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-D

Appearances:

Kurt C. Kobelt, Lawton & Cates, Attorneys at Law, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of State of Wisconsin.

ORDER ON REVIEW OF EXAMINER'S DECISION

On July 27, 2007, Examiner Stuart D. Levitan issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter. He concluded that the Respondent State of Wisconsin (State) had not violated an agreement to accept the terms of prior arbitration awards by disciplining certain employees for failing to supply a diagnosis or related details regarding the medical conditions precipitating their sick leave use. The Examiner therefore dismissed the Complaint filed by the Wisconsin State Employees Union, AFSCME Council 24, AFL-CIO (Union), which had alleged a violation of Sec. 111.84(1)(e), Stats.

On August 9, 2007, the Union filed a timely petition pursuant to Secs. 111.07(5) and 111.84(4), Stats., seeking review of the Examiner's decision. Both parties thereafter submitted briefs in support of their respective positions, the last of which was received by the Commission on September 24, 2007.

For the reasons set forth in the Memorandum that accompanies this Order, the Commission largely affirms the Examiner's Findings of Fact, Conclusions of Law, and Order, although the Commission clarifies the underlying analysis.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1 through 13 are affirmed.

B. The Examiner's Finding of Fact 14 is set aside.

C. The Examiner's Conclusion of Law is affirmed.

D. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 6th day of November, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

State of Wisconsin

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

The Commission has largely affirmed the Examiner's Findings of Fact, which are summarized as follows.[1]

The parties' Master collective bargaining agreement 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) ...."

Since at least 1989, the Master Agreement has included provisions relating to sick leave and sick leave abusers. As amended in the 2000-2001 agreement, the relevant provision states:

> **13/5/2A.**
>
> . . .
>
> 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.

[1] The following summary includes certain factual information that was contained in the Examiner's discussion as well as information included in the Examiner's enumerated Findings of Fact.

> 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.

Employees who have been identified as sick leave abusers and who are therefore required to supply medical verification for sick leave are referred to colloquially as being "on the letter."

On December 4, 2004, Arbitrator Herman Torosian issued an award in STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS), OSER CASE NO. 19121, (JX-2), concerning a grievance arising under the above provision. In that case, a manager at the State's Redgranite Correctional Institution testified that employees "on the letter" were required to validate their absences with only "a simple note from a doctor indicating that the employee was sick and unable to work on the day in question." (JX-2 at 24). However, the institution also had a practice of paying the costs of obtaining such medical validation exclusive of any costs associated with the diagnosis or the treatment. Without informing the grievants or obtaining a release, the institution had contacted their medical providers to obtain details about the tests and services performed, ostensibly in order to distinguish reimbursable from non-reimbursable costs. The pertinent issue before Torosian was whether these contacts with the medical providers were "necessary 'in the course of administering'" the sick leave provisions of the contract. Id. Stating, "Section 13/5/2A [is] 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,"(Id), Torosian held:

> 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.

On May 4, 2005, Arbitrator George Fleischli issued an award in DEPARTMENT OF HEALTH AND FAMILY SERVICES, OSER Case No. 019255 (JX-3) also interpreting the above-quoted sick leave provision. The issue in that case was whether the Winnebago Mental Health Institute, an agency within the State's Department of Health and Family Services (DHFS), was warranted in imposing three separate disciplinary actions upon the grievant, who was on the letter, based upon her submitting what the institution viewed as an inadequate medical slip. The institution required that a medical slip include (a) an appropriate signature; (b) the date and time seen; (c) the length of absence required; and (d) a statement that the illness did preclude work for each day of absence and the reasons why. Fleischli noted that:

> The parties agree that … the medical provider need not set out a detailed diagnosis of Grievant's illness. Rather the medical provider need indicate only that 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.

JX-3 at 9-10. He elaborated his view that:

> 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 than 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 ensure 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 addresses the justification for the three disciplinary actions imposed by the Employer.

JX-3 at 10. (Emphasis added).

Fleischli found the discipline warranted in the first situation, because the medical slip "merely states that Grievant was seen in the clinic on February 28. It does not indicate that her absence on the 28th was medically required. It does not state the length or reason for her absence." JX-3 at 11. Regarding the second situation, Fleischli upheld the discipline because the grievant had submitted a slip for the first day of a multi-day absence that did not state the length of the absence or that it was medically necessary. After disciplining the grievant for these incidents, the institution thereafter accepted medical slips on three occasions over ten months that were similarly technically deficient. Shortly thereafter, when the grievant submitted a slip that failed to specifically state "medical illness," the institution terminated her employment. Fleischli concluded that the grievant had been misled over those ten months into believing that the institution had slackened its insistence on fully adequate medical slips, and, on that basis, he held that her discharge was without just cause.

The instant case, like those before Torosian and Fleischli, involves employees who are "on the letter." For several years such employees at the Central Wisconsin Center, an

institution within the DHFS, have been required to substantiate their sick leave with a medical certificate 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, all of which are within the DHFS, the employer has not considered it sufficient for the health care provider to state simply "medical illness." Similarly, employees "on the letter" at the Wisconsin Veterans Home at King, an institution within the State's Department of Veterans Affairs, have been required since at least 1999 to submit medical verification that includes "a specific description of the illness or injury being treated."

On or about August 2, 2002, the Human Resources Director of the Veterans Home at King issued a letter to employee Nikki Powell, requiring her to provide "appropriate medical verification for all future absences involving an illness." Among other elements, her verification was required to "articulate the nature of the health care problem and why the health care problem prevented you from working…." By letter dated September 14, 2004, Powell was issued a written warning for submitting a medical slip stating "medical illness." Powell 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,* citing the Torosian and Fleischli awards, and 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 aspect of the relief the Union sought.

During January, February, and March, 2006, three employees who were "on the letter" at the Central Wisconsin Center were disciplined for presenting medical slips citing only "medical illness" or "illness" to substantiate their sick leave. In each situation, the institution disciplined the employee for failing to provide sufficient medical verification and each situation was grieved. In each case, the Union has demanded that the discipline be rescinded in light of the Torosian and Fleischli award and the institution has refused to do so.

The Parties' Positions and the Examiner's Decision

Both here and before the Examiner, the Union argued that the State was refusing to accept the terms of an arbitration award, within the meaning of Sec. 111.84(1)(e), Stats., by requiring employees "on the letter" at any State department or agency to supply details of their medical condition or diagnosis, beyond "medical illness," in connection with verifying their illness-related absences. According to the Union, both the Torosian and Fleischli awards explicitly or implicitly interpreted Section 13/5/2A of the State-wide contract to prohibit the State from compelling its employees to supply more detailed medical information. Further, the Torosian award ordered the State to "cease and desist" seeking such information without the employees' consent. Hence, argues the Union, the State has both refused to comply with an

arbitral remedy and ignored the resolution of a specific issue without any change in material facts. In both respects, the Union contends that the State has violated the requirements set forth in STATE OF WISCONSIN, DEC. NO. 31240-B (WERC, 5/06) (hereafter, "LUDER").

The State's position is that, despite certain dicta, neither Torosian nor Fleischli actually addressed and resolved the issue presented in the instant grievances, i.e., whether 13/5/2A permits an institution to require detailed medical verification. In addition, the State argues that there are material factual differences between the situations underlying Torosian and Fleischli and those in the instant cases, principally the different medical verification requirements that prevailed at the different institutions. Finally, the State contends that, even if Torosian and Fleischli had resolved the issue presented in the instant grievances, that resolution should not be binding on other institutions, because each is a separate employing unit with legal and contractual autonomy over sick leave practices.

The Examiner held that neither the Torosian nor the Fleischli awards addressed the issue presented in the instant cases, i.e., whether an employer may require more than "medical illness" as verification, because in both cases the institution itself did not seek more than that simple statement. In Torosian, the issue was how much additional medical information the institution could seek regarding cost reimbursement, after employees had already validated their absences. In Fleischli, the issue was whether the certificate stated that "medical illness" made the absence necessary and/or specified the length of absence, as required by the institution's verification requirements. Thus, in both awards, the arbitrators accepted as a mutually-acknowledged "factual predicate" – and hence did not decide -- that an employee need supply no more than "medical illness." He also concluded that the instant case presented "a significant discrepancy on a material matter of fact," in that, unlike the requirements prevailing in the Torosian and Fleischli situations, the King Home and the Central Wisconsin Center required that employees supply details regarding the illness, its diagnosis, and why it required the absence. Since the scope of what the State could require under Section 13/5/2A had not been definitively construed, the Examiner found it unnecessary to decide whether the contract would permit those requirements to differ among different State agencies or departments.

Discussion

Regarding the Union's claim that the State has failed to comply with the remedy ordered in the Torosian award, we affirm the Examiner's conclusion that the Torosian remedy was limited to inquiries about costs employees incurred in obtaining the medical certificate "where employees have validated their absences under Section 13/5/2A," for the reasons the Examiner artibulated.

Turning to the Union's second argument, the parties and the Examiner recognized that the controlling principles were set forth in the Commission's LUDER decision, where the Commission interpreted subsection (1)(e) to require two things of the State: first, the State must comply "with the specific remedy set forth in a specific arbitration award"; second, based

upon issue preclusion principles, the State 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." LUDER at 6. On the second prong, the question is "what issues were actually resolved and necessary to the outcome?" ID. at 9. The Commission took pains to point out that, "the party asserting issue preclusion bears a relatively heavy burden to show that a particular issue was actually decided in a previous case. … [T]he doctrine is 'equitable' and should not be applied rigidly to foreclose a party from an opportunity to litigate a claim." ID. at 11 (citations omitted).

The instant case is complicated by the considerable language in both arbitration awards expounding upon the strong privacy interest employees have in the medical details and diagnosis underlying their sick leave claims. Fleischli went so far as to label the employee's right to withhold such information as a "contractually protected option." In light of such language, it is understandable that the Union would view these awards as definitively interpreting Section 13/5/2A such that the State may not require more than "medical illness" for sick leave verification purposes.

Nonetheless, while a future arbitrator may find the Fleischli and Torosian awards instructive or persuasive because of their strong and broad language on the issue, we agree with the Examiner, for the reasons he articulated, that neither arbitrator was actually presented with the question of whether the employer may require more than "medical illness" in connection with sick leave verification. By the same token, the question the State raises here, i.e., whether Section 13/5/2A can impose different requirements on different institutions, is also an open question that is subject to contractual interpretation regarding, inter alia, how much local autonomy the parties intended to give local departments or institutions over sick leave. As the Commission has emphasized innumerable times throughout its jurisprudence, arbitration (where, as here, it is contractually available and designed to be the exclusive mechanism for enforcing the contract) remains the primary forum for enforcing and interpreting contractual provisions. Both parties are entitled to fully litigate issues regarding the meaning of contract language in the arbitration forum. The Commission's jurisdiction under subsection (1)(e) is not a proper vehicle for extrapolating the outcome of issues that were not actually controverted in earlier cases, even if, as here, an earlier case may have been premised upon assumptions regarding those issues. Given the primacy the Commission traditionally places on the arbitration forum, LUDER itself acknowledged the Commission's limited role in cases like this, where one party seeks to avoid arbitration, and the correspondingly elevated burden placed upon that party.

In affirming the Examiner's conclusion, we acknowledge the Union's argument by analogy to a hypothetical situation where the union grieves a state agency's failure to pay overtime based upon a "contractually required wage rate of $20 per hour," and, in the course of deciding the overtime issue, the arbitrator "stated that the contract required the grievant to be paid $20 per hour." (Union Br. at 23). The Union questions, under that hypothetical, whether a different agency in a subsequent arbitration could compel the union to arbitrate the

issue of whether the contract requires $20 per hour, on the ground that the second agency has a "local practice" of paying less than $20 per hour. Consistent with the narrow basis of the LUDER holding, the answer in that hypothetical situation might very well be "yes." If the issue of whether or not the contract required $20 per hour and/or required it of every agency regardless of practice or alleged "local autonomy" language elsewhere in the contract was not actually controverted and litigated in the first arbitration, LUDER probably would not forestall a subsequent arbitration of that issue.

We do take this opportunity to clarify one element of the LUDER paradigm, which appears to have caused some confusion in the Examiner's decision and perhaps between the parties. Having decided that the actual issue underlying the instant set of medical verification grievances has not been conclusively litigated and determined in the prior Torosian or Fleischli arbitration awards, it is not necessary or appropriate to reach the question of whether material factual circumstances have changed since those awards. "Material factual circumstances" means subsequent events that are material to the previous outcome on the issue. If there has been no determination of the issue, then subsequent events are immaterial. Accordingly, there is no need to consider this issue and we have set aside the Examiner's Finding of Fact 14, which found "significant differences in material facts between the Torosian Award and Fleischli Award" and the instant grievances.

Dated at Madison, Wisconsin, this 6th day of November, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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