

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**PORTAGE COUNTY COURTHOUSE, HEALTH CARE CENTER
AND HUMAN SERVICES, AND LIBRARY SYSTEM EMPLOYEES,
LOCAL 348, AFSCME, AFL-CIO**

and

PORTAGE COUNTY

Case 160
No. 60532
MA-11652

(Kathleen Prior Grievance)

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Ms. Therese M. Freiberg, Portage County Personnel Director, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein “Union” and “County”, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Stevens Point, Wisconsin, on April 22, 2002. The parties there agreed that I should retain jurisdiction if the grievance is sustained and they subsequently filed briefs that were received by June 24, 2002.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Did the County violate Article 3 of the contract when it refused to let grievant Kathleen Prior return to work because of injury and, if so, what is the appropriate remedy?

BACKGROUND

Prior, a Deputy Clerk II, has worked in the County's Clerk of Courts office since 1997. She injured her back and missed several days of work in December, 2000. Prior received treatment for her back from Rice Medical Center which on December 13, 2000 (unless otherwise stated, all dates herein refer to 2000), provided a note to Clerk of Circuit Court Bernadette Flatoff stating she could return to work on December 13 with the following restrictions: "10-15 lb. Lifting limit. No bending to floor level. Will be unable to work remainder of work day after scheduled due to sedation." (County Exhibit 2).

Prior, who had no sick leave at the time, presented another medical certification on December 18 stating she could work with the following job restrictions: "She is capable of working with 15 lb. lifting limit. No bending to floor level. She has to retrieve a scanner device that falls to floor behind her computer 15-20 times a day because of inadequate work station set-up." On December 19, Prior worked about 4.5 hours before being told she could not work because of the medical restriction placed on her. On December 20th or 21st, Prior furnished the County with a Return to Work Order provided for by her doctor stating she could return to work on December 22 with "No restrictions", and she subsequently returned to work on December 22 without incident.

Diane Cramlet, a long-term court reporter for the County courts, testified that court files on a given date "could weigh five or ten pounds"; that, "But to me 15 pounds would be a pretty good weight for a file to weigh"; and that Court Clerks normally "don't bend for anything."

Prior testified that she works in a small, cramped space that was not "ergonomically correct"; that she experienced great difficulty whenever she had to retrieve a computer wand that fell off her desk about 15-20 times a day; and that that problem was not rectified until after she returned to work on December 22. She performed her work duties without incident between December 13-18 and no one else had to perform any of her lifting duties during that time. She said she was told on December 18 that she had to leave because the personnel department has a "zero-100 percent policy" of sending employees home if they cannot perform all of their job duties, and that she was instructed on December 18 to fill out a workers'

compensation form which she did, after which time she was sent home. That claim was rejected the next day. (County Exhibit 5).

She on December 19 presented management with a doctor's note stating she could work provided that she not lift anything over 15 pounds, and provided further that she not bend down to the floor. (Union Exhibit 1). She worked 4.5 hours on December 19 before she was sent home. She added that she never has lifted or carried anything weighing 15 pounds; that the doctor informed the County she could do all of the essential duties in her job description but for lifting 20 or more pounds and but for excessive bending (Union Exhibit 1); and that she hurt herself on December 12 when she worked late and did filing work.

On cross-examination, she testified that she did not work on December 14; that she worked December 15-18; and that she spends about half of her time doing office work and the other half doing courtroom-related work.

Deputy Register-In-Probate Sandy Gagas testified that she formerly worked as a Deputy Clerk 2 alongside Prior; that Prior's scanner pen regularly fell to the floor and that Prior had to retrieve it about ten times a day; and that Prior and Deputy Clerks never carried anything over 15 pounds.

Union President Collene Ottum testified that if employees receive a worker's compensation injury, "they work within the restrictions and the employee returns to work. If it is a non-work related incident, there is no consistency." On cross-examination, she said that employees with restrictions were not always allowed to return to work after non-related injuries; that such matters were handled on a case-by-case basis; and that most involved weight restrictions.

Clerk of Circuit Court Flatoff testified that Prior missed work on December 14 and 15 and that she reported sick on the morning of December 18; that she met with Prior on December 18 to discuss her work restrictions; that she, Flatoff, sent Prior home after she was told by the personnel department that employees were not allowed to return to work if they have medical restrictions that do not match a person's job description; and that she ordered Prior to leave work on December 19 because those restrictions were still in place. She said that Prior's job description calls on her to lift storage boxes that weigh up to 20 pounds; that employees must be able to lift such boxes at all times; that employees regularly stretch and reach; that she told Prior, "You have restrictions here that I cannot do anything with as a non-work related illness or injury"; and that she has not created any light duty positions in her office.

On cross-examination, she testified that she has not seen any Deputy Clerks pick up certain exhibits.

Recalled as a witness, Prior testified that she worked on December 13; that she did not work on December 14; that she worked until 1:30 p.m. on December 15; that she worked between 11:30 a.m. and 1:15 p.m. on December 18; that she worked until 12:30 p.m. on December 19; and that she did not work on December 20-22. She denied ever refusing to leave the courtroom on December 19 and said that it was “always maintenance” personnel that removed very heavy boxes.

Flatoff also was recalled as a witness and testified about the heavy boxes that had to be lifted. When asked about Prior’s testimony, she said: “I would agree with Kathleen to a point. . .”, and added that Prior regularly crouches as part of her job.

POSITIONS OF THE PARTIES

The Union asserts that the County violated Article 3(A)4 of the contract by refusing to let Prior return to work because she, in fact, “could do her work”; because it was the County’s responsibility to fix the faulty scanner on her desk so that the wand did not drop on the floor; because there was no need for Prior to carry anything over 15 pounds; and because there was very little bending involved in her job. As a remedy, the Union asks that Prior be paid the 22.25 hours she was not allowed to work.

The County asserts that the grievance is without merit because it is not required to let employees work with medical restrictions that can result in further injury; that it is not required to create “light duty in any circumstance”; and that no past practice supports the Union’s contrary claim. The County also claims that the testimony of the Union’s witnesses relating to the Deputy Clerk II job duties “was not credible”; that those job duties entail considerable lifting and bending; and that, the “Job description accurately reflects the actual requirements of the position of Deputy Clerk II.”

DISCUSSION

A key factual issue centers on exactly what duties Prior regularly performs. While the County asserts that the testimony of the Union’s witnesses should not be credited, I find that Prior, Cramlet, Gagas, and Ottum all testified truthfully when they pointed out that Prior hardly ever lifts anything weighing 15 pounds or more, a point corroborated by Flatoff herself who admitted that she could not give even one example of where Prior in the past has had to lift and/or carry that much weight. In addition, Prior did not lift anything that heavy when she returned to work on December 19 and after December 22 when her restrictions were finally lifted and when she finally was allowed to return to work. Hence, even though Prior’s job description states that she sometimes must lift up to 20 pounds, there is no proof that Deputy Clerk II’s have ever done that in the past.

The County also asserts that Prior's medical restriction prevented her from bending down on a regular basis and that the Union's witnesses tried to downplay the regularity of her doing so.

I disagree. For while the record fails to establish exactly how much bending is required in Prior's job, the record does not establish that such bending down, no matter how much there is, constituted a sufficient basis for not allowing Prior to return to work. Prior on December 19 performed all of her job duties, including bending, without incident before she was sent home and that she similarly performed all of her duties, including bending, after she returned to work for good on December 22. In addition, the County, not Prior, was responsible for fixing the problem with the wand falling down which is something it did after Prior returned to work.

Hence, there is no objective evidence that Prior could not properly perform her job during the time she was not allowed to work. The County's refusal to let her work violated Article 3 of the contract because the County lacked a legitimate basis for not letting her work and because Prior had the right to work her regular work schedule as provided for in Article 19, Section A(2), of the contract.

The larger question is whether the County, as a matter of policy, must make reasonable accommodations for employees who are not injured on the job and who have medical restrictions placed on their ability to return to work to their regular job duties. The County thus states, on page 6 of its brief: "It is an employer's right and responsibility to protect the safety of employees by refusing to allow the employee to work where there is a question about the employee's ability to perform the required work safely."

That certainly is true as a general proposition provided, however, that an employee, in fact, cannot perform his/her regular duties because of a medical restriction. Here, Prior could perform her regular duties, which is why her grievance is being sustained. This ruling, though, is limited to the unique facts of this case, which is why it is unnecessary to address the broader question of what must be done in other circumstances.

In light of the above, it is my

AWARD

1. That the County violated Article 3 of the contract when it refused to let grievant Kathleen Prior return to work after her injury.
2. That to rectify that contract violation, the County shall immediately reimburse grievant Prior for the 22.5 hours she was not allowed to work.

3. That to resolve any remedial questions that may arise over application of this Award, I shall retain my jurisdiction for at least thirty (30) days, and I will extend it if necessary to do so.

Dated at Madison, Wisconsin, this 3rd day of September, 2002.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

