BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME, COUNCIL 40, AFL-CIO

and

COUNTY OF MARATHON

Case 292
No. 61752
MA-12011

(Hoffman Grievance)

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.

Ruder Ware, by **Mr. Dean Dietrich,** Attorney, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin, appearing on behalf of the County of Marathon.

ARBITRATION AWARD

AFSCME, Council 40, AFL-CIO, 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 22, 2003, in Wausau, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received on April 16, 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.

ISSUE

The parties stipulated at hearing that there were no procedural issues in dispute and the matter was properly before the Arbitrator. The parties were unable to stipulate to the substantive issue, thus leaving it to the Arbitrator to do so.

The Union framed the issue as:

> Did the Employer violate the collective bargaining agreement when it refused to grant the Grievant a one year, unpaid medical leave of absence? If so, what is the appropriate remedy?

The County framed the issue as:

> Whether the County violated the Labor Agreement when it decided not to grant continued medical leave of absence to the Grievant? If so, what is the appropriate remedy?

Because the Grievant did not request a one year unpaid medical leave of absence I do not accept the Union's proposed issue nor do I accept the County's framing of the issue since there is no reference in the labor agreement to continued medical leave. As a result, based on the relevant evidence and arguments in the case, I frame the issue as:

> Whether the County violated the collective bargaining agreement on September 9, 2002 when it denied the Grievant's request for an unpaid medical leave of absence from "present to January 2003"? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

The following are provisions taken from the parties' 2000-2002 collective bargaining agreement, hereinafter the Agreement, and are cited, in relevant part:

. . .

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 the contract. These rights include, but are not limited to, the following:

. . .

C. To hire, promote, transfer, assign and retain employees;
D. To suspend, demote, discharge, and take other disciplinary action against an employee for just cause;
E. To relieve employees from their job duties because of lack of work or for legitimate reasons,

. . .

Article 17 – Other Leaves

A. Personal Leave: Applications for leave of absence without pay for personal reasons shall be made in writing on forms provided by the County to the department head. A leave of absence may not be granted for the purpose of taking other employment; however, the term "other employment" shall not include union duties. Union duties do not include the taking of a full-time position with the Union as a representative.

   The granting of such leave and the length of time for such leave shall be contingent upon the reasons for the request. The department head may grant leaves of absence without pay for thirty (30) calendar days or less without further authority of the Personnel Committee. Leave of absence for more than thirty (30) calendar days shall be referred to the Personnel Committee by the department head with a recommendation, and all such leaves, if granted, shall be for a specific period of time.

B. Notice: The Union shall be notified in writing by the department head at the time each leave of absence of more than thirty (30) days is recommended, denied, or authorized, indicating the duration of the authorization and at the time of subsequent renewals. Seniority shall continue to accrue during the authorized leave of absence. No other benefits shall accrue, however, participation in the medical/hospital insurance group will be permitted if the employee pays the full cost of such participation.

C. Military Leave: Employees who are members of a reserve component of the military forces of the United States or State of Wisconsin shall promptly notify the department head and be granted a leave of absence if called for reserve training or duty for civil emergency. Such employees shall be paid the difference, if any, between their regular pay and their military pay for the period not to exceed ten (10) working days per calendar year.

D. Veteran's Leave: Any veteran of the armed forces of the United States of America may be granted an authorized leave of absence to pursue under the G.I. Bill of Rights or any subsequent government veteran's training program, provided the department head determines that such training is of value to the department and the person's position.

E. Educational Leave: Educational leave of absence not to exceed one (1) year may be granted with pay and benefits at the discretion of the Personnel Committee. The employee must agree in writing to remain employed for a period of time equivalent to three times the length of leave of absence. If that amount of service is not rendered, the employee shall be required to make repayment of that expenditure within sixty (60) days of termination.

F. Medical Leave: In the event of an extended absence due to sickness or temporary disability stemming from such causes as heart attack, stroke, cancer, pregnancy, etc., the employee may take an unpaid medical leave of absence up to one (1) year so as to retain a sick leave balance for use after return to work. Such medical leave of absence may be requested as specified above.

. . .

BACKGROUND AND FACTS

The Grievant, Emma Hoffman, began her employment with the County on May 13, 1991 as a Corrections Officer. Hoffman maintained continuous employment with the County until September 11, 2002 at which time she was administratively terminated. Hoffman was elected Union President in 2002 and held such position through the date of the hearing.

This grievance precipitated from a non-work related medical condition of the Grievant and her subsequent absences from work due to the medical condition. The chronology of her condition is as follows:

Hoffman requested and was approved for a two-week medical leave from December 15, 2001 through December 29, 2001 due to health problems associated with her back. This time period was calculated against her 2001 State and Federal Employee Medical Leave. Hoffman's Medical Certification form completed by her physician, Dr. Grim, indicated that Hoffman was suffering from a "herniated cervical disc with severe pain" which commenced during October 2001 and that the duration of the condition was "unknown – possibly 6-8 weeks" with an estimated return to work date of "4-6 weeks."

On December 28, 2001 Hoffman requested additional medical leave time which was granted by her supervisor, Captain John Reed. From December 28, 2001 through January 8, 2002, she used accumulated sick leave and vacation leave. From January 10, 2002 through March 25, 2002 Hoffman used and exhausted her State and Federal Employee Medical Leave.

County Personnel Specialist Carol Pasnecker sent a letter to Hoffman dated February 20 which reviewed the communications between Hoffman and Pasnecker as it related to a requested medical certificate:

> Since their (sic) was no mail delivered on Monday due to the President's Day holiday, I first called you yesterday to inquire why you did not yet return the updated medical certification due last Friday, February 15th. You indicated your surgeon would not complete the form until he saw you again today and that you would then have your husband bring the completed form to me today.
>
> I did not receive the completed medical certification. Instead you left a voice mail indicating the surgeon will not complete the form and wants your primary physician to provide the required medical documentation. In addition, you indicated your primary physician will not complete the form until you meet with him next Monday, February 25th for a pre-surgical appointment. You also related you do not know when your neck surgery will be scheduled.
>
> You may have one additional extension to submit to me the completed Medical Certification form by next Tuesday, February 26th. This is your responsibility since any further delays in providing the required updated medical documentation could affect your continued eligibility for Federal Employee Medical Leave.
>
> I appreciate your assistance.
>
> /s/
> Carol Pasnecker, PHR
> Personnel Specialist

Hoffman responded to Pasnecker's letter in writing on February 22 and informed Pasnecker that she would be seeing her primary physician, Dr. Grim, on Monday, February 25 and that the form would be delivered to Pasnecker on February 26.

At Hoffman's February 25 appointment with Dr. Grim, he indicated that Hoffman was not able to perform all functions of her position and that she needed to be absent from work for treatment. Dr. Grim did not indicate an estimated return to work date.

In advance of surgery scheduled for March 12, Hoffman requested from Sheriff Randy Hoenisch 30 days of medical leave. In her request, Hoffman informed Hoenisch that she would need to be off work for a time period of between four and nine months following surgery. Hoenisch approved the 30 day unpaid county medical leave, from March 26 through April 24 in a letter which read in pertinent part:

. . .

> Since you indicated in your March 10th letter that your surgeon expects you to "be off anywhere from 4 to 9 months", you will need to again submit a written request for any additional medical leave beyond April 24th. Prior to Tuesday, March 26th, please submit this request plus the following updated medical documentation from your surgeon relating:
>
> - A more specific date or time period you can return to work. Four to nine months is too broad of a time period for me to determine the impact of your absence.
> - Will you be able to return to work with or without any restrictions. (sic)
> - If there are restrictions, provide detail concerning these restrictions and how they apply to your job duties and requirements. A copy of the Corrections Office class specification and "Employer's Statement of Job Requirements" is enclosed for your surgeon's review.
>
> I will review this medical information to better assess if or how much additional leave I can further consider. If I recommend the additional time off, the Personnel Committee will also need to approve the leave during their April 1st meeting.

. . .

Hoffman was unable to obtain the necessary forms for Hoenisch before the April 1st Personnel Committee meeting and informed Hoenisch of same. Hoenisch recommended to the County Personnel Committee a 12 calendar day unpaid medical leave to allow him the opportunity to "better determine what recommendation" he would make in response to Hoffman's request for nine months of unpaid medical leave. The Committee approved the 12 days of leave from April 25 through May 6.

Hoffman's surgeon, Dr. Paul Jensen, completed a County provided Medical Assessment form on April 11 which indicated that he did not believe Hoffman would have a permanent disability that would affect her ability to perform her job explaining "currently Ms. Hoffman has significant physical limitations and will for a period of 6 to 9 months. At this point it is "too early to determine any long term limitations or restriction" and further, that it was "too early to determine" whether she would have any permanent restrictions that would affect her return to work.

At its May 6 meeting, the Personnel Committee approved four of the nine requested months of unpaid County medical leave for Hoffman and recommended to the County Hiring Moratorium Committee that the position be double filled.

Hoenisch, knowing that Hoffman desired additional leave time due to her inability to return to work, informed Hoffman during August 2002 that the Personnel Committee had changed its expectations for employees requesting unpaid leave. Employees were now required to submit revised forms including a Request for Unpaid County Medical Leave form and a medical information release. Hoenisch requested that Hoffman return the forms to him by August 21 and let her know the date and time of the Personnel Committee meeting.

The Personnel Committee addressed Hoffman's Unpaid County Medical Leave request from "present to Jan 2003" on September 9, 2002. Hoffman submitted the leave form and Medical Assessment form as provided by Hoenisch. Inclusive to the Unpaid County Medical Leave form, Hoenisch responded to questions as follows:

> 7. How will the approval of this additional leave affect your department operational issues (scheduling, staffing levels, morale, past practice, availability of light duty work if requested, etc.)?
>
> This position was authorized for a double fill. It has not been filled due to other previous vacancies in the Corrections Division, and postings that occurred. Currently the day shift is still operating with this position vacant.
>
> 8. What additional costs will your department incur if this leave is approved (overtime, additional wage & benefits due to double filling, unemployment cost, etc.)?
>
> As stated, this position was authorized for double fill. We continue to pay overtime for vacant shifts due to minimum staffing level requirements.
>
> 9. As the department head, what is your recommendation concerning this request for additional leave?
>
> I recommend this request for continuation of unpaid leave be denied. The length of the leave has become problematic and there is continued uncertainly pertaining to permanent disability.
>
> 10. Any additional comments:
>
> I would be willing to consider reinstatement rights within 24 months if the employee successfully meets medical and physical requirements of the position. The employee must be capable of returning to unrestricted full duty as a Correctional Officer.

The County Medical Assessment form, dated August 1st read in relevant part:

> . . .
>
> 2. Amount of additional time off from work required to recover from medical condition:
>
> Unknown at this time but currently considering return in January
>
> . . .
>
> 4. Will Ms. Hoffman have a permanent disability which will affect her ability to perform her job duties (See attached information about Corrections Officer job duties.)
>
> Unknown at this time
>
> 5. Will Ms. Hoffman have permanent restrictions with regard to the performance of her job duties when she returns to work? (Refer again to attached information about Corrections Officer job duties.)
>
> Unknown at this time.

Personnel Director Frank A. Matel informed Hoffman that the Personnel Committee had denied her request for additional unpaid leave. The September 10 letter read as follows:

> This letter is written confirmation of the Marathon County Personnel Committee's decision to deny your request for additional unpaid leave time. You have previously exhausted all leave entitlements under both Federal and State Family and Medical Leave Acts and your Collective Bargaining Agreement. The Sheriff has granted an additional 30 days of unpaid leave and the Marathon County Personnel Committee then granted another 12 days of unpaid leave. On May 6, 2002, the Personnel Committee granted an additional 4 months of unpaid leave. You have been on continuous leave from December 15, 2001 through September 9, 2002.
>
> The County has been advised that you are not able to return to work and fully perform any duties of your position. The County has also been advised that you do not anticipate to return to your duties in the near future.

> Your employment, therefore, shall be administratively terminated effective September 10, 2002.
>
> The Sheriff will consider reinstatement rights within 24 months if you can meet the medical and physical requirements of the correctional officer position and return to unrestricted full duty. This is no guarantee of future employment. Good luck in your recovery and future endeavors.
>
> /s/
> Frank A. Matel
> Personnel Director

On November 12, 2002, the Grievant filed the pending grievance alleging that Article II, Section D of the labor agreement had been violated. The grievance was immediately advanced to arbitration since the County Personnel Committee had already ruled on the issue thus placing the grievance properly before the Arbitrator.

The factual background set forth to this point is undisputed. The balance of the background is contained in the parties' arguments and in the **DISCUSSION** section below.

POSITIONS OF THE PARTIES

Union Initial Brief

The Union argues that the language of the collective bargaining agreement is clear and expressly provides employees with the discretion to utilize up to one year of unpaid medical leave of absence. Consistent with arbitral authority, this language is to be given its full effect and, lacking ambiguity, the clear language is to be applied. Even if the parties do not agree as to the meaning of the language, this, in and of itself, does not allow for the automatic conclusion that the language is unclear. Rather, it is the obligation of the Arbitrator, consistent with the negotiated grievance procedure, to determine whether the language in dispute is unambiguous and thus entitled to enforcement or ambiguous and subject to interpretation.

Given that the grievance procedure limits the Arbitrator to only the terms of the labor agreement where the alleged breach occurred, the Arbitrator is restricted solely to the medical leave section, Article 17, Section F. Article 17, Section F includes the discretionary term "may" "which is preceded and qualified by the word "employee" making it crystal clear that the option is not up to the employer, but rather the employee." (brief, p. 5, underline in

original). This language is clear and vests all discretion as to whether unpaid medical leave will be used with the employee provided the employee has a qualifying medical condition. There is no question the Grievant qualified in that she suffered from a serious and fully documented medical condition which required a long and painful healing process. Having met the qualifying medical condition requirement, the Grievant was entitled to unpaid leave for an automatic one year time period and the County's denial was inconsistent with the express language of the agreement and intent of the parties.

The parties' intent as to Section F is discernable when contrasted with Section E. Section F clearly grants the discretion as to whether or not to take unpaid medical leave with the employee. Conversely, in Section E, Educational Leave, the discretion as to whether an employee will take educational leave is grounded in the negotiated language "may be granted" which places the decision making authority in the employer. It is emphasized to the Arbitrator that the difference in the language between Section F and Section E is likely due to the lack of choice an individual has when taking medically necessary leave and the option an employee exercises when requesting unpaid educational leave.

The parties' intent to allow an employee the discretion of taking up to one year of unpaid medical leave is further supported by an examination of the motives of the parties when drafting the labor agreement. The purpose of the medical leave language was to guarantee a minimum of a year's leave to employee's with serious and debilitating medical conditions. This makes good labor and human relations sense in that it does not "throw out to the wolves" an employee who is ill and has exhausted his or her accrued sick leave. This purpose would not be attained if it were up to the employer to determine when a seriously ill employee is entitled to unpaid medical leave, especially since there is no cost to the employer.

Finally, in the event that the Arbitrator determines that the language is ambiguous, that ambiguity has been clarified by the actions of the parties when presented with similar circumstances in the past. The Union submitted an unchallenged lengthy exhibit which establishes a longstanding and unequivocal past practice of the County granting medically necessary leaves. (Exhibit 2). Pointedly, there is no instance in the history of the parties where the Personnel Committee denied an extended unpaid medical leave request.

County Initial Brief

The County argues that the language of the collective bargaining agreement is clear and the County acted within its contractual rights when the Personnel Committee did not authorize an extension of Hoffman's unpaid leave of absence. Further, the Committee's decision was based on a rationale justification and thus is not subject to being overturned by the Arbitrator.

Article 17 of the labor agreement is clear and unambiguous. Section F provides the County with the right to approve or deny employee requests for unpaid medical leave of absence. The manner in which requests are to be submitted, Section A, is referenced in Section F. This is the procedure the County and the Union have historically followed when addressing requests for unpaid medical leave. This procedure arises out of the County ordinance that governed these employees prior to their organization with a labor union and was relied upon when drafting the labor agreement. Further, the procedure identified in Article 17 was followed by the Grievant and the County in this matter.

Article 17 affords the Personnel Committee with decision-making authority when addressing requests for unpaid County medical leave. The language of Section F includes the phrase "if granted" and therefore had it not been intended for the Committee to have discretion, the phrase would not have been written into the section.

The past practice and bargaining history further confirm that the Personnel Committee has the discretion to grant or deny requests for unpaid County medical leave. The bargaining language originated from the 1983 Personnel Ordinance and was essentially incorporated into the parties' initial labor agreement with only the addition of "up to one year" added to the contract. This language is the same as that contained in the current agreement, albeit a change in the name of the committee, and is the practice followed by the parties. In addition, given that the Union has never filed a grievance challenging the County's consistent practice of processing requests, it has acquiesced to review and approval or denial by the County Personnel Committee. This, coupled with the Union's decision to not grieve the Personnel Committee's denial of the Grievant's request for a nine month unpaid medical leave proves the County's interpretation and application are consistent with the intent of the parties.

Finally, application of the rules of contract interpretation require the Arbitrator to find for the County. Labor agreements are to be construed as a whole and effect is to be given to all words and phrases. Noting that the second sentence of Article 17, Section F refers to Section A which grants the Personnel Committee the discretion to grant or deny requests, the Union's interpretation that one year of leave is an automatic would render the second sentence of Section F meaningless. Further, accepting the Union's interpretation would render meaningless the recommendation from the department head since the one year leave is automatic. Finally, Article 17, Section B specifically notes that the Personnel Committee may deny the requested leave of absence and affirms that denial of requests was contemplated by the parties.

Moving to the action of the Personnel Committee, it was neither arbitrary nor capricious and thus, even if the Arbitrator finds that the language of the labor agreement is ambiguous, the County's action may not be overturned. Referring to the decision reached by

Arbitrator Stephen G. Bohrer in SCHOOL DISTRICT OF DRUMMOND, WERC MA-10898 (BOHRER, 3/00), lacking an arbitrary or capricious decision by the County, the County has wide latitude in its application of discretion when making it's decision as to what qualified for requested leave. The record establishes that the County made its decision on a rationale basis, "the Grievant's medical documentation was lacking", (brief p. 33) and it should be sustained. Even if the Arbitrator were to find the County's decision to be arbitrary or capricious, the only remedy available is to overturn the Personnel Committee's decision and grant the one year unpaid leave request. A monetary award for damages, as sought by the Union at hearing, is not causally connected to the Personnel Committee's decision to deny her request for unpaid leave and, consistent with the decision of Arbitrator Richard B. McLaughlin in BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF MELLON, WERC MA-7953 (MCLAUGHLIN, 3/94).

Union Reply Brief

The Union agrees with the County's contention that the language of the collective bargaining agreement is clear and unambiguous, but takes issue with the County's conclusion that the language "clearly and unambiguously" vests the Personnel Committee with the discretion to deny the Grievant's request. The language expressly provides that an employee with a qualifying condition may take one year of unpaid medical leave.

In response to the County argument that since an employee must "request" the leave from the Personnel Committee, then the Committee must have the authority to deny the request, the Union finds the conclusion faulty. Rather, when an employee meets the only eligibility requirement contained in Section F, a qualifying medical condition, and the employee provides medical certifications that are not "bogus or unsubstantiated", then the employee is entitled to one year of leave.

The record is void of any examples that support the County's reliance on past practice. There is no evidence to show the "overwhelming" support for the County's position because unpaid medical leave requests have been routinely approved by the County. Although the County attempted to rely on other County contracts which made medical leave discretionary, the language of all three other contracts grant the employee the leave warranted. A past practice does not exist which supports the County's interpretation.

The County's attempt to suggest that it was the negotiators' intent to immediately terminate seriously ill employees is an unreasonable interpretation and is inconsistent with the rule of interpretation which favors the avoidance of harsh, absurd or nonsensical results when an alternative interpretation would result in a just and reasonable result.

The Union next challenges the County's reliance on SCHOOL DISTRICT OF DRUMMOND, ID. In that case the language specifically provided the District with the discretion to evaluate leave requests which is distinguishable from the language of Article 17, Section F.

With regard to the remedy, there is little question that the County intentionally violated the spirit and letter of the labor agreement and therefore the Union seeks more than a make whole remedy. The Grievant was required to withdraw her Wisconsin Retirement System employee fund balance as a result of the County's actions and thus her WRS fund credits should be restored. Additionally, a punitive reparation is in order due to the County's callous action. The Union recognizes that punitive or other penalty-type relief is not generally applied in an arbitral forum, however, the egregious conduct of the employer in this case justifies such an award.

For the reasons cited, the Union respectfully requests that the Grievance be sustained.

County Reply Brief

In response to the Union's assertions that the County Personnel Committee was motivated by Union animus, the Union failed to produce facts to support its assertion. The evidence adduced at hearing does not support that either Sheriff Hoenisch or Mr. Matel were motivated by union animus; both were new to their positions and Staff Representative Salamone testified that neither bore animus to the Grievant. The majority of the Personnel Committee was new to County government and as such, had no knowledge of the Grievant's prior union activities or her Union position. Consequently, the claim is baseless and needs to be rejected.

As to the "lengthy record of employees who have been granted extended leaves in the past," this is irrelevant to the matter pending before this Arbitrator. Further, the exhibit is unsubstantiated and incomplete. At best the exhibit supports the conclusion that the County allowed the Grievant to exhaust her accumulated contractual leave and family medical leave in the same manner as it allowed those employees listed on Exhibit 2.

Finally, the County challenges the Union's conclusion that the information provided to the County Personnel Committee indicated that the Grievant would not be permanently restricted in the performance of her duties when she returned to work. Rather, the record establishes that it was "too early to determine" whether the Grievant's condition would result in permanent restrictions.

For the foregoing reasons and those set forth in the County's initial brief, the County requests the Arbitrator deny the grievance in its entirety.

DISCUSSION

This case arises as a result of the administrative termination of the Local 2492-E Union President following the County's denial of her request for unpaid medical leave of absence on September 9, 2002. There is essentially no dispute as to the facts leading up to the County Personnel Committee's decision on September 9, 2002. The dispute lies in the meaning of Article 17, Section F and thus, it is the appropriate place to start.

In contract interpretation cases, the role of the arbitrator is to give meaning to the words and conduct used by the parties in their collective bargaining agreement. *Labor and Employment Arbitration*, 2nd Ed. Volume 1, p. 9-3. When the "plain" or "clear and unambiguous" language of the agreement is ascertainable, it is to be given effect. How Arbitration Works, Elkouri and Elkouri, 5th Edition, p. 470 (1997). If the language is ambiguous, contractual intent is determined through application of 1) the standards of contract interpretation, 2) the concept of past practice and 3) the principle of reasonableness. Common Law of the Workplace, Theodore St. Antoine, (BNA, 1999) p. 65.

Both the County and the Union conclude that the language of Article 17, Section F is clear and unambiguous yet each side asserts a different interpretation. Article 17, Section F provides:

> In the event of an extended absence due to sickness or temporary disability stemming from such causes as heart attack, stroke, cancer, pregnancy, etc., the employee may take an unpaid medical leave of absence up to one (1) year so as to retain a sick leave balance for use after return to work. Such medical leave of absence may be requested as specified above.

This section contains three components. First, there must be a sickness or temporary disability with causation similar to heart attack, stroke, cancer, pregnancy, etc. The Union argues that the Grievant meets this component of the Section in that she has a "fully documented medical condition which required a long and painful healing process." The County did not challenge the nature of the Grievant's medical condition. Although I do not entirely agree with the Union's conclusion that all medical absences for the conditions as contained in Section F are unforeseeable, the Grievant's medical diagnosis is of similar causation to those identified in the Section and I find she met the plain language of the first component of the Section.

Moving to the second component, the maximum amount of time in which a bargaining unit member "may take" a leave is for one (1) year. Discretion rests with the employee. The employee has discretion in multiple areas; whether to take unpaid medical leave; the length of the unpaid medical leave of absence provided it is less than one year; and whether to retain a sick leave balance to be utilized when the employee returns to work. There is no ambiguity in this part of the Section and reading it in isolation, I find the Union's argument more persuasive.

The third component is identified in the second sentence of Section F. The County argues that the Union's asserted clarity in the first sentence is clouded when read in conjunction with the second sentence thus shifting the discretion to the County. Sentence two indicates that medical leaves of absence must be requested and that the requests are to follow a procedure "specified above". "As specified above" is ambiguous to the extent that it is unclear what Section "specified above" is referencing, but accepting the testimony of the Grievant, Sheriff Hoenish, prior Personnel Director and current Deputy County Administrator Brad Karger, and the process followed by the parties in this instance, the section which is

referenced is Section A grants the Committee the discretion to approve or deny the leave request. Arbitrator Richard B. McLaughlin in COUNTY OF MARATHON, WERC MA-5973 (MCLAUGHLIN, 7/90), when addressing the same language presented in this case, found:

> . . . leaves under Article 17 presume the exercise of discretion by the County. Section D specifies a type of cause of "sickness or temporary disability" for which a medical leave may be requested, I find the County's position on the language of Article 17 to be persuasive. The final sentence of the section specifies that the procedure for requesting the leave is "specified above." Section A specifies that granting of leave "shall be contingent upon the reasons for the request." Each of these references presumes the County's exercise of discretion in granting a leave.

I concur and conclude that it was within the County's discretion to grant or deny the Grievant's request for unpaid medical leave of absence provided the decision was consistent with Section A and was not arbitrary or capricious.

Article 17, Section A limits the County to granting or denying applications for leaves of absence based on "the reasons for the request". The County argues that its decision to deny the Grievant's request was for a valid reason and not arbitrary or capricious. Personnel Committee member Karen Piel testified that the Committee did not approve the Grievant's request because of the medical evidence. She testified that there was "not sufficient information to approve", that there was "no basis to grant" the request and that the physician's report was "vague" and lacking a timeframe for the Grievant to return to work.

The Grievant and her physician provided responses to all questions on the newly created Personnel Committee forms. 1/ Lacking within the responses was a date certain when the Grievant would be considered "recovered" and returning to work. Although the Committee may have desired a date certain, the fact that it was unknown to the physician and indicated as such on the form does not make the documentation insufficient. This is not a situation where the County is questioning the reason for the requested leave because there is inadequate documentation as to the existence or extent of an employee's medical condition. Rather, it is a situation where the County desired to minimize the Grievant's time spent on leave when faced with an uncertain return to work date and its concerns as to whether the Grievant would ever be able to return to her former position. Although I find the County's concerns valid, the labor agreement does not provide the County the right to deny unpaid leave requests based on the length of the leave, but rather allows it to deny leave based on the "reason for the request". This is further supported by the language of Section A wherein the parties' reference an "employee returning to work" after an absence of what could be a full year which makes it clear that the parties contemplated that an employee would be absent for

as much as one year and return thereafter. The County's decision to deny the Grievant's leave request is therefore inconsistent with Section A.

1/ The Grievant's unpaid leave request addressed by the Personnel Committee in May 2002 was the progenitor to its decision to change the forms that employees needed to complete when requesting an unpaid leave.

The County finds support in Arbitrator Stephen Bohrer's decision in SCHOOL DISTRICT OF DRUMMOND, ID. Having reviewed the decision, it is distinguishable in that the District was not limited by the language of the labor agreement as to how its discretion was to be applied as it is here.

Having found that the County's denial of unpaid leave was inconsistent with the collective bargaining agreement, the question becomes what is the appropriate remedy. The impact of the County's decision was the Grievant was terminated. But for the County's 24 month restoration period, it would be necessary to address how to remedy the County's action. Since the County has created re-employment rights for the Grievant for 24 months, which is in excess of the 12 months afforded the Grievant by Article 17, Section A, I encompass the County's offer of re-employment for 24 months into this award. The Union seeks restoration of the Grievant's retirement system credits and punitive damages. There is strong precedent against awarding punitive damages in the arbitral setting, but for a limited number of arbitrators who have done so when willful and repetitive violations were found. Remedies in Arbitration, Hill Jr. and Sinicropi, 2nd Edition, p. 447 (1991). The facts of this case do not rise to this level and thus a make whole remedy is appropriate.

AWARD

1. Yes, the County violated the collective bargaining agreement when it denied the Grievant's unpaid medical leave request on September 9, 2002.

2. The appropriate remedy is to revise the Grievant's employment records to reflect an unpaid County medical leave of absence from September 9, 2002 through January, 2003 and to make the Grievant whole for losses, if any, through January 2003.

3. I shall retain jurisdiction for at least sixty (60) days to resolve any questions involving application of this award.

Dated at Wausau, Wisconsin, this 18th day of July, 2003

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

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