BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DOOR COUNTY COURTHOUSE EMPLOYEES
LOCAL 1658, AFSCME, AFL-CIO

and

DOOR COUNTY (COURTHOUSE)

Case 88
No. 50593
MA-8311

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Dennis Costello, Corporation Counsel, Door County, appearing on behalf of the Employer.

ARBITRATION AWARD

The Employer and Union above are parties to a 1991-93 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the discipline grievance of Virgean Ostrand.

The undersigned was appointed and held a hearing on July 11 and 12, 1994 in Sturgeon Bay, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on October 27, 1994.

Stipulated Issues:

1. Did the Employer discipline the grievant for just cause?

2. If not, what is the remedy?

Relevant Contractual Provisions:

ARTICLE IX - SICK LEAVE

. . .

F. Medical and Dental Appointments: Employees may use accrued sick leave for personal medical or dental appointments which cannot be scheduled for times other than work hours. To qualify for such use, the employee shall give the Department Head

three (3) work days' advance notice of such appointment except in the case of an emergency. Use of sick leave for this purpose is limited to four (4) hours per incident, except in cases of emergency, or outside of the County.

. . .

ARTICLE XXI - DISCIPLINARY PROCEDURE

The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc., which are not consistent with the aims of the Employer's public function, and thereby to correct those deficiencies.

Any employee may be disciplined, demoted, suspended, or discharged for just cause. It is understood that just cause for immediate discharge includes, but is not limited to, being under the influence of intoxicants or controlled substance on duty and dishonesty. This expression of specific reasons for discharge shall not preclude discharge for other reasons normally considered just cause.

The normal sequence of disciplinary action for minor offenses shall be oral reprimands, written reprimands, suspension, demotion, or discharge. A written reprimand sustained in the grievance procedure or not contested shall be considered a valid warning. A valid warning shall be considered effective for not longer than a nine (9) month period. . . .

Discussion:

Grievant Virgean Ostrand is a Deputy Clerk II employed by the Door County Clerk of Courts Office since the past two years. She was previously employed as a social worker by the County for 17 years. Since a work-related accident in 1992, the grievant has obtained medical attention to her hand on a number of occasions, totalling approximately 25 visits. The instant grievance arose concerning an incident in which the grievant is alleged not to have given advance notice of one of these visits.

It is undisputed that the grievant had an appointment at 11:30 a.m., Monday, December 20, 1993 to see a Dr. Mohr in Green Bay, Wisconsin. The grievant went to work that morning, left work to attend the doctor's appointment, and returned later. It is also essentially undisputed that Clerk of Courts Sandra Simonar, the grievant's supervisor, was unaware that the grievant was leaving, was working in the courtroom on the morning in question, and was distressed to discover the grievant not present at work when she emerged from the courtroom. On December 22, 1993, Simonar issued a written documentation of an oral warning issued to the grievant for leaving without notice on December 20.

Simonar testified that the grievant never gave her advance notice of this particular

appointment, although the grievant had done so on previous occasions by leaving a note for Simonar in a conspicuous location on her desk, stating a time and date which Simonar would then enter into her calendar. The grievant testified that she did leave Simonar two notes, one shortly after a previous appointment, identifying several possible dates for a follow-up appointment, and another about a week to a week and a half before December 20th. The grievant testified that this was a copy of the earlier notice, with a hand written note at the bottom indicating the specific date that she was to return to the doctor. The grievant testified that she placed this note on Simonar's desk by the telephone.

There is no dispute that the grievant had previously given notice of doctors' appointments to Simonar by means of written notes placed on her desk, but that other employes have given similar notice orally and made sure that Simonar wrote down the information in the calendar on the spot. Simonar testified that the particular day in question was a busy day and that the office could not afford to have Ostrand absent; Ostrand and Judy Jacobson, another Deputy Clerk of Courts who is also a Union Steward, testified that December 20 was a busy day but not necessarily busier than any other Monday morning. Jacobson testified that she did not know that Ostrand was leaving for a doctor's appointment, but that Ostrand told her that was where she had been when she returned.

Ostrand testified that on January 5th, while searching for another document in Simonar's office, she found the note which she had left for Simonar in mid-December. She testified that she left it where it sat, and immediately went to get Jacobson to show her that she had found it. Simonar testified that when she was shown this document, it was in a location on the left side of her desk by the telephone, in a pile of papers relating to other matters, and that she had never received absence notices from either Ostrand or any other employe in that pile of papers. Simonar testified that Ostrand would have put previous notices on top of her date book. Simonar added that this was the procedure that Ostrand had used on many previous occasions, and she would have seen the notice if it had been placed there.

Jacobson and the grievant testified that the latter part of December, 1993 was a backlogged period in the Clerk's office, and that there were piles of paperwork in Simonar's office in a number of locations. Jacobson described traffic tickets on Simonar's desk, a pile of paperwork next to her typewriter on her typewriter stand, files that came from the judge's office back to her on top of the file cabinet, and "files and things" on top of the typewriter. Jacobson added that "mail is put very frequently on the right-hand side of her desk until it's opened, and she had a large stack of papers that she was . . . working on close to the telephone on the left side of her desk. She also had files and papers underneath the computer stand and next to her computer on the computer table." Jacobson described these documents as in some cases going back as far as six months. Jacobson also testified that there were times when she herself was told that she had traffic tickets that people were looking for, and would search her desk and search the areas where she was working, but eventually found them in Simonar's office, sometimes on her desk and sometimes under her computer printer. Jacobson testified that at the first step in the grievance process she requested that Simonar put something in writing to specify a procedure by which employes should give notice of doctors' appointments and similar requests for time off, but that no such policy or procedure had been established by the date of the hearing.

The Employer contends that while Simonar received the earlier notice of absence indicating that the grievant would need to be at a doctor's office on one of several dates, she never saw the note that Ostrand wrote specifying a particular date, and alleges that the grievant could have placed the appointment notice in the pile of papers "after the fact" and then claimed to discover it. The Employer contends that it is the grievant's responsibility to see to it that if she needs to be absent, the supervisor will know when this is to occur, that her previous method of notification was adequate, but that this time she changed it. The Employer contends that it was obvious that the method of notification changed because this time Simonar did not get notice. The Employer argues that the three-day requirement for notice is in the collective bargaining agreement, and that the grievant failed to meet it. The Employer contends that the penalty is not too severe and is appropriate in this case, contending that the oral reprimand which was reduced to writing was given on December 22, 1993, more than nine months before the Employer's brief was written, and that under Article XXI of the collective bargaining agreement, a valid warning is not considered effective for longer than nine months. The Employer requests that the grievance be denied.

The Union contends that the grievant did in fact give notice of her impending absence in a timely fashion and in the same manner in which she had done so previously. The Union contends that it was not the grievant's fault that the specific paper involved became shuffled among other papers in Simonar's busy office, and that the grievant did not deserve to receive a reprimand because the evidence is that the document was in fact properly submitted, even though Simonar did not find it. The Union requests that the grievance be sustained and that reference to the reprimand in the incident be removed from the grievant's record.

Even though, as the Employer notes, the discipline in this incident was not severe, and even though by operation of the collective bargaining agreement's rules it may already have been removed from the grievant's records due to the passage of time, this case is still before me on the merits. The principles which apply are the same general principles which would apply in a more severe disciplinary incident, notably that it is the Employer's burden to establish that the employe acted improperly in some manner so as to warrant the imposition of a penalty under the "just cause" standard. In this instance, I find that that proof is insufficient.

The Employer's assertion that the grievant could have fabricated the note in question long after she was disciplined, and placed it in the middle of a pile of papers in Sinomar's office, cannot be disproven on this record. But it is clear that the office in question was in some disarray during the period involved. Simonar did not deny Jacobson's testimony that the office was backlogged during this period and that a number of papers were left lying about in various piles. Simonar's testimony to the effect that she would not have overlooked a document placed in the proper place encounters some skepticism in view of Jacobson's unopposed testimony as to the state of the office in general and the difficulties she had previously had in locating some documents which she herself was alleged to have, but which turned up in Simonar's office. This kind of disarray of paperwork

is a common enough occurrence in offices in many settings that the possibility that the grievant placed the document in an appropriate position, but that subsequently another stack of papers was dropped on top of it, cannot be discounted on this record. Furthermore, I note that Simonar, invited by the Union to specify a clear and consistent procedure for handling such notices, did not immediately avail herself of the invitation. This supports the Union's contention that an employe acting in good faith should not be penalized for following what appears to be an acceptable method of notice. I conclude that the Employer has not sustained its burden of demonstrating that the grievant acted improperly so as to justify any level of discipline.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the grievant was disciplined without just cause.

2. That as remedy, the Employer shall, forthwith upon a receipt of a copy of this Award, remove all reference to the reprimand and the underlying incident from the grievant's file, and shall not consider said incident as the basis for any subsequent discipline on other matters.

Dated at Madison, Wisconsin this 20th day of January, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator