BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES AND COURTHOUSE EMPLOYEES, LOCAL 2492, (para-professional and clerical unit), AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	Case 164 No. 43442 MA-5973
and	
COUNTY OF MARATHON	

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, N-419 Birch Lane, Hatley, Wisconsin 54440, appearing on behalf of Marathon County Department of Social Services and Courthouse Employees, Local 2492, (paraprofessional and clerical unit), American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Jeffrey T. Jones, Mulcahy & Wherry, S.C., Attorneys at Law, 401 Fifth Street, P.O. Box 1004, Wausau, Wisconsin 54402-1004, appearing on behalf of County of Marathon, referred to below as the Employer or as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Pat DeTienne, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as the Arbitrator. Hearing on the matter was held in Wausau, Wisconsin, on March 21, 1990. The hearing was not transcribed, and the parties filed briefs and reply briefs by May 23, 1990.

ISSUES

The parties stipulated the following issues for decision:

> Whether the County had "just cause" to suspend the Grievant for failing to report to work on September 1, 1989?
>
> If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - MANAGEMENT RIGHTS

> The County possesses the sole right to operate the department and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:
>
> . . .
>
> D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
>
> . . .
>
> F. To maintain efficiency of department operation entrusted to it;
>
> . . .
>
> I. To manage and direct the working force,
>
> . . .
>
> The rights of management set forth above are not all inclusive, but indicate the type of matters or rights which belong to and are inherent to management. Any of the rights, powers and authority the County had prior

to entering into this collective bargaining agreement are unqualified, shall remain exclusively in the County, except as expressly modified by this Agreement.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure . . .

. . .

ARTICLE 3 - GRIEVANCE PROCEDURE

A. Definition and Procedure: . . .

Step 1: . . . In the event of a grievance, the employee shall continue to perform the employee's assigned task and grieve the complaint later . . .

B. Arbitration:

. . .

5. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

. . .

ARTICLE 5 - HOURS AND OVERTIME

A. Hours: The normal hours of work form Memorial Day to Labor Day shall be 8:00 a.m. to 4:30 p.m. with a one hour lunch break, Monday through Friday. During the rest of the year, normal hours of work shall be 8:00 a.m. to 5:00 p.m. with a one hour lunch break, Monday through Friday . . .

. . .

ARTICLE 14 - SICK LEAVE

A. Rate of Earnings: . . . In order to qualify for sick leave, an employee or his/her representative must report that he/she is sick no later than one-half (1/2) hour after the earliest time which he/she is scheduled to report for work except in case of emergency or when the Employer is fully aware the employee will be on sick leave for an extended period.

B. Evidence of Illness - Abuse: If sick for more than three (3) consecutive work days, the employee shall furnish his/her supervisor with a certificate of illness signed by a licensed physician if requested by the Director or the employee's immediate supervisor. Employees who abuse sick leave benefits shall earn no sick leave for the six (6) months succeeding the date of last proven violation. Additional abuses of sick leave may subject an employee to dismissal . . .

. . .

E. Advance Notice and Use: In the event that an employee is aware in advance that sick leave benefits will be needed or due, it shall be the duty of the employee to notify the Department Head as far in advance as possible in writing of the anticipated time and duration of such sick leave, the reason for requesting such sick leave and medical certification that the employee will be unable to perform his/her normal work function. Employees will be required to begin using sick leave on the date which their doctor certifies that they are medically unable to perform their normal duties. An employee on sick leave is required to notify the Department Head at the earliest possible time of the anticipated date on which the employee will be able to resume his/her normal duties.

F. Miscellaneous: Seniority shall continue to accrue during leave of absence for personal illness and disability. During leaves of absence, no other benefits except for seniority shall accrue. Management shall not pay retirement benefits or hospitalization benefits, nor shall sick leave or vacation accumulate during leaves of absence without pay.

. . .

ARTICLE 17 - OTHER LEAVES

A. Personal Leave: Applications for leaves of absence without pay for personal reasons shall be made in writing . . .

The granting of such leave and the length of such leave shall be contingent upon the reasons for the request. The department head may grant leaves of absence without pay for thirty (30) calendar days or less without further authority of the Personnel Committee. Leaves of absence for more than thirty (30) calendar days shall be referred to the Personnel Committee by the department head with a recommendation, and all such leaves, if granted, shall be for a specific period of time.

B. Notice: . . . Seniority shall continue to accrue during the authorized leave of absence. No other benefits shall accrue, however.

. . .

D. Medical Leave: In the event of an extended absence due to sickness or temporary disability stemming from such causes as heart attack, stroke, cancer, pregnancy, etc. the employee may request an unpaid medical leave of absence so as to retain a sick leave balance for use after return to work. Such medical leave of absence may be requested as specified above.

. . .

ARTICLE 20 - PART-TIME EMPLOYEE BENEFITS

Regular part-time employees are defined as employees in an established position who are regularly scheduled to a lesser number of hours than a full-time employee as provided for in the work schedule of Article 5. Part-time employees shall receive the following prorated fringe benefits of the basis of their regularly scheduled hours per year . . .

. . .

ARTICLE 24 - MAINTENANCE OF BENEFITS

Any benefits received by the employees, which are mandatorily bargainable but not referred to in this document, shall remain in effect for the life of this Agreement unless changed by mutual agreement.

BACKGROUND

The Grievant has been employed by the County for about nine years. She has worked in her present classification of Income Maintenance Worker for about six years. She had not, prior to the one-day suspension at issue here, received any discipline from the County.

The one-day suspension was issued to the Grievant in the following letter, dated September 6, 1989, from James E. Dalland, the County's Director of Social Services:

> The purpose of this letter is to issue you a one-day unpaid suspension for failing to report to work on September 1, 1989.
>
> The facts surrounding the matter are as follows:
>
> 1. On August 23, 1989, you provided the Department with a statement from your personal physician which indicated his recommendation that you work a four (4) day week for health reasons.

2. In response you were advised in a August 23, 1989, letter that the Department would require specific information before evaluating your request and denied your request until further information is received.

3. On August 30, 1989, the Union grieved the denial of your request for Fridays off.

4. On August 30, 1989, you sent a letter indicating that you would be taking Fridays off even though you did not have Department approval to do so.

5. On August 31, 1989, you participated in a telephone conversation with the Personnel Director in which you were warned of the possible consequences of the actions described in your letter.

6. On September 1, 1989, you failed to report for work and you have not provided the Department with any reason why you did not report other than the note from Dr. Peterson which was previously determined by the Department to be inadequate.

On September 5, 1989, a meeting was conducted to review the facts of the matter in which you participated along with Mr. Phil Salamone and Pat Haskin of the Union.

During the meeting you said that your physician had "ordered" you to work a four day week. However, in Dr. Peterson's note dated August 22, 1989, he says that "it is recommended that this patient work only four days per week..." Further, you said that you would not be seeking any more documentation as to the need to use sick leave nor would you report to work on any Fridays for the next six (6) months.

After having considered all the information, I have decided to suspend you without pay on Wednesday, September 13, 1989, for refusing to follow a legitimate supervisory directive and failing to report to work on September 1, 1989.

I also expect that you will report to work on Fridays as scheduled unless specific medical information is provided as to your need for time off. Further acts of insubordination or failure to report to work will result in more serious disciplinary action being taken against you including dismissal.

The background to Dalland's September 6, 1989, letter is traceable to June 2, 1989. On that date, the Grievant submitted to her supervisor, Jeanne Brandl, the following memo, dated May 30, 1989, from her physician:

> For health reasons this patient should decrease her work week to 4 days for 3 mo.

Brandl referred the memo to Jean Russell, the County's Economics Support Manager, who met with Dalland to discuss the matter. Russell testified that she hoped to cooperate with the Grievant, and informed Dalland she felt the request could be handled for three months. The Grievant had requested that she be granted either Mondays or Fridays off, and the County afforded her a four day work week from Monday through Thursday.

From June 9, 1989, through August 25, 1989, the Grievant worked the four day work week noted above, and took sick leave, vacation and leave without pay to cover the Friday absences.

In a memo to Brandl dated August 23, 1989, the Grievant made the following request:

> Attached is a statement from my Dr. recommending I continue the 4 day work week. Please advise me if I can take the time off without pay and thus allow my sick leave to accrue

The doctor's statement reads as follows:

> It is recommended that this patient work only 4 days

per week for the next 6 months for health reasons.

Brandl referred the memo to Russell, who discussed the matter with Dalland.

Russell testified that she had become, by the time of this request, concerned with the department's ability to cover for the Grievant's caseload. Russell had hoped to assign certain Nursing Home cases to the Grievant, and feared that other employes could not cover for the Grievant's continuing absence for each Friday for the next six months. Russell recommended to Dalland that the August, 1989, request be denied, and Dalland concurred.

Dalland confirmed the County's decision in a letter to the Grievant dated August 23, 1989, which reads thus:

> This letter is in response to your memo of August 23, 1989 to your supervisor, Jeanne Brandl. I have reviewed your request with the Personnel Department, and have been advised to deny your request. We need specific information from your personal physician before we can evaluate your request.

Russell testified that she believed Brandl had communicated the County's workload concerns to the Grievant. Brandl testified she had done so, but that it may have been prior to the Grievant's first leave request.

The Grievant responded to Dalland's letter of August 23, 1989, in a letter dated August 30, 1989, which reads thus:

> This letter is in response to your denial of my 4 day work week as ordered by my physician. Please refer to Articles 14 & 17 of Local 2492's Labor agreement. Nowhere in the contract does it state that a medical leave as prescribed by a physician is subject to your approval.
>
> Please be aware that I intend to comply with my physician's directive and will continue to take Fridays off as previously approved.

Dalland was not at his office on August 30 and 31, 1989. In his absence, Linda Berna, the County's Administrative Services Supervisor, reviewed his mail. She read the Grievant's August 30, 1989, reply on August 31, 1989, and upon reading it phoned Brad Karger, the County's Personnel Director. She read the letter to Karger, who asked to speak to the Grievant directly. Berna brought the Grievant and Brandl to Dalland's office, where Karger spoke, by speaker phone, with the Grievant. It is undisputed that Karger informed the Grievant that she should report to work and file a grievance if she disagreed with Dalland's position, and that if she failed to report for work on September 1, 1989, he would regard her conduct as insubordination and would recommend that she be discharged.

After this conversation, the Grievant discussed the matter with Pat Haskin, her Union representative, who attempted, without success, to arrange another meeting with Karger. Haskin requested that Karger put the substance of the earlier conversation into writing. Karger did so in a letter to the Grievant dated September 1, 1989, which reads thus:

> The purpose of this letter is to summarize our telephone conversation of August 31, 1989. That conversation responded to a letter which you had apparently sent to the Director of Social Services in which you challenged the Department's right under the Labor Agreement to require additional medical information before you would be authorized to continue to take Fridays off on sick leave. Your letter further advised the Department that you would be taking this Friday off even though you have not been authorized to do so. My warning to you is that this threatened action may be viewed as an act of insubordination. Most often blatant acts of insubordination are responded to by employers with immediate dismissal.

The Grievant testified that she had been able to meet her caseload demands throughout the summer, and anticipated no difficulty in obtaining approval to her August, 1989, request. She stated that, prior to the arbitration hearing, no one had informed her that the County was anticipating difficulty meeting its caseload demands. She noted she has discussed the "health reasons" referred to by her physician only with her doctor, her husband and one close friend.

The County conducted a pre-determination hearing on September 5, 1989, to further discuss the matter before any disciplinary action was taken. Dalland advised the Grievant she could bring a union representative to the meeting, and both Haskin and Salamone attended the meeting for the Union. Dalland, Karger, Russell and Brandl attended the meeting for the County. At a minimum, the

County representatives asserted their desire for greater specificity of the reasons for the reduced work week, and the Union asserted the Grievant's interest in keeping the matter confidential. The Grievant indicated she had understood the conversation with Karger on August 31, 1989. Dalland testified that he stressed that the second request was not a doctor's "order", but a doctor's "recommendation". Karger stated that the recommendation was discussed, but could not recall if the distinction between an "order" and a "recommendation" was discussed in detail. The Grievant testified that the sole point communicated to her by the County was its desire for greater specificity of the underlying health reasons warranting the reduced work week.

As noted above, the County determined to issue the Grievant a one-day suspension.

At some point subsequent to the imposition of the suspension, Karger offered to make a former Social Services Department Director available to the Grievant to permit her to disclose the underlying health reasons to someone other than incumbent County management personnel. The Grievant declined to do so, and stated that the sole issue to her was confidentiality. She stated she did not volunteer to disclose the reasons to anyone because she felt the underlying reasons were irrelevant to the County. She testified that she fully understood discharge was a possible result of her refusal to report for work on September 1, 1989, but that she felt her health was more important than the County's need for greater detail. She stated she felt the County's efforts to determine the underlying health reasons cited by her physician was a "fishing" expedition by County management.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

The Union argues initially that "Article 14(B) deals directly with questions concerning abuse of sick leave and the penalties which are derived from such." While noting that the absences at issue here may arguably not be "consecutive", the Union asserts that "the penalty assessed here was inconsistent with those provided by 14(B)."

Beyond this, the Union notes that Section 14, E, is relevant here, since the Grievant was aware in advance that she would be using sick leave benefits. While acknowledging that there may be a dispute regarding the Grievant's compliance with one of the four elements to that section, the Union contends that "the more important issue to be decided here involves whether or not the failure (to provide a reason for the absence) constitutes just cause for discipline . . . " Asserting that the Grievant has supplied a reason for the absence through her physician's recommendation that she work no more than four days per week for "health reasons", the Union concludes that the nature of the illness would be of consequence only to "the most intrusive of employers." If the physician's recommendation is not sufficiently detailed, the Union asserts that the only appropriate sanction under Section 14, E, is "to deny usage of accumulated sick leave benefits".

Although arbitral authority is "divided" on "whether an employer's right to know take(s) precedence over personal privacy rights of an individual employee", the Union contends it is necessary to balance the individual's rights against that of the employer's right to conduct the business. Critical to this balancing, according to the Union, is "whether there was a legitimate business need for management's action or rule", and the degree of intrusion into an employe's rights. Because there is "no evidence that there was any legitimate business necessity for the employer to know the nature of the illness", and because the burden of proof on this point "is on the employer", it follows, the Union contends, that "a significant weakness" exists "in the County's case." That the County permitted the Grievant to work a four day week for the previous three months underscores this weakness, according to the Union, especially when viewed in light of Article 24.

The considerations appropriate to this case are set forth, the Union contends, in Pilgrim Liquor Inc., 66 LA 23 (Fleischli, 1975). Because the Employer in that case was able to demonstrate a legitimate business interest in seeking information and sought less sensitive information than that at issue here, yet failed to prove cause for the discipline imposed, demonstrates the weakness of the County's case, according to the Union.

Beyond this, the Union asserts that the grievance implicates "health and safety" concerns, which arbitrators have shown "(c)onsiderable latitude on the part of the employee to engage in self-help actions". Acknowledging that the Grievant was painfully aware of the potential impact of not reporting for work, the Union argues that "(t)he choice she made was courageous, principled and reasonable in light of the circumstances involved." Asserting that the County's attempt to distinguish between a "recommendation" and an "order" is specious, the Union concludes that the County has failed to "provide the necessary proof of wrongdoing on the part of the grievant."

The County's Initial Brief

After an extensive review of the evidence, the County argues that it had just cause to discipline the Grievant, since it acted "in good faith" with "fair reason" as "supported by the evidence" for disciplining the Grievant. A review of relevant arbitral law, the County contends, establishes that "insubordination, such as refusing to report to work as directed to do so following denial of a requested leave of absence, constitutes 'just cause' for discipline." Beyond this, the County contends that the evidence demonstrates that it reasonably, under Articles 2 and 17, denied the Grievant's second request to work a four day week and that the Grievant's failure to report for work on September 1, 1989, was "blatant insubordination". More specifically, the County urges that the evidence demonstrates that the circumstances surrounding the Grievant's second request are distinguishable from those surrounding the first, and demonstrate that the Grievant's caseload "could no longer be properly managed on the basis of a 4 day work week." In addition, the County urges that the Grievant's request would have, in effect, made her a part-time employe receiving full-time benefits in violation of Article 20. Noting that the Grievant was fully aware of the consequences of refusing to report to work, yet consciously chose not to report to work, the County concludes that the one day suspension was fully justified. Because "arbitral law" establishes "that an arbitrator should not substitute his discretion for that vested with the employer to determine the proper penalty to be imposed for an employee's misconduct", it follows, according to the County, that the suspension must be upheld.

The County then focuses on the three major lines of argument asserted by the Union at hearing. Initially, the County argues that "(t)he County had the right to require the Grievant to submit more detailed medical information in support of her request." The Union's argument to the contrary, according to the County, misapplies Article 14 and ignores "well-recognized" arbitral precedent. The vagueness of the physician's recommendation, standing alone, constitutes 'suspicious circumstances' requiring further investigation, the County contends. That Article 17, Section D, specifies very serious types of illnesses as those for which medical leave may be granted reinforces the County's need to verify the circumstances regarding the Grievant's request, according to the County. Noting that Wisconsin's Family & Medical Leave Law requires an employee to provide the medical facts regarding a medical condition, the County concludes that its request for further detail on her condition was appropriate.

Asserting that arbitral law places the burden of establishing a safety hazard justifying self-help on the Union, and that the record is "(d)evoid of any evidence which establishes that the Grievant's appearance at work would have involved an unusual or abnormal safety or health hazard", the County concludes that "the Union has failed to meet its burden."

Nor can the Union's assertion of a past practice be credited, according to the County, since "(n)one of the elements necessary to establish such a practice are present." The record establishes, the County notes, that the Grievant is "the only employee who has ever been permitted to work a 4 day work week over an extended period of time."

Viewing the record as a whole, the County concludes by requesting "the Arbitrator to dismiss the grievance in its entirety."

The Union's Reply Brief

The Union asserts initially that the County's characterization of the Grievant's request as one for "unpaid medical leave" is erroneous. Specifically, the Union argues that "(t)here is no evidence that time off is a leave of absence request or any application of Article 17." More fundamentally, the Union addresses the County's assertion thus:

> . . . the county alleges that this was some type of attempt to permit accruals of sick leave and other contractual benefits. Why would theses benefits not accrue without an approved leave of absence? Or if not, how is that fact relevant? This question is simply not the issue in dispute in this case. This is a discipline case.

Even if characterized as a request for leave under Article 17, the Union argues that the article would mandate that the leave be granted.

The Union also challenges the County's request for "diagnostic information":

> There is no evidence that the employer is qualified to second guess a licensed physician. There is no evidence that the knowledge of this information was necessary for the operation of the Social Service Agency. There are not even any assurances of confidentiality by the employer. How can this information serve any legitimate employer concern?

Noting that the County has questioned whether the information it seeks could have provided it with a basis to accommodate the Grievant's need for a shorter work week, the Union questions why this point was not made until the filing of a brief, and how such accommodations could have provided the County the forty hours of work it claims it now needs from the Grievant.

Contending that "(t)here is no evidence that the Union would challenge a proration of benefits under Article 20", the Union dismisses the County's claim that the Grievant's request was improper. Nor can the County's assertion that the Grievant failed to properly notify it of her September 1, 1989, absence be credited, according to the Union, since the advance notice she gave her supervisors was taken by them as insubordinate. Contending that 'suspicious circumstances' have nothing to do with a discipline case, and that the burden of proving a health hazard shifted to the County once the Grievant provided the County with her physician's recommendation, the Union concludes that supplying the County with the intrusive information it seeks would have destroyed the very right the grievance seeks to preserve.

Viewing the record as a whole, the Union concludes that the County lacked just cause to discipline the Grievant, and that "(t)he grievance should be sustained."

The County's Reply Brief

The County argues initially that "the Union has mischaracterized the evidence in this dispute in an attempt to support its position." Specifically, the County asserts that the Union has incorrectly argued the Grievant's request falls under Article 14, not Article 17. Beyond this, the County contends that the Union has mischaracterized the Grievant's refusal to provide medical information to the County as a protection of her right to privacy. At most, according to the County, the Grievant asserted the County was "fishing" for something and being "nosey". However characterized, the County argues that it can contractually require "medical information relating to the reasons for an employee's requested absence from work".

Since the record establishes, according to the County, that the circumstances surrounding the first leave request are distinguishable from those surrounding the second, it follows that the Union's rejection of the County's claim for greater documentation of the second request is unpersuasive.

No more persuasive, according to the County, is the Union's assertion that the Grievant's absence "was justified under the 'health and safety' exception." Noting that the Grievant's physician only recommended the shorter work week, and that the Grievant did not testify that reporting for work on September 1, 1989, would have jeopardized her health, the County concludes that the asserted exception can not be applied here.

The County's next major line of argument is that "(t)he Union's reliance upon Pilgrim Liquor, Inc., is misplaced." Specifically, the County notes that the Grievant's request, in this case, was for the employe's benefit, not the employer's. Beyond this, the County notes that Pilgrim Liquor involved a discharge, and a more intrusive request for information than that at issue here. Beyond this, the County contends that it has sought no more information from the Grievant than that the Wisconsin Statutes impose on any employe

seeking leave under the Wisconsin Family & Medical Leave Law.

The County concludes that the present grievance poses insubordination issues only, and that the present record requires that the grievance be dismissed.

DISCUSSION

The issue is stipulated, and questions whether the County had just cause under Article 2, Section D, to suspend the Grievant. The stated basis for the suspension is the Grievant's insubordination in not reporting for work on September 1, 1989.

Fundamentally, a just cause analysis requires that the County demonstrate that the Grievant committed an act in which the County has a disciplinary interest, and that the discipline imposed reasonably reflected that interest.

On a superficial level, the first element to the just cause analysis can not be considered in doubt. That an employer has a disciplinary interest in an employe's reporting for work when assigned to is self-evident, as is an employer's interest in assuring that work assignments are carried out. To establish insubordination warranting suspension, the County must, at a minimum, demonstrate: (1) that the Grievant was issued a clear and direct order; (2) that the order was issued by a person known by the Grievant to be a supervisor; and (3) that the Grievant refused to obey the order. 1/

Since the Grievant has acknowledged she understood Karger's directive to report for work on September 1, 1989; that she knew Karger occupied a supervisory position; and that she knowingly refused to report for work on that date, it appears, on a superficial level, that the first element of the just cause analysis poses no significant dispute.

This grievance does, however, pose significant points of dispute, and cannot be considered a simple case of insubordination. The minimum elements for establishing insubordination noted above gloss over potential disputes on whether the content and context of the order given can be considered to preclude the assertion of the employer's disciplinary interest in the questioned conduct. A number of such issues have been ably posed by the Union here.

The Union contends that the order to work and subsequent discipline seeks either to advance an improper County interest, or to deny the Grievant a benefit she is entitled to. The latter aspect of the Union's contention will be addressed first.

Article 24 cannot serve as a basis to establish the Grievant's entitlement to the August, 1989, leave request. That article refers to "benefits . . . not referred to in this document". As the positions of both parties demonstrate, the labor agreement does refer to paid and unpaid absences. The Grievant's entitlement to the leave must, then, be rooted in other provisions of the agreement.

1/ See, generally, Roberts' Dictionary of Industrial Relations, (BNA, 1986).

Article 14 cannot be meaningfully applied to the Grievant's request, since something more than sick leave is implicated here. The Grievant used sick leave, vacation and leave without pay for the absences which followed the County's approval of her June, 1989, request. Thus, the Grievant has not confined her requested leave to the use of sick leave, and thus her alleged entitlement to take September 1, 1989, off cannot be restricted to Article 14.

Arguably, the Grievant's August, 1989, request for leave could be viewed as either personal or medical leave. The Grievant's August 23, 1989, request, and her August 30, 1989, letter unequivocally focus on her doctor's recommendation. Thus, the focus of the asserted entitlement is medical leave under Article 17, Section D.

Contrary to the assertion of the Grievant's August 30, 1989, letter, leaves under Article 17 presume the exercise of discretion by the County. Section D specifies a type of cause of "sickness or temporary disability" for which a medical leave may be requested. The final sentence of the section specifies that the procedure for requesting the leave is "specified above." Section A specifies that granting of leave "shall be contingent upon the reasons for the request." Each of these references presumes the County's exercise of discretion in granting a leave.

Accepting the assertion that the August 23, 1989, recommendation for a four day week based on "health reasons" mandated the leave would read the discretion of Article 17 out of existence. The assertion denies the County any ability to determine if the cause for the request rises to the level of "heart attack, stroke, cancer, pregnancy, etc." Beyond this, the assertion assumes that a general statement of one physician can determine the matter. This assumption can not be extended to other employes or the County without reading the grievance procedure out of existence. For example, if the County terminated the employment of an employe based on a physician's conclusion of the employe's ability to work, the employe would be permitted, through the grievance procedure, to test the basis of that physician's conclusion through cross-examination or through other rebuttal evidence perhaps including contrary medical opinion. In this case, however, the Union asserts the general statement of one physician, standing alone, dictates a reduced work week. As noted above, this assertion can not be meaningfully extended to other employes or the County, without reading the grievance procedure out of existence.

The County has introduced unrebutted testimony that it was not able to accommodate the Grievant's second request as it had the first, based on caseload concerns. As is noted below, these concerns were not well-communicated to the Grievant, but the County has detailed its caseload concerns more than the Union has detailed the Grievant's health concerns. Thus, the present record affords no persuasive basis to conclude that the County abused its discretion by denying the second leave request.

There is, then, no demonstrated contractual basis for the leave the Grievant took on September 1, 1989.

The Union contends that the basis of the leave is insignificant compared to the nature of the privacy right asserted by the Grievant, and that the alleged insubordination of September 1, 1989, is actually an appropriate response to the County's attempted intrusion into her personal life. The force of the Union's arguments must be acknowledged. An employer cannot claim unlimited right to pry into the lives of its employes. The difficulty with the Union's arguments, however, lies in the facts of this grievance. The issue posed by the grievance is less of privacy than of contractual leave rights.

The County's request for further clarification of the "health reasons" was not gratuitous, but was prompted by the Grievant's August 23, 1989, leave request. That request was something other than a claim to privacy. Rather, the Grievant asked for a contractual leave which would, in effect, have granted her part-time status while preserving her benefits as a full-time employe. When the County sought sufficient detail to evaluate the basis for the request, the Grievant responded by asserting the privacy interests argued by the Union. The matter did not end at this point, but was brought to a head by the Grievant's August 30, 1989, letter to Dalland. In that letter, the Grievant did not address the right to privacy, but the right to a leave: "Nowhere in the contract does it state that a medical leave as prescribed by a physician is subject to your approval." More significantly here, the Grievant asserted that right to a leave was absolute: "Please be aware that I intend to comply with my physician's directive and will continue to take Fridays off as previously approved."

The Grievant's August 30, 1989, letter to Dalland posed less an issue of privacy than authority, as that letter applies to the first element of the just cause analysis. The Grievant denied the County's authority to take any action other than approving her leave request. The letter informed the County she would take a leave she was, in the absence of approval, not entitled to. Karger's August 31, 1989, order for her to report for work on September 1, 1989, did no more than clarify that if she took an unapproved leave, the County would react with discipline.

The Union's arguments on privacy thus obscure that the underlying issue here is the Grievant's entitlement to a leave. In the absence of such an entitlement, the September 1, 1989, absence was unapproved. The leave request, to be evaluated by the County under Article 17, required something more than a bare reference by a physician to "health reasons" to be properly evaluated. What that "something more" is can not be addressed on this record. Nor can the intrusiveness of the County's request for further detail be scrutinized since the Grievant has never varied from the position that the County has no right to any information on the point. To accept the Union's arguments demands concluding either that the County has no discretion in granting medical leave under Article 17, or that a party to a collective bargaining agreement can be bound by an untested, general recommendation of one physician. Neither conclusion can be accepted without reading the rights and obligations of Articles 2, 3 and 17 out of existence.

Similar considerations govern the Union's claim that the Grievant's absence was necessitated by health and safety reasons. Article 3, Step 1, states the "work now, grieve later" rule. The Union's health and safety argument cannot be meaningfully extended to the County or other employes. For example, if the County disciplined an employe who refused an assignment to handle a toxic substance, the just cause litigation for that discipline would not be concluded by the County's submission of a physician's memo that no health reasons existed to make the work dangerous. This is, however, the type of assertion the Union advances in this litigation. That assertion is not persuasive.

In sum, the County has demonstrated a disciplinary interest in the Grievant's absence from work on September 1, 1989. Since leave for that absence had not been approved, and since the record affords no factual basis to question the reasonableness of the County's refusal to grant that approval, Karger's order that the Grievant report for work on September 1, 1989, cannot be considered unreasonable. Because the Grievant knew Karger was a supervisor, understood the order, and knowingly disobeyed it, the absence can be considered insubordinate.

The second element of the just cause analysis is whether the one-day suspension reasonably reflected the County's disciplinary interest. The suspension is minimal in impact, and communicated that the County did have a disciplinary interest in the Grievant's reporting for work when assigned, and in securing approval before claiming a leave. The suspension cannot persuasively be characterized as excessive or unreasonable. The nature of the County's disciplinary interest should not, however, be exaggerated. The record does indicate that the County did not communicate the basis of its workload concerns with the Grievant. Russell thought Brandl had detailed the workload concerns to the Grievant. Brandl did, but may have done so as early as the Grievant's first request. There is no persuasive evidence County management informed the Grievant of their workload concerns as the caseload built up throughout the summer of 1989. Thus, the Grievant's assumption that her second request would be treated as the first had been cannot be dismissed as unfounded. The County's request for greater detail for the second request would thus have appeared more intrusive than it would have been had the Grievant been apprised of the workload problems. Thus, the County may have played a role in the inflexible stance taken by the Grievant toward documenting the leave request. This consideration does not, however, detract from the reasonableness of the sanction applied by the County.

In sum, the County has established that it had just cause under Article 2, Section D, to issue the Grievant a one-day suspension for her refusal to report for work on September 1, 1989.

Before closing, it is appropriate to address certain contentions made by the Union, which are not addressed above. Those points are subsumed in the Union's use of Pilgrim Liquors. The Union persuasively uses that case to illustrate that an employer's legitimate business interests must be weighed against the privacy rights of employes. The Union also forcefully questions the legitimacy of the County's business interest in this case in light of the County's assertion of the fact that the physician's memo was a "recommendation" and not an "order". This distinction was only belatedly communicated by the County to the Grievant, and, in any event, lacks any persuasive force. If the memo was phrased as an order, the same issues would be posed.

More fundamentally, Pilgrim Liquors can not be applied to the facts at issue here to yield the result the Union seeks. In Pilgrim Liquors, the employer sought to require employes to complete and sign a fidelity bond as a condition of continued employment. The bond application form sought detailed financial data from employes. Arbitrator Fleischli described the intrusive nature of that application form thus:

> The requirement that the employes complete and sign the fidelity bond application form constituted a substantial intrusion into their privacy and caused them to assume obligations which are greater than those otherwise imposed by law on employes who are accused of

dishonesty. 2/

The employer, in that case, unilaterally set the bond requirement.

In this case, the County did not unilaterally set an obligation, and seeks no more than the law would otherwise require. Medical Leave has been bargained by the parties, and has been set forth in Article 17, Section D. That provision grants the County some discretion in granting leaves. The County's request for greater specificity on the "health reasons" is the basis upon which discretion is exercised. Beyond this, the Wisconsin Family & Medical Leave Act grants certain rights to a medical leave (See Sec. 103.10(4)(a), Stats.), but places certain "certification" requirements on the requesting employe 3/, and grants employers a right to an employer-paid second opinion (See Sec. 103.10(7)(c), Stats.). Thus, unlike the case in Pilgrim Liquors, the County, in this case, is seeking no more than the law permits. This is not to say the law or the contract grant the County the right to any information it wishes. Rather, in this case, the Grievant asserts the County has no right whatsoever to any detail beyond that stated in the August 23, 1989, memo. This is not the case under either the law or the contract. In sum, Pilgrim Liquors does not support the result the Union urges here.

The record will support the Union's contention that the Grievant made an "extremely difficult" choice, based on her own principles. Article 3, Section B, 5, restricts an arbitrator to the terms of the labor agreement. Thus, the principles advanced by the Union must be given a contractual basis to be upheld. The right sought by the Grievant is, ultimately, the right to a leave. The contract does not support the assertion that the Grievant was entitled to that leave as a matter of right or as a function of the August 23, 1989, doctor's memo standing alone. In the absence of a right to take September 1, 1989, off, the Grievant's absence was unexcused. In the presence of Karger's order to report for work on that date, the absence was insubordinate.

2/ 66 LA at 24.

3/ See, for example, Sec. 103.10(7)(b)3, Stats., which requires "(w)ithin the knowledge of the health care provider . . . the medical facts regarding the serious health condition."

AWARD

The County had just cause to suspend the Grievant for failing to report to work on September 1, 1989.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 12th day of July, 1990.

By_____
Richard B. McLaughlin, Arbitrator