m. to 7:00 a.m.

On June 6, 2005, the Employer adopted an attendance policy, which, as modified, is still in effect (the "New Attendance Policy" or sometimes simply, the "Policy"). The New Attendance Policy is what is commonly described as a "no-fault" policy, i.e., it defines some absences as excused and all others as not excused and triggers discipline automatically without regard to fault at fixed accumulations of unexcused occurrences. The New Attendance Policy is similar, but not identical, to the Employer's previous attendance policy, which had been in place, with some modifications, since 2001.

That policy had some of the features of a no-fault policy, but the New Attendance Policy includes significant changes.

The New Attendance Policy is set out below:

#### PURPOSE

Regular attendance and punctuality are essential functions of every job at Supervalu. Absenteeism and tardiness reduce the efficiency of our business operations, cost Supervalu and its customers money, and force others to do the work of absent or tardy colleagues. Supervalu, Inc. has created this guideline to:

- (a) Encourage employees to work their scheduled work days, including overtime;
- (b) Ensure that employees who do not perform these essential functions understand the consequences of their actions.
- (c) Provide a means for progressive discipline and termination of employees who fail to meet the Company's attendance and punctuality expectations.

The Attendance Guidelines take into account that unforeseen events and illnesses happen to everyone, and provide ample accommodation to such events. Employees only receive discipline after their attendance is deemed unacceptable, and employees will receive several notices before termination occurs. However, the Attendance Guidelines are "no fault," meaning that if absence is not "excused" under the definition below, the reason for the absence is irrelevant. It is essential, therefore, that employees use and track all absences carefully, so when an unforeseen event does occur, it will not jeopardize their job.

#### UNEXCUSED ABSENCE

An absence includes all or part of a scheduled workday (regular or overtime), including:

1. Absence for a full day,
2. Absence from a scheduled shift,
3. Early departure from a scheduled workday or shift,
4. Tardiness of sixty (60) minutes or more for a scheduled workday or shift,
5. Every two (2) tardies of less than sixty (60) minutes will count as a full day's absence.

All absences are unexcused unless they fall under one of the following exceptions:

1. Paid holidays, unless the employee is scheduled to work.
2. Funeral leave, if authorized by the Company.

3. Subpoena for jury duty/court required appearance, with appropriate advance notice.
4. Leave of absence, approved in writing, pursuant to Collective Bargaining Agreement and all other Company approved leaves.
5. Company-approved FMLA leave pursuant to the Company's FMLA policy.
6. State/Federal Government approved absences.
7. Workers' compensation-related approved absences.
8. Disciplinary suspensions.
9. Military duty.
10. Bona fide union business with prior notice that is approved by the Company.
11. Paid scheduled vacation.
12. Time off for lack of work, approved in advance by the Company.

### PROGRESSIVE DISCIPLINARY ACTION

Unless covered by the accelerated disciplinary provision described below, unexcused absences will be dealt with as follows:

#### DISCIPLINE STEPS

- |                          |   |
|--------------------------|---|
| 1. Consultation          | Upon three absences (Includes FMLA, DOR documents/discussion) |
| 2. Verbal Warning        | Upon five or more absences                                    |
| 3. 1st Written Warning   | Upon seven or more absences                                   |
| 4. Final Written Warning | Upon nine or more absences                                    |
| 5. Termination           | Upon eleven or more absences                                  |

Absences before or after holidays, vacations, split vacation days, personal days, or weekends (two regularly scheduled days off) are especially problematic and burdensome to the Company and fellow employees and therefore will be treated more aggressively. The first time such an absence occurs, no accelerated discipline will apply. However, each time thereafter, the employee will receive the next level of progressive discipline than their absences would otherwise qualify them for (see appendix for examples).

Discipline remains active in the employee's file for eleven (11) months. Progressive discipline is applied using a rolling eleven (11) month period.

### NOTIFICATION REQUIREMENT

Employees (warehouse and sanitation) must notify the Company approved call-in service at least one (1) hour before their scheduled start time whenever:

- (a) the employee will not be reporting to work; or
- (b) the employee will be late.

The employee must communicate to their supervisor in the event they must leave work early.

[Procedure for notification by telephone is omitted.]

Employees who fail to follow these notification requirements may be disciplined under Company Rules and Regulations.

NO CALL NO SHOW

As described in Article 26 of the Collective Bargaining Agreement "Reporting For Work: If any employee is notified to report for work and does not report promptly or give satisfactory explanation for not reporting, the employee shall be considered as having voluntarily quit."

DISCIPLINE VIA MAIL

To comply with contractual time limits, the Company reserves the right to mail disciplinary and other important notices to the employee's home address. Employees are responsible for keeping the Company informed of all address changes; the employee's failure to do so, and subsequent failure to receive important notices, will not invalidate the discipline issued and mailed. The Union will receive a copy of all mailed discipline. Discipline will be mailed in a regular envelope, first class mail, postage pre-paid. Final Warning and Termination letters will be sent via regular and certified mail. . . .

This Policy supersedes all previously published Policies and Guideline regarding attendance and takes effect as of June 12, 2005.

The New Attendance Policy was modified on October 12, 2005, under the following circumstances. Two representatives of the Union and two representatives of the Employer held a Step 4 Panel meeting on that day to consider the grievances of four employees who had been discharged for poor attendance. At the conclusion of the meeting, the four members of the panel signed the following agreement:

A motion was made, seconded, and approved by a majority of the Step 4 Panel to render the following decision for Grievance Numbers 03-3525, 03-3516, 03-3521, and 03-3514:

1. The grievants will have their terminations reduced to suspension without pay for a period of thirty (30) days from the date of their termination (with current

time off without pay counting toward the thirty days). The grievants' discipline will be placed at Final Written Warning and their record will reflect they have accrued nine (9) absences. This decision is effective October 12, 2005, for these persons.

2. For all other employees covered by the collective bargaining agreement:
  - a. absentee occurrences accrued prior to June 12, 2005, will be removed from the employees' records;
  - b. all occurrences accumulated on and after June 12, 2005, shall remain in the employees' records (i.e., an employee who has accrued six (6) occurrences will remain with six (6) occurrences and the progressive discipline associated with it);
  - c. those employees who have accrued ten (10) or more occurrences since June 12, 2005, shall be placed at the Final Written Warning level, meaning they will be considered to have nine (9) absences;
  - d. those employees on a Last Chance Agreement will remain under the terms and conditions of those Last Chance Agreements; and
  - e. this decision will apply to all outstanding grievances concerning absenteeism that have not previously been heard by the Step 4 Panel prior to October 12, 2005.

Sue M. Hanson, a Human Resources Specialist, testified that the Employer agreed to this modification because of past inconsistencies in recording absences.

On October 19, 2005, the following notice was published in the "Weekly Bulletin," and it was posted on bulletin boards and distributed to each employee:

Attendance ruling at Step 4 -- The Teamsters/Supervalu Step 4 panel rendered a decision on October 12 about discipline for unacceptable attendance that applies to all warehouse employees. In the decision all incidents of absence prior to the new attendance guideline implementation on June 12, 2005, are removed from Supervalu's records. All occurrence accumulated on and after June 12, 2005, shall remain in the records; the discipline level will correspond with these occurrences. Those employees who have accrued ten or more occurrences since

June 12 will be placed at the Final Written Warning level. The next step of discipline for these employees will be termination. The adjustment of records is currently underway and once completed, a list of all employees and the corresponding occurrences and level of discipline will be reviewed with union leadership and Supervalu operations management. Discipline that corresponds with the occurrences will be issued once this review is completed. It is important that all employees maintain acceptable attendance at all times within the present guidelines. Your efforts to improve and maintain good attendance is critical to our success in serving our customers.

On October 27, 2005, the grievant met with his supervisor, Andy Welna, with a Union representative present. Welna gave the grievant his adjusted attendance record as determined in the review process described in the Weekly Bulletin of October 19, 2005, set out above. The adjusted attendance record as reviewed with the grievant on October 27, 2005, shows the expungement of all occurrences before June 12, 2005. It also shows his record of occurrences between June 12 and October 21, 2005, thus:

<u>Date</u>	<u>Occurrence</u>	<u>Unexcused Absence</u>	<u>Reason</u>
07-04-05	No Call No Show		
07-05-05	Personal Unexcused		
08-09-05	Left Early	1.0	MOT-Sick
08-10-05	Left Early		
08-23-05	Left Early	1.0	MOT
09-05-05	School Function		Document Rec'd
09-07-05	Tardy	1.0	
09-11-05	Sick	1.0	Pers. Illness
09-21-05	Tardy	1.0	Due to Weather
09-22-05	Tardy	.5	
10-02-05	Left Early	1.0	MOT for #389/jr.
10-04-05	Tardy	1.0	
10-06-05	Tardy	.5	
10-19-05	Sick	1.0	Pers. Illness
10-21-05	Adjustment		Per Step 4 Dec.
TOTAL		9.0	

ACTION

FINAL WRITTEN WARNING - Next step is termination

I note that the grievant was not charged with an unexcused absence for some of the occurrences in this record, even though they would result in a charged absence under the Policy. It appears that the omission of charged absences for those occurrences is the result of the adjustment of his record to a maximum of nine charged absences, as agreed by the Step 4 Panel on October 12, 2005.

Welna's notes made during his meeting with the grievant on October 27, 2005, show the following comment:

Rod feels that he should only have 6.5 unexc. abs. He feels that the weather related on 9/21 and 9/22 and the "sick" day on 9/11 (has Dr. note) should not be counted. I explained "No Fault."

After the grievant received the Final Written Warning on October 27, 2005, he was charged with an unexcused absence for "personal illness" occurring on December 29, 2005, bringing his total occurrences within the previous eleven months to ten. The Union argues that the grievant's absence on that date should have been excused as leave under the Family Medical Leave Act ("FMLA"), raising an issue that I discuss and resolve below.

On March 29, 2006, the grievant was charged with an unexcused absence for "no call no show" -- the eleventh occurrence charged within the previous eleven months -- and on April 2, 2006, he was discharged. On April 5, 2006, the Union brought the grievance now before me, challenging his discharge.

#### DECISION

The Employer points out that no provision of the labor agreement expressly requires that the Employer have just cause

for the discharge of an employee. Article 13, which is entitled, "Discharge," has five sections that relate both to discharge and to other discipline:

- 13.01 Drunkenness, dishonesty, insubordination, or repeated negligence in the performance of duty, unauthorized use of or tampering with Employer's equipment; unauthorized carrying of passengers; violations of Employer's rules which are not in conflict with this Agreement; falsification of any records; or violation of the terms of this Agreement shall be grounds for immediate discharge.
- 13.02 Discipline based on computer performance: The Employer agrees to thoroughly investigate prior to issuing discipline based on computer information. The investigation will, at a minimum, include a discussion with the employee.
- 13.03 Employees desiring to protest discharge must do so within five (5) calendar days by giving notice in writing to the Employer and the Union.
- 13.04 All grievances, other than "discharge," must be raised within ten (10) days of the alleged occurrence, or they will be deemed to be waived.
- 13.05 Warning notices will be disregarded after an eleven (11) month period for disciplinary purposes.

The Employer argues that, because the labor agreement does not expressly require just cause for the discharge of an employee, that standard should not be applied when determining limits to its right to discharge. The Employer urges that the appropriate standard to be applied in the present case should derive from Section 13.01 of the labor agreement, which provides that "violations of Employer's rules which are not in conflict with this Agreement" are grounds for discharge. For the Employer, therefore, the issue should be whether the grievant violated the Policy.

The Union argues that the Employer should be held to a just cause standard here, as it has been in past arbitrations of grievances challenging a discharge. The Union cites previous

decisions in which the arbitrator has interpreted the parties' labor agreement as requiring just cause for discharge. The Union also argues that management employees have consistently applied a just cause standard in processing past discharge grievances. The Union notes that, at the hearing in the present case, Bruce Anderson, General Manager of the Hopkins Distribution Center, gave the following answer to the following question asked on cross-examination:

Q. You need just cause to discipline under the contract, don't you?

A. Yes, we do.

On June 13, 2005, John Schwartz, Business Agent for the Union, wrote the following letter to Anderson:

It has been brought to my attention that the company has imposed a new absentee policy. The Union understands that the company has a right to implement such policies which do not conflict with the Collective Bargaining Agreement. Please be aware that the Collective Bargaining Agreement calls for just cause for any discipline. The Union's position is that applying this new policy does not necessarily meet just cause. It is also our position that this policy must be applied equally across all members covered under the bargaining agreement. The Union reserves the right to grieve any discipline issued under the policy.

I make the following ruling with respect to the Employer's argument that the labor agreement does not require just cause for discharge. The evidence shows that, even though the labor agreement does not expressly state that just cause is required for discipline and discharge, in practice, the parties have consistently employed such a standard, and indeed, Anderson testified that the Employer is bound by that standard. It is possible that the practice arose when, in the past, arbitrators

and the parties recognized an implied just cause standard in Section 13.01, which, if read literally, could be applied unreasonably to permit discharge even for a minor rule violation. I do not, however, base my ruling on that possibility. Rather, I conclude that the parties have, by their past consistent use, adopted a just cause standard for discharge that has become contractually binding.

The New Attendance Policy is a work rule and, as such, it must be reasonable and it must be reasonably applied. As Schwartz' letter to Anderson of June 13, 2005, indicates, the Union did not challenge the reasonableness of the Policy itself at the time of its adoption, but, instead, reserved whatever challenge the Union would make to its future application. Schwartz' letter of June 13 also took the position that application of the Policy must meet the just cause standard, and the Union asserts that position here. I agree. The application of any work rule, to be reasonable, must not violate contractual standards.

In the present case, the Union does not argue that the rule itself is unreasonable; it argues that the rule was applied to the grievant unreasonably, thereby violating the just cause standard. The Union concedes that using a policy that triggers discipline at fixed levels of occurrence may not be in itself unreasonable, though it "rejects the notion that just cause can be quantified in an 11-point, no fault policy."

The Union argues that the grievant should not have been charged with several of the eleven charged occurrences that were

the basis for his discharge. It argues that the grievant should not have been charged with one occurrence for tardiness on September 21, 2005, and with one-half occurrence for tardiness on September 22, 2005. The grievant testified that his tardiness on September 21 (arrival about three hours after the start of his 11:00 p.m. shift) was caused by a severe storm that damaged his home and prevented him from leaving for work until roads were opened with the removal of debris and the abatement of severe flooding. He also testified that his tardiness on September 22 (arrival less than sixty minutes after the start of his 11:00 p.m. shift) occurred because his home was without power from the storm and he had to take his children to a hotel.

As noted above, the grievant raised these objections when he met with Welna on October 27, 2005, and was given a Final Written Warning. That discipline resulted from the adjustment of his record -- reducing it to nine occurrences -- that was made in accord with the Step 4 Panel agreement between the Employer and the Union on October 12, 2005.

Although the Employer argues that the grievant should have been able to get to work on time on both days, its primary argument on this issue is the following. The Step 4 Panel agreed unanimously on October 12, 2005, 1) to remove occurrences accrued by all employees before June 12, 2005, and 2) to reduce the records of all employees who were then charged with ten or more occurrences to only nine occurrences. Those employees would receive a Final Written Warning, the specified discipline for that level of occurrences. The Panel also agreed, however, that

"all occurrences accumulated on and after June 12, 2005, shall remain in the employees' records." The Employer argues that the meaning of this agreement is clear -- that absences between June 12 and October 12 would not be subject to challenge.

For several reasons, I rule that the charged absences occurring between June 12, 2005, and October 12, 2005, are not subject to challenge. First, the written Step 4 Panel agreement of October 12, 2005 -- a binding agreement between the Union and the Employer -- clearly provides not only that all occurrences before June 12, 2005, are to be removed from the record of all employees, but that all occurrences between that date and October 12, 2005, are to remain in the record of all employees, not subject to challenge.

Second, though Schwartz testified that he understood the Step 4 Panel agreement to permit employees to grieve charged absences occurring between June 12 and October 12 within a limited time after October 12 or after conference with each employee (which for the grievant occurred on October 27), no such grievance challenged the nine occurrences that appeared on the grievant's adjusted record during his October 27 conference with Welna.

Third, even if the Step 4 Panel agreement is interpreted to permit a challenge to unexcused absences occurring during the June 12 to October 12 period -- thereby permitting a possibly successful challenge to the grievant's 1.5 occurrences on September 21 and 22 -- a fair reading of the agreement would permit a corresponding restoration of the 4.0 occurrences for

July 4, July 5, August 10 and September 5, 2005, that were removed from the grievant's record as a result of the adjustment to nine occurrences agreed to by the Step 4 Panel. Such a restoration would make moot the removal of the 1.5 occurrences charged for September 21 and 22. I note that the Union argues that the Employer treated the grievant unfairly because another employee who lived near the grievant at the time of the storm of September 21 was given an excused absence based on weather for that day. Even if I were to accept this argument and rule that the one point charged against the grievant for being late on September 21 should be removed from his record, that removal would not result in an adjusted record of less than nine occurrences on October 12 -- because restoration of any of the 4.0 occurrences that were removed in the adjustment process would restore the level to nine occurrences.

I conclude that the nine occurrences that appeared on the grievant's record at the October 27 conference with Welna are not subject to challenge.

The Union argues that the grievant's absence on December 29, 2005, qualified as FMLA leave and that, therefore, he should not have been charged with a tenth occurrence for that absence. The grievant was scheduled to start the last shift of his regular five-day work week at 11:00 p.m. on December 29, 2005, with the shift ending the following morning at 7:00 a.m. His regular two-day "weekend" was scheduled for December 30 and 31, 2005. Though the grievant took vacation the following week, his regular work schedule for that week would have begun with

the shift starting at 11:00 p.m. on Sunday, January 1, 2006, and would have continued through the shift starting at 11:00 p.m. on Thursday, January 5, 2006.

The grievant was absent for the shift that began at 11:00 p.m. on December 29, 2005, because, earlier that day, he had two molars extracted by an oral surgeon, Robert B. Gillum. At the end of his previous shift, which began at 11:00 p.m. on December 28, 2005, he told Welna, his supervisor, that he would be absent the next shift because he was going to have the teeth removed. The extraction was performed on December 29, and Gillum gave the grievant a prescription for a generic form of Vicodin -- twenty pills to be taken one "every four hours as needed for pain." The grievant testified that he took all of the prescribed drug, using it through January 6, 2006.

On December 30, 2005, though it was a day off for him, the grievant went to the Hopkins Distribution Center and spoke with Hanson, the Human Resources Specialist who processes FMLA leave requests for the Employer. The grievant gave her a note from Gillum. The note stated that the grievant "has been under my care from 12-29-05 to 12-31-05 and is able to return to work on 1-1-06," that he "was seen for oral surgery" and that he "is on pain medication." Hanson testified that the Employer routinely provides a form entitled, "Family and Medical Leave Preliminary Designation," to employees seeking such leave; parts of that form are set out below:

The Company has preliminarily designated your requested absence as Leave under the Family and Medical Leave Act of 1993 ("FMLA leave"). Upon completion of the medical

certification process and final approval of the leave by Supervalu, this leave will be counted against your annual FMLA leave entitlement . . .

Medical Certification: If you are requesting leave because of your own serious health condition . . . [or that of a family member], you must provide Supervalu with a medical certification signed by your health care provider or the health care provider of your ill family member. An appropriate health care provider must complete a medical certification form. The certification must be returned to the Company within fifteen (15) days from today's date, unless that is not practical under your circumstances. In such a case you should immediately contact your Human Resources representative. Even if the certificate is timely submitted, leave may still be denied if your request is not timely. The Company may delay or deny the approval of leave if a medical certification is not properly completed or is not timely provided. . . .

Hanson testified the note from Gillum on its face did not show that the grievant qualified for FMLA leave because it did not state that the grievant would be incapacitated for more than three days, a prerequisite to establishing that he had a "serious health condition," as required by the Employer's FMLA leave policy. She also testified that the grievant did not provide further medical certification and that on January 31, 2006, she sent him the following letter denying final approval of the leave:

. . . This is to inform you that your Leave request has been denied under FMLA because sufficient medical documentation was not timely provided. Since you do not qualify for FMLA Leave, your absences will be subject to the [New Attendance Policy]. Please feel free to contact me at [telephone number omitted] if you have questions.

The grievant testified that he did return further medical certification to the Employer about January 17 or 18, 2006. Because no other evidence indicates that the Employer received further medical certification -- neither a copy provided by the

grievant nor any record of it in the Employer's files -- I find that that additional certification was not provided to the Employer.

The grievant also testified that he did not receive Hanson's letter of January 31, 2006, denying his FMLA leave request and that he had moved, though he did not provide the Employer with his new address. No grievance was brought that challenged the denial of the request for FMLA leave covering the absence of December 29, 2005.

The parties disagree whether the circumstances relating to the grievant's absence on December 29, 2005, should have required the Employer to approve his FMLA leave request. If his condition on that day qualified as a "serious health condition," as that term is defined by regulations implementing the FMLA, his leave request should have been approved. A "serious health condition" is an illness, injury, impairment or physical or mental condition that involves a "period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom of more than three consecutive calendar days." C.F.R. Section 825.114(a)(2)(i). Continuing treatment by a health care provider for more than three days in a prerequisite. 29 U.S.C. 2611.

The Employer argues that the evidence does not show that the grievant's condition met this definition because the note from Gillum that the grievant gave Hanson on December 30, 2005, states that the grievant "has been under my care from 12-29-05

to 12-31-05 and is able to return to work on 1-1-06," that he "was seen for oral surgery" and that he "is on pain medication." The Employer argues that, according to Gillum's note, the period of the grievant's incapacitation was three days -- December 29, 30 and 31, 2005, and that he could work on the fourth day, January 1, 2006. The Employer urges, therefore, that this evidence does not show that the grievant had a "serious health condition," the definition of which requires incapacitation for more than three days. Gillum was not available to testify at the hearing in this case, but the Union presented in evidence a letter from him dated October 28, 2006, which states:

. . . I would consider that [the grievant] was under my care and expecting to take narcotic medication for three days. This time could be longer if healing problems arise. . . .

The Employer argues that this additional evidence, supplied just before the hearing, still limits the period of the grievant's incapacitation to just three days.

The Union argues that the treatment the grievant received from Gillum qualifies as treatment for more than three days because C.F.R. Section 825.114(a)(2)(i)(B) defines such treatment to include treatment "by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider." The Union argues that Gillum's treatment of the grievant included December 29, 30 and 31, 2006, and the days thereafter when he continued to take the narcotic pain reliever. Therefore, the Union urges that the absence of December 29,

2005, was caused by a serious health condition and that his request for FMLA leave should have been approved.

The Employer argues that continuing treatment by a health care provider requires both incapacity of more than three days and either treatment two or more times by a health care provider or treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment. The Employer urges, therefore, that because the grievant was not incapacitated, i.e., unable to work, for more than three days, he could not have a serious health condition even if he continued to take medication after the three days of his incapacity.

I rule that, because the evidence shows that the grievant's inability to work lasted only three days, his condition did not fall within the FMLA definition of a "serious health condition" and that, therefore, his absence on December 29, 2005, did not qualify for FMLA leave.

The Union argues that, even if, arguendo, the absence of December 29, 2005, did not meet the technical requirements for FMLA leave, it seems obvious that the grievant should not have come to work on December 29, 2005. Indeed, the Union urges that he would have been in violation of the Employer's policies regarding work place safety and drug use if he had operated a fork lift truck under the influence of narcotic medication.

The Employer makes the following response to this argument. The grievant was discharged because of his poor overall attendance record and not because of a single absence on December 29, 2005. His entire record was so poor that his last

unexcused absence, on March 29, 2006, which he did not contest, caused him to cross the discharge threshold of eleven unexcused absences established by the New Attendance Policy.

Because this argument of the Union challenges the strict application of the New Attendance Policy, I consider it with the Union's additional argument that administration of the Policy is subject to the just cause standard, which, as I have ruled above, the parties have established as a contract requirement by practice. The Union argues that it is a failure of just cause to count as part of the grievant's attendance record occurrences that appear to have been justified, even though they may constitute charged occurrences under a strict reading of the Policy -- in the Union's view, the weather-related occurrences of September 21 and 22, 2005, and the absence caused by an obvious medical impairment of his ability to work on December 29, 2005, whether or not that impairment qualified for FMLA leave.

I rule as follows with respect to this argument. I agree with the Union that the grievant is entitled by contract to have his discharge judged under the just cause standard. Nevertheless, for the following reasons, I conclude that the Employer had just cause to discharge him. It would be inconsistent and unfair to apply selectively the just cause standard and the Policy's standards -- eliminating, under just cause principles, the arguably excusable occurrences on September 21 and 22, 2005, and on December 29, 2005, yet still requiring the Employer to apply the Policy's disciplinary thresholds and its beneficial

expungements from the grievant's attendance record. The basis for determining whether the grievant's attendance gave the Employer just cause to discharge him should be his entire record.

The grievant was disciplined for poor attendance many times before the New Attendance Policy became effective on June 12, 2005. The evidence does not include a full listing of all of his absences, but it shows that he was disciplined on many occasions before the Policy became effective, thus:

<u>Date</u>	<u>Discipline</u>
02-20-01	One-day Suspension/Final Warning
12-19-01	Verbal Warning
01-14-02	Verbal Warning
02-12-02	Written Warning
03-17-02	One-day Suspension/Written Warning
04-10-02	Three-day Suspension/Written Warning
08-13-02	Three-day Suspension/Written Warning
08-04-03	Verbal Warning
12-08-03	Written Warning
04-19-04	Final Warning
11-21-04	Final Warning
12-26-04	Final Warning
05-16-05	Written Warning

The evidence also shows the following occurrences -- "points" under the previous attendance policy -- in the months just preceding adoption of the New Attendance Policy:

<u>Date</u>	<u>Reason</u>	<u>Points</u>
06-17-04	Left Early	1.0
06-18-04	Left Early	1.0
06-20-04	Sick	1.0
06-23-04	Sick	1.0
07-08-04	Personal Unexcused	1.0
07-15-04	Sick	1.0
08-03-04	Sick	1.0
08-05-04	Sick	1.5
08-15-04	Sick	1.5
08-16-04	Sick	1.0
08-17-04	Sick	1.0
08-18-04	Left Early	1.0

<u>Date</u>	<u>Reason</u>	<u>Points</u>
08-19-04	Tardy	1.0
10-06-04	Personal Unexcused	1.0
10-07-04	Sick	1.5
11-18-04	Left Early	1.0
11-21-04	Sick	1.5
12-14-04	Tardy	0.5
12-19-04	Left Early	1.0
12-27-04	Tardy	0.5
03-20-05	FMLA	
03-21-05	Non-work Injury	1.0
05-09-05	Left Early	1.0

An employer has just cause to discharge an employee whose conduct -- either misconduct or a failure of work performance -- has a significant adverse effect upon the enterprise of the employer, if the employer cannot change the conduct complained of by a reasonable effort to train or correct with lesser discipline.

Some conduct is only a slight hindrance to good operations. For example, a single instance of tardiness will not have a significant adverse effect on the operations of most employers. Conduct, however, that is only slightly adverse when it is infrequent, may have a significant adverse effect on operations if it occurs often. Tardiness and absence that are chronic will usually cause a serious disruption to operations. The Employer presented evidence showing that poor attendance is disruptive to its operations, causing the delay of outgoing shipments and requiring extra effort from employees who do come to work. If progressive discipline does not eliminate poor attendance, it will accumulate in its adverse effect and constitute just cause for discharge.

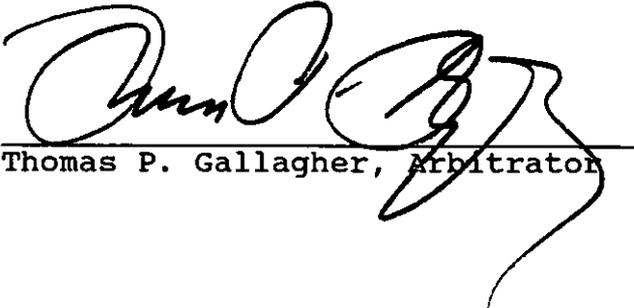
The grievant's entire record shows that he has had many opportunities to improve his attendance, but has failed to do

so. I conclude that, even if the occurrences of September 21 and 22, 2005, and of December 29, 2005, are disregarded, the Employer had just cause to discharge him because of his overall attendance record.

AWARD

The grievance is denied.

February 28, 2007



Thomas P. Gallagher, Arbitrator