

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CITY OF ADAMS EMPLOYEES' UNION
LOCAL 323, AFSCME, AFL-CIO**

and

CITY OF ADAMS

Case 15
No. 61906
MA-12101

(McConnell Leave Grievance)

Appearances:

Mr. William Moberly, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, for the labor organization.

Mr. Robert Ellisor, City Administrator, 101 North Main Street, Adams, Wisconsin, for the municipal employer.

ARBITRATION AWARD

The City of Adams Employees' Union, Local 323, AFSCME, AFL-CIO and the City of Adams are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The union made a request, in which the city concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance concerning the meaning and interpretation of the terms of the agreement relating to medical leaves of absence. The commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held on March 23, 2003; it was not transcribed. The city and union filed written arguments on May 8 and 9, respectively; only the union chose to file a reply brief, which it did on May 20.

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.

ISSUE

The parties stipulated to the following issue:

Did the City violate the collective bargaining agreement when it required Terry McConnell to exhaust his earned vacation during an approved and unpaid medical leave of absence?

The parties further stipulated to the following remedy, in the event the grievance were sustained:

If so, then the City should restore McConnell's 2002 vacation which it required him to use and allow him twelve months to schedule and use it.

RELEVANT CONTRACT LANGUAGE

Article 6 – Sick Leave

Section 6.04 Medical Leave of Absence: An employee who exhausts his sick leave credits and is unable to work due to injury or illness will be granted a leave of absence upon satisfactory documentation by a doctor or chiropractor of his/her inability to perform the duties of his/her position. The Employer is entitled to a medical report, when requested, as to the employee's medical condition. Such medical report should include the approximate duration of the employee's absence and possible limitations upon the employee's return to duty.

...

ARTICLE 19 – EMPLOYER'S FUNCTION

19.01 **Functions of Management**: The Union recognizes that except as herein provided, the Employer has the right to manage and direct the work force. This right includes the following: to subcontract work, provided that jobs historically performed by members of the bargaining unit shall not be subcontracted and further provided that no present employees shall be laid off or suffer a reduction of hours as a result of

subcontracting; the determination and direction of the work force; the right to plan, direct and control activities; to schedule work and assign workloads; to determine methods in work to maintain the effectiveness of the Employer; to determine the employee competence; to create, revise, and eliminate positions; to establish and require observance of reasonable rules and regulations; to select and terminate employees and to discipline and discharge employees for just cause. "Jobs historically performed" shall be defined as street maintenance, water and sewer maintenance, wastewater, snow plowing and removal, and duties performed by Public Works Secretary and City Hall Data Clerk/Deputy-Treasurer positions. If trash collection is returned to the bargaining unit, trash collection would become included in the definition of "jobs historically performed."

- 19.02 **Not Inclusive**: The foregoing enumeration of the functions of the Employer shall not be deemed to exclude other functions of the Employer not specifically set forth the Employer retaining full functions not otherwise specifically nullified by this Agreement.

OTHER REVELENT PROVISIONS

CITY OF ADAMS PERSONNEL ADMINISTRATIVE POLICIES

III. Leaves of Absence

E. Leaves Without Pay

4. Medical Leave of Absence

- a. An employee who will be absent because of an injury to the employee or because of the employee's physical or mental illness, and who has exhausted all of his or her paid sick leave, must request an unpaid leave of absence, accompanied by a doctor's certificate.

BACKGROUND

The grievant, Terry McConnell, was hired by the City of Adams on June 3, 1997, and became a full-time Crewman II on October 7, 1997. In a motorcycle accident on June 24,

2002, 1/ McConnell suffered five broken ribs and damaged the tendons in his left shoulder. Due to his injuries, McConnell was unable to return to work until December 2, a period of 115 work days.

1/ Unless otherwise specified, all further references are to 2002.

At the time of his accident, McConnell had seven days, 3.5 hours of accrued sick leave credits, plus six days, one hour of accrued unused vacation leave. Prospectively, the grievant was also to receive a paid holiday on July 4 and another sick day credit on July 16.

Following the accident, McConnell requested to cover the first 13.5 days of absence through use of vacation and sick leave. Following the use of these leaves and the holiday, the grievant sought and was granted an unpaid medical leave beginning July 17.

On McConnell's fifth anniversary, Oct. 7, he was to receive another 11.65 days of vacation (prorated from the normal fifteen (15) days due to the unpaid leave), for his use in the coming 12 months. On October 3, Street Superintendent David Mead wrote McConnell as follows:

Re: Request for Medical Leave (September 29, 2002)

Dear Terry:

The purpose of this letter is to confirm receipt of your request for Medical Leave dated September 29, 2002 on October 2, 2002 and to summarize our discussion of October 2, 2002.

As to your request for Medical Leave, it is our understanding that you are scheduled for shoulder surgery on Friday, October 4, 2002. Accordingly, you have requested Medical Leave for a period of six (6) weeks after October 4, 2002 (October 7, 2002 - November 15, 2002). Pursuant to the terms of the collective bargaining agreement between the City and the City of Adams Employees Union, your request for unpaid Medical Leave is granted. Please note that as of October 7, 2002 you will have earned 93 ¼ hours of vacation time. Based upon past practice, the City will toll your Medical Leave beginning October 8, 2002 and will require you to use your vacation time. As such, you will be paid for your vacation time beginning October 8, 2002 until such time as your vacation is depleted.

As to our discussion of October 2, 2002, you indicated that your health care provider believed you would be able to return to work without restrictions on or before December 2, 2002. However, you indicated that you would make every effort to return to work prior to this time. Specifically, you indicated that you believed you would be able to return to work within six (6) weeks – at some point prior to November 15, 2002. In addition, you indicated that you would advise the City of the results of your surgery and your progress during your rehabilitation on a regular basis.

During our discussion of October 2, 2002, we discussed the burden your absence has placed on the Department of Public Works. You have been absent since June 26, 2002. As a result, your responsibilities have had to be spread out amongst the other members of the Department, resulting in an increased burden for them. We also discussed with you the fact that this was a busy time of year for the Department and that it would be getting busier as the Department begins a number of new projects. You indicated your understanding and desire to return as soon as possible.

Please be aware that because of the size of the Department and the projects the Department is to undertake, the City of Adams cannot afford to lose one of its employees indefinitely. It is therefore imperative that you return to work as soon as your health care provider clears you, and that you keep the City apprised of your status during your absence. In the event you are unable to return to work without restrictions on or before December 2, 2002, the City will have no choice but to re-evaluate the situation and make a determination at that time as to your employment status.

Should you have any questions, please call.

On October 21, the union grieved, alleging this action constituted a violation of Article 6.04 of the collective bargaining agreement. Mead and City Administrator Robert Ellisor denied the grievance on October 23, stating as follows:

On three separate occasions, two of which were in regards to Mr. McConnell, employees were required to use their vacation time before being granted extended medical leave. Based on past practice, there was no violation of the collective bargaining agreement in this case. The City is, therefore, denying Mr. McConnell's request to reinstate and hold his vacation time until he returns to active duty.

On November 13, the union appealed the denial of the grievance to Step 2, the city Personnel Committee. On November 27, Personnel Committee chair Don Williams wrote McConnell as follows:

Dear Terry:

As you are aware, the City of Adams Personnel Committee convened on Monday, November 25, 2002 to consider your grievance appeal. The appeal pertained to vacation time use and was made pursuant to procedures outlined in Article 13, Section 13.02 of the Union Agreement. Representation from the Union was provided on your behalf by Mr. Jeff Moore. In summation, your appeal contested the policy of exhausting vacation time prior to taking extended medical leave.

Subsequent to hearing and deliberating the facts of the appeal, the Committee rendered a unanimous decision to deny the request to preserve and suspend use of accrued vacation time through an extended sick time leave period. In rendering the decision, the Committee referenced past practice of utilizing accrued vacation time prior to extended leave and management right to uphold policy and practice of employee vacation use.

On December 16, the union filed its request with the commission for grievance arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

The collective bargaining agreement is clear and unambiguous in establishing that an employee who exhausts sick leave credits and is unable to work due to illness or injury will be granted a leave of absence. It is not disputed that the grievant was unable to work due to documented injuries, and that he had exhausted his sick leave credits.

Had the parties intended for the agreement to include the use of vacation as a prerequisite for qualifying for a medical leave of absence they would have bargained that into the collective bargaining agreement. By specifically expressing the conditions that it did, the agreement must have been intended to exclude all other qualifications, including the exhaustion of vacation.

Past practice also supports the union, both for the grievant and for all other employees in the bargaining unit.

Because the grievant complied with the clear and unambiguous conditions of the collective bargaining agreement, it is evident the city violated the agreement. The city should be required to restore the grievant's vacation and allow him twelve months for its scheduling and use.

In support of its position that the grievance should be denied, the city asserts and avers as follows:

Management retains the right to coordinate and schedule employee work hours and time off to provide effective service and productivity, a management prerogative equally important toward maintaining equitable work hours and distribution of labor.

Because the city has a small shop and is responsible for a wide range of vital services, extended absences increase the work demands on the remaining crew. Prolonging an extended leave of absence with accrued vacation time prolongs the burden on other employees, adversely affecting worker morale and hampering productivity through a negative work environment.

As both parties acknowledge, the city has maintained a practice of requiring use of accrued vacation time prior to granting extended leave. In three separate occasions, twice involving the grievant, employees complied with the stipulation of using vacation time prior to being granted extended medical leave. The city has been consistent in application of the policy and the policy has not been contested on prior occasions.

For these reasons, the city did not act outside of its management rights or violate the spirit of the collective bargaining agreement.

In response, the union posits further as follows:

The city's arguments workload and worker morale are not supported by the evidence and were not offered at hearing. Whether the grievant used accrued vacation before an extended medical leave had no impact on the duration of his leave, which was dictated by his recovery time. The city's argument is speculation based on unsubstantiated argument.

DISCUSSION

The contract language at issue in this dispute seems, on its face, fairly clear – employees who have exhausted their sick leave credits and unable to work due to injury or illness “will be granted a leave of absence” upon satisfactory documentation of their inability to perform their duties.

Notwithstanding this language from the collective bargaining agreement, the City required the grievant to also exhaust his vacation bank prior to going on unpaid leave. The City offers three explanations for this course – management rights, practical necessity and past practice.

As noted above, the employer does retain the normal rights of management, including the rights to “plan, direct and control activities,” to “schedule work and assign workloads,” and to “establish and require observance of reasonable rules and regulations.” However, these rights are subject to the normal proviso that they can only be exercised “except as herein provided.” That is, the employer’s general right to manage does not supersede specific provisions of the collective bargaining agreement requiring another course of action. Here, because there is specific language in the agreement setting the conditions and criteria for a medical leave of absence, those terms take precedence over the city’s general management right. 2/

2/ It is worth noting that in those areas where the city’s right to manage is not restricted by a collective bargaining agreement, it has adopted an administrative policy, III/E/4, which, apart from a slightly different sentence structure, provides for the same course of action regarding the mandatory request for an unpaid medical leave following exhaustion of sick leave credits.

The City’s argument as to practical necessity also fails, primarily because it is premised on allegations about workforce morale and productivity which are unsupported by the record. Whether or not requiring exhaustion of vacation prior to use of an unpaid medical leave would indeed reduce the length of an employee’s absence (an assumption the city makes, but one which is also unsupported by the evidence), the record lacks any testimony of documentary evidence regarding the impact on scheduling or the rest of the workforce.

Finally, the City’s reliance on past practice is misplaced. First, it is rarely, if ever, appropriate to even consider past practice when contract language is clear and unambiguous. Moreover, for there to be a legitimate past practice, certain conditions must be met – namely, that the practice be longstanding, obvious and mutually understood. As it is said in the most

famous recitation of the criteria, “(i)n the absence of a written agreement, ‘past practice’ to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties.” CELANESE CORP. OF AM., 24 LA 168, 172 (Justin, 1954).

Here, the purported practice fails on all three prongs. While there were apparently instances, including one in August, 1999, when the parties mutually acted in a manner consistent with the City’s policy, there were others, notably August, 2001, when they did not. The fact that McConnell took leave while still holding two vacation days in the bank in 2001 demonstrates that the parties did not have a practice with sufficient longevity, clarity and universality to overcome the clear and unambiguous language of Section 6.04.

That section provides that employees who have exhausted their sick leave but are unable to work due to a documented illness or injury “*will* be granted a leave of absence....” (*emphasis added*) The collective bargaining agreement makes no reference, either explicit or implicit, to any other qualifying conditions an employee needs to meet before obtaining a leave of absence. Under its terms, the city should have granted McConnell his medical leave upon exhaustion of his sick leave credits, and not required exhaustion of his vacation as well.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is sustained. The City shall restore 11.65 days of vacation to the grievant, and allow him twelve (12) months in which to schedule its use.

Dated at Madison, Wisconsin, this 3rd day of July, 2003.

Stuart Levitan /s/

Stuart Levitan, Arbitrator

SDL/gjc
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