BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between Safeway Stores, Inc. the Employer and United Food and Commercial Workers Local 367 the Union	)	**ARBITRATOR'S OPINION AND AWARD** (Grievance of [redacted])

Representatives:

For the Employer:
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For the Union:
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March 17, 2002

Jane R. Wilkinson, Esq.
Labor Arbitrator
PMB 211
3 Monroe Pkwy, Ste. P
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WITNESS LIST

For the Employer:

Lou Piazza, Store Manager

Mark Eglin, Juanita Store Employee (adverse)

Jay Gomez, Safeway Store Manager (Assistant Manager in 1999-2000)

Tim Bailey, Assistant Store Manager

Barbara Dorsey, Safeway Labor Relations Manager

Stephanie Cook, Head Price Changer

For the Union:

Grievant

the Grievant's brother

EXHIBIT LIST

Joint Exhibits:

1. Collective Bargaining Agreement, 1998-2001
2. Grievance, May 18, 2000, with response attached
3. Stipulated issue

For the Employer:

1. Safeway Policies and Procedures, including Absenteeism and Tardiness Policy (reviewed 3/99/00)
2. Retail Policies and Procedures, Acknowledgement of Company Policies and Procedures, signed by , February 18, 2000
3. Seattle Division Retail Stores Absenteeism and Tardiness, revised August 1985, receipt acknowledged by on 5/8/86, 3/20/92 and 3/13/96
4. Corrective Action Notice to , February 17, 2000
5. Corrective Action Notice to , (three-day suspension), March 17, 2000
6. Joey Soares' note of Grievant's tardiness on May 1, 2000
7. Complaint submitted by Grievant to the Washington Human Rights Commission

Received post: Declaration of Barbara Dorsey

For the Union:

1. Attendance records for showing tardinesses, various dates
2. Shift schedules for store employees during the period covered in Exh. U-1
3. Document showing medical side effects of Dilantin
4. Document showing medical side effects of Dilantin

I. INTRODUCTION

This dispute, between Safeway Stores, Inc., (the Employer) and United Food and Commercial Workers Local 367 (the Union), concerns the grievance of [redacted] (the Grievant), which the Union timely submitted to the Employer on May 18, 2000, pursuant to the parties' 1998-2001 Collective Bargaining Agreement. The grievance alleges that the Employer violated the Labor Agreement when it discharged the Grievant. The parties were unable to resolve the grievance pursuant to the dispute resolution provisions of their Labor Agreement. Accordingly, they submitted the dispute to arbitration. At an arbitration hearing held on December 6, 2001, in Redmond, Washington, the parties had the opportunity to make opening statements, submit documentary evidence, examine and cross-examine sworn witnesses and argue the issues in dispute. The parties stipulated that the dispute was properly before the undersigned Arbitrator who has the authority to issue a final and binding decision as to the issues submitted herein. The parties also stipulated that the Arbitrator would retain jurisdiction, for 90 days, over the remedial aspect of the dispute should a remedy be awarded in favor of the Union. Upon the receipt of both parties' closing briefs to the Arbitrator on January 29, 2002, the hearing closed and the case stood fully submitted for decision.

II. SUMMARY OF THE EVIDENCE

A. Background

The Grievant worked for Safeway since 1986. He started as a courtesy clerk at age 17. For a number of years, he had worked the night shift as a price changer and doing night crew work. Until his transfer in 1999, he worked in Safeway's Juanita store under store manager Elsie Godfrey (and briefly under Stan Faw). In 1999, he decided to move to the South Sound area because of the number of family members he had living in that area.

He transferred to the Yelm Highway store about June 6, 1999, a store that employed about 122-125 employees. About 118 to 120 of those are bargaining unit employees.

Not long before the Grievant's transfer to Yelm, Lou Piazza became the store manager at that store. The other non-bargaining unit managerial positions were that of first assistant manager and second assistant manager. Jay Gomez was the first assistant manager in 1999 and 2000. The second assistant manager position either did not exist or was unfilled prior to February 2000. In February 2000, Tim Bailey was assigned to the position of second assistant manager. Lead positions in the store included head price changer and head night stocker. Doug Trogstad, head night stocker, was in charge of the store at night. Stephanie Cook was head price changer at all relevant times in the context of this dispute. Her position reports to the store manager or assistant manager. The Grievant worked at the direction of Ms. Cook. Usually the Grievant worked at least three or four shifts as a price changer. He also filled in as a night stocker, working under the direction of the head night stocker. According to Mr. Piazza, lead positions have no true managerial authority or supervisory authority to hire, fire, discipline, or evaluate employees. The lead positions only direct the work of employees under their leadership. If a person must be sent home at night, the head price changer does not have that authority, but the head night stocker, as the person-in-charge of the store during the night does have that authority. Lead employees leave notes every morning for store management concerning significant events. If an employee is late and may have an excuse, the lead employee should leave a note explaining the matter. Stephanie Cook has done just that on prior occasions, Mr. Piazza testified.

A store manager makes the decision to excuse an absence or tardiness. Piazza testified that he has made this determination "many times." Piazza said that he considers "extenuating circumstances" to determine whether an absence or tardiness is excused or unexcused. He would excuse an absence or tardiness because the employee was in an

accident on the way to work, or had a family illness to deal with him. If a person's tardiness is related to a medical condition, Piazza testified he would gather the information needed and would seek human resources' advice on how to handle the situation.

B. Safeway's Absenteeism Policy

The Employer's absenteeism policy did not change in respects pertinent to this dispute when the 1985 policy was revised in 1999. That policy states:

POLICY

1. Absences will be defined as excused or unexcused. All absences, including part days, full days, or absences for sickness and/or personal problems, will be included in this program.

We will consider absences in terms of frequency of occurrence, being unavoidable or of an emergency nature, and/or whether the employee was legitimately sick and could not report for work. We believe recurring attacks of the same illness (examples: headaches, stomach aches, or backaches) can be corrected, and we will expect the employee to see a doctor in order to get the problem taken care of. When an employee is absent for health reasons to the extent he or she is not able to be an effective employee, a counseling session will be held to determine whether the problem can be corrected or whether the employee's employment should be continued. It is, of course, the Division's intention to fully comply with obligations imposed under applicable authority (e.g. handicap/disability laws/regulations, Workers' Compensation law, etc.) which might apply to the particular medical condition of any given employee. In turn, employees are expected to cooperate with the Division in furnishing all relevant and necessary medical information concerning their particular condition.

3. In the case of each absence:

a. You must notify Management before your shift starts that you will be absent. Please report in ample time so a replacement can be secured before your shift starts. At the same time, please advise us how long you expect to be absent. It will be necessary *for you* to keep us informed, especially if you are unable to return to work as expected. Failure to notify Management will mean the absence is unexcused.

b. Any employee who is absent for three consecutive days and fails to notify Management shall be presumed as having quit the job.

c. Upon return from each absence, you will be required to fill out an absenteeism form stating the reason for the absence. A doctor's certificate or other confirmation of reasons may be required and may be verified by Management.

4. If we find an employee has given a false reason for an absence or if a doctor's certificate cannot be confirmed, the employee may be terminated immediately.

5. If an employee requests a specific day off which cannot be granted and then fails to report as scheduled on that day without proper justification, the employee will be subject to suspension or termination.

6. All employees are expected to be at their work station at the scheduled time. An employee shall be considered tardy if late more than five minutes from the scheduled start time. An accumulation of three instances of tardiness will be considered as an unexcused absence. When an employee reports more than *30* minutes late for a scheduled shift, that will be considered an unexcused absence.

7. To be fair to everyone, there is no way we could list rigid rules defining excused and unexcused absences. However, we can list a few guidelines.

Partial guidelines for <u>unexcused</u> absences may be as follows:

a. Personal business, unless previously approved by your supervisor.

b. Family problems that could be handled other than during work hours.

c. Transportation problems, unless you immediately notify your supervisor of your problem. Recurring problems will not be excused.

d. Child care problems, unless you notify your supervisor of your problem immediately and when you expect to report to work. Recurring problems will not be excused.

e. Outside activities (e.g., sports, etc.).

Partial guidelines for <u>excused</u> absences may be as follows:

a. Illness outlined in the policy.

b. Death of a relative or friend; absence should have prior approval of your supervisor.

c. Doctor or dental appointments should be made outside of regular shift hours. When not possible, prior approval *is* required.

8. Any employee having one unexcused absence shall receive a written corrective action letter.

9. Any employee accumulating two unexcused absences in a nine-month period shall be subject to suspension.

10. Any employee accumulating three unexcused absences in a nine-month period shall be subject to termination.

The Employer presented evidence that the Grievant had received and acknowledged receipt of its policy on four occasions. The Grievant testified that he had always believed that employees were given three unexcused absences in a three-month period. He claimed there

was a policy in existence that specified a three-month period. He first became aware that the period was nine months when so advised by Mr. Piazza on February 17, 2000.

C. Events Leading to the Grievant's Discharge

The Grievant's tardinesses leading to his discharge were as follows:

On February 13, 2000, the Grievant was two hours late for his shift that was to begin at 11:00 p.m. Store Manager Lou Piazza discussed the lateness with him the next morning, February 14, 2000. (The Grievant disputes the date of this meeting). The Grievant told Mr. Piazza that he had overslept. He did not mention any medical condition or medication to his manager.

On February 15, 2000, the Grievant was again two hours late for his shift. Mr. Piazza learned of this upon his arrival at about 6:30 or 7:00 a.m. on February 16, 2000, and issued the Grievant a "Corrective Action Notice," Exh. E-4. He gave the Grievant the document and talked to him about the discipline on February 17, 2000. Mr. Piazza testified that the Grievant did not mention any medical condition or medication that contributed to his being tardy. In the Corrective Action Notice, Mr. Piazza advised the Grievant:

> Set additional alarms or have someone from the store call you or do whatever it takes to be here on time. One more unexcused absence over 30 minutes will put you on suspension in the next 9 months (November 15, 2000).

The Grievant affixed his signature showing he received the Corrective Action Notice. The document contains a blank for an employee statement. The Grievant elected not to write anything in that blank. The Grievant did not grieve the Corrective Action Notice and the Employer received no communication from the Union regarding the same.

On March 16, 2000, the Grievant arrived 48 minutes late for his 11:00 p.m. shift. Assistant store manager Jay Gomez issued the Grievant a three-day unpaid suspension on March 17, 2000, documented in the form of a Corrective Action Notice. See Exh. E-5. Again, the Grievant did not fill in the blank for the written employee statement, although he affixed his

signature to the document, nor did he file a grievance.[1] Mr. Gomez testified that he discussed the discipline with the Grievant, and he volunteered merely that he overslept. He did not state that he had any kind of medical condition or medication that contributed to being late.

Mr. Gomez was acting store manager because from April to June of 2000, Mr. Piazza was absent on medical leave.

On May 1, 2000, the Grievant was nearly 38 minutes late for his shift, which was scheduled to begin at 10:00 p.m. Joey Soares made a note of it, see Exh. E-6, and Tim Bailey initially handled the matter because Mr. Gomez was on vacation. Mr. Bailey was in charge of the store that week and testified that when the Grievant came in late, he happened to be in the store shopping. He recalled that about 10:30, just after he started shopping, a store employee told him that the Grievant hadn't arrived to work yet. Mr. Bailey couldn't recall whether he went to get Mr. ████'s telephone number or whether he asked someone to telephone him, but he recalled going into the break room to check his schedule and ran into the Grievant. Mr. Bailey asked him whether he knew what time he was scheduled and why he was late. The Grievant responded that he slept through his alarm. During the "very brief" conversation, he didn't mention a medical condition or medication, Mr. Bailey testified. Mr. Bailey told the Grievant he would speak to him later during his (Bailey's) regular working hours. Mr. Bailey next looked in the Grievant's file and learned of the Grievant's prior discipline for attendance, and followed up by contacting Barbara Dorsey in labor relations. He had a "couple of discussions" with her, he testified.

Mr. Bailey met with the Grievant on Saturday, May 6, 2000 and gave him a chance to respond both orally and in writing. The Grievant wrote:

> Slept through alarm. Woke up fifteen minutes before 10:00 p.m. Was able to make it in at 10:38 p.m.

[1] The evidence suggested that each time the Grievant was late, he would make up the time by working past the end of his shift.

Mr. Bailey reviewed the prior discipline with the Grievant and advised him of the seriousness of the matter. He testified that the Grievant didn't really react. He did not mention a medical condition or medication then, or on the following Monday, May 8, 2000, when Bailey told the Grievant that he was being suspended pending investigation. Mr. Bailey spoke with Ms. Dorsey one more time, on May 8, 2000.[2]

Mr. Gomez testified he came back from vacation on May 8, 2000, and learned that Mr. Bailey had spoken to Barbara Dorsey in corporate labor relations and they were awaiting his return. After Mr. Gomez spoke with Tim Bailey and Barbara Dorsey, management decided to terminate the Grievant pursuant to Safeway's attendance policy. Mr. Gomez so advised the Grievant by telephone on May 12, 2000. In that telephone call, the Grievant did not mention a medical condition or a problem with medication.[3]

The Grievant confirmed that he did not mention his medical condition or medication in any of the meetings with management. He testified that he didn't say anything because he "assumed this information was in his file and they knew about it" and he'd been accommodated in the past. He also stated that when Mark Eglin told Elsie Godfrey about his "disability," he assumed the information and his need for accommodation would be put in his employee file, and since he was accommodated in the past, this accommodation would continue. He testified after the written warning, he told Mr. Piazza that he oversleeps through his alarms about once a month, and he told him that it had not been a problem before, and wondered why it was a problem now. He acknowledged that an offer was made to have co-workers telephone him, but

[2] Mr. Bailey's subsequent involvement appeared to have been fairly minimal because he was being transferred at the end of that week to a new store location in Walla Walla.

[3] Mr. Piazza testified that Jay Gomez telephoned him about the Grievant's tardiness and because he was at the discharge step, he advised Mr. Gomez to contact Safeway's corporate human resources. Mr. Piazza testified that he had no further involvement in the matter. When asked on cross-examination whether knowledge of the Grievant's medical condition or medication would have affected his decision to discipline the Grievant, Mr. Piazza indicated that the ultimate discharge decision wasn't his, and in any event he would have sought and followed the advice of the corporate human resources department.

he responded that he has different shift starting times, and he didn't know how the logistics of telephoning could therefore be accomplished.

When he was late in March, he recalled that Stephanie Cook told him to check in with Mr. Piazza. He didn't file a grievance over the suspension because "I didn't know at the time that employers could stop accommodating disabilities."

The Grievant testified that his final tardiness occurred because his brother misunderstood his shift starting time and woke him up late, only fifteen minutes before the shift starting time.

D. Grievant's Medical Condition

In 1992, the Grievant was diagnosed with an epileptic type of condition that produces seizures called "seizure syndrome." Seizures were infrequent, about every six months. By comparison, epileptic seizures can occur multiple times in a single day. Dilantin was prescribed by his physician, which effectively eliminated the seizures. His last seizure was in 1998. An unfortunate side effect of Dilantin is drowsiness. See Exh. U-3 and U-4. The Grievant testified that his initial prescription dosage was 200 mg a day. His physician increased his dosage over time to 650 mg a day. Eventually "I couldn't take it any more" and in July 2000 (after his discharge) his neurologist prescribed Tegretol instead. However, the Tegretol still makes him sleepy, the Grievant stated.

The Grievant testified that when he first started taking Dilantin, he was extremely drowsy[4] and that he slept most of the time during the first month he took it, when he wasn't working. The Dilantin also has adversely affected his vision, produced an acid reflux condition and produced occasional nausea and vomiting. The Dilantin still makes him sleep very soundly and on occasion, he has slept through three and four alarm clocks. The only effective antidote

[4] As to whether he had a problem getting up before he started taking Dilantin, as Mark Eglin testified, the Grievant testified "I couldn't tell you." He can only recall being on Dilantin.

has been to have someone he's living with wake him up.

The Grievant testified that he "believed" he told his lead, Stephanie Cook, the head price changer about his medical condition. He testified that he thought he told her right after he was transferred to Yelm "because people need to know what to do." Sometimes he has a clue that he is going to have a seizure, although during his 1998 seizure at the Kingdome, he didn't know it was coming on. He testified he would have told Ms. Cook about what to expect and how to react. He also believed he told her he was taking Dilantin for his condition and that it makes him drowsy and can make him late for work. He told Ms. Cook because "she was my immediate supervisor" and "I worked with her regularly."[5] He didn't tell other people at the store because when he was first diagnosed his neurologist told him to only tell people who need to know about the condition, explaining there is a tendency among uninformed individuals to discriminate against people with seizure disorders.

Ms Cook, however, denied receiving this information. Ms. Cook testified that the only thing the Grievant said about a medical condition or medicine was that once he mentioned he had an acid reflex problem and had to pick up some Pepcid. He never mentioned any prescription medication, Ms. Cook testified. He never mentioned or hinted at any connection with his tardiness to a medical condition or medication, Ms. Cook stated, "not that I could remember, no." Had he said something, "he would have to tell Lou or Jay." She stated that had he said something about a medical condition, "I would think I would have remembered it.

The Grievant testified when he was living by himself from September through December 1999, he was late about once a month to the Yelm store. This was always on a Friday night (it just seemed to work out that way, no particular reason, the Grievant testified) when he worked

[5] Counsel brought out on cross-examination that the Grievant actually worked with Ms. Cook only three-fifths of the time. When asked about this on cross-examination, he said "at the Juanita store, everyone pretty much works together so …" implying that everyone communicates with each other. The upshot was that he thought Ms. Cook would tell the head night stocker, but he admitted he didn't ask Ms. Cook to tell the head night stocker, and did not know whether or not she did.

the night crew. Being late and making the time up affected no one and no one said anything about these occasions of tardiness, he testified.

On Exh. E-8, a sworn complaint to the Washington State Human Rights Commission, the Grievant stated he asked a "supervisor" for an accommodation to a different shift. At hearing, he acknowledged that the referenced "supervisor" was Stephanie Cook, who lacked the authority to make this kind of accommodation (although she could go to management, as Mark Eglin did), the Grievant maintained. He explained that by "different shift" he meant making up the time late by working past the end of his shift. On cross-examination, however, he admitted he never told Ms. Cook he sought this accommodation because of his disability. He explained that he told her that this is how "we did it" at the Juanita Safeway.

The Grievant's brother, ,[6] testified that he told a person named "Christina" whom he knew at the Yelm "downtown store" about the Grievant's condition. Christina then became a management trainee in the Yelm store, t testified. The conversation came up in the context of 's diabetes. He also told a person named "John," a frozen food manager and SMT, as well as Dan Boedecker, a meat manager who later moved to Eastern Washington. He mentioned it to each of them in response to remarks about his brother being late for work or being disciplined for being late. He agreed that his brother is fairly reclusive and introverted, whereas he, , is just the opposite.

E. Safeway Juanita Store Personnel's Knowledge of Grievant's Medical Condition

Mark Eglin testified that he has worked for Safeway for 27 years, and he has been head night stocker for a number of years. In that capacity, he was the Grievant's lead in Juanita for eight or nine years and he became personal friends with the Grievant. He testified that his

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[6] worked as a meat cutter floater for Safeway in 1999 (and was a member of a different union) and last "punched a time clock" on December 6, 1999. Apparently Scott had a falling out with Safeway, and he stated he went to the store to get affidavits and statements for "future litigation with the company" until February 2000.

position only allowed him to direct the work, but occasionally he'd give permission, in advance, for a late arrival, but he doesn't know whether he had the authority to do that.

He first learned that the Grievant had some sort of problem with seizures in roughly 1994 when the Grievant told him that if he had a seizure he could pass out. Such an event had occurred not long before the Grievant relayed the information to Eglin. The Grievant didn't volunteer much personal information, Mr. Eglin recalled. Mr. Eglin's testimony indicated he was at one point concerned about the Grievant having a seizure at work, and explained that the Grievant was not the type to go home because he was feeling ill, unless you really forced him to.

Mr. Eglin testified that he was aware the Grievant was on medication that he had to take all the time. Otherwise, he didn't know "much" about the medication. Eglin testified he couldn't recall the name of the medication, and after some hesitation with his recall, he testified he thought that the Grievant told him the medication made him tired, but wasn't helping with the seizures all that much. Eglin testified that the Grievant didn't tie any medication-induced fatigue with being late to work.

Mr. Eglin's testimony suggested that the Grievant had a tardiness problem at the Juanita store also, but he was not specific as to the number of incidents. He merely said that the Grievant was tardy sometimes, and when he was late, he "was very late," meaning an "hour or two" late.

Mr. Eglin testified that during the period he worked with the Grievant, there was a store manager and one or two assistant managers, all non-bargaining unit positions. Elsie Godfrey was the store manager until sometime in 1999, when Stan Faw became manager. The close-up PIC is in the bargaining unit and was the next in the command structure. There were probably five or six PICs on the payroll altogether. Next in the PIC hierarchy were the inventory control clerk (ICC) and the head night stocker, respectively.

When asked whether he said anything about the Grievant having seizures or being on medication in any reports to Ms. Godfrey, Mr. Eglin testified "that I'm sure I mentioned it to her." But he stated he probably mentioned just the seizures, not the medication and he can't recall what he said. He recalled that the seizure problem bothered him because he was concerned that it might be stress induced, and that job stress, such as when the Grievant was required to be a checker, would bring one on. But, the Grievant never had a seizure at work, he testified. He also testified that had the Grievant told him that his medication could make him late to work, he "definitely" would have told management about it, however.

The responsibility for disciplining the Grievant for tardiness was management's according to Mr. Eglin. He also testified that although he didn't formally report the Grievant's tardies to store manager Elsie Godfrey, sometimes she would see that the Grievant worked over his assigned shift time by one or two hours and would wonder whether he worked overtime. Mr. Eglin testified that he would explain to her that the Grievant had come in late and was making up the time; the Grievant wasn't disciplined. He didn't think Ms. Godfrey thought "it was that big of a problem – as big as it was," he stated. Mr. Eglin also testified that he and other team members wouldn't just let the Grievant's late arrivals go by without comment, but would "give him a hard time" every time it happened.

Mr. Eglin testified that he recalled that the Grievant had a problem with tardiness even before he went on the medication because he always had been a very sound sleeper. For a time he lived at home and family members would get him up, but when he went out to live on his own, it became worse.

The Grievant confirmed that he was late from time to time at Juanita and was not disciplined. He was late "about once a month." He might have been threatened with discipline "once a long time ago" but he couldn't recall for certain he stated. The Grievant testified that he

told one other person at the Juanita store about his medical condition also. He stated he told the head price changer, who had acted in Mark Eglin's position during his absence.

According to Mr. Piazza, the Grievant's personnel file arrived from the Juanita store about two months after his transfer. He testified that there was nothing in his personnel file about his attendance, punctuality, medical condition, or any medication he was taking. He testified that it is his custom to go through an employee's personnel file when he receives it and make a note of anything important to him. He didn't note anything that was significant in the Grievant's file. He testified that he had one discussion with Juanita store manage Stan Faw about the Grievant's transfer. Jay Gomez talked to Mr. Faw twice. Nothing was said in those conversations about the Grievant's medical condition or medication that he was taking.

F. Disparate Treatment/Improper Motivation

The Union presented evidence that one [redacted] was late by more than six minutes on about 16 occasions over a multiple-month period and was not disciplined. See Exh. U-1 and U-2. Mr. Piazza testified that Mr. [redacted] had child-care issues that interfered with his schedule, but that he always gave him (Mr. Piazza) advance notice of when he would be late --usually at the start of the week, specifying the exact dates. Mr. [redacted]'s wife and mother-in-law also were store employees (who worked other shifts) who shared in the child care, so Mr. Piazza could see were there were occasional gaps for child care. Mr. Piazza acknowledged that Mr. [redacted]'s wife is Mr. [redacted]'s sister.

As to a possible motivating factor for being singled out, the Grievant testified that Mr. Gomez was extremely irritated with him after a vacation problem where Mr. Piazza overrode Mr. Gomez's decision denying the Grievant's vacation. That is when he had an "attitude problem" discussion with his manager. The Grievant testified that "I knew I was" being singled out for discipline over attendance. He noted that Mr. [redacted] clocked in late frequently. Stephanie Cook told him she saw people clocking in late all the time who weren't getting written up and

told him he was being singled out. Ms. Cook herself got written up when she forgot something at home and drove home to get it. The Grievant indicated that she was singled out for this discipline. He did not offer a reason why they might be singled out, except to suggest whimsy on the part of management.

The Grievant testified that he thought he had a good working relationship with Stephanie Cook and so believed until the unemployment hearing, and since then has heard "things" from other people. He suggested that financial problems might induce her to lie under oath.

III. ISSUES

The parties stipulated to the following statement of the issues:

1. Did the Employer have just cause to discharge [redacted]?
2. In not, what is the appropriate remedy?

IV. RELEVANT CONTRACT LANGUAGE

ARTICLE 2 – UNION SECURITY
2.4 No employee shall be disciplined or discharged except for just cause. The Employer shall be the judge of the competency and qualifications of his employees and shall make such judgment fairly. The Employer's judgment is subject to review by an Arbitrator.

ARTICLE 16 - NON-DISCRIMINATION
16.1 The parties to this Agreement acknowledge their responsibilities under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and do hereby agree not to discriminate on the basis of race, color, religion, sex, national origin or age.

ARTICLE 17 - GRIEVANCE PROCEDURE
17.1 Any grievance or dispute concerning the application or interpretation of this Agreement must be presented in writing by the aggrieved party to the other party within sixty (60) days from the date of the occurrence giving rise to such grievance or dispute, except in cases of discharge which must be presented within fifteen (15) days; otherwise, such right of protest shall be deemed to have been waived. Such grievances shall be adjusted by accredited representatives of the Employer and the Union. In the event of the failure of these parties to reach a satisfactory adjustment within twenty-one (21) days from the date the grievance is filed in writing by the aggrieved party, the matter must be referred by the moving party for final adjustment to a Labor Relations Committee

consisting of two (2) members from the Employer and two (2) members from the Union and the decision of the Labor Relations Committee shall be final and binding. In the event the Labor Relations Committee fails to reach an agreement within seven (7) days from the date a grievance is considered by the Committee, the moving party must, within seven (7) days thereafter, refer the grievance to arbitration by requesting the Federal Mediation and Conciliation Service to submit a list of eleven (11) names of qualified arbitrators from which the parties shall select the Arbitrator. In the event the moving party submits a request for a panel of arbitrators in accordance with the foregoing provisions and the Federal Mediation and Conciliation Service fails to provide such a list within twenty-one (21) days from the date of the request, the parties may mutually select an Arbitrator. If they are unable to agree upon an Arbitrator within three (3) working days, the moving party may contact the American Arbitration Association for an alternate panel of arbitrators. The Labor Relations Committee and the Arbitrator shall have no power to add to, subtract from, or change or modify any provision of this Agreement, but shall be authorized only to interpret existing provisions of this Agreement as they apply to the specific facts of the issue in dispute. The decision of the Arbitrator shall be final and binding on all parties and shall be rendered within thirty (30) days from the close of the hearing or the receipt of briefs, whichever is later. Should the arbitrator fail to comply with these provisions, he will not be paid for his services. The moving party shall notify the arbitrator of this provision during the selection process. If the assignment is refused, the parties agree to select an alternate.

17.1.1 The losing party shall pay the cost of the arbitrator. The parties agree that the arbitrator has the authority to determine appropriate proration of this cost in the event of a split decision and award. The arbitrator should be made aware of the requirements of this provision at the conclusion of the arbitration hearing.

V. POSITIONS OF THE PARTIES

A. Position of the Employer - The Grievant was discharged for just and reasonable cause for the following reasons:

1. The Employer properly applied progressive discipline under its absenteeism and tardiness policy.
   a. The absenteeism and tardiness policy is reasonable and comprehensive.
   b. The Grievant was on notice of the policy.
   c. The Grievant violated the policy; the Employer applied progressive discipline according to the policy.
      (1) He was more than 30 minutes late on four occasions in less than four months.
      (2) Although not required by the policy, the Employer issued the Grievant only a verbal warning for the first violation, and for the next three violations, the Employer issued the Grievant a written warning, a 3-day unpaid suspension, and termination, respectively.
   d. The Employer conducted a fair investigation.

(1) At each step in the progressive discipline, the Employer asked the Grievant why he was late.

(2) The Grievant never mentioned his medical condition as the reason for his absences during the progressive discipline; he merely said he had overslept.

e. The Grievant has not suffered disparate treatment.

(1) Although the Employer allows employee [redacted] to occasionally come in late, [redacted] approached the Employer in advance of the problem, and the parties came to a suitable arrangement.

(2) [redacted] always calls the Employer in advance if he is to be tardy.

2. The Union has failed to meet its burden to prove its affirmative disability defense.

a. The Union has not established that the Grievant had a "disability" as defined by the law.

(1) The Union provided no medical records showing that the Grievant had a disability or that the effects of his medication made him late for work.

(2) The Grievant has not shown that his so-called "seizure syndrome" limits a major life activity.

(3) The fact that the Grievant was able to report to work on time most days while taking his medication every day undermines the argument that the medication made the Grievant extremely drowsy.

(4) The documentation describing the effects of the Dilantin does not describe symptoms any more severe than typical over-the-counter medications.

(5) If the medication was causing the Grievant to oversleep occasionally, then he had an obligation to seek medical assistance.

b. The Union has not shown that the Grievant ever informed the Employer of his condition or requested an accommodation. The Grievant's circumstances do not meet the criteria for the narrow exception to this notification requirement.

(1) During the disciplinary process, he submitted a written statement declaring he was late simply because he overslept. The written statement did not mention his medical condition.

(2) His failure to disclose his condition to management on the advice of his doctor makes no sense, nor does it relieve him of his legal obligation.

(3) If the Grievant was worried about discrimination, he had nothing to lose when he was suspended. Yet he remained silent.

(4) The claim that the Grievant thought his employee file contained information on his medical condition defies logic: the progression of discipline should have tipped off the Grievant that management was not aware of his condition.

(5) If he thought there was documentation, he should have asked the managers to check his file.

(6) Witness Stephanie Cook testified that the Grievant never told her anything about seizures or medication.

(7) The testimony of surprise witness [redacted] the Grievant's brother, is not relevant to the Grievant's case and was not credible. The three people he claimed knew about the Grievant's medical condition either were not managers or did not work at the Yelm Highway store when the Grievant was there.

c. Even if the Grievant had a disability and had brought it to the attention of managers, discharge still would be proper because regular attendance was an essential function of the job.

B. Position of the Union – The Employer did not have just cause to terminate the Grievant. The Grievant should be made whole. The arguments supporting the Union's position are as follows:

1. The Grievant's seizure disorder is recognized as a disability by both the ADA and the WLAD.

   a. Seizure disorder is a mild form of epilepsy. Seizure disorder, if it produces more than a few seconds of unconsciousness, is commonly accepted as a covered condition. Medication may produce side effects that need accommodation.

   b. The Grievant's condition was severe enough to produce spells of extended unconsciousness.

   c. The fact that the Grievant has controlled his condition for a long time does not remove it as a disability.

   d. Being to work on time was not an essential function of the Grievant's job, as evidenced by the fact that the Grievant's manager at the Juanita store allowed him to come in late with no undue hardship on the Employer.

   e. Schedule modification is a recommended accommodation for epilepsy in the EEOC policy manual.

2. The Employer had sufficient notice of the Grievant's disability and his need for accommodation.

   a. The manager of the Juanita store was certainly aware of the Grievant's condition, as she accommodated it.

   b. Ninth Circuit precedent indicates that it was the responsibility of the Employer to share between stores information on the Grievant's condition. It was not the Grievant's problem that this information was not included in his personnel file.

   c. Although the collective bargaining agreement does not explicitly prohibit disability discrimination, it does prohibit discrimination based on "race, color, religion, sex, national origin," etc. This canned statement reflects the parties' desire not to tolerate any kind of illegal discrimination.

   d. It is the current trend of arbitration law to invoke external law.

3. Disparate treatment is an independent ground for overturning the discharge.

   a. Employee [redacted] was allowed to come in late without fear of discipline.

   b. [redacted]' child care issues are irrelevant. Page 7 of the Employer's own policy states that recurring baby sitter problems will not be excused.

   c. Thus, the Employer's policy was not enforced uniformly.

d. [redacted] was [redacted]' future brother-in-law.

4. [redacted] took a dislike to the Grievant, and thus had a motive for getting rid of him.

VI. DISCUSSION AND ANALYSIS

A. Introduction

It is well-established that the burden of proof in a discharge case is on the employer. *See, e.g., Georgia Pacific Corp*., 89-1 ARB ¶8194 (Sergent, 1989); *Whirlpool Corp*., 58 LA 421 (Daugherty, 1972); *Ingersoll Prod. Div*., 49 LA 882, 886 (Larkin, 1967); *American Maize Prod.* Co., 39 LA 1165, 1168 (McGury, 1963); *Southern Bell Tel. & Tel*., 26 LA 742, 746 (McCoy, 1956). In *Midwest Telephone* Co., 66 LA 311 (Witney, 1976) Arbitrator Fred Witney stated that an employer bears the burden of proving an employee committed the offense for which he is disciplined:

> As countless arbitration decisions explain, in a disciplinary case the employer bears the burden of proof. In short, the employer must supply convincing evidence that the employee committed the offense for which he was discharged. It is up to the employer to prove the employee "guilty", and not the employee who must prove himself "not guilty."

Id. at 314.

The parties are familiar with the guidelines used by arbitrators to determine whether discipline or discharge was for just cause, which is the standard contained in Article 2.1 of the parties' collective bargaining agreement. The essential elements of proof in a just cause case are whether the employee committed the offenses charged, whether the penalty was appropriate under the facts and circumstances of the case, including the employee's record of employment, and whether the employee was afforded due process. The "due process" consideration is multi-faceted. The due process determination includes, but is not necessarily limited to, inquiries as to whether the conduct violated an express or implied employer rule, whether the rule was reasonable and known to employees, whether the employer conducted a fair and adequate investigation before imposing discipline, and whether the discipline was

equitable in light of the employer's treatment of similar cases. In addition, an employer must comply with any procedural requirements contained in the collective bargaining agreement. *See,* Adolph M. Koven and Susan L. Smith, *Just Cause: The Seven Tests*, (2nd ed. 1992). To further assess the just cause of discipline or discharge, Arbitrators sometimes look to the guidelines set forth by Arbitrator Daugherty in Appendix A to his decision, *Enterprise Wire Co.,* 46 LA 356, 362 (Daugherty, 1966).

The specific issues raised under the rubric of just cause vary according to the facts of the case. With those precepts in mind, I will review the Grievant's discharge against the just cause standard set forth in the parties' Collective Bargaining Agreement.

The Grievant does not dispute that he was tardy on the occasions alleged by the Employer. Nor does he contend he lacked notice of the Employer's attendance policy and the steps of progressive discipline contained in that policy. He does not challenge the Employer's investigation as being unfair or inadequate. Therefore, the Arbitrator will not further comment on those just cause considerations. The Arbitrator will turn next to the issues raised by the Union on the Grievant's behalf.

B. Disability Claim

The Grievant's principal just cause contention pertains to his claimed disability. As recounted in detail in the Summary of the Evidence, above, the Grievant testified that he suffers from seizures and to avoid those seizures, is required to take medication that makes him drowsy. He testified that the medication causes him to sleep extremely soundly and that sometimes he has been unable to wake up even when using several alarm clocks. Thus, he maintains that he has a qualified disability that entitles him to a reasonable accommodation from the Employer and that, in fact, the Employer had been reasonably accommodating his disability in the past by allowing him to make up his tardinesses by working additional time at the end of his shift.

The Union contends that the seizure disorder claimed by the Grievant is a qualified disability within the meaning of both federal (Americans with Disabilities Act) and state (Washington Law Against Discrimination) statute. The Employer contends that the Union has not demonstrated this. The Union also contends that the Grievant's medical condition remains covered, even though it is controlled, when the medication used to control the condition has side effects that may require accommodation. The Employer disputes aspects of this assertion as well as its application to the facts of this case. The parties also disagree as to whether attendance and punctuality are essential functions of the Grievant's job and whether working a flexible schedule is a reasonable accommodation.[7]

The Arbitrator does not need to address these questions because the Grievant's disability claim must be dismissed on the basis of the evidence showing that the Grievant never gave the Employer timely notice of his disability.

An employer's duty of reasonable accommodation of a disability is not triggered unless the employee gives the employer notice of his disability, or, under certain circumstances, the employer has reason to know of the disability. *Goodman v. The Boeing Co.*, 127 Wn.2d 401, 899 P.2d 1265 (1995). *See also, Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 638, 9 P.3d 787 (2000); *Brown v. Lucky Stores, Inc.*, 11 AD Cases 1195, 1198 (9th Cir. 2001).

It was undisputed that the Grievant never informed any Yelm Highway store management of his seizure disorder condition or the medication he was taking despite having ample opportunity to do so. Store Manager Lou Piazza verbally counseled the Grievant in February, 2000. Shortly after that, he was given a written corrective action letter for being late for work. A month later an assistant manager gave him a three-day unpaid suspension for violating the Employer's attendance policy. The Grievant was well aware of the Employer's rules on attendance and its policy of progressively disciplining violators. He knew by the time

[7] The Employer has not challenged the Arbitrator's authority to entertain the Grievant's disability claim within the context of just cause; therefore, the Arbitrator will assume, without deciding, that she has this authority.

he received the three-day suspension that if he was late one more time in a rolling nine-month period, he would be terminated. Yet, he never chose to speak up and explain that medication for a serious medical condition was interfering with his ability to come to work on time. When he was late again on the first of May, 2000 and confronted by Assistant Manager Tim Bailey, he continued to remain silent, and remained close-mouthed about his condition even when asked, on May 6, 2000, to give his side of the story in writing. The Grievant consistently maintained that he overslept on the occasions he was late, and he just as consistently omitted mention of any medical condition or medication that interfered with his attendance.

At hearing, the Grievant claimed that he believed that store management already knew about his condition, that it was "in his file," that Safeway had been accommodating it (at the Juanita store), and therefore he didn't believe it was necessary to provide the information.

The Grievant's claim is not persuasive. If store management did have prior notice of the Grievant's condition, yet continued to discipline him, it should have been obvious to the Grievant that the information had not been conveyed to those presently making the decisions. It is not reasonable for an employee to sit by silently under those circumstances and not advise the employer that a mistake is being made. A person in the Grievant's position who values his job would surely speak up at the earliest opportunity.

Secondly, the Grievant's own testimony on store management's knowledge of his condition was insufficient to constitute actual notice. The only creditable evidence was that Mark Eglin, a lead at the Juanita store and a friend of the Grievant's, was aware of the Grievant's medical condition. But, Mr. Eglin was not a manager or supervisor. Moreover, although Mr. Eglin was aware that the Grievant had suffered from seizures, he opined that the Grievant had a problem with oversleeping even before he began any medication. The Grievant claimed that the Juanita store had been "accommodating" his condition. However, the evidence indicated that at best, the Juanita store had tolerated his occasions of tardiness, and that store

management did not have actual knowledge of his condition. That the Yelm store later chose to enforce Safeway's attendance policy is permissible, so long as it does so even-handedly and gives its employees notice that the policy will be enforced if prior enforcement has been lax.

The Grievant also claimed that he told Stephanie Cook, a lead at the Yelm Highway store about his condition, but again, a lead is not a managerial or supervisory employee. Moreover, his claim is suspect, given that Ms. Cook disagreed that he supplied her with this information.

As the Employer asserted in its post-hearing brief, progressive discipline is a two way street. The Employer has certain responsibilities but so does the employee. The employee must communicate in the process, especially if the manager is not aware of things that may be influencing the employee's performance (or ability to get to work on time). Grievant failed to take advantage of the multiple opportunities afforded him through this process.

Indeed, the Grievant's silence was so contrary to how one would expect a reasonable person to behave under similar circumstances that it lends credence to the Employer's questioning of the bona fides of the Grievant's claimed disability. As the Employer pointed out, although the Grievant presented evidence of the medical side effects of Dilantin (Exhibits U-3 and U-4), those documents merely list "drowsiness" as a "possible side effect." One finds the same possible side effect on a bottle of over-the-counter cough or non-prescription antihistamine. There was no evidence showing that Dilantin would cause the extreme drowsiness that the Grievant claims. Moreover, the medication did not interfere with the Grievant's ability to get to work on time most days and certainly did not interfere with his ability to call the store to let them know he was going to be late. If the medication caused the extreme drowsiness claimed by the Grievant, one would expect to see this manifested more consistently. The Grievant never sought the assistance of his physician, even though his job was on the line. As the Employer pointed out, the Eighth Circuit Court of Appeals held against

a plaintiff on an ADA claim of drug-induced drowsiness because she failed to discuss the issue with her physician to see if something could be done to adjust her medication to alleviate the problem. *Hill v. Kansas City ATA*, 9 AD Cases 833 (8th Cir. 1999). (In addition, like the Grievant's claim here, her claim was untimely). Finally, there was evidence that the Grievant had a tendency to oversleep even before he began taking Dilantin.

C. Other Just Cause Considerations

The Union contends that the Grievant was denied due process because he was not afforded even-handed treatment. It contends that although the Employer rigidly enforced its attendance policy in his case, it has ignored the same issue in the case of another employee, [redacted].

The disparate treatment claim is essentially an affirmative defense that may be asserted to overcome a claim of just cause. *State of Ohio*, 99 LA 1169 (Rivera, 1992). One arbitrator stated:

> [The principle of nondiscrimination in discipline] requires like treatment under like circumstances.... There is no discrimination or no departure from the consistent or uniform treatment of employees, merely because of variations in discipline reasonably appropriate to the variations in circumstances.

Pepsi Cola Bottling Co., 78 LA 516, 527 (Keenan, 1982), quoting from *Alan Wood Steel Co.*, 21 LA 843, 849 (Short, 1954). *See also Grey Eagle Distributors, Inc.,* 93 LA 24, 28 (Canestraight, 1989); *Dole Can Plant*, 83 LA 253, 257 (Tsukiyama, 1984); *Alumax Extrusions Inc.*, 81 LA 722, 725 (Miller, 1983).

The Grievant's claim of disparate treatment is not convincing. As the Employer has demonstrated, Mr. [redacted] has demonstrated to the Employer a bona fide reason for needing a schedule accommodation, and he has consistently arranged for the same in advance. In fact, Mr. [redacted] has done exactly what the Grievant failed to do: communicate with store management as to his needs. The Grievant's claim that his discharge is tainted by Mr. Gomez's animosity towards him lacks insufficient basis in the record.

D. Conclusion

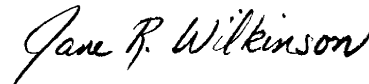
The Grievant violated the Employer's attendance policy, and the Employer properly applied the steps of progressive discipline set forth in that policy and it did so even-handedly. The Grievant was given ample opportunity to present to the Employer any mitigating or extenuating circumstances surrounding his attendance violations and he failed to avail himself of that opportunity. If the Grievant was taking a medication for a medical condition that interfered with his attendance, the Employer was never made aware of that fact. Accordingly, it had no duty to accommodate the Grievant. The Arbitrator concludes that the Employer had just cause for its discharge of the Grievant.

VII. AWARD

Pursuant to the foregoing discussion and analysis, the Arbitrator concludes that the Employer had just cause to discharge the Grievant; accordingly, his discharge did not violate the parties' Collective Bargaining Agreement, and the grievance herein is DENIED.

Per Article 17.1.1. of the parties' Agreement, the Union, as the losing party, shall pay the Arbitrator's fees and expenses.

Date: March 17, 2002



Jane R. Wilkinson
Labor Arbitrator