

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 OSHKOSH CITY EMPLOYEE UNION LOCAL 796, : Case 147
 AFSCME, AFL-CIO : No. 44436
 and : MA-6302
 :
 CITY OF OSHKOSH :
 :

Appearances:

Mr. Gregory N. Spring, Staff Representative, on behalf of the Union.
Mr. John Pence, City Attorney, on behalf of the City.

ARBITRATION AWARD

Oshkosh City Employee Union Local 796, AFSCME, AFL-CIO, and the City of Oshkosh, herein the Union and City, are parties to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission staff arbitrator. Pursuant thereto, I heard this matter on November 14, 1990, in Oshkosh, Wisconsin. The parties presented oral argument in lieu of briefs and I issued a bench decision which this Award augments.

Based upon the entire record, I issue the following Award.

ISSUE:

The parties have agreed to the following issue:

Did the City violate the contract by refusing to let grievant Michael O'Brien use sick leave on June 4 and 5, 1990, and, if so, what is the appropriate remedy?

DISCUSSION:

O'Brien, a Parks Department employe, went to a hospital on or about May 27, 1990, 1/ where he was diagnosed as having walking pneumonia. He was on sick leave for several days and then returned to work. His doctor thereafter told him that he should not return to work for several weeks.

On Saturday, June 2, O'Brien and a friend participated in a local fishing tournament out of Oshkosh. O'Brien testified that he telephoned his friend at about 4:00 a.m. to make sure that the weather was alright; that they started fishing in the early morning hours in a small boat; and that they fished up to around noon when the tournament ended. O'Brien said that the boat was about a quarter of a mile from land; that it was cool in the morning and that the wind picked up throughout the morning; and that the lake was fairly calm.

O'Brien and his friend ended up winning the top prize in the tournament for catching the biggest fish - \$1,000 which they split evenly between themselves.

The City, having learned of his participation in the tournament, subsequently denied O'Brien the two sick leave days for June 4 and 5, with City Parks Foreman Jeff Basler testifying here, "If he can be out fishing, he sure as heck could be working."

In support of the grievance, the Union primarily argues that O'Brien complied with all of the contractual requirements needed to receive sick leave because he presented the City with an "Employee Return to Work Certificate" from his doctor which stated that he had pneumonia and that he was "Unable to work from 6-4 to 6-18."

In almost all other situations, such a doctor's note would be conclusive proof that an employe was entitled to sick leave, as Article XIII of the contract, entitled "Authorized Absence", provides:

. . .

An employee may use sick leave with pay for absence necessitated by injury or illness, or exposure to contagious disease when confirmed by a physician. Routine doctor and dental exams shall be scheduled on off-duty time whenever possible. In order to qualify for a sick leave payment an employee must:

1/ Unless otherwise noted, all dates hereinafter refer to 1990.

- a. Report prior to the start of each work day to his department head or supervisor for his absence.
- b. Keep his department head informed of the condition if the absence is more than three (3) working days.
- c. Submit a doctor's certificate for such absence if in excess of three (3) working days. The certificate must state the kind and nature of sickness or injury and whether the employee has been incapacitated for said period of absence.
- d. Apply for such leave according to the procedure established by the employer.

. . .

Here, O'Brien followed all of these steps.

However, that is not the end of the matter since this same part of the contract goes on to add that:

Employees suspected of abusing sick leave privileges, may be required to submit a medical certificate to substantiate each absence, of claimed illness, regardless of duration. This requirement will not be invoked without first advising the employee of his questionable sick leave record and giving him an opportunity to improve. If there is no improvement, the employee will be advised, in writing, that all future requests for sick leave, must be supported by a medical certificate. This requirement will be periodically reviewed with the employee, at least once each ninety (90) days, and determination will be made, if this requirement is to continue. Employees shall be given written notification as to their status within seven (7) calendar days of this review.

Sick leave should be regarded by all supervisors and employees as valuable, free health, and welfare insurance which, in the best interests of all employees, shall not be used unless really needed. Sick Leave is not a "Right like vacation: It is a privilege to be used carefully."

This latter language clearly gives the City the right to question an employee's request for sick leave and to thereafter deny it when the circumstances warrant it.

Well here, we have the extraordinary situation of where the grievant went fishing for much of Saturday, June 2, and participated in the fishing tournament in order to win money. He therefore was not fishing for only pleasure; he viewed the tournament as a money making opportunity, just as he viewed another fishing tournament subsequently held in Fond du Lac as a money making endeavor. Thus, O'Brien is a quasi-professional fisherman.

Having chosen to therefore work on June 2, and to earn \$500 for his efforts (his half of the prize money), the City in such a situation could reasonably conclude that he was not as sick as he claimed and that he was fit to work on June 4 and 5, especially when it would have been easy to assign O'Brien to light duty.

O'Brien's doctor's note asserts the contrary. However, it cannot be given the usual weight accorded in almost all other situations since O'Brien did not tell his doctor about his fishing plans for June 2. Had he done so, it is possible that his doctor may have concluded that he was not as sick as he claimed. In addition, the doctor may have told him not to go fishing because he needed to preserve his strength, particularly when it is remembered that he got up at about 4:00 a.m. the next morning. Indeed, it is difficult to envision anything that would have been as bad for O'Brien as sitting out in a small boat in damp and cool weather in the morning of June 2 and to then participate in the excitement of winning the top prize in the tournament for the rest of the day. It is these unusual circumstances which support the City's denial of sick leave and which dictate that the grievance must be denied.

In so finding, I am of course aware of the Union's concern that the City (and arbitrators) should not second-guess a doctor's note, as that may lead to the denial of a clear contractual benefit. While this certainly is a legitimate worry, it must be remembered that the decision herein is very narrow

and only stands for the proposition that this employe was not entitled to sick leave when he engaged in another money making endeavor and when that endeavor - i.e. sitting in an open boat for half-a-day - may have made his condition worse. This is the only narrow question before me and that is all that is being decided.

In light of the foregoing it is my

AWARD

The City did not violate the contract by refusing to let grievant Michael O'Brien use sick leave on June 4 and 5, 1990; the grievance is therefore denied.

Dated at Madison, Wisconsin this 2nd day of January 1, 1991.

By _____
Amedeo Greco, Arbitrator