

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LINCOLN COUNTY PROFESSIONAL DEPUTIES' ASSOCIATION
LOCAL 101, LABOR ASSOCIATION OF WISCONSIN, INC.**

and

LINCOLN COUNTY

Case 187

No. 58054

MA-10827

(Brian Kingsley Grievance)

Appearances:

Mr. Thomas Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., appearing on behalf of the Union.

Mr. John Mulder, Lincoln County Administrative Coordinator, appearing on behalf of the County.

ARBITRATION AWARD

The Lincoln County Professional Deputies' Association, Local 101 (herein the Union) and Lincoln County (herein the County) are parties to a collective bargaining agreement covering the period January 1, 1999, to December 31, 2000, and providing for binding arbitration of certain disputes between the parties. On September 29, 1999, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration on a denial of overtime pay to Brian Kingsley (herein the Grievant) and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on December 7, 1999. The proceedings were not transcribed. The parties filed briefs on February 22, 2000.

ISSUE

The parties stipulated to the following statement of the issue:

Did the County violate the collective bargaining agreement when it denied the Grievant overtime pay for time spent to obtain a doctor's certificate for use of sick leave on June 7, 1999?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

ARTICLE 12 – OVERTIME

12.1 – Overtime. All hours worked in excess of the regular eight and one-half (8-1/2) hours shift shall be deemed overtime, and, when authorized by the Sheriff, shall be compensated at time and one-half (1-1/2) of the employee's normal hourly rate. The hourly rate shall be computed based upon the 2,080 hour work year. The parties, by mutual agreement, may agree that compensatory time be given in lieu of payment, up to a maximum of forty-two and one-half (42.5) hours. If compensatory time is given, the same shall be at the rate of time and one-half (1-1/2). Scheduling of compensatory time off shall be by mutual agreement between the employee and the Sheriff, or his designee.

ARTICLE 20 – SICK LEAVE

20.1 – Annual Accumulation. Employees shall be entitled to sick leave at the rate of eight and one-half (8-1/2) hours for each calendar month of service, after the probationary period of employment has been completed, and may accumulate such leave to a maximum of 850 hours.

...

20.4 – Physician's Statement. In order to become eligible for sick leave, an employee may be required to furnish a physician's certificate to either his Department Head, or the County Personnel Office, as proof of his or her illness.

20.5 – Notice. An employee desiring sick leave shall inform his immediate supervisor at least thirty (30) minutes prior to the start of his work shift for that day, and explain the reason for his absence.

BACKGROUND

The Grievant, Brian Kingsley, has been a deputy with the Lincoln County Sheriff's Department for more than seven years. In early June, 1999, the Grievant had the wisdom teeth in the right side of his mouth extracted. On the evening of June 6, he bumped his right cheek and experienced severe pain at the extraction sight, whereupon he took some

medication, which had been provided to him by his oral surgeon. On June 7, the Grievant was scheduled to work the day shift from 5:45 a.m. – 2:15 p.m. Since the medication contained warnings regarding operation of motor vehicles, he elected to take a sick day and called the shift sergeant, Kenneth Schneider, shortly after 5:45 to explain the situation and inform him he would not be coming to work. Schneider advised the Grievant that he would need to submit a Sick Leave Report form before he would receive compensation for June 7.

On June 9, 1999, the Grievant submitted a Sick Leave Report form, requesting eight and one-half hours of sick leave for June 7. Because the contract provides that such requests are to be made at least one-half hour prior to the beginning of the shift, and because the Grievant had been late to work the previous day, Schneider determined that the Grievant should provide a physician's statement to justify the request. On June 14, therefore, he told the Grievant that he would need a doctor's certificate in order to qualify for sick leave. On June 28, the Grievant obtained a note from his oral surgeon supporting his request, which he resubmitted along with an additional claim for one hour of overtime pay for the time he spent obtaining the note. Schneider granted the sick leave request, but denied the request for overtime, whereupon a grievance was filed on June 30, which was denied. The grievance, thereupon, proceeded through the contractual steps to arbitration. Additional facts will be referenced, as needed, in the discussion.

POSITIONS OF THE PARTIES

The Union

The specific language of Article 20, Section 20.4 of the collective bargaining agreement provides the County with the authority to order an employe to provide a doctor's certification to support a sick leave request. Specifically, the section states that such documentation "may be required" in order to become eligible for sick leave. This is in keeping with the accepted principle that it is reasonable for an employer to require documentation of illness in order to prevent sick leave abuse. In Black's Law Dictionary, (5th Ed. 1979) p. 1172, the word "require" is defined, *inter alia*, as "to, direct, order, demand, . . . instruct, . . . command, . . . compel." This permits the inference that the Grievant was ordered to provide a doctor's certificate for his absence on June 7.

The testimony of the County's witnesses that Sergeant Schneider merely advised the Grievant that he needed a doctor's certificate in order to be compensated for a sick day cannot be credited. Further, Schneider's opinion that such is the meaning of Section 20.4 reflects his lack of experience in the negotiation and interpretation of collective bargaining agreements. The purpose of the requirement is to investigate a questionable sick leave claim when there is reasonable cause and had the Grievant failed to obey the order, he would have been disciplined as well as denied sick pay.

There was no basis for the County's suspicion that the Grievant was abusing sick leave. This was the second time all year that he had requested sick leave and the basis was legitimate. Sergeant Schneider's explanation, that the Grievant had been late for work the previous day and he might be trying to avoid discipline for additional tardiness, is questionable. Nevertheless, the Grievant complied with the order and obtained the certificate, as directed.

The County's argument that the Grievant was not authorized to work overtime on June 28 is unsupported by the facts. The Overtime provision provides for compensation at time and one-half for hours worked beyond the regular eight and one-half (8-1/2) hour shift. The Grievant's normal shift is 5:45 a.m. – 2:15 p.m. On June 28, he visited the doctor's office between 3:30 and 4:30 p.m. on the express orders of Sergeant Schneider. Schneider's order was an extension of the Sheriff's authority, based upon his suspicion that the Grievant was abusing sick leave. For this reason, the doctor visit should be considered authorized overtime and should be compensated accordingly.

Precedent also supports the Union's position. In December 1998, Deputy Thomas Koth called in sick and his supervisor, Sergeant Jeff Jaeger, ordered him to obtain a doctor's certificate before returning to work in order to be compensated for it. Koth complied and requested an hour of overtime for the doctor visit, which was denied. The Union grieved the denial and the grievance was resolved in April 1999, when the County agreed to pay Koth the requested hour of overtime. "Where a grievance has been settled by mutual agreement of the parties, the same issue that is involved in such 'settled' grievance, though appearing in the guise of another grievance, should not ordinarily be subject to arbitration at the request of only one party (or, if the issue does reach arbitration, the prior settlement should constitute a binding precedent)." Elkouri and Elkouri, How Arbitration Works, 4th Ed., p. 206. Further, such settlements are typically given great weight when addressing contract provisions that lend themselves to more than one interpretation. (Citations omitted.) This case is identical to the Koth grievance and should, therefore, have the same outcome.

The County introduced a February 15, 1999 memo from Chief Deputy Soucy to the department sergeants (Co. Ex. 1) in an attempt to establish that there was no presumption of leave abuse on the Grievant's part. The document contradicts itself in that at one point Soucy states that Section 20.4 is to be invoked whenever there is a suspicion of sick leave abuse, and yet he later states that a request for a physician's statement is not an accusation of abuse. Further, it conflicts with the collective bargaining agreement and, in such cases, the provisions of the agreement control. For these reasons, the memorandum should be disregarded. The record is clear that the Grievant was ordered to obtain the statement, and that he did so outside normal working hours. The grievance should be sustained.

The County

This issue in this case is strictly whether the Grievant is entitled to overtime pay as a result of obtaining a physician's statement after being advised by Sergeant Schneider that he

would need one to qualify for sick pay for June 7, 1999. The County has not contended that

Page 5
MA-10827

the Grievant has abused sick leave in the past, or that his use of a sick day on June 7 was unjustified. Likewise, the grievance doesn't concern management's right to require a physician's statement to qualify for sick leave. This right is clearly established in Section 20.4 of the collective bargaining agreement. These matters are irrelevant and should have no bearing on the decision.

This is also a wholly different case than the Thomas Koth grievance, cited as precedent by the Union. In the Koth case, the Grievant was specifically ordered to obtain a doctor's certificate by Sergeant Jaeger prior to returning to work, as shown by Joint Exhibits 4A & 4C, unlike the circumstances here. No evidence was offered at the hearing by anyone directly involved in the Koth case to establish precedential effect and it has none.

The Grievant was not ordered to obtain a physician's certificate. He was, rather, advised that he would need to provide such a certificate to qualify for sick leave. The Union misconstrues the meaning of Section 20.4. The Grievant was advised, under that Section, that a certificate would be necessary to receive compensation, but the choice of whether or not to make the appointment and obtain it was the Grievant's. The County merely exercised its prerogative under Section 20.4 to require a physician's statement as a condition for eligibility for sick leave.

In February, the Chief Deputy issued a memo to the department sergeants (Co. Ex. 1), explaining the new leave form and clarifying the policy on physicians' statements. That document makes it clear that officers are not "ordered" to go to the doctor or to obtain physicians' statements. The statement may be required to qualify for sick leave, but the decision whether to get it is voluntary.

The Grievant made the decision to get the statement based on his desire to receive sick pay. Only after the fact did he request overtime for the doctor's appointment. Under Section 12.1, however, overtime must be pre-authorized. The Grievant did not receive any such pre-authorization, which is an important vehicle for management to direct the workforce and control costs. Employees should not be allowed to self-direct their overtime under circumstances such as this and the grievance, therefore, should be denied.

DISCUSSION

The collective bargaining agreement between the County and the Union contains a sick leave provision, Article 20, which permits bargaining unit members to accrue up to 850 hours of paid sick leave, which may be used in cases of illness, injury, or physical disability. Section 20.5 of that provision requires that an employe desiring sick leave give notice to his supervisor at least 30 minutes prior to the start of his shift to explain the reason for his absence. Section 20.4 permits the County, at its discretion, to require a physician's certificate as a condition to receiving sick leave. The Union contends that, by invoking this provision in

this case, the County is obliged to compensate the Grievant for the time spent in obtaining the certificate, because his compliance was mandatory. Furthermore, inasmuch as the doctor's appointment took place outside normal working hours, the Grievant is entitled to overtime.

The specific language of Section 20.4 is as follows: "In order to become eligible for sick leave, an employee may be required to furnish a physician's certificate to either his Department Head, or the County Personnel Office, as proof of his or her illness." This type of language is typically inserted into contracts as a means of monitoring sick leave usage to prevent abuse, and the record reflects that that is its purpose here. A February 15, 1999 memo to the department sergeants from the Chief Deputy (Co. Ex. 1) states, in pertinent part, "The decision criteria for the sergeant is simple. If there is a reasonable suspicion that a worker has misused sick leave, the sergeant will refer to article 20.4 of the L.A.W. contract or article 25.02 of the AFSCME contract In order to become eligible for sick leave an employee may be required to provide a physician's statement. The sergeant will decide, based on the presence or absence of a reasonable suspicion, whether or not a physician's statement is necessary on a case by case basis."

In this instance, the Grievant had been late for work on June 6, and had received a verbal reprimand. On June 7, he called the shift supervisor, Sergeant Schneider, shortly after he was to have begun his shift, to call in sick, due to pain associated with his recent dental work, and the effect of the prescription medicine he was taking for it. Inasmuch as the call came in after the Grievant's shift had begun, Schneider suspected it may have been to avoid discipline for being late a second consecutive day, and so determined to require a doctor's statement from the Grievant to justify the leave day. The Grievant did obtain the statement and the County did pay him for the sick day. It's decision to not pay him overtime for obtaining the statement was not based on any presumption of abuse, but on the County's determination that the Grievant was not entitled to such compensation under the contract.

At the hearing, Sergeant Schneider testified that when he received the leave request form he told the Grievant that to qualify for sick leave he would have to provide a doctor's statement, and cited him to Section 20.4 of the contract. This essentially agrees with the Grievant's recollection of the conversation. Where the two differ is in the effect of Schneider's statement. The Union maintains that the statement was a direct order, which the Grievant had no choice but to obey and that, therefore, the County is required to compensate him. The County, on the other hand, maintains that there was no order, and that Schneider merely invoked Section 20.4, as he was entitled to do, and advised the Grievant of his options.

Based on the language of the contract alone, the County's position would seem the more reasonable. While the provision does use the words "may be required," it is important to note that they are used in the context of establishing a precondition for exercise of an employe benefit, the use of sick leave. There is no suggestion in the contract language, or the record, that an employe would face potential discipline for not supplying a doctor's statement. Failure to do so would not be an act of insubordination, but an election to forego the option of

receiving pay for a sick day.

The Union, however, cites the settlement of a previous grievance as precedent for its position. The record contains documents regarding the grievance of Officer Thomas Koth, who in December 1998, was instructed to obtain a doctor's certificate after taking sick leave, and who requested overtime for the time spent obtaining the statement, which was denied. (Jt. Ex. 4) The County ultimately paid Koth one hour of overtime and the Union withdrew the grievance. The Union argues that this settlement has precedential effect, and also reflects the understanding of the parties that a requirement of a doctor's statement under Section 20.4 does, in fact, constitute an order to perform "work," which must be compensated.

The County argues that the Koth grievance is not relevant to the facts here. In particular, the County points to the fact that Koth was apparently ordered to provide a doctor's statement prior to returning to work. This is confirmed by a letter to the Sheriff by Sergeant Jaeger, who had issued the order, on the day of the incident, wherein Jaeger states, "Per you [sic] request, I did place a call to Deputy Koth's residence at approximately 1630 this date. This was to advise him that he was required to provide a doctor's excuse prior to returning to work for today's illness." (Jt. Ex. 4-C - emphasis added.) The County maintains that that is dramatically different than this case, where Grievant was not ordered to obtain the statement, but was only told he would need one to qualify for sick leave.

The County also disputes the contention that the Koth settlement reflects any common understanding of the meaning of Section 20.4. The County points to the February 15 memorandum, referenced above, as evidence that, in fact, from the County's perspective, Section 20.4 does not have any mandatory application. In addition to the portions previously quoted, the memo states, "Not every sick call will trigger a request for a physician's statement. In fact, the vast majority of sick leaves are legitimate, so only a few will trigger requests. The department does not require the worker to go to the doctor; therefore no compensation will be given for that purpose. Per contract, if s/he wants to be paid for the sick day, s/he will provide a physician's statement when requested. If the worker does not provide a statement after the sergeant's request for one, the worker is not eligible for sick pay. The decision is up to the worker." (Emphasis added.)

I am satisfied that this accurately reveals the County's actual understanding of the meaning of Section 20.4, as well as its position on whether doctor's office calls to obtain requested certificates are compensable. The timing of the memo is significant, as it was issued after the Koth grievance was filed, but prior to the present one. The wording also indicates that it was intended, in part, to clarify the rationale and procedure for physician's statement requests in light of the Koth situation in order to prevent similar problems from arising in the future. The problem in the Koth case, as previously discussed, was that the sergeant ordered Koth to obtain a physician's statement prior to returning to work, which triggered his request for compensation. The memo instructs the sergeants that officers cannot be "ordered" to obtain such statements. The sergeant may request a statement, as a precondition for qualifying for sick leave, but the decision whether to obtain it is the officer's. In my view, the settlement of the Koth grievance was a recognition that the contract language had, perhaps, been

incorrectly interpreted by the sergeant and the memo was a curative for the problem that led to it.

Page 8
MA-10827

The Grievant testified that his overtime request was triggered, in part, by the knowledge that Koth had been paid under similar circumstances. He had no personal knowledge of the Koth grievance, however, and was unaware of whether Koth had been ordered to obtain a physician's statement. He also did not testify that his awareness of the Koth settlement influenced his decision to obtain the statement in the first place. Therefore, there is no sense in which he can be said to have acted in reliance on his understanding of the Koth settlement, although it may have created an expectation that he would be compensated for his time.

For all the foregoing reasons, I do not see the Koth settlement as having any relevance in this case. As far as the record indicates, the Koth matter was an isolated occurrence and there is no established pattern of compensating employees for time spent in obtaining physician's statements when required under Section 20.4. It cannot be said, therefore, that any past practice applies to this situation. Further, the Koth case is distinct from this one in that the evidence indicates that Koth was, in fact, ordered to provide a physician's statement and may have, therefore, acted under compulsion. Here, and partly because of the Koth case, Sergeant Schneider merely indicated that the physician's statement was a precondition for using sick leave, not a precondition for returning to work. Because of the different facts, therefore, the Koth case has no precedential effect. Finally, although the Grievant was aware of the Koth settlement, it did not apparently influence his decision to obtain the physician's statement.

In sum, therefore, I find that the language of Section 20.4 does not make obtaining a physician's statement mandatory. Rather, it permits the County to require verification to support a sick leave request, at which point the employee has the option of providing it or foregoing the request. The time spent in obtaining such certificate, therefore, does not constitute "work time" eligible for compensation under Article 12. Further, the extrinsic evidence does not support an alternative interpretation, nor does it establish the existence of any contrary practice or precedent.

Based upon the foregoing and the record as a whole, the undersigned enters the following:

AWARD

The County did not violate the collective bargaining agreement by its refusal to pay the Grievant overtime for time spent obtaining the doctor's certificate requested under Section 20.4. The grievance is, therefore, denied.

Dated at Eau Claire, Wisconsin this 18th day of May, 2000.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/ans
6067.doc