STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION, AFSCME, COUNCIL 24, Complainant,

vs.

STATE OF WISCONSIN, Respondent.

Case 706
No. 65994
PP(S)-373

Decision No. 31865-C

Appearances:

Kurt Kobelt, Lawton & Cates, Attorneys at Law, P.O. Box 2965, Madison, Wisconsin 53701-2965, for the Complainant.

David Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 20, 2006, the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin had committed unfair labor practices by failing and refusing to comply with certain grievance arbitration awards, in violation of Secs. 111.84 (1)(a) and (e), Stats. On July 17, 2006, the State filed a Notice of Motion and Motion for the Commission to decline jurisdiction. Following a briefing schedule which closed on September 21, 2006, the Examiner on October 16, 2006 issued an Order Denying Motion to Decline Jurisdiction. Hearing in the matter was held on February 9, 2007, with a stenographic transcript being made available to the parties by February 21. The parties thereafter exchanged written briefs (the complainant submitting on April 6 and May 30, the respondent on April 26). The examiner hereby issues the following

FINDINGS OF FACT

1. The Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, is a labor organization as defined by 111.81(12), Stats. At all times material hereto, it was and continues to be the exclusive bargaining agent for state employees whose positions were previously allocated by action of the Commission to statutorily created bargaining units pursuant to Sec. 111.825, Stats.

2. The State of Wisconsin is the "employer" of WSEU members as that phrase is used and defined throughout the State Employment Labor Relations Act, which, at Sec. 111.815(1), Stats., provides that "the state shall be considered as a single employer and employment relations polices and procedures throughout the state shall be as consistent as practicable."

3. The parties at all times material have had a Master collective bargaining agreement, which includes a provision, at Article 4, establishing a grievance procedure culminating in an arbitration that is "final and binding on both parties to this Agreement." The parties to the agreement are defined as "the State of Wisconsin and its Agencies (hereinafter referred to as the Employer) … and AFSCME, Council 24, Wisconsin State Employees Union, AFL-CIO, and its appropriate affiliated locals (hereinafter referred to as the Union) …."

4. Since at least 1989, the parties' master agreements have included provisions relating to sick leave and sick leave abusers, amended in the 2000-2001 agreement as follows:

> **13/5/2A** The Employer agrees to provide the following:
>
> Employees may use accrued sick leave for personal illnesses, bodily injuries, maternity, or exposure to contagious disease:
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> A. which requires the employee's confinement; or
> B. which render the employee unable to perform assigned duties; or
> C. where performance of assigned duties would jeopardize the employee's health or recovery.
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> In the event the Employer has reason to believe that an employee is abusing the sick leave privilege or may not be physically fit to return to work, the Employer may require a medical certificate or other appropriate verification for absences covered by this Article. When an employee has been identified as a sick leave abuser by the Employer and required to obtain a medical doctor's statement for sick leave use, the notice of such requirements will be given to the employee and the local Union in writing. If the medical certificate verifies that the employee was not abusing sick leave or is physically fit to report to work, the Employer shall pay the cost of the medical certificate. When an employee must obtain such medical certificate during his/her regularly schedules hours of employment, he/she shall be allowed time off without loss of pay or sick leave

credits to obtain the certificate. Employees will be permitted to use holidays, compensatory time off and/or annual leave in lieu of sick leave when they so request.

To protect employee privacy, the parties shall make a good faith effort to maintain the confidentiality of personal medical information which is received by or disclosed to the Employer in the course of administering this section.

Sick leave, unanticipated use of sick leave, and innovative positive methods or programs to reduce the use of sick leave are appropriate topics of discussion at local labor/management meetings. (added in 2000-2001).

5. On December 4, 2004, Arbitrator Herman Torosian issued an award in STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS), OSER Case No. 19121 ("the Torosian Award," or the "Local 281 award") concerning a grievance alleging the employer had violated Article 13/5/2A of the collective bargaining agreement. The Torosian Award held that the employer had violated Article 13/5/2A of the agreement by securing medical information from the grievant's medical providers without the grievant's consent, and ordered the state to "cease and desist from doing so in cases where employees have validated their absences under Section 13/5/23A."

6. On May 4, 2005, Arbitrator George Fleischli issued an award ("the Fleischli Award," or the "Local 48 award") in DEPARTMENT OF HEALTH AND FAMILY SERVICES (OSER Case No. 019255), also interpreting Section 13/5/2A. Arbitrator Fleischli held that the employer had just cause to impose a three-day and a five-day suspension, but did not have just cause to terminate the grievant.

7. Among its varied general government functions, the State of Wisconsin maintains the Department of Health and Family Services (DHFS). Within the DHFS there is a Division of Care and Treatment Facilities, which operates seven facilities at locations around the state. The facilities have separate policies for the information which employees who are designated as Sick Leave Abusers (SLA's) have to provide when taking sick leave. At the Winnebago Mental Health Institute and Mendota Mental Health Institute, SLA's merely have to submit a slip from their health care provider stating the employee had "a medical reason" for missing work. At the Central Wisconsin Center, Southern Wisconsin Center, Northern Wisconsin Center and Wisconsin Resource Center, SLA's have for several years been required to provide a certificate from their health care provider stating "medical condition for absence," along with a "statement that the illness did preclude work for each day of absence and the reasons why." At these facilities, having the health care provider state "medical illness" has not been considered sufficient.

8. The State of Wisconsin also maintains a Department of Veterans Affairs, which operates the Wisconsin Veterans Home at King, where the sick leave policy in effect since at

least 1999 requires employees "on the letter" as SLA's to submit a medical verification that includes "a specific description of the illness or injury being treated."

9. On or about August 2, 2002, the Human Resources Director of the Veterans Home at King issued a letter to DVA employee Nikki Powell, requiring her to provide "appropriate medical verification for all future absences involving an illness." Among other elements, the medical verification was required to "articulate the nature of the health care problem and why the health care problem prevented you from working...." Unless the requirement was subsequently waived, Powell was required to provide the verification or face disciplinary action for insubordination as well as loss of pay. By letter dated September 14, 2004, Powell was issued a written warning for submitting a medical slip stating "medical illness." Prior to the event for which she was disciplined, Powell had submitted full medical verifications on at least seven occasions. Powell, who in July 2004 had signed a release authorizing her medical provider to "release information to by employer," filed a grievance over the written warning, which was processed to the point of arbitration. By letter dated October 28, 2005, the WSEU's counsel requested that Powell's grievance be sustained on the basis of *res judicata* and *collateral estoppel,* (namely the Torosian and Fleischli Awards) further requesting that "all other pending grievances presenting the same issue be resolved in accordance with these arbitration decisions. Moreover, the form letter sent to Sick Leave Abusers must be altered to conform to these decisions." The State, through OSER, refused to grant either relief the Union sought.

10. By letter dated January 26, 2006, Rick Brockwell, an employee of the DHFS's CWC who had earlier been designated as an SLA, was given a reprimand and a two-day suspension for presenting a medical slip stating "Due to medical illness, my patient Rick D. Brockwell is unable to work on the following dates." During a meeting to discuss the resulting grievance, a WSEU steward demanded that the discipline be rescinded in light of the Torosian and Fleischli awards, which the CWC refused to do, leaving the grievances pending.

11. On February 21, 2006, Charles Cregger, also "on the letter" as a CWC sick leave abuser, received a verbal reprimand for presenting a medical slip stating he was "seen in my office with an illness on January 24, 2006." Citing the Torosian Award, Cregger grieved the verbal reprimand, which grievance was pending at time of hearing in the instant complaint.

12. On March 9. 2006, CWC employee Rachel Tatge, another SLA, was given a verbal reprimand and leave without pay after she submitted a medical slip stating, "off work due to an illness and appointment to evaluate and treat on March 5, 6 and 9th, 2006." During a meeting to discuss the resulting grievance, a WSEU steward demanded that the discipline be rescinded in light of the Torosian and Fleischli awards, which the CWC refused to do, leaving the grievances pending.

13. Neither the Torosian Award nor the Fleischli Award resolved the precise issue of whether 13/5/2A of the Master collective bargaining agreement prohibits the State of Wisconsin from requiring employees on the Sick Leave Abuser letter to provide a statement as to the medical diagnosis and/or symptoms which prompted their sick leave.

14. There are significant differences in material facts between the Torosian Award and Fleischli Award and the grievances referenced in Findings of Fact 9-12.

On the basis of the above and foregoing Findings of Fact, the Examiner issues the following

CONCLUSION OF LAW

That the Respondent did not violate secs. 111.84(1)(a) or (e), Stats., by imposing the disciplinary actions referenced in Findings of Facts 9-12.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner issues the following

ORDER

That the complaint be and hereby is DISMISSED.

Dated at Madison, Wisconsin, this 27th day of July, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/
Stuart D. Levitan, Examiner

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

In support of its complaint, the Union asserts and avers as follows:

Pursuant to Commission case law, parties must comply not only with the specific remedy in a specific arbitration award, but must also comply with the resolution arbitrators reach regarding the issues underlying an award when the same issues arise subsequently between the same parties and no material facts have changed. The respondent in the instant case has failed to comply both with a broad cease-and-desist order directing the respondent to secure employees' consent before obtaining confidential medical information as well as with the underlying principle that employees cannot be required to disclose their medical conditions.

While the precise issue of requiring employees on sick leave abuse status to disclose their medical condition as part of verifying their absence was not before Arbitrator Torosian in the LOCAL 281 arbitration, his rationale and award necessarily hold that the employer cannot inquire into the nature of the employee's medical condition.

By issuing his broad language that "the Employer shall cease and desist" from obtaining medical information without employee consent "where employees have validated their absences under Section 13/5/2A and that any inquiry should be limited to determining the cost of the office visit and doctor's fees employees incur in obtaining a medical certificate," arbitrator Torosian clearly intended to enjoin the employer from violating the principle – which Torosian found in 13/5/2A – that employees must consent to the release of medical information to the employer. The contract, Torosian found, assumes that the only information an employee can be required to provide to validate an absence is a "simple note from a doctor indicating that the employee was sick and unable to work on the day in questions." Torosian thus invalidated any policy requiring employees to disclose anything more than the costs of obtaining the medical certificate.

Accordingly, the discipline of the four employees in the instant matter violated Torosian's cease-and-desist order; it is immaterial that the employees work at institutions that have not interpreted 13/5/2A in the same manner as the facility involved in the Torosian award.

Further, arbitrators Torosian and Fleischli necessarily decided that sick leave abusers cannot be required to disclose their medical conditions. The Commission requirements for issue preclusion – that the issue was actually litigated in the prior proceeding and was necessary to its outcome, and that there are no material factual differences – are met here.

In the LOCAL 48 case, arbitrator Fleischli expressly interpreted 13/5/2A as requiring employees to indicate only that they suffered from a "medical illness." This interpretation was clearly intended to invalidate any policy disciplining employees for refusing to provide any further information other than "medical illness." The Examiner has already properly described the correct interpretation of these cases in his decision of October 16, 2006.

The material facts in LOCAL 48 were: a unit employee on sick leave abuser status is absent from work, presents a medical certificate in a timely manner and is disciplined. It is undisputed that the four employees who figure in the instant proceeding were unit employees on sick leave abuser status who were disciplined after presented a medical certificate in a timely manner.

The Respondent's claims of differences in material facts are without merit and are unpersuasive. While it may be true that the institutions in the prior cases both did not require sick leave abusers to reveal the nature of their illnesses, this cannot be considered material in the sense that if it were not so a different result would have occurred. There is no indication that either decision would have been different had either institution required sick leave abusers to disclose their conditions. Even though arbitrator Torosian based his analysis on the assumption that sick leave abusers were not required to disclose their conditions, there is no question he would have reached the same result had the practice been otherwise. His interpretation of 13/5/2A as establishing the principle that the employer cannot access employee medical records without their uncoerced consent necessarily requires invalidation of any policy to the contrary. The same holds true for Arbitrator Fleischli's decision. The coincidence that the two institutions involved were among an apparent minority of institutions which did not require sick leave abusers to disclose their illnesses is a non sequitur.

The Respondent's efforts to portray the two institutions are separate employers from the agencies involved herein is equally deficient. Statute and the text of the collective bargaining agreement itself establishes that there is a single employer, the State of Wisconsin. References to "employing units" and "appointing authority" are also red herrings.

In support of its position that the complaint should be dismissed, the Respondent asserts and avers as follows:

The precise issue for which complainant seeks issue preclusion in this proceeding was not resolved in the Torosian and Fleischli awards. Neither award actually or even remotely hints that Section 13/5/2A limits in any way the type of medical information the employer may require. Torosian specifically found that notwithstanding privacy considerations an employer has the right to insist on "personal medical information" when administering this provision. This holding clearly rejects complainant's position that "personal medical information" is limited to the phrase, "medical illness." Complainant even acknowledges that the precise issue involved herein was not before Torosian, but erroneously contends that his rationale and award necessarily so hold. Fleischli made no finding that "medical illness" was all that was required by 13/5/2A because the parties agreed at the local level that "medical illness" was acceptable. Because the precise issue of whether the phrase "medical illness" satisfies 13/5/2A was not decided by these awards, issue preclusion does not apply.

Further, the instant case involves different material facts than were present in the Torosian and Fleischli awards. It is uncontradicted that the employing units involved herein – Central Wisconsin Colony and the Veterans' Home at King – are different than those before Torosian (the Department of Corrections facility at Redgranite) and Fleischli (the Department of Health and Family Services' Winnebago Mental Health Institute). Separate employing units are autonomous and have different practices. The earlier awards clearly were limited to the facts and practices at those particular institutions, and were not meant to apply statewide or to employing units other than those before the arbitrator(s).

The practices at the two employing units involved in the instant case differ form those involved in the earlier awards. Indeed, the requirement for medical specificity for medical verifications vary at the various employing units in state service. These differing practices is consistent with language in the master collective bargaining agreement which identifies sick leave matters as appropriate for discussion and implementation at the local level. The practice at WMHI was the exception to the divisional policy at DHFS requiring information about a specific medical condition, and the practice at CWC and King is different than it was at WMHI and RGCI. Different practices at different employing units limit the applicability of arbitral awards.

Further, Torosian and Fleischli both upheld the employer's right under 13/5/2A to require medical information when it was necessary to administer that provision, which allows for greater scrutiny of an employee designated as a sick leave abuser, including obtaining personal medical information to medically validate the absence. Sick leave abusers had already shown untrustworthy conduct which prompted great suspicion of that employee's absences; supervisors needed information to determine if these employees were in fact so

sick as to be unable to come to work, which required specificity more than merely "medical illness." Moreover, the sick leave abuser at King signed a document authorizing the health care provider to release medical information, a material fact not present in the earlier awards.

The Complainant also disregards three other arbitration awards which are binding in this proceeding, all of which validate the employer's requirement for more information that a mere statement as to "medical illness."

Complainant's position advocated herein was not only sidestepped and rejected but it is inconsistent with its advocacy in the Torosian and Fleischli arbitrations. Complainant also totally misreads the Fleischli award, which did not, contrary to the complainant's contention, restrict an employer to only "medical illness." Further, Complainant's failure to act until three years after the contractual change in 2000 undermines its position.

Applicable Commission caselaw sets a very rigid standard and heavy burden a party advocating the applicability of a prior arbitral award must meet in order for an award to be binding in a subsequent proceeding. Unless the exact issue has been resolved and the material facts are identical, Respondent is not bound by the Torosian and Fleischli awards.

Here, there is absolutely no proof that the precise issue was decided in those awards. In any event, the material facts are different. The only award that is binding is an earlier award by arbitrator Ver Ploeg which established that the employer at CWC can demand a statement of symptoms and diagnosis. Commission case law requires a finding that the Torosian and Fleischli awards are not binding, the Ver Ploeg award is, and that the complaint must be dismissed on its merits.

In response, the Complainant further asserts and avers as follows:

Respondent errs when it contends that the Torosian case involved materially different facts because the employees were not on sick leave abuser status. In fact, because the Union did not challenge the employer's treatment of the employees as sick leave abusers do to concerns about a "blue flu" job action, the employees in that case were indeed deemed to have been "on the letter," a material fact identical to those employees at issue here.

Respondent errs by not recognizing that, while Torosian did not incorporate HIPPA into the collective bargaining agreement, he did acknowledge that the contractual language regarding privacy did incorporate several HIPPA concepts, including banning the release of medical records without consent.

Torosian's rationale necessarily extended to the right to withhold information regarding the nature of the employee's illness. Torosian's assumption that the only information needed to validate the illness was a "simple note from a doctor indicating that the employee was sick and unable to work on the day in question" was based upon the practice at the institution, but was clearly critical to his "cease and desist" order. Torosian impliedly found that the employer is not entitled to anything more than the "simple note" to validate an absence.

Respondent errs further in its mischaracterization of the Fleischli award, especially its absurd assertion that the arbitrator did not interpret 13/5/2A. Contrary to Respondent, the coincidental fact that the institution in question did not require sick leave abusers to disclose their illness does not render any statement any less of a contract interpretation or dicta.

Section 13/5/2A is not ambiguous, and requires employees designated as sick leave abusers to provide a medical certificate which "verifies that the employee was not abusing sick leave or is physically fit to report to work." It does not specify the contents of the certificate or require the employee to provide any information regarding the nature of the illness. The Respondent errs in maintaining it is for the Examiner to decide whether the employers herein have a need to know the medical reasons; such a determination is beyond the Examiner's authority.

Nothing in Respondent's brief requires any change in Examiner's previous finding that the "employer cannot go beyond the magic words attesting to the nature of the illness."

The Respondent errs further in maintaining that the Torosian and Fleischli awards apply just to the two institutions involved in those decisions. Respondent does not even address Complainant's rebuttal based on the statutory definition of a "single employer." Respondent further distorts the record by implying the practices at the two institutions were negotiated pursuant to the last sentence of 13/5/2A.

DISCUSSION

Section 111.84(1)(a), Stats., makes it an unfair labor practice for the State of Wisconsin to interfere with, restrain or coerce employees in the exercise of their statutory rights to form, join or assist labor organizations, bargain collectively, and to engage in lawful concerted activities for the purposes of collective bargaining or other mutual aid, or to refrain from any or all activities. Section 111.84(1)(e), Stats., provides in pertinent part that the State commits an unfair labor practice if it does not "accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them."

Although the Complainant alleged violations of both Sections (1)(a) and (e), its evidence and arguments focused exclusively on (1)(e). As the parties both recognize, the leading Commission case in the jurisprudence of Section 111.84(1)(e) is STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS), a/k/a "LUDER," Dec. No. 31240-B (5/2006), in which the Commission held:

> It is clear from the language of this provision that its application is dependent upon whether the parties themselves have "agreed" to accept an award as "final and binding."
>
> Historically, the Commission has viewed the Section (1)(e) requirement, and its municipal and private sector analogs, as taking two forms. First, an employer must comply with the specific remedy set forth in a specific arbitration award. SEE, E.G., STATE OF WISCONSIN, DEC. NO. 14823-C (WERC, 10/77) (holding that the State violated the law by granting the relief only to the specific grievants when the award by its terms covered all similarly situated employees). Second, taking guidance from the concepts of claim preclusion (res judicata) and issue preclusion (collateral estoppel), an employer must comply with the resolution arbitrators have reached regarding the issues underlying an arbitration award, when the same issues arise subsequently between the same parties and no material facts have changed. SEE, E.G., WISCONSIN PUBLIC SERVICE CORPORATION, DEC. NO. 11954-D (WERC, 5/74). It is only the second type of Section (1)(e) violation, i.e., a violation resting upon preclusion principles, that precipitates an inquiry into the similarity of "material facts" between the first and the subsequent grievances.
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> Under the preclusion prong of the Section (1)(e) analysis, as set forth in WISCONSIN PUBLIC SERVICE CORPORATION, the award would be binding whether or not it involved in the same grievant. Without dissecting the differences between claim preclusion and issue preclusion, we note that issue preclusion is generally the more apposite concept when considering the effect of an arbitration award in a subsequent grievance.[1] For issue preclusion purposes (and thus for the second type of Section (1)(e) violation), it does not matter whether the same grievant is involved in the subsequent arbitration. What matters, as the Commission held in its seminal decision in WISCONSIN PUBLIC SERVICE CORPORATION, *Supra*, is whether the precise *issue* has been resolved and subsequent circumstances have not called the resolution into question.

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[1] Claim preclusion generally applies to situations where the same temporal events (or "transaction") give rise to more than one cause of action. Claim preclusion is related to the "merger doctrine," requiring that all claims arising out of a single transaction be combined; accordingly, such claims will be precluded whether or not they were actually litigated. See STATE OF WISCONSIN (DER) (METHU), DEC. NO. 30808-A (WERC, 1/06) at 8-9. Issue preclusion, on the other hand, applies to subsequent events or transactions that implicate issues already settled in previous litigation. Unlike claim preclusion, issue preclusion does not require the same parties, but does require that the issue actually have been litigated in the prior proceeding and have been necessary to the outcome. See discussion in WAUPACA COUNTY, DEC. NO. 30882 (WERC, 4/04).

> This extremely close question ultimately must be answered on the basis of the burden of proof. As always in a complaint proceeding, the complaining party (here, the Union) bears the burden of establishing the requisite elements of the claims by a clear and satisfactory preponderance of the evidence. See Secs. 111.07(3) and 111.84(4), Stats. Similarly, the party asserting issue preclusion bears a relatively heavy burden to show that a particular issue was actually decided in a previous case. WAUPACA COUNTY, DEC. NO. 30822 (WERC, 4/04), and cases cited therein. As the Commission noted in WAUPACA COUNTY, the jurisprudence regarding issue preclusion cautions that the doctrine is "equitable" and should not be applied rigidly to foreclose a party from an opportunity to litigate a claim. Therefore it is up to the Union to convince us that the Ver Ploeg award actually determined that the State could not prohibit Luder from smoking (unless material circumstances changed) and, by the same token, that she did not rule for Luder on some other more limited ground.

Under LUDER, the "first question" is "what issues were actually resolved and necessary to the outcome." Id., at 9. Therefore, to prevail in its complaint, the union must show by a clear and satisfactory preponderance of the evidence that either the LOCAL 281 or the LOCAL 48 award resolved the precise issue involved in the CWC and DVA grievances, *and* that there was no significant difference in the material facts.

I turn, therefore, to a close review of those earlier awards, to determine whether or not they preclude the employer from requiring employees who are considered to be sick leave abusers to submit medical certificates with information more specific that simply "medical illness."

I find they do not, and accordingly have dismissed the complaint. In so doing, of course, I decidedly do *not* interpret and apply the collective bargaining agreement to the underlying grievances, nor offer any opinion on the merits of the underlying grievances. The issue before me was not whether the employer violated the collective bargaining agreement by imposing any or all of the underlying disciplinary actions, but rather whether it was an unfair labor practice for the employer to do so.

The Torosian Award

The parties – Wisconsin State Employees Union, Local 281 and the State of Wisconsin, Department of Corrections -- stipulated to one issue, viz., "Did the Employer violate the collective bargaining agreement when it did not pay certain charges on the grievants' medical bills?" The union also proposed a second issue, viz., "Did the Employer violate the collective bargaining agreement when it asked the grievants' health care providers to provide the grievants' protected health information without first securing the consent of the grievants?" The arbitrator disagreed with the employer's position in opposition to a second issue, stating, "(t)he grievance giving rise to the instant arbitration raises the privacy issue."

The award indicates that the "Pertinent Contract Provisions" are the sections of 13/5/2A, the same provisions at the heart of the instant controversy.

The grievance involved six DOC employees at the Redgranite Correctional Institution who called in sick during a four-day period during which the state, concerned that its employees would engage in job actions including the "blue flu," had required medical certificates to verify their inability to work. This directive was done pursuant to Section 13/5/2A of the master agreement. For the purposes of the arbitration, the union did not challenge the legitimacy of the employer's decision to require such certification, meaning the employees were thus tantamount to sick leave abusers.

The grievants and/or their medical provider, Berlin Memorial Hospital, provided bills showing an "ER General" fee and "Professional Fees ER," along with other charges for lab work, x-rays and other tests. Human Resources personnel at Redgranite Correctional Institution reviewed the bills and contacted the billing department of the hospital to determine the exact nature of the charges, including disclosure of the actual test or service provided. The RGCI human resources personnel did not contact the grievants to inform them of the investigation of their bills or to ask for a release to obtain the information concerning their tests or treatments.

The employer ultimately did not question the legitimacy of the grievants' sick leave usage, but did challenge the amount billed back to it, contending that certain costs should properly be borne by the grievants' insurance carrier. The union thereafter filed a grievance alleging that the employer violated sections 13/5/2A and 9/5/1 of the collective bargaining agreement by investigating the specifics of the bills.

The aspect of the Torosian Award relating to the allocation of costs is not pertinent to the matter before me. Arbitrator Torosian's consideration of 13/5/2A is. Because of its importance to the instant controversy, I quote it in its entirety:

> Issue 2
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> A new paragraph was added to Section 13/5/2A in the 2002-2003 collective bargaining agreement to protect employee privacy with respect to medical information. It requires the parties to "…make a good faith effort to maintain the confidentiality of personal medical information which is received by or disclosed to the Employer in the course of administering this section." [2]
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> The Union argues that this language incorporates existing laws protecting the privacy of employees including the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The Employer claims otherwise.

[2] As noted above, this clause was actually added in the 2000-2001 collective bargaining agreement. See, exhibit Employer 4.

Whether the State as an Employer is covered, in full or in part, by HIPAA is not an issue that needs to be decided by this Arbitrator. In the opinion of the Arbitrator, a good faith effort was not made in this case as required by the above-noted provision.

The Employer argues that under the contract, it has a right to request and receive medical information in the course of administering Section 13/5/2A. Assuming this to be true, the Employer in this case did not adequately explain why it decided to investigate the grievants' bills "in the course of administering this section." Significantly, Human Resources Director Souzek testified that she had already received medical certificates from the grievants and concluded that they were indeed sick on the days in question prior to investigating their medical bills. Souzek testified as follows:

Q: And is it correct that you and your office reached a conclusion that the employees were, in fact, sick on those days in question?

A: That's correct.

Q: Now, after you made that determination, did this institution then receive bills from the medical providers who provided the certificates on behalf of these employees?

A: The bills either came from the employee themselves or the institution wherever they received the services. They came from both places.

Souzek also testified that *for sick leave abusers under Section 13/5/2A, all that is required, as far as validation, is a simple note from a doctor indicating that the employee was sick and unable to work on the day in question*. She cited Employer Exhibit 1 as an example. Given Souzek's testimony, one wonders why the calls about the bill were made. Souzek testified that it was "Because of – DOC's practice and RCGI's practice is to pay the cost of the certificate and not the diagnosis or treatment. So it's to decipher which one was which. Sometimes you can tell. But mostly you can't." Here, however, there was no need for the Employer to contact the grievants' medical provider because the medical bills submitted were itemized and specifically listed charges for "E R general" and "professional fees E R." There was nothing to decipher; the charges were apparent. Since the grievants' absences were validated and accepted and the "cost" of the medical certificates was clearly identified on the grievants' bills, there was no need for the Employer to seek additional information much less the specifics of the charges identified as lab work, x-rays, etc. If for some reason clarification was needed, Souzek should have limited her inquiry and simply asked for the charges for the office visit and doctor's fee. (*emphasis* added).

> The Arbitrator interprets Section 13/5/2A as an acknowledgement by the parties that an employee's medical information is a private matter and that said information is subject only to the Employer's right to administer said section. In the final analysis, the Employer offered no evidence to establish that its inquiries about the grievants' medical bills were necessary "in the course of administering" section 13/5/2A. The Employer, therefore, did not have a right to such information under Section 13/5/2A, and by obtaining same, without the grievants' permission, the Employer violated the grievants' privacy rights.
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> Based on this analysis, Arbitrator Torosian issued the following Award:
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> 1. That the Employer did not violate the collective bargaining agreement by not paying charges other than for an office visit and doctor's fee incurred by the grievants in obtaining a medical certificate.
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> 2. That the Employer violated Section 13/5/2A of the collective bargaining agreement by not securing the grievants' consent before obtaining medical information regarding their medical bills; that the Employer shall cease and desist from doing so in cases where employees have validated their absences under Section 13/5/2A and that any inquiry should be limited to determining the cost of the office visit and doctor's fee employees incur in obtaining a medical certificate.

Because the employer was satisfied, as far as validation of a medically required absence, with a "simple note from a doctor indicating that the employee was sick and unable to work on the day in question," Torosian never addressed – much less answered -- the question of what information the employer *could* require in administering Section 13/5/2A. The Union implicitly acknowledges as much, stating in its brief that, "(w)hile this precise issue was not before him, his rationale and award necessarily so hold." This, of course, is not the standard which LUDER requires. Indeed, Luder holds directly to the contrary – that the precise issue *must* have been before the arbitrator for there to be issue preclusion.

As quoted above, arbitrator Torosian interpreted Section 13/5/2A as an acknowledgement by the parties that an employee's medical information *is* a private matter, but that said information *is* subject to the Employer's right to administer said section. He did not, however, state how far the Employer's "right to administer said section" extends where the employer in question had not previously determined that sick leave verification would be accomplished by a "simple note" stating the employee had an unspecified "medical illness."

Thus, even assuming *arguendo* that Torosian's broad cease-and-desist order – that the employer not seek information about an employee's medical bill without first securing the employee's consent where employees have validated their absences under Section 13/5/2A – applies to the employer in the matter before me, it is clear the order does not apply to the

instant controversy because it applies only *where employees have validated their absences under Section 13/5/2A*.

In the employment settings before me, of course, the employer has *not* determined that a "simple note" is sufficient for those on the sick leave letter, but rather has insisted on a more detailed explanation for the employee's absence. Accordingly, even though the employees in the matter before arbitrator Torosian were indeed sick leave abusers (contrary to the state's argument before me), the Torosian Award cannot serve to preclude consideration of this issue because it fails to satisfy both strands of the LUDER standards – Torosian did not resolve the precise issue involved in the subsequent grievances, and there is a significant discrepancy of material fact among the several cases. Accordingly, I have held that the employer did not violate the Torosian award in its discipline of the four employees referenced in Findings of Fact 9 through 12.

The Fleischli Award

This arbitration involved a Resident Care Technician at the Winnebago Mental Health Institute, a facility operated by the State of Wisconsin Department of Health and Family Services. In May, 2002, the employer found the grievant, DC, to be a "sick leave abuser" and placed her "on the letter," setting out the requirements she had to meet when submitting verification for her use of sick leave. In material part, the letter provided:

> The medical slip must be given to your supervisor on the day you return to duty. Denial of sick leave benefits and disciplinary action may be taken if:
>
> 1. You do not see the physician on the first day of your absence;
>
> 2. You do not obtain the medical slip or other appropriate verification;
>
> 3. The medical slip is incomplete. To be complete, the medical slip must include:
>
>   a. Appropriate signature
>   b. Date and time seen
>   c. Length of absence required
>   d. Statement that the illness did preclude work for each day of absence and the reasons why
>
> 4. The medical slip is not returned when you returned (sic) to work.

The parties agreed that under 3.d., the medical provider did not need to provide a detailed diagnosis of the illness. As the Union explained in its brief:

There was no need for the clinic to identify the nature of DC's illness because the Employer has made it clear to the Union that – although it will accept a slip with a detailed diagnosis – a slip that indicates that the reason for the absence was a medical illness is sufficient to meet the Employer's medical verification requirements. Human Resources Director Frances Dujon-Reynolds testified: (emphasis added).

Q: (By the OSER representative) I'd like you to look at what has been entered as Joint No. 8 and tell me if this is the letter that you've referred to?

A: Yes, this is the letter that we use to require medical verification.

Q: I'd like to have you look at the section in the letter that talks specifically about what needs to be in the medical verification. There is a listing there that there needs to be something from the doctor which indicates the person is not capable of working?

A: Correct.

Q: Have you all talked about that particular criteria at labor management meetings?

A: Yes, we have.

Q: What has been the gist of that conversation?

A: Basically that we would accept the statement on any kind of medical slip that – the reason for the absence. If it just stated medical illness, we would accept that as adequate verification. (emphasis added)

Q: So you did not necessarily need a specific diagnosis?

A: No.

As Arbitrator Fleischli wrote, "the medical provider need indicate only that the Grievant's absence, and where appropriate her continued absence, is medically necessary. A medical slip that sets out the date of absence and provides as a reason, 'medical illness,' is deemed sufficient by the Employer. Contrary to the union, Fleischli did *not* "h(o)ld that this practice was required by Article 13/5/2A;" instead, he accepted as a factual predicate that this practice was just that – a practice instituted by the employer. The union also errs in calling this fact "coincidental," when it is actually central to the legal issue in the instant proceeding.

Between May, 2002 and January, 2003, the grievant received a verbal reprimand, a written reprimand and a one-day suspension, all of which she accepted without grieving.

In February 2003, the grievant submitted a medical slip that did not fully comply with the above-noted requirements, in that it was submitted in an untimely manner and stated only, "Patient was seen in our office today." Determining that the slip failed to state the length of the illness, a reason for grievant's absence or that the illness prevented her from reporting to work, and was also untimely, the employer issued a letter in lieu of a three-day suspension, which discipline the grievant timely grieved.

Less than two weeks later, the grievant submitted a medical slip from her chiropractor which contained no statement as to the reason for her absence from work or the length of her malady. Also, like 23 of the 29 slips she submitted during the period May 2002 to March 2004, this slip did not indicate the time the grievant saw the health care provider. If the lack of a time seen was the only defect in a submitted slip, the employer accepted the verification; however, if other data was missing, the employer documented this failure as well. The employer did not impose any discipline for this incident.

On April 10 and April 11-14, grievant was again absent from work. Upon her return, she submitted two slips covering these absences. The April 10 form failed to state a reason for her absence, the time or length of her office visit with the doctor, or indicate that her medical condition prevented her attendance at work. The April 11-14 verification, on a different form but signed by the same physician, stated:

> D… C… is a patient under my care. Due to medical problems, it is necessary for her to be off work beginning 4/11/03 through 4/14/03…

The employer accepted this medical slip as being in full compliance with the above-noted requirements. It did not accept the slip for the April 10 absence, and issued a letter in lieu of a five-day suspension, which DC timely grieved. The employer did not impose any discipline for her absence of April 11-14, when she suffered a miscarriage.

DC submitted three additional slips in 2003 which did not meet the requirements of the May 2002 letter. In June, the note failed to state the length of the absence. In August, the note failed to state the reason for the absence or that her condition prevented her from working. In October, the note failed to indicate the reason for her absence, length of the absence, or that her condition prevented her from working. The employer did not impose any discipline for these inadequacies, or counsel DC that in the future it would strictly enforce the requirements of the May 2002 letter.

On March 7, 2004, DC submitted a slip on which a physician had checked the box stating, "Patient may return to work with no limitations on 3/7/04." On March 16, the employer terminated DC for submitting a slip that failed to conform to the May 2002 letter, stating in its termination letter:

> This is official notification of termination of employment for violation of Department of Health and Family Services Work Rule No. 1, which states:
>
> All employees of the Department are prohibited from committing any of the following acts:
>
> 1. Disobedience, insubordination, inattentiveness, negligence or refusal to carry out written or verbal assignments, directions, or instructions.
>
> . . .
>
> 14. Failure to give proper notice when unable to report for or continue duty as scheduled, tardiness, excessive absenteeism, or abuse of sick leave privileges.
>
> This action is being taken based on incident of March 6, 2004, when you failed to provide adequate medical verification for your absence as required. The medical documentation that you submitted did not have a statement that you were unable to work and the reason why. The medical verification letter you were given requires that any medical slip you submit have this complete documentation in order for the absence to be authorized.

DC grieved the three disciplines, asserting that the employer lacked just cause to impose the letter in lieu of a three-day suspension, the letter in lieu of a five-day suspension, and the termination.

Arbitrator Fleischli elaborated on the factual and contractual context in which the grievances arose, as follows:

> The submission of complete medial verification is dependent on the participation and cooperation of others outside the employ of the Winnebago Mental Health Institute. The medical provider must submit the information requested and attest to its accuracy. In the end, the Employer through placement of the employee "on the letter" requires the employee to review the medical slip she intends to submit for completeness. It is her responsibility. She seeks out medical attention, and she must provide evidence to the Employer that she is sick on the day of absence and that the illness precluded her reporting to work on the day of absence.
>
> For its part, the Employer must consistently and fairly apply the technical requirements set out in the "letter." Otherwise, an employee subject to the "letter," such as the Grievant, may believe that general compliance with the intent of the rule may be sufficient. The inconsistent application of the rule,

> through imposition of discipline in some instances and overlooking other infractions of the "letter" requirements may lead an employee who is subject to the "letter" to form a false sense of security that certain of the requirements need not be met.
>
> On the other hand, the employee who is subject to the "letter" need not provide the Employer with detailed information, often of a very personal nature, to establish the medical basis for an absence. The employee's medical provider need only assure the Employer that absence from work was medically required. It provides the Employer with its needed assurance that the employee's absence was medically necessary. It protects the employee's privacy in that the details of a medical diagnosis are not revealed to the Employer. An employee may view the necessity of including the magic words, "medical illness" on a medical slip as formalistic. However, it is through the use of that phrase that a physician certifies to the Employer that an employee's absence was medically justified. An employee may choose to refrain from giving the Employer detailed information about the illness that prevented her from reporting to work. This is a contractually protected option open to her. However, given the limited information provided by the medical provider, what may seem to the employee as a formalistic requirement represents the central reason for the imposition of the "letter" requirements, to insure that the employee's absence on a particular day was medically required. The Employer clearly has the right to insist that the medical slip submitted contain the magic words.

With these principles in mind, the arbitrator addressed the justification for the three disciplinary actions imposed by the Employer. Regarding the February, 2003 three-day suspension, the arbitrator found that the grievant submitted her slip in a timely manner, but the slip was deficient because it did not state her absence was medically required, or the length or reason for her absence. He therefore denied the grievance and sustained the disciplinary action. Regarding the April, 2003 five-day suspension, the arbitrator found that the grievant's absence was not accounted for by a complete medical slip, and so he again denied the grievance and sustained the discipline. Regarding the March, 2004 discharge, the arbitrator found that the employer had not been uniform in its application of the requirements and had given the grievant inadequate notice as to its insistence on full compliance with the "letter" requirements. Accordingly, arbitrator Fleischli found that the employer did not have just cause to terminate the grievant, and ordered her to be reinstated and made whole.

The critical question for the instant controversy, though, is not *who* won the Fleischli Award, but *why*. And as this summary of the award indicates, the mere fact that the grievance was sustained, in part, does not necessarily provide sufficient legal support for the union in the matter before me.

As noted above, Arbitrator Fleischli explicitly found that it was the *employer,* and *not* the provisions of 13/5/2A, which established that "the medical provider need indicate only that the Grievant's absence, and where appropriate her continued absence, is medically necessary.

A medical slip that sets out the date of absence and provides as a reason, 'medical illness,' is deemed sufficient by the Employer." (emphasis added). The Union is incorrect when it asserts that Fleischli "held that this practice was required by Article 13/5/2A." Instead, Fleischli held that a simple statement of "medical illness" was all that the *employer* required.

The employer in the matter before me has a practice of requiring more, insisting instead on a statement of the employee's illness and why it prevented the employee from reporting to work. Thus, again, the presence of such a significant discrepancy on a material matter of fact, coupled with the fact that the Fleischli Award did not resolve the precise issue involved in the DVA and CWC disciplines, prevent the union from claiming issue preclusion under LUDER.

I have no idea, and express no opinion, whether the employer's practice of requiring such medical information is allowed under the collective bargaining agreement or HIPPA, but I find that doing so is not prohibited under the precedent of the Torosian and/or Fleischli awards.

As the Union correctly notes, there are statements contained on page 3 of my Order Denying Motion to Decline Jurisdiction that support its position. That Order, however, was issued prior to hearing, and thus was without benefit of testimony and documentary evidence necessary to fully understand the legal and factual issues before me. Moreover, there are statements therein which implicitly go to the merits of the underlying grievances, which are not before me. Accordingly, the parties should consider the penultimate paragraph on page 3 of that Order as dicta, without binding legal force or applicability.

Having dismissed the complaint, I decline to address the employer's further argument that this case and the Torosian and Fleischli Awards involved different employers, other than to note Findings of Fact 2 and 3, above.

Dated at Madison, Wisconsin, this 27th day of July, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/
Stuart D. Levitan, Examiner

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