

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF GREEN BAY (PARKS DEPARTMENT)

and

GREEN BAY MUNICIPAL EMPLOYEES UNION
PARKS DEPARTMENT LOCAL 1672, AFSCME,
AFL-CIO

Case 272
No. 54247
MA-9603

Appearances:

Mr. Alexandre Little, Director of Personnel and Labor Relations, 100 North Jefferson Street, Green Bay, Wisconsin 54301-5026, on behalf of the City.

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 639 West Scott Street, #205, Fond du Lac, Wisconsin 54937, on behalf of the Union.

ARBITRATION AWARD

According to the terms of the 1994-95 collective bargaining agreement between the City of Green Bay (hereafter City) and Green Bay Municipal Employees Union Park Department, Local 1672, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding whether Grievant Arnie Aubry should have had his vacation time docked because he failed to produce verification of sick leave for his absence on March 15, 1996.

Sharon A. Gallagher was designated Arbitrator by the Commission. A hearing was held at Green Bay, Wisconsin on September 24, 1996. No stenographic transcript of the proceedings was made.

The parties filed their briefs by October 28, 1996 and they agreed to waive reply briefs. 1/ The record was thereupon closed.

Issues:

1/ On November 4, 1996, the undersigned received a letter and enclosures from the City which presented evidence and argument herein. The parties stipulated and agreed at the instant hearing that no reply briefs would be submitted herein. Therefore, the City's letter and enclosures cannot and have not been considered in reaching the Award in this case.

The parties were unable to stipulate to the issue to be determined in this case, but they agreed to allow the undersigned to frame the issue(s) based upon the relevant evidence and argument. The Union suggested the following issue:

Did the City violate the contract when it required the Grievant, Arnie Aubry, to substitute vacation for a sick day he had requested?

If so, what is the appropriate remedy?

The City suggested the following issue:

Did the City have the right to request verification of sick leave?

If so, did the City have the right to deny sick leave to the Grievant when he failed to submit such verification?

Based upon the relevant evidence and argument in this case I conclude that the City's issue reasonably states the dispute between the parties and it shall be determined herein.

Relevant Contract Provision:

ARTICLE 6
SICK LEAVE

. . .

(A) All full-time employees shall be granted sick or emergency leave with pay of one (1) full working day for each month of service. . . .

In order to be granted sick leave or emergency leave an employee must:

(1) Report prior to the start of the work day to the department head or supervisor the reason for the absence.

(2) Keep the department head informed of his/her condition and the anticipated date of return to work.

(3) Be legitimately ill or attending a member of the immediate family who is ill and unable to care for themselves or make other arrangements for care.

(a) For purposes of this article, "immediate family" shall mean spouse, parent, stepparent, child, stepchild, foster child, guardian or sibling.

(4) Be on route to, or at, a medical or dental appointment which could not be scheduled outside of work hours. Appointments that must be schedule during work hours will qualify for sick leave on an hour for hour basis. When possible, the supervisor will be allowed to adjust the employee's work schedule to accommodate the appointment.

(B) All sick leave requested is subject to verification. The department head may request reasonable evidence from the employee to achieve verification.

(C) Misuse of sick leave may subject the employee to disciplinary action per the labor agreement. To avoid misuse, management may periodically review amounts of use as well as patterns of use and counsel employees on problem areas.

(D) All employees who terminate employment by eligibility and acceptance to the State Retirement System, disability or death shall have a portion of accumulated sick leave paid out in a lump sum cash payment or at the option of the employee shall have that amount placed in an escrow account to pay health insurance premiums. . . .

ARTICLE 15

DISCIPLINARY PROCEDURE

The Employer shall not discharge any employee without just cause, and shall give at least one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Union affected, except that no warning notice need be given to an employee before discharge if the cause of such discharge is dishonesty, being under the influence of intoxicating beverages while on duty, recklessness, endangering others while on duty, the carrying of unauthorized passengers, or other flagrant violations. Discharge must be by proper written notice to the employee and the Union affected. Any employee may request an investigation as to the discharge Should such investigation prove that an injustice has

been done an employee, the employee shall be reinstated and compensated at the usual rate of pay while having been out of work.

Appeal from discharge must be taken within five (5) days by written notice, and a decision must be reached within ten (10) days from the date of discharge. In the event a settlement cannot be reached within ten (10) days of the first date of appeal, then such dispute shall be submitted to arbitration as outlined in Article 15 of this Agreement.

. . .

ARTICLE 17

MANAGEMENT RIGHTS

The Union recognizes the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City, including the power of establishing policy to hire all employees, to determine qualifications and conditions of continued employment, to dismiss, demote, and discipline for just cause.

. . .

Background:

During negotiations for the 1991 collective bargaining agreement, the language of Article 6, Sections B and D was changed by the parties based upon proposals that had been made by the City. During those negotiations, the City made a proposal which included percentage pay-outs of accumulated sick leave at retirement, an additional two days of personal leave for employees, and the calculation of sick leave in terms of incidents (one day of sick leave would equal an incident) with two sick leave incidents per year being paid automatically as sick leave and the third and subsequent incidents remaining unpaid unless the employee received a doctor's excuse for the absence. The Union herein rejected this proposal by the City, but the Union accepted the language that appears in the labor agreement quoted herein. Thus, the use of sick leave did not change after the amendment of the language in the 1991 agreement and employees continued to use sick leave for themselves as well as for family illnesses pursuant to Article 6. There was no change in the personal leave provisions of the contract as a result of these negotiations for the 1991 agreement.

The unit employees who testified herein agreed that during their tenure with the City (up to 18 years) the City had never required an employee to provide a doctor's excuse for a one-day

absence. These employees also stated that it had been the City's practice to require employees to bring in a doctor's excuse if an employee was absent for more than three days. The employees also stated that there was no City policy regarding this matter that they knew of. In addition, Parks Department Superintendent Keith Wilhelms stated that he did not recall whether any employee had been asked for a doctor's excuse or other verification for having requested and used one day of sick leave prior to this incident. Fritsch as well as the unit employees who testified corroborated Wilhelms on this point.

On cross-examination, Wilhelm stated that in the past nine years since he has been Parks Superintendent, he has disciplined two employees for abuse of sick leave and that as he recalled, these employees were both suspended regarding one-day absences. However, Wilhelm gave no specifics regarding these absences. Wilhelm's assistant, Tom Fritsch (Assistant Parks Superintendent since 1979) stated that he believes that the City has enforced sick leave verification in the past, but he stated that he did not know when that might have been or with which employees. Fritsch could give no specifics regarding which employees, if any, have been asked to produce verification or a doctor's excuse for one-day sick leave absences in the past. Wilhelm also stated that he may also have said words to the effect "it looks like a sick day" prior to a day he took personal leave or vacation. However, Wilhelm stated that he never called in sick after he had made such a comment. Wilhelm also stated that over the years, he has heard unit employees make similar comments.

Facts:

On March 14, 1996, three unit employees, the Grievant (Arnie Aubry) Tim VandenHeuvel and Ron Pierquet made arrangements to go to an establishment known as "The Bar," to watch a University of Wisconsin-Green Bay basketball game on TV. In conjunction with this, and before March 14th, Pierquet and VandenHeuvel had asked Assistant Parks Superintendent Fritsch for time off during the afternoon of March 14th. During the morning of March 14th, the Grievant also requested vacation for two hours beginning at 1:00 p.m. that day. Fritsch, although upset at Aubrey's having requested vacation so late, granted Aubry's request. Just prior to 1:00 p.m. VandenHeuvel, Aubry and Pierquet gathered near the time clock to punch out and prepare to go to watch the game together.

VandenHeuvel stated that at this time he made a statement that "it sure looks like a good day for a sick day tomorrow" before the three employees left. 2/ During the conversation, VandenHeuvel stated that he did not hear Aubry make any comment similar to his regarding the

2/ VandenHeuvel stated that employees joke about taking sick leave in this fashion on a regular basis. VandenHeuvel also stated, however, that most employees do not use sick leave in this fashion. VandenHeuvel stated that he and his co-workers feel that the City should enforce sick leave rules and crack down on abuse.

following day possibly being a sick day. VandenHeuvel stated that the three of them then walked out to their cars and met at "The Bar" to watch the game. 3/ On cross-examination, VandenHeuvel stated that he did not know whether Aubry had said anything like the comment that he (VandenHeuvel) made regarding it possibly being a sick day on March 15th; that he only specifically recalled what he (VandenHeuvel) had said on March 14th.

Aubry specifically denied that he ever made any comment similar to that admittedly made by Tim VandenHeuvel on March 14, 1996. Aubry also stated that he recalled that both VandenHeuvel and Pierquet made comments on March 14th that it would be a good time to take a sick day on March 15th. Aubry stated that such comments are made frequently by employees who are just joking. Aubry also stated that in 18 years he had never been required to get a doctor's excuse for a one-day absence.

On March 15, 1996, Aubry stated that he woke up before 6:00 a.m. with a sore throat, not feeling well and that he went back to sleep. Aubry stated that normally there is someone at the City's Parks Office by about 6:20 a.m. each day and that at some point between 6:50 a.m. and 9:00 a.m. he called Tom Fritsch and talked to him. Aubry stated that he told Fritsch that he had a sore throat and was sick. Fritsch said that that was okay and he would see him the next day. At some point during the morning, Aubry stated that he spoke to his wife and told her that he was ill, that he had a sore throat and was not going to work that day. 4/ Thereafter, Fritsch called Aubry back and stated that Aubry should get verification for his sick day. Aubry stated that he would see if he could get in to see his doctor and that he would try to do so. Aubry stated that Fritsch did not tell him that he needed to go to the doctor; only that he needed to get verification. Aubry stated that he felt that he had done what he was supposed to do by calling in sick.

At some time between 9:30 and 10:30 a.m., Aubry's wife returned home from her job. At this time, Aubry called Chief Steward Mike Landry and told him that Fritsch had requested verification for his (Aubry's) use of one day of sick leave. Thereafter, Union President Hoffman called Aubry. Aubry filled Hoffman in on Fritsch's request for sick leave verification. Hoffman stated that he told Aubry not to worry about it, that the City was wrong in insisting upon this verification, and that the City had never before requested such a verification for a one-day absence. Hoffman stated that he did not do anything about the situation right away because he did not think that it was an emergency. Rather, he thought that the City had made a mistake and that he could get it corrected on the next work day.

On Monday, March 18, 1996, Aubry was called to a meeting with Tom Fritsch, Chief

3/ It should be noted that Ron Pierquet did not testify in this proceeding.

4/ Aubry's wife Harriet testified herein and corroborated her husband's statements in this regard.

Steward Landry and Union President Hoffman. At this time, Fritsch stated that Aubry should have brought in a doctor's excuse and because he did not do this, his vacation time would be docked and his sick leave bank would be restored for March 15th and he would get a letter in his file regarding the matter. That letter read in relevant part as follows:

. . .

Friday, March 15 at 7:10 AM, you were asked by me to bring in on Monday, March 18th, verification of your illness. You had called me on Friday at 6:50 AM complaining of a sore throat and said you would not be to work that day. Verification was not submitted. As was discussed this morning with you and other people present, Mike Landry, Shop Steward, Stephen Hoffman, Union President and Keith Wilhelm, Park Superintendent, I had legitimate reasons to request this document.

This letter is documentation of an oral warning that you failed to provide verification of illness per contract language Article Six (6) Paragraphs B & C, Lines 154 through 158, stating B. "all sick leave requested is subjected to verification. The Department Head may request reasonable evidence from the employee to achieve verification." C. Lines 156 through 158, "Misuse of sick leave may subject the employee to disciplinary action per labor agreement. To avoid misuse, management may periodically review amounts of use as well as patterns of use and counsel employees on problem areas."

Furthermore, non-compliance to any direct work related requests made to an employee by a supervisor results in insubordination with further disciplinary action.

It was also understood by all present today that any future request made of this nature by any supervisor of the Park, Recreation & Forestry Department will be complied to (sic) first, in the best possible manner by the employee before following the suggestion made by other members of the Union Committee.

In addition to this warning, please understand that you are being denied your request for sick leave because of your failure to provide verification. We will allow use of a personal leave day or vacation day to be substituted. Be advised that any further incidents may subject you to more severe discipline up to and including discharge.

. . .

Fritsch corroborated Aubry's testimony regarding their March 15th conversation and the details surrounding it. Fritsch stated that he told Aubry to take care and that he (Fritsch) would see Aubry on Monday. After he hung up with Aubry, Fritsch talked to Wilhelm because he recalled a conversation he had heard between Aubry and Pierquet on March 14th. Fritsch told Wilhelm that he had heard Aubry tell Pierquet that he (Aubry) thought Friday would be a good day to use sick leave. Wilhelm told Fritsch that he felt Fritsch had a reasonable suspicion sufficient to require that Aubry bring in verification of sick leave. Thereafter, at approximately 7:10 a.m., Fritsch called Aubry and asked him for verification of his illness. Aubry responded that he was not sure he could get in to see his doctor. Fritsch asked him if he would try and Aubry responded that he would try to do so.

Fritsch stated that he did not believe asking an employe for verification of illness constituted discipline and that he did not believe the substitution of one day's vacation for one day of sick leave constituted discipline. Fritsch also stated that he was certain that the voice he heard making the comments on March 14th was Aubry's. Fritsch stated that he believed that the conversation that he overheard was between Pierquet and Aubry outside his office between 8:30 a.m. and approximately 12:45 p.m. and that Aubry stated "it could be a sick day tomorrow". Fritsch stated that he had heard the same type of comment made by other people many times over the years.

During the instant case, three affidavits were submitted to the Arbitrator by the Union. These affidavits were from Arnold Aubry, Harriet Aubry (the Grievant's wife) and Tim VandenHeuvel, all signed and sworn to on June 3 or 4, 1996. All three of these individuals were witnesses at the instant hearing and they were each subject to cross-examination. Therefore, the affidavits are not admissible in this case.

City Director of Personnel and Labor Relations, Alex Little, stated that the City does not have a policy regarding what constitutes proper verification of sick leave; that he (Little) believed that a doctor's excuse, a visit to the City nurse, or even the verification of a relative or a spouse that an employe had in fact been ill, might constitute such verification. Little admitted that he has not informed City supervisors of his definition of sick leave verification. Little stated that if Aubry had any questions regarding what would constitute proper verification, he should have asked Fritsch at the time the request was made. Little also confirmed that an analysis of Aubry's sick leave usage in the past to determine whether there had been a pattern of abuse did not occur until after the instant grievance was filed. 5/

5/ The City offered documentary evidence regarding a pattern of sick leave usage by Aubry which the City gathered after the instant grievance was filed. I find that this evidence is not relevant to this proceeding as the City did not consider it in making its decision to deny Aubry one day of sick leave. Therefore, this evidence of a pattern of sick leave usage has not been considered in this case.

Positions of the Parties:

Union:

The Union argued that the central issue in this case is whether the City had a reasonable basis for requiring Aubry to produce verification of his illness on March 15, 1996. The Union noted that the determination of this issue must turn in large part upon the credibility of the witnesses who appeared at the instant hearing. The Union urged that its witnesses should be credited over the City's. The Union asserted that in the circumstances, Fritsch could easily have been mistaken regarding the identity of the employe he allegedly heard making the sick leave usage comment on March 14, 1996.

The Union observed that the contract does not define what constitutes "reasonable evidence" of sickness verification and it does not state that the City can deny sick leave to employes. The Union pointed out that the City admitted having no policy, practice or criteria for what constitutes proper verification or when verification must be sought. In addition, the Union asserted that no employes have ever been asked for illness verification for a one-day absence prior to this case. Thus, the Union contended that the City did not have a right to require Aubry to produce illness verification based upon the questionable evidence Fritsch possessed on March 15, 1996.

Absent a contractual basis for denying sick leave, the City should have used the contractual disciplinary scheme to impose discipline on Aubry after an appropriate investigation had been conducted. The City's judgment could have then been challenged under the contract. As the City failed to follow proper procedures in this case and for the other reasons stated in its brief, the Union sought an award sustaining the grievance and restoring Aubry's vacation account and expunging his personnel record.

City:

The City argued that the contract clearly states that the City has the right to request verification for any sick leave absence. In this case, the City urged, Fritsch had a reasonable suspicion that Aubry was abusing sick leave by his March 15th request therefor. However, the City noted that Union President Hoffman advised Aubry not to seek verification of his illness despite Fritsch's request therefor.

The City contended that because the language that appears in the effective labor agreement also appeared in all contracts between the parties since 1989, the Union cannot succeed in its claims in this case. The City asserted that the comment which Fritsch overheard on March 14th could reasonably lead him to request sickness verification from Aubry. In addition, the City observed that its investigation of Aubry's past sick leave usage at the third step of the grievance procedure in this case confirmed a pattern of sick leave abuse by Aubry at approximately this same time of year for each year since 1992. In the City's view, whether Fritsch offered Aubry any

alternative means to verify his illness is not relevant to this case. The City argued that a supervisor's request for illness verification is the only means by which the City can confirm that an employe who has requested sick leave is in fact ill. Finally, the City noted that it had been extremely fair with Aubry by docking his vacation leave rather than disciplining him. 6/

Discussion:

There is no dispute that Grievant Arnold Aubry met the initial requirements of Article 6, Section A(1) through (4) by his March 15, 1996 request for sick leave. Rather, the dispute between the parties centers around whether and under what circumstances the City can require Aubry to bring in "verification" of his illness on March 15, 1996.

In my view, Article 6, Section B clearly states without limitation that "all sick leave requested is subject to verification" and that the department head "may request reasonable evidence . . . to achieve verification." The fact that the contract is silent regarding what level of suspicion is necessary before a department head (or his designee) may require an employe to submit "reasonable evidence" of verification necessitates a conclusion that the parties intended that the City determine the appropriate level of suspicion before further action could be taken. In such instances, Arbitrators generally imply a standard of reasonableness.

Applying a reasonableness standard to this case, I find that it was reasonable for Assistant Parks Superintendent Fritsch to request illness verification from Aubry for his absence on March 15th. In this regard, I note that Fritsch had worked with Aubry for many years, that he had spoken to Aubry on a daily basis over those years and that Fritsch stated that he was certain that the voice he heard making the sick leave comment on March 14th was Aubry's. I note that the pivotal portions of Fritsch's testimony regarding the March 14th sick leave comment stood uncontradicted on this record. In addition it is also significant that VandenHeuvel was not involved in the conversation which Fritsch stated he overheard between Aubry and Pierquet and that Aubry never specifically testified concerning the latter conversation or specifically denied it. Furthermore, Pierquet was not called as a witness in this case. Therefore, in all the circumstances, and given the uncontradicted testimony of Fritsch and the essentially unrestricted language of the first sentence of Article 6, Section B, it was reasonable for Fritsch to request that Aubry submit illness verification for his absence on March 15th and that the City could reasonably expect that Aubry would submit such verification upon his return to work on Monday,

6/ The City appended excerpts from Article 6, sick leave contained in the parties' 1989-90 labor agreement as well as excerpts from a 1996-98 labor agreement between the City and Teamsters Local 75. These documents were not offered or admitted into the record in this case. Therefore these excerpts cannot and have not been considered in reaching this award.

March 18th.

The question then arises whether Aubry's visiting his doctor would constitute "reasonable evidence" of verification. Indeed, Little stated herein that he would have accepted a spouse's verification of illness to satisfy the Article 6 verification requirement. Notably, neither the contract, any relevant past practice, nor City policy/rules define what constitutes reasonable evidence of verification. Certainly, one reasonable way to verify illness is to visit one's doctor for a medical certification of illness. However, this is not the only reasonable method of verifying illnesses, as Personnel Director Little stated herein. In this particular case, the facts showed that in his conversation with Fritsch, Aubry volunteered to go to his doctor to obtain verification of illness and that Fritsch gave his approval of this approach.

However, after assuring Fritsch he would try to get in to see his doctor, Aubry was advised by Union representatives not to present any illness verification. Aubry followed the Union's erroneous advice. In my view, it would be unfair to essentially punish Aubry for following the bad advice of Union representatives. Therefore, I will order that the City restore Aubry's vacation time bank and deduct one day of sick leave for Aubry's absence of March 15, 1996. I make this order based upon the above analysis as well as Mr. Little's statement herein that the City would accept a spouse's verification of illness as "reasonable evidence" thereof and Aubrey's wife's testimony herein verified her husband's March 15, 1996 illness. But given the analysis herein, both the Union and unit employees are now on notice that the clear language of Article 6 allows the City to request reasonable evidence of illness verification for all sick leave requested if the City has a reasonable suspicion regarding abuse.

The Union has argued that despite the change in the language of Article 6 in 1991, a past practice survived between the parties which requires a conclusion that the City may only seek verification of illness for absences in excess of three days. As I have found that the language of Article 6, Section B contains a clear requirement that employees must present reasonable verification of all illnesses whenever such is reasonably requested by the City, consideration of evidence of past practice proffered by the Union is barred. 7/

Based upon all the evidence and argument in this case I issue the following

7/ It is also a long-established principal of arbitration that evidence of past practice may only be admissible to support clear contract language or to fill in the gaps where contract language either does not exist or extant language is ambiguous. At the hearing, the parties failed to offer evidence of past bargaining proposals and past contract language which might have been relevant in this case.

AWARD

The City had the right to request verification of sick leave from Aubry for his absence on March 15, 1996 based upon Fritsch's reasonable suspicion. The City did not violate the contract when it required Grievant Arnie Aubry to substitute one day of vacation leave for a sick day he had requested. However, in fairness, and because Aubry and his wife verified his illness under oath herein, the City shall credit Aubry with one day of vacation and subtract one day of sick leave for his absence on March 15, 1996. The March 18, 1996 letter from Tom Fritsch to Arnold Aubry shall remain in Aubry's personnel file.

Dated at Oshkosh, Wisconsin this 10th day of December, 1996.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator