

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

BLUE CROSS & BLUE SHIELD UNITED OF  
WISCONSIN

and

OFFICE & PROFESSIONAL EMPLOYEES  
INTERNATIONAL UNION, LOCAL 787,  
AFL-CIO, CLC

Case 1  
No. 51815  
A-5309

Arbitration Board Members:  
Dan Nielsen, Neutral Chair  
Gina Wagner, Company Arbitrator  
Michael Walker, Union Arbitrator

Appearances:

Foley & Lardner, 777 East Wisconsin Avenue, Milwaukee, WI 53202-5367 by

Mr. Lawrence T. Lynch, Attorney at Law,  
appearing on behalf of Blue Cross and Blue Shield  
United of Wisconsin.

OPEIU Local 787, 633 South Hawley Road, Milwaukee, WI 53214 by Mr. Vincent G.  
Cossens, Business Representative, at the hearing, and Murphy, Gillick, Wicht &  
Prachthauser, Brookfield Corporate Center, 300 North Corporate Drive, Suite 260,  
Brookfield, WI 53045 by Ms. Sandra K. Graf, Attorney at Law, on the brief, appearing  
on behalf of the grievant.

ARBITRATION AWARD

Blue Cross and Blue Shield United of Wisconsin (hereinafter referred to as the Company) and Local 787, OPEIU, AFL-CIO, CLC (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate Dan Nielsen, an arbitrator on its staff, to serve as chair of an arbitration board which would hear and decide a dispute over the termination of Vernita Dailey's employment with the Company. The undersigned was so designated. A hearing was held on February 13, 1995 in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted post-hearing briefs and the record was closed on April 19,

1995.

Now, having considered the evidence, the arguments of the parties, the relevant provisions of the contract and the record as a whole, the majority of the Arbitration Board makes the following Award.

#### I. Issue

The parties stipulated that the arbitration board should frame the issue. The issues may be fairly stated as follows:

1. Did the Company violate the collective bargaining agreement by not granting the grievant a leave of absence pursuant to Section 7.1 of the contract?
2. Was the grievant constructively discharged?
3. If the answer to question 1 and/or 2 is "yes", what is the appropriate remedy?

#### II. Relevant Contract Language

##### ARTICLE VII Leave of Absence

7.1 A leave of absence up to sixty (60) calendar days will be granted for confirmed personal illness or disability. A leave of absence up to thirty (30) calendar days will be granted for compelling personal reason. A leave of absence of up to seven (7) calendar days will be granted for marriage of an employee or death in the immediate family. A leave of absence of up to fourteen (14) calendar days will be granted for the employee to care for a spouse, child or parent with a serious health condition. A father shall be entitled to 30 workdays for family leave, as required by Wisconsin law, in connection with the birth of the employee's child or placement with the employee of a child for adoption. A similar family leave opportunity of up to 30 workdays, as required by Wisconsin law, will be made available to female employees with whom a child is placed for adoption. A leave of absence up to thirty (30) calendar days will be granted for reasons other than specified above if such absence would not interfere with the efficient operation of the employee's department. In the event of a request for a leave due to compelling personal reasons, the parties will use their best efforts to keep the same confidential.

. . .  
ARTICLE VIII  
Seniority  
. . .

8.12 An employee shall lose his seniority and be considered terminated for any of the following reasons:

- (a) Voluntary termination
  - (b) Retirement
  - (c) Discharge for just cause
- . . .

### III. Background

The grievant, Vernita Dailey, was employed by the Company for 10 years, until June of 1993. For seven of those years she was a Union steward, and in 1993 she served as one of seven members of the Union's bargaining team. In her regular job she was a reconciler, making sure that customer claims were accurately paid. She worked a Monday-Thursday work week.

In April of 1993, the grievant was called by her sister, who told her that her father was seriously ill with kidney failure. Her father and two of her three sisters lived in Cleveland, Ohio. The grievant immediately took four days of vacation and traveled to Cleveland to be with her father. Her father survived the crisis, but his family members realized that he would be unable to go back to operating his bakery, and that he would have to retire and find someone to either run or buy the business. Her father did not initially accept this.

When the grievant returned from Cleveland, she and Chief Steward Vicky Botros inquired about converting the vacation time to leave under Wisconsin's Family and Medical Leave Act. Given her father's health difficulties, the grievant wanted to preserve as much leave time as possible. The Company agreed to review the question. Without the four days, the grievant still had between ten and twelve vacation days available to her.

The grievant was involved in reconciling a very large account for the Teamsters Union, which had canceled its coverage with the Company. The Company needed to determine what was owed on the account before it could be closed, and had promised to have it reconciled by May 1st. When it became apparent that it would not be finished in time, this deadline was extended to July

1st. Since the grievant was tied up with negotiations, the Company assigned two subprocessors 1/ who were being trained as reconcilers to work with her on the account. She remained the lead worker on the Teamsters account. Ultimately the work on this account was not finished until early August.

After the crisis in April, the grievant's father returned home, where he was cared for by his other daughters and a nursing service. The grievant kept in regular contact with her father and her sisters regarding his condition. While it was clear to the children that he could not return to work, he continued to resist selling the business and retiring. On Sunday, June 6th, the grievant's sister called her and told her that he had finally agreed to dispose of the business. She asked the grievant to come to Cleveland immediately to make arrangements for both the sale and her father's long-term care. Her father wanted the grievant, as the eldest daughter, to be involved.

The grievant contacted her supervisor, Shirley Ravnik, via voice mail on Friday, June 11th to request a thirty day leave of absence. On Monday the 14th, they spoke personally and the grievant explained the situation. During the conversation, the grievant told Ravnik that she would resign if she could not receive the leave. Ravnik said she did not know whether she could approve the leave and would have to check. Later that day she told the grievant by telephone that the request was denied. The grievant pointed out that she was entitled to thirty days of leave for compelling personal reasons, and Ravnik said the manager had denied the request. The grievant was in a bargaining session at the time of this call, and went to Botros. Botros said she was sure that the supervisor simply did not understand the contract's provisions for leaves based on compelling personal reasons. She and the grievant called aside Claudia Banks, the Company's Supervisor of Labor Relations, and explained the situation to her. Banks called the grievant the next day and told her the leave request did not meet the "compelling personal reasons" criterion in the contract and that the department could not afford to have her absent at that time.

The grievant was distressed by the denial of her leave request. She made it clear that she intended to go to Cleveland to see to her father's affairs, and asked if she would receive unemployment compensation if she quit. Banks told her the Company would not pay her unemployment compensation if she quit. The grievant was also told that she needed to submit something in writing if she was going to leave her employment. On Tuesday morning, she submitted a note:

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1/ A subprocessor handles straightforward changes in account data, such as changes in addresses or dependents. It is a job with less responsibility than a reconciler, and it requires less expertise.

On 6/11/93 I requested a 30 day leave of absence for compelling personal reasons under Article 7.1. On 6/14 the Company denied request for leave ("due to business needs"), thereby forcing me to give my 1 week notice for resignation. This resignation is a direct result of the denial of my request for leave of absence.

The grievant worked the remainder of the day on Tuesday, and on Wednesday the 16th she, Botros, Ravnik and enrollment services manager Jan Stemplewski met to review her file. Included in the file were notes regarding her request from Ravnik and Stemplewski, indicating that the request was for thirty days or more to move or sell the business. The grievant corrected this notation, to reflect that she would either have to relocate herself, or sell the business to start another business. During the meeting, they discussed some of the difficulties of going into small business, and the grievant said she would probably start a business in Milwaukee rather than Cleveland. The grievant commented that she had been putting the trip off, but that negotiations seemed to be going well and that she could not delay going to Cleveland any longer. The supervisors informed the grievant during this meeting that the four days of vacation she had taken in April had been converted to leave of absence under Wisconsin law, and that her vacation balance had been recredited with the time.

On Thursday the 17th, the grievant was in negotiations. She did not return to work at the Company after that time. On Friday the 18th, a grievance was filed protesting the failure to grant the leave of absence:

On 6-11-93 Vernita requested a 30 day leave of absence due to compelling personal reason. On 6-14 and 6-15-93 the line department and Claudia Banks denied the leave, thereby forcing Vernita to terminate her employment. The Union contends the Company clearly violated the CBA and we are requesting that the employee be reinstated and made whole and be granted the 30 day leave of absence.

The grievant went to Cleveland and spent about ten days there. During this trip she and her sisters solidified the arrangements for her father's continuing dialysis treatment. She also accompanied her father as he and his lawyer took care of the sale of his business. She returned to Milwaukee sometime prior to July 1st.

Additional facts, as necessary, will be set forth below.

#### IV. Arguments of the Parties

##### A. The Union's Brief

The Union takes the position that the Company violated the contract by refusing the grievant's request for a leave of absence, and thereby compelled her to choose between her father and her

job. Thus the "resignation" she submitted was forced, and she should be reinstated and made whole for her losses.

The Company refused to grant the grievant's leave request, despite the fact that she told them of her father's serious illness, and that the need for personal attention to disposing of his business should have been self-evident. The contract does not give the Company unbridled discretion to deny leave requests. Section 7.1 of the contract uses the phrase "a leave of absence . . . will be granted" in describing the entitlement to leave for compelling personal reasons and other reasons. This is a guarantee to the employee that the benefit will be available when needed. While there is some ambiguity in determining what constitutes a "compelling personal reason", the record is clear that no employee who ever requested such a leave under similar circumstances was denied. The only examples raised by the Company were one unnamed person who wanted to take a three month trip to Japan, and another who wanted to use leave to attend school. These are obviously less compelling than the serious family illness the grievant was coping with. The Company's attempt to limit compelling personal reasons to caring for a sick family member is nonsensical, the Union submits, since the leave provision already makes specific allowances for such a leave in a different sentence.

Even if there were no compelling personal reasons for a leave of absence, employees are entitled to thirty day leaves for other reasons, so long as it does not impair the efficient operation of the department. The evidence shows that the primary work of the grievant, the Teamsters account, was finished in May. The department had functioned smoothly during her prior absences for bargaining. There was absolutely no evidence that the grievant's absence would have in any way hampered the operations of her department, outside of the unsupported, subjective opinion of Jan Stemplewski.

The denial of the leave, together with the uniform policy of denying vacation requests, led the grievant to submit the purported "resignation". In fact, the Company asked for something in writing from her, and she provided the letter. However, she simultaneously filed a grievance. It is obvious that there was no intent to resign her employment. The resignation was the natural and foreseeable consequence of the improper leave denial. It is nothing more than a discharge in a different guise.

The Union notes that the grievant was very active in bargaining and enforcing the contract. Her urgent need for time off came at a point of tense and adversarial negotiations over the contract. Given the sequence of events, and the greater sophistication of anti-union employers in the 1990's, the Union submits that it is a logical inference that the constructive discharge of the grievant was a direct result of her protected concerted activity.

For all of these reasons, the Union urges the Arbitration Board to uphold the grievance, reinstate the grievant, and make her whole for her losses.

## B. The Company's Brief

The Company takes the position that it properly denied the requested leave of absence, and that the grievant's resignation was a matter of personal choice rather than anything forced on her by the Company.

The evidence is unrefuted that the grievant's absence would have interfered with the efficient operation of the department. Thus if she had any contractual entitlement to a leave of absence, it must be based on compelling personal reasons. In April of 1993, the grievant requested a leave of absence to travel to Cleveland and join her father, whose kidneys had failed and who was seriously ill. This request obviously meets the definition of "compelling personal reasons" and was granted. In contrast, her request for a leave in June came after her father had stabilized and he had left the hospital. Its purpose was to advise him on the sale of his business, decisions that he ultimately made on his own. It is apparent that her role was solely as moral support. Any argument that there was some compelling reason for her trip is undercut by the fact that she put it off so she could participate in bargaining, and did not travel to Cleveland until a week and a half after her sister called and told her to come. Further, she made no effort to use accumulated vacation time for this trip, and after her ten days in Cleveland, she made no effort to rescind her resignation or inquire about her job. Nothing in this sequence suggests that the grievant was under some great personal compulsion to get to Cleveland. Instead, the evidence shows that the grievant went to Cleveland because her father wanted her to come, she was the oldest child, and she felt she had to obey his wishes and do her part to help out the family. These may be good reasons for wanting to go, but they do not in any way fit into the definition of "compelling personal reasons".

Assuming for the sake of argument that the grievant had a compelling personal reason for her trip, the Company argues that she was not justified in terminating her employment as a response to the Company's refusal to grant her request. Clearly, the grievant had time before she needed to travel to Cleveland. She made no effort to discover whether the leave would be covered by the Family and Medical Leave Act, and tried to manipulate the situation to secure unemployment benefits while seeking an even bigger payoff through arbitration. The grievant should not be rewarded for such conduct.

The Company argues that a reasonable person in the grievant's situation would not have resigned her employment simply because her father wanted her to come to Cleveland. Even if she felt a purely personal compulsion to go, she should have explored alternatives such as using vacation or making a shorter trip to Cleveland on her three off days. By resigning from her job, the grievant acted unreasonably, and thus the Company cannot be charged with a constructive discharge.

Since the grievant's request for a leave was not justified by compelling personal reasons, and since the Company cannot be held responsible for her decision to resign rather than seek some other reasonable alternative, the grievance should be denied.

## V. Discussion

The grievant left employment because she felt she needed to go to Cleveland and the Company denied her request for leave. The primary issue in this case is whether the Company had the right to refuse a leave under these circumstances. There are two portions of Article VII that have been cited as bearing on this question. Section 7.1 provides that employees will be granted leave of up to 30 days for compelling personal reasons. Later in that same section, the contract provides for leaves of up to 30 days for other reasons, if the leave does not "interfere with the efficient operation of the employee's department."

### A. The Applicable Leave Provision

The Arbitration Board views this dispute as being controlled by the "compelling personal reason" clause of Article VII. This is the provision under which the leave was actually requested, analyzed and denied. The grievant did not contest the Company's claim that her absence in June of 1993 would impair the efficient operation of the department until well into the grievance procedure, and even at the arbitration hearing the Union's case was focused on showing the existence of compelling personal reasons, rather than the absence of legitimate business considerations for denying the leave. Thus this case, as it developed in actuality and in litigation, has turned on whether the Company erred in deciding that the request was not supported by compelling personal reasons.

The Board's conclusion that the leave request must rise or fall on the presence of compelling personal reasons is buttressed by the fact that the preponderance of the evidence establishes the existence of legitimate business reasons for the Company to deny a discretionary leave at that time. At the time of the leave request, the Company had two vacancies in the reconcilers' job and three inexperienced reconcilers, leaving four experienced reconcilers including the grievant. Stemplewski provided un rebutted testimony that the department was working a great deal of overtime in May and June to keep up with the workload. The grievant was the lead worker on reconciling the Teamsters' account, a very large project which had originally been promised on a May 1st deadline, and had been extended to July 1st. While the grievant testified that, to her knowledge, the Teamsters' account was finished by the end of May, she was spending a great deal of time in negotiations during this time period, and her knowledge of the precise standing of that account may have been incomplete. Stemplewski testified that the account was not finished until August 1st, and was only accomplished then because she assigned two experienced reconcilers to replace the grievant after her resignation. The Company's position on the size of the workload is supported by the grievant's own testimony, in which she acknowledged that she did not make any attempt to use accumulated vacation time to cover her June absence because the Company had previously announced that vacation requests would not be approved in June due to the department's anticipated workload. The fact that the Company had taken steps to restrict the right



of all employees to take vacation time in June strongly indicates that there was a legitimate concern with allowing time off, and that this concern was not directed at the grievant personally or related to her activities on behalf of the Union.

#### B. Compelling Personal Reasons - The Standard for Review

The grievant requested thirty days' leave for what she characterized as compelling personal reasons. The contract does not define what constitutes a "compelling personal reason", and the term is inherently ambiguous. Despite the Company's claim that it refers only to a need to provide care for an ill relative, the language cannot be read so narrowly. The words used are broader and more general in nature than the Company suggests. Moreover, the contract already provides leave in a different portion of 7.1 for care-givers, and the Company's interpretation would render this language surplusage. Thus the reasons for a leave under this provision go beyond family health problems. Just as clearly, the sufficiency of a reason will vary from employee to employee, depending upon the employee's personal situation. A "compelling personal reason", by definition, must take into consideration the impact of the situation on the individual worker. By way of illustration, personal circumstances may make problems with a child compelling for a single parent, while they would not be so serious for an employee in a traditional two parent family with a non-working spouse. On the other hand, the term cannot be taken to mean that the Company has no ability to evaluate the reasons so long as a particular employee feels strongly. The contract does not grant carte blanche to employees, and the right to be absent from work regardless of the Company's needs cannot spring from purely subjective individual beliefs. The Board takes the contract provision as insuring an unpaid leave of absence where the situation would cause a reasonable person of normal sensibilities in that employee's position to conclude that a leave of absence is a necessity.

#### C. Application of the Standard to this Case

Although the Union's brief suggests that the grievant's leave request was directly tied to her father's health problems, the facts do not support this interpretation. Her father's medical crisis had passed, he was back at home and was receiving treatment for his condition. The grievant's leave request was triggered by her sisters and her father asking her to come to Cleveland to help make arrangements for disposing of his bakery. Her father was competent to arrange his own affairs, and two of her three sisters lived in Cleveland. The need for the grievant's personal involvement was premised upon her status as the eldest child.

The Arbitration Board respects the grievant's sincere desire to do her fair share in a family effort, and recognizes that her trip to Cleveland was not intended as some sort of frolic or vacation. However, the Board cannot find that this trip reasonably fits into the definition of a "compelling personal reason" which allows a leave of absence as a matter of right without regard to the Company's interests. By her own testimony, the grievant's activities in Cleveland primarily

consisted of discussing matters with her sisters and accompanying her father as he sorted out his own business affairs. One critical element in determining whether a leave is a necessity is whether there are realistic alternatives that would still adequately address the situation. Certainly the grievant's physical presence in Cleveland was helpful, and may well have provided comfort to her family and to her, but it is not at all clear to the Board why the bulk of the grievant's substantive contribution could not have been made over the telephone and by using her three day weekends for one or more trips to Cleveland. 2/ The Board does not suggest that a leave of absence is only justified when all other options are completely ruled out, but the leave must be more than just the most convenient way to deal with a problem.

It is difficult to articulate precisely where the line is drawn between a legitimate reason for a leave and a reason which rises to the level of "compelling". The grievant's desire to play the role expected of the eldest child by her father and sisters is understandable, and the Board can appreciate the pressures on an out-of-town child to be visibly involved when children must take an active part in a parent's affairs. However, the trip to Cleveland to help with her father's decision to sell his business was not undertaken on an urgent basis and has not been shown to have been the only realistic option open to the grievant. On the specific facts in this record, the Board concludes that the grievant's request for a leave of absence was not predicated on compelling personal reasons, and that the Company did not violate the contract when it refused to approve the request.

#### D. Constructive Discharge

The grievant's resignation from the Company was clearly brought about by the denial of her leave request, and the Company had actual knowledge that she would probably resign if the request was denied. Inasmuch as the Company was within its rights in denying the request, the Board cannot conclude that the denial constitutes a constructive discharge which may be remedied in this proceeding. While there are exceptions to the "obey now - grieve later" doctrine in labor relations, the conclusion that her leave request was not based on compelling personal reasons necessarily leads to the conclusion that a reasonable person in the grievant's position would not normally have reacted to the leave denial with a resignation.

On the basis of the foregoing, and the record as a whole, the Board makes the following

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2/ Another possible option would have been a leave of less than 30 days. The Company offered evidence that this option had been offered to the grievant, and that she had rejected it. The evidence of this offer, however, was in the form of hearsay, and the grievant testified that no such offer had been discussed. The Board has therefore attached no weight to this offer in arriving at its conclusion.

AWARD

1. The Company did not violate the collective bargaining agreement by not granting the grievant a leave of absence pursuant to Section 7.1 of the contract.
2. The grievant was not constructively discharged.
  
3. The grievance is denied.

Signed this 19th day of July, 1995 at Racine, Wisconsin:

By Daniel Nielsen /s/

**PARTY ARBITRATORS' SIGNATURE PAGE**

I dissent from the Neutral Chair's decision:

Signed this 21st day of November, 1995 at Milwaukee, Wisconsin:

By  /s/ Michael C. Walker

I concur in the Neutral Chair's decision:

Signed this 8th day September, 1995 at Milwaukee, Wisconsin:

By  /s/ Gina Wagner