

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABOR UNION OF WISCONSIN, INC.

and

WINNEBAGO COUNTY (DISPATCHERS)

Case 312

No. 57273

MA-10575

(Mertz Grievance)

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Union of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, on behalf of the Union.

Mr. John A. Bodnar, Corporation Counsel, Winnebago County, 415 Jackson Street, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808, on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1998-2000 collective bargaining agreement between Winnebago County and Public Safety Professional Dispatchers' Union, affiliated with the Labor Union of Wisconsin, Inc. (Union), the parties jointly requested that the Wisconsin Employment Relations Commission designate Sharon A. Gallagher, a member of its staff, to hear and resolve a dispute between them regarding whether the County was responsible to reimburse grievant Mary Mertz for a doctor's office visit charge for an illness she suffered on December 30, 1998. Hearing was originally scheduled for May 25, 1999 but was postponed to June 23, 1999 and again postponed to July 14, 1999. Hearing was completed on July 14, 1999. No stenographic transcript of the proceedings was made. The parties submitted their initial briefs by September 23, 1999 and reserved the right to file reply briefs. The record was closed on October 4, 1999, when no reply briefs were received.

ISSUES

The parties were unable to stipulate to an issue for decision herein. However, they agreed to allow the undersigned to frame the issue based upon the relevant evidence and argument in this case, as well as the parties' suggested issues. The Union's suggested issue is as follows:

Did the Employer violate the provisions of the collective bargaining agreement when they denied the Grievant's request to be reimbursed for out-of-pocket expenses incurred due to the Employer ordering the Grievant to obtain a physician's certification of illness for December 30, 1998? If so, what is the appropriate remedy?

The County suggested the following issue:

Did the Employer violate the collective bargaining agreement when it denied the Grievant reimbursement for co-payment expense due to the Grievant's attempt to obtain a physician's certification for illness for December 30, 1998? If so, what is the appropriate remedy?

Having considered the parties' suggested issues, as well as the relevant evidence and argument in this case, I find that the County's issues reasonably state the issues before me, and they shall be determined herein.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHT

3.1 Except as otherwise specifically provided herein, the management of the Communication Center and the direction of the work force including, but not limited to, the right to hire, to discipline and discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work, together with the right to determine the methods, equipment, process and manner of performing work, are vested exclusively in the Employer.

3.2 Nothing contained herein shall divest the Union of any of its rights under Wisconsin Statute 111.70.

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ARTICLE 11 – SICK LEAVE

11.1 – Sick Leave Accrual. Each employee shall earn paid sick leave at the rate of one (1) day per month to a total maximum accumulation of one hundred twenty (120) days. A sick day shall be defined as eight and one-fourth (8 – ¼) hours.

11.2 Sick leave with pay shall be granted to an employee for absences necessitated by the employee's personal illness, maternity, or injury provided that the employee:

11.2.1 Notifies his supervisor or the supervisor's designee at least one and one-half (1-1/2) hours prior to the start of the employee's shift unless emergency conditions prevent such notification in which case notice shall be given as soon as reasonably possible.

11.2.2 Keeps his supervisor or the supervisor's designee apprised of his condition on a daily or other designated basis during the duration of the absence.

11.2.3 Presents a physician's certification upon his return to work from all absences exceeding three (3) consecutive days in duration stating the fact that the employee was physically unable to work during the absence period, and identifying the date that such employee is physically fit to return to work. (Such statement shall be made on a form provided by the Employer.) Note: Physician reporting procedures regarding maternity leaves are stated in Article 14.

11.2.4 No sick leave shall be granted for the sixth or successive absence of three (3) days or less within a calendar year unless the employee, upon his return to work, presents the physician's certification described in Section 11.2.3, above, for the sixth and each subsequent incident occurring within that calendar year.

11.3 Employees with five (5) or more years of seniority who retire upon becoming eligible therefore, or retire thereafter, or who die during the period when they are employed by the County (not quit or discharge) shall receive a sick leave termination benefit of one-half (1/2) a normal day's straight-time pay based upon the base rate only, for sick leave up to a maximum of ninety (90)

days [maximum payout of forty-five (45) days, excluding the first thirty (30) days of sick leave accrual] straight-time pay. Such benefit shall be paid to the retiree upon retirement. In the event of the death of an employee, this benefit shall be paid to his designated beneficiary or, if none is designated, to his next of kin.

11.4 Attempted use of sick leave for any reason other than absences necessitated by illness, maternity, or injury of the employee shall constitute just cause for disciplinary action.

BACKGROUND

During negotiations which resulted in the 1998-2000 collective bargaining agreement, the Union proposed to change Article 11 to delete Section 11.2.4 (requiring employees to get physician's certification for the sixth and all subsequent sick leave incidents in a calendar year) and Section 11.4 (discipline for misuse of sick leave). The Union indicated that this section essentially needlessly forced employees to go to the doctor when they could deal with their illness at home. The Union stated that no other collective bargaining agreement in any of the County's bargaining units had similar language. The Union submitted excerpts from the various collective bargaining unit contracts in the County and gave these to the County during negotiations in support of its proposal. However, when the contract went to mediation, the Union decided to drop the proposed deletion of Sections 11.2.4 and 11.4 in order to reach a settlement. The Union sent a message to the Employer in mediation, indicating that they were not happy with the failure to delete 11.2.4 because of the \$10.00 office visit co-pay, the parties knew would be imposed during the life of the agreement. The Union indicated that it would file a grievance regarding the employees' need to pay the \$10.00 office visit co-pay when that issue arose in the future. Thereafter, the parties entered into a full settlement of the 1998-2000 labor agreement.

FACTS

The grievant, Mary Mertz, has been employed by the County for over 24 years. Her current position is 911 Dispatcher. Mertz' supervisor is Chief Dispatcher Kathy Biggar. In 1998, Mertz had the following incidents of sick leave:

1-22-98	1 day	1 st . incident
2-6-98	1 day	
2-7-98	1 day	2 nd . incident
2-14-98	1 day	
2-15-98	1 day	3 rd . incident
3-15-98	1 day	4 th incident
4-9-98	1 day	5 th incident
8-23-98	1 day	6 th . incident
9-17-98	1 day	
9-18-98	1 day	7 th . incident
9-19-98	1 day	
9-23-98	1 day	8 th . incident
12-30-98	1 day	9 th . incident

Although Mertz' fifth sick leave incident occurred on April 9, 1998, Biggar mistakenly failed to require Mertz to get a doctor's certificate for Mertz' next absence on August 23, 1998. However, on September 11, 1998, Biggar spoke to Mertz about her sick leave usage and advised Mertz that as she had already passed her fifth incident of sick leave, and that if she wanted to receive paid sick leave, she would have to get a physician's certificate for all incidents thereafter. Mertz complied with Biggar's request and submitted certification slips for her seventh and eighth incidents.

On August 19, 1998, the County issued a memo to employees which concerned dual choice enrollment in the various health insurance programs available to County employees. That memo read, in relevant part, as follows:

The annual Dual Choice Enrollment will be held beginning August 25, 1998 for persons desiring to change their group health coverage. Plan comparisons will be available at the Personnel Department.

The major changes in the plans are:

1. UNITY HEALTH PLANS – Effective October, 1998, Unity Health Plans will only offer the HMO program. The Point-Of-Service plan has not been offered for renewal
2. UNITED HEALTH PLAN – Effective October, 1998, the cost per prescription will change to \$5.00 for generic drugs. The cost for brand name drugs remains at \$10.00 per prescription. Please note when only a brand name drug is available, the cost remains at \$10.00 for each. Also, there will be a \$10.00 co-pay on office visits associated with an illness or injury. Routine physical exams will continue to be paid at 100%.
3. NETWORK HEALTH PLAN – Effective November, 1998, Dr. Connelly will no longer be associated with LaSalle Clinics. Dr. Connelly will continue as a specialist with Unity and United Health Plans.

Employees who wish to meet with insurance representatives should select the closest site. Any meetings during working hours should be approved in advance by the employee's management supervisor. The meeting schedule is as follows:

Tues. Aug. 25	8:00 A.M. – 10:00 A.M.	Personnel Conference Room Orrin King Admin. Bldg.
Tues. Aug. 25	10:30 A.M. – 12:00 P.M.	Human Services Bldg. Rm. 152
Tues. Aug. 25	1:00 P.M. – 3:00 P.M.	Park View Health Center (Pleasant Acres Auditorium)
Tues. Aug. 25	3:30 P.M. – 5:00 P.M.	Highway Department
Fri. Aug. 28	8:00 A.M. – 10:30 A.M.	Personnel Conference Room Orrin King Admin. Bldg.

Employee monthly costs for group health coverage for the renewal period are as follows:

	Unity Health HMO	Network POS	Health HMO	United Health HMO
Single	\$10.01	\$4.63	-0-	\$.74
Double	\$20.29	\$9.13	-0-	\$1.40
Family	\$25.95	\$12.04	-0-	\$2.11

This memo was distributed to all staff individually in their mailboxes and also posted on two bulletin boards in the Sheriff's Department. It should be noted that each year, the County prepares a memo (like that quoted above) as well as a list of comparisons of benefits in the various health insurance programs offered by the County so that employees can make an informed choice regarding coverage during the County's annual open enrollment. As noted in the memo, the County also offered all its employees the opportunity to meet with plan provider representatives to discuss specific questions they had regarding coverage. On the comparison of benefits chart which the County issued in August of 1998, the change indicating a \$10.00 co-pay for office visits associated with an illness or injury under the United Health Plan and Unity HMO were specifically listed. Two other health plans offered by the County provided 100% coverage for office visits and immunizations while a fifth plan indicated that office visits would be subject to deductible and co-insurance.

During open enrollment in August, 1998, Mertz received the above-quoted memorandum dated August 19, 1998, as well as the comparison of benefits memo. Mertz decided to stay with United Health Plan because the coverage regarding hearing aid benefits was superior to the other plans. Mertz did not attend the open enrollment meetings with health insurance provider representatives offered by the County in 1998. Mertz did not recall noticing the \$10.00 office visit co-pay listed in the 1998 open enrollment documents, although she admitted that she knew of United Health's \$10 office visit co-pay requirement when she decided to take that insurance.

On December 30, 1998, Mertz took sick leave, her ninth incident. She was suffering flu-like symptoms and did not feel she needed to go to the doctor as the doctor would not be able to do anything for her. However, because of her prior conversation with Biggar, Mertz went to the doctor on December 30th to get a doctor's certificate. Mertz had to pay \$10.00 for the office visit. Mertz submitted a request for reimbursement of the \$10.00 co-pay for the office visit to the County on January 2, 1999. The County refused to reimburse Mertz, and she filed the instant grievance which was fully processed to arbitration.

Mertz stated that she knew that the County would not have stopped her from returning to work if she did not have a physician's certificate but if she wanted to receive paid sick leave for her absence, she knew that she had to have a certificate, or explain to the County why she did not have one, given the fact that she already had had more than six incidents of sick leave.

Mertz also admitted that she got the physician's certificate because she wanted to receive pay for the sick leave she took on December 30. 1/

1/ Mertz stated that sometime in the fall of 1998, Biggar told her that she had reached her fifth sick leave occurrence, and that she would need a doctor's slip to return to work if she had any further occurrences. Mertz characterized this as Biggar's order to her that she get a physician's certificate in the future.

It is undisputed that had Mertz had any compensatory or holiday time, Mertz could have been "paid" for December 30th out of those accounts, rather than request paid sick leave. It is also undisputed that the County has not paid co-pays for office visits required to get physician's certificates regarding illness or injury in any time period relevant hereto. Finally, it is undisputed that Mertz could have returned to work without a physician's certificate, but that she would not have received paid sick leave for the December 30th incident without such certification.

POSITIONS OF THE PARTIES

Union

The County, pursuant to the requirements of the collective bargaining agreement, ordered the grievant to obtain a doctor's certificate of illness before she could use paid sick leave on December 30, 1998. The Union noted that the contract states that no sick leave will be granted for the sixth or successive absence of three days or less during a calendar year unless the employe presents such a doctor's certificate. Thus, in the Union's view, Mertz was implicitly ordered to get a doctor's certificate for her absence on December 30th, because Mertz had eight sick leave incidents prior to December 30, 1998, and her failure to get such a certificate, as ordered by her supervisor, would have resulted in her not getting paid for the date of absence. The Union speculated that Mertz might ultimately be disciplined for excessive use of sick leave, although the Union offered no evidence on this point.

The County's argument that a certificate is not required for an employe to return to work, but only for the employe to receive pay for sick leave, the Union found absurd. In this regard, the Union noted that supervisor Biggar stated that she only reminded Mertz that if Mertz wanted pay for the absence of December 30th, she should get a physician's certificate. In the Union's view, Biggar's statement to Mertz constituted an order, not a suggestion.

Mertz had to pay a \$10.00 doctor visit fee because of the County's order that she obtain a doctor's certificate of illness for December 30th. In the Union's view, the County should reimburse Mertz for this \$10.00 fee. In this regard, the Union noted that Mertz had decided, voluntarily, to stay with United Health Insurance due to other coverage provided under that policy and that Mertz admitted she knew that United Health intended to implement a \$10.00 office visit co-pay when she decided, during open enrollment, to continue with United Health. However, Mertz assumed that the \$10.00 co-pay would be incurred due to her voluntary decision to see her doctor. Because Mertz would not have gone to the doctor regarding her December 30th illness, the Union sought reimbursement of the \$10 co-pay to Mertz.

The Union notified the County that it would grieve any out-of-pocket expenses employees incurred due to the office visit co-pay requirement that would become effective during the term of the 1998-2000 collective bargaining agreement. The Union noted that it had proposed to delete Article 11.2.4 from the contract during negotiations because no other County employees have such a restriction in their contract and because bargaining unit employees would be required to pay the \$10.00 office visit co-pay under the United Health policy if Article 11.2.4 were not deleted. However, as the County refused to delete Article 11.2.4 and it remained in the contract, the Union decided to grieve any matters that arose due to these circumstances.

In all of these circumstances, the Union sought an award ordering reimbursement of the \$10.00 office visit co-pay to Mertz for her December 30, 1998 illness and an order that the County refrain from further violations of the collective bargaining agreement and any other remedies that are fair and appropriate.

County

The County noted that there is no dispute in this case that Mertz was required to get a physician's certificate in order to be paid for her absence of December 30, 1998. The County observed that no provision of the collective bargaining agreement requires the Employer to pay for office visits when Section 11.2.4 comes into play. In addition, no evidence was offered to show that the County ever paid such fees in the past as part of any past practice.

The County argued that it has a right and a duty to make reasonable inquiries regarding the basis for the usage of sick leave benefits, including the right to receive information necessary to evaluate a claim. The County noted that the December 30th absence was Mertz' ninth absence, and the contract allowed the Employer to require that she bring in a certification of illness if she wished to be paid for the day.

As the Union had entered into the 1998-2000 collective bargaining agreement fully aware that insurance changes would be made in September or October, 1998, the County urged that no remedy is required in this case. Here, the County observed, that the contract was not executed until December 2, 1998, well after the changes in the office visit co-pay provision of the insurance benefit went into effect. Indeed, the Union ratified the contract knowing that a \$10.00 office visit fee would be charged pursuant to Article 11.2.4. Furthermore, the Union made no proposal that the County pay the \$10.00 office visit co-pay fee under Article 11.2.4 or any other provision of the 1998-2000 labor agreement.

Thus, given the past practice, the clear language of the contract and the history of negotiations between the parties, the County urged that the Arbitrator deny and dismiss the grievance in its entirety.

DISCUSSION

The facts herein demonstrate that on August 19, 1998, Mertz received written notice that the United Health Insurance Plan intended to begin charging an office visit co-pay to subscribers, effective October 1, 1998. With full knowledge of this intended change in her health insurance coverage, Mertz decided to remain with United Health Plan and not change to a different plan offered by the County during open enrollment that year.

On September 11, 1998, supervisor Biggar spoke to Mertz about her sick leave usage. Biggar advised Mertz that she (Mertz) had passed her fifth incident of sick leave and that Mertz would have to get a physician's certificate for every sick leave incident after September 11, if Mertz wished to receive paid sick leave therefor. It should be noted that there was no evidence to show that Mertz misunderstood Biggar's conversation with her, that Mertz asked any questions during that conversation or that any mention was made of the office visit co-pay change for United Health subscribers during the conversation.

It is in this context that Mertz called in sick on December 30th and then went to her doctor that day and paid the office visit co-pay to obtain a physician's certificate, which she later presented to the County in order to receive paid sick leave for December 30th. It is undisputed that Mary Mertz had more than six incidents of sick leave prior to December 30, 1998. In my view, the language of Article 11, Section 11.2.4, clearly and unambiguously requires any employee who wishes to receive paid sick leave for the sixth and successive absences of three or less days in a calendar year, to present a physician's certificate of illness upon the employee's return to work. Thus, to receive pay for her absence of December 30, Mertz was required to present a physician's certificate upon her return to work.

The Union has argued that Supervisor Biggar ordered Mertz to get a physician's certificate for her absences beginning in September, 1998. In my view, the facts and Mertz' testimony fail to show that Biggar, in fact, ordered Mertz to obtain certificates for her absences. Rather, Biggar made a non-mandatory, conditional statement to Mertz in September, 1998 that if Mertz wished to receive pay for her absences, she would have to obtain certificates therefor. Thus, Biggar left it up to Mertz to choose whether she wished to receive paid sick leave for her future absences or not. In addition, the evidence is clear that if Mertz chose not to request paid sick leave for her absences, that no adverse action would have been taken against her had she chosen to take leave without pay. Thus, the facts of this case show that Mertz chose voluntarily to request paid sick leave for December 30th. In order to receive pay for that day, Mertz essentially agreed to meet the condition precedent therefor, that she submit a physician's certificate of illness for December 30th.

The Union has argued that the County should reimburse Mertz for the December 30 office co-pay she paid because she would not have gone to the doctor as her illness (the flu) could not be successfully treated by a physician. Whether Mertz would have otherwise gone to the doctor regarding her December 30th illness is not relevant, as the language of Article 11 does not give employees any options (other than to obtain a physician's certificate) if they choose to receive paid sick leave.

The Union has argued that its proposal to delete Section 11.2.4 in negotiations for the 1998-2000 collective bargaining agreement, and the Union's subsequent notice to the County (when the parties settled without deleting Section 11.2.4) that the Union would grieve the office visit co-pay issues if they arose, should form a basis for the issuance of the award the Union seeks in this case. I disagree. As the County has properly pointed out, there is no language in the Agreement which requires the County to pay for office visit co-pays incurred by employees who request paid sick leave and need a physician's certificate to qualify therefor under Section 11.2.4. Indeed, the contract is silent regarding who must pay such co-pays.

As a general rule, where a labor agreement is silent on a subject, evidence of past practice and/or bargaining history becomes admissible to flesh out the contract and the parties' intent regarding the subject involved. In this case, the evidence failed to show that the County has ever paid for office visit co-pays in the past. Thus, evidence of past practice supports the County's arguments herein. The evidence of bargaining history herein also supports dismissal of this grievance. In this regard, I note that the parties were aware of United Health's intention to begin charging office visit co-pays in October, 1998, when the parties were negotiating the 1998-2000 labor agreement. In this context, the Union proposed to delete Section 11.2.4 and it provided the County with reasons to support such deletion. However, the County refused to accede to the Union's proposal, and the parties thereafter agreed upon and executed the 1998-2000 contract without changing Section 11.2.4 or adding language to require the County to pay for office visit co-pays. In these circumstances, the Union has failed

to prove that the County is obligated to reimburse employes for office visit co-pays incurred due to the employe's wish to receive paid sick leave for a Section 11.2.4 absence. Therefore, based upon the relevant evidence and argument in this case, I issue the following

AWARD

The Employer did not violate the collective bargaining agreement when it denied the grievant reimbursement for co-payment expense due to the Grievant's obtaining a physician's certification for illness for December 30, 1998. Therefore, the grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 8th day of November, 1999.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

