

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**AFSCME, COUNCIL 40, AFL-CIO**

and

**MARATHON COUNTY**

Case 295

No. 61752

MA-12055

(Hatleback-Wolfe Grievance)

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**Appearances:**

**Mr. Phil Salamone**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin, appearing on behalf of Local 2492-E, Office and Technical Employees Union.

**Mr. Frank A. Matel**, Employee Resources Director, County of Marathon, 500 Forest Street, Wausau, Wisconsin appearing on behalf of the County of Marathon.

**ARBITRATION AWARD**

Council 40, hereinafter "Union," requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the County of Marathon, hereinafter "County," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on January 3, 2003, in Wausau, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received on March 26, 2003, with the option to file reply-briefs by April 11, 2003. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

**ISSUES**

The parties agreed at hearing that there were no procedural issues in dispute and stipulated that the issue to be determined was:

Did the County violate the collective bargaining agreement when it issued a written warning to the Grievant on March 22, 2002, and later required a physician's certificate for any further absences, regardless of length? If so, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE**

**Article 2 - Management Rights**

The County possesses the sole right to operate the departments of the county and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include, but are not limited to, the following:

. . .

B. To establish reasonable work rules;

. . .

D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;

. . .

I. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, and to determine the competence and qualifications of employees;

. . .

**Article 13 - Sick Leave**

. . .

C. Evidence of Illness - Abuse: If sick for more than three (3) consecutive work days, the employee may be required to furnish the supervisor with a

certification of illness signed by a physician if requested by the department head or his/her immediate supervisor. Employees who abuse sick leave benefits shall earn no sick leave for six (6) months succeeding the date of last proven violation. Additional abuses of sick leave may subject an employee to dismissal.

. . .

- E. Family Illness: Employees will be allowed to use a maximum of thirty-two (32) hours per calendar year of sick leave in cases of illness or injury in the immediate family where immediate family member requires the attention of the employee. Immediate family is defined as the employee's spouse, children, parents, or a member of the employee's household. This provision shall not apply to employees accompanying family members to any routine medical or dental appointments.

. . .

### **RELEVANT PERSONNEL POLICY**

#### 33107.00 Dereliction of Duty

Dereliction of duty on the part of any employee is cause for disciplinary action and/or dismissal. The following acts or omissions shall constitute dereliction of duty:

1. Failure to obey orders, or willful or repeated violation of any rule, regulations, policy or procedure of the Facility.
2. Failure to properly report incidents occurring in the Facility.
3. To be absent without authorized leave. This rule may be extended to include failure to report to duty on time, or leaving a place of duty or assignment without authorization.
4. Failure to assist or support fellow employees, or perform duties.
5. Sleeping on duty.
6. Failure to complete required training requirements.
7. Neglect of duty.

8. Displaying a reluctance to properly perform assigned duties or acting in a manner tending to bring discredit upon oneself, the Facility, or the Department; or failing to exercise diligence and interest in pursuit of duties.

### BACKGROUND AND FACTS

The Grievant is an 11-year employee with the Marathon County Correctional Facility. She resides in Harshaw, Wisconsin, which is located approximately 60 miles north of her work location, the County Correctional Facility and is the mother of two school age children with asthamatic conditions.

County payroll records indicate that the Grievant generally worked four days on followed by two days off. Between the dates of February 1, 2002, and March 15, 2002, the Grievant called in sick and used 65.36 hours accumulated paid sick leave on eight occasions. Her absences noted below extended scheduled time off on five occasions including February 1, February 9-10 1/, March 3, March 9-10, and February 15. The dates of absence and the accompanying weather conditions on those dates are as follows:

	Weather conditions in Wausau	Weather conditions in Rhinelander
February 1	3 inch snowfall	No precipitation
February 3	trace snowfall	No precipitation
February 9	trace snowfall	No precipitation

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*1/ Winter watch for Marathon County 2/8; Grievant used compensatory time for February 10 absence.*

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February 20	4 inch snowfall 68/100 precipitation	3/10ths precipitation
February 21	2/10th inch snowfall Trace precipitation	No precipitation
March 9	1 and 1/10 inch snowfall 36/100 precipitation	3/10ths precipitation

March 10	No precipitation 2/	
March 15	3/10 <sup>th</sup> inch precipitation	No precipitation

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*2/ Weather information from County Exhibits 1A, 1B and 2. No entry for Rhinelander March 10.*

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On March 22, 2002, the County issued a written reprimand to the Grievant. The Employee Disciplinary Notice indicated the action was taken for “absenteeism” and explained:

Since February 1, 2002, Corrections Officer Hatleback-Wolfe has called in sick, or sick family eight times.

Seven of those incidents were during periods of snow fall which has been documented by weather history for Marathon County and Rhinelander, WI. One of those incidents involved a winter storm watch for those areas.

There is a consistent pattern of using sick days whenever snow is falling to apparently avoid driving.

You have been counseled previously about inappropriate use of sick leave and absenteeism. As of this date, you may be required to produce documentation of any illness for yourself or any family member resulting in sick family use, from a physician.

Your excessive absenteeism is in violation of Corrections Division policy 33107.00, falling under dereliction of duty, sub. 3.

Continued absenteeism and/or sick leave abuse will result in continued progressive discipline including termination of your employment.

As a result of the March 22, 2002 discipline, a grievance was filed on March 27 alleging that:

**VIOLATE CONTRACT LANGUAGE Article 13 SICK LEAVE/DISCIPLINE WITHOUT JUST CAUSE/WRITTEN REPRIMAND IN FILE AND MAKING JULIE WOLFE BRING IN DOCTOR SLIP FOR EVERY SICK CALL IN ACCUSATION DATE 3-21-02/ WRITTEN DISCIPLINARY NOTICE 3-22-02**

County Personnel Director Frank Matel denied the March 27 grievance finding that “calling in sick eight times in less than two months is just cause for discipline.” The grievance was processed to arbitration.

Two additional grievances were filed by the Grievant on July 3, 2002, and August 20, 2002, as a result of a memorandum issued to the Grievant informing her on that she was required to provide a physician's certificate for any future sick leave absences and enforcement of the memorandum. The grievances were denied by the County.

Further facts will be set forth in the DISCUSSION section below.

### POSITIONS OF THE PARTIES

#### The County

The County maintains that the discipline imposed on the Grievant was necessary in order to maintain efficiency and manage and direct the work force. The Grievant's abnormal sick leave usage was the highest number of days utilized between February 1, 2002, and March 15, 2002, by any Corrections employee, resulted in increased costs due to mandatory overtime, and negatively impacted staff morale.

The Grievant called in sick eight times between February 1, 2002, and March 15, 2002. On seven of those eight days, it snowed. The snow, coupled with the fact that the Grievant lives 60 miles from her place of work, resulted in a determination by her supervisors that her absences were excessive justifying discipline. The eight days in which the Grievant called in sick resulted in an extension of her "off days." The Grievant is in the habit of calling in sick to extend her days off. In addition to the dates between February 1, 2002, and March 15, 2002, the Grievant also extended her off days on April 17, 2002, and June 1, 2002. The Grievant's use of sick leave, coincidentally arising when snow falls and at the beginning or end of her days off, justified a finding by the County that she should be discipline and closely monitored.

Based on the evidence, the grievance should be denied.

#### The Union

The Union asserts the written reprimand imposed on the Grievant on March 22, 2002, and the requirement that the Grievant submit a physician's certificate for all sick leave absences subsequent to March 22, 2002, are in violation of the labor agreement.

The County lacked any proof that the Grievant abused sick leave when it imposed the disciplinary warning. The County was suspicious of the Grievant's sick leave usage due to the geographic location of her residence and adverse weather conditions and acted solely on this suspicion. The evidence submitted by the County is flawed; there was not measurable snowfall on three of the days for which the County bases its discipline. Recognizing that the County bears the burden of proof in a disciplinary matter, the County has fallen well short of this requirement.

Moving to the directive that the Grievant produce a physician certificate for absences less than three consecutive days, it is in clear conflict with the language of the collective bargaining agreement. The agreement provides the County the right to request a physician's certificate when an employee is off for more than three consecutive work days. The agreement does not provide the County the right to require the Grievant to provide a medical certificate for every instance of absence. This is a flagrant violation of the labor agreement.

The County has violated the collective bargaining agreement and the Grievant should be made whole for her losses. The appropriate remedy is to withdraw the disciplinary letter from her Personnel File and direct the County to cease and desist from requiring a notice from a physician for all absences less than three consecutive days.

### DISCUSSION

This case arises out of the usage of contractually provided sick leave benefits by the Grievant and the subsequent disciplinary action taken by the County. The County maintains that the discipline was justified while the Union counters that it lacked just cause.

Management has the right to discipline an employee provided there is proof of wrongdoing. There is no such proof in this case. The County Employee Discipline Notice indicates the Grievant was disciplined for a "consistent pattern of using sick days whenever snow is falling to apparently avoid driving," yet there was snowfall on only five the eight days in question in the Wausau area and on only two days of the eight in question in the Rhinelander area. Lacking snowfall, it is difficult to conclude that the Grievant's failure to report for work on these dates was due to her desire to avoid driving. Moreover, there is documentation that on February 3 and March 9, the Grievant's child was seen at the emergency room and one of these dates was a day in which there was snowfall in both Wausau and Rhinelander. Given that there is insufficient evidence to support that there was snowfall on the eight dates in which the Grievant used sick leave between February 1 and March 15, the County has failed to meet its burden of proof in this case.

The Grievant is an 11-year veteran with the County. She has commuted between her home in Harshaw and the correctional facility for an unknown period of time, but at least for the last two years. This is not the first year in which the Harshaw/Rhinelander area and the Wausau area have experienced snowfall and I am sure that had the Grievant previously engaged in a pattern of absence associated with snowfall, the County would have informed me of such. Cary Pellowski, Jail Line Supervisor, though not the Grievant's supervisor and who initiated the discipline imposed on the Grievant, testified that he had no evidence to support that the Grievant was not sick on the dates in question and that he was aware that the Grievant had submitted written documentation supporting her use of sick leave for some of the dates. I accept that the Grievant's absences may have negatively affected the morale of the other employees in the Jail and that there may have been overtime costs associated with the absences, yet this is not a sufficient basis for imposing discipline when the evidence is lacking.

The County Employee Discipline Notice references a prior instance in which the Grievant was counseled for absenteeism and use of sick leave. The Grievant's Supervisor, Paul Mergeneahl testified that he had a conversation in March, 2001, at which time the Grievant was advised the County was concerned she was abusing sick leave. The Grievant denies this conversation ever occurred. Given that the alleged conversation occurred one year prior to the discipline in question and the fact that the County did not reduce it to writing, I conclude that it is not relevant to the current discipline, especially since there is not sufficient evidence to support the written disciplinary action.

The County has argued that the Grievant's sick leave use in conjunction with scheduled time off (which effectively extended the amount of her time off) was a further basis for discipline. Review of the Employee Disciplinary Notice confirms that the Grievant was not disciplined for this reason. I am unwilling to uphold the written disciplinary notice for a reason separate and distinct from that which the Grievant was originally disciplined. The County's identification and suspicion that Grievant extended her time off on five of the eight dates in question occurred after the discipline was issued. Had it been identified prior to the discipline, it would have been included in the disciplinary notice.

I next move to the issue of the County's requirement that the Grievant provide a physician's certificate for all sick leave absences following June 25. It is a legitimate exercise of management authority to prevent sick leave abuse and as such, management may establish reasonable work rules or other methods of monitoring so long as the method is not arbitrary, discriminatory, or unreasonable. Elkouri and Elkouri, How Arbitration Works, 5<sup>th</sup> Edition, p. 1027-1028 (1997); cites SERVICES OIL CO. 62 LA 77, 82 (TAYLOR, 1974). The County, after having identified that the Grievant had used what it determined to be an abnormally high number of days of sick leave in a 45-day time period, regardless of whether the use of the leave was to avoid poor driving conditions or to extend a scheduled leave, imposed the expectation of the Grievant that she provide a written confirmation from a physician for future sick leave absences. It is a reasonable exercise of management authority to create a mechanism to monitor the Grievant's continued use of leave. Although the Union identified instances in which the County may have known that a similarly situated officer utilized sick leave inconsistent with the purpose for which sick leave benefits are afforded, it is unknown whether management was aware of the instances and there is no evidence to suggest that the County's treatment of the Grievant was discriminatory or discriminatorily motivated. Given that during the time period in question, the Grievant worked only 19 of the 43 days, having used 8 days sick leave, 4 days of compensatory time and was scheduled off for the remaining dates, it was reasonable for the County to act as it did in choosing to increase the level of scrutiny placed on the Grievant provided it occurs for a reasonable period of time.

The Union challenges the County's expectation that the Grievant submit written documentation following sick leave use on the basis that Article 13, Section C of the collective bargaining agreement provides the only circumstances in which sick leave abuse can be found and specifies the penalty. This article and section does not apply to these circumstances. The



Grievant has not been found to be a sick leave abuser, has not been absent nor in sick leave status for three consecutive days and her sick leave benefits have not been denied for a period of six months. Provided there are no specific provisions in the labor agreement or a past practice to the contrary, an employer has the right to verify absenteeism and specifically, sick leave use. Common Law of the Workplace, (St. Antoine, 1998) p. 321. Article 13, Section C, is a specific provision that addresses a specific situation. The inclusion of this section by the parties does not negate management's right to manage its workforce. Lacking clear contract language which denies the County the right to monitor employee sick leave usage, the management right clause applies.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

**AWARD**

1. Yes, the County violated the collective bargaining agreement when it issued a written warning to the Grievant on March 22, 2002.

2. No, the County did not violate the collective bargaining agreement when it required the Grievant to submit a physician's certificate for all sick leave absences beginning June 25 provided the obligation does not continue for an unreasonable amount of time.

3. The appropriate remedy is to rescind and purge from the Grievant's personnel file of the written warning issued.

Dated at Wausau, Wisconsin, this 25<sup>th</sup> day of June, 2003.

Lauri A. Millot /s/

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Lauri A. Millot, Arbitrator