BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**KENOSHA COUNTY INSTITUTIONS EMPLOYEES,
LOCAL 1392, AFSCME, AFL-CIO**

and

KENOSHA COUNTY

Case 204
No. 61022
MA-11779

(Grievance #01-1392-004 — R__ H__ — denial of Accident & Sickness benefits)

Appearances:

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, WI 53401-0624, appearing on behalf of the Union.

Mr. Frank Volpintesta, Corporation Counsel, 912 - 56th Street, Kenosha, WI 53142, appearing on behalf of the County.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission (WERC) designated the undersigned, Marshall L. Gratz, as arbitrator to hear and decide a dispute concerning the above-noted grievance under the parties' 2001-03 Agreement (Agreement).

The Arbitrator heard the dispute on October 1 and 24, 2002, at the County's Administration Building in Kenosha, Wisconsin. The hearing was not transcribed, but the parties authorized the Arbitrator to maintain a tape recording of the evidence arguments for his exclusive use in award preparation.

The parties summed up their positions in written briefs exchanged by the Arbitrator on January 21, 2003, marking the close of the hearing.

ISSUES

The parties authorized the Arbitrator to frame the issues for determination. The Union proposed that the issues be stated as follows:

1. Did the County violate the Agreement when it denied R__ H__ Accident & Sickness benefits as regards her absence from work during the period October 14 through October 28, 2001?

2. If so, what is the appropriate remedy?

The County proposed that the issue be stated as follows:

Is "stress" a valid, medically-recognized diagnosis that qualifies for Accident & Sickness benefits under the Agreement?

The Arbitrator frames the issues as proposed by the Union. So framed, the issues include but are not limited to the issue proposed by the County.

PORTIONS OF THE AGREEMENT

ARTICLE XII - ACCIDENT AND SICKNESS PAY MAINTENANCE PLAN

Section 12.1. Accident and Sickness Pay Maintenance Plan. Effective January 1, 1975, an Accident and Sickness Pay Maintenance Plan was established. The following benefits will be paid in a case of non-occupational accident or illness:

(a) All regular full-time employees will receive thirty (30) calendar days at full pay with coverage starting on the first day of accident, if authorized by a physician, first day of hospitalization, first day of out-patient surgery and seventh (7th) day of illness.

(b) From the 31st day to the 365th day, an employee will receive two-thirds (2/3rds) of his regular pay. Regular pay means forty (40) times the employee's regular straight-time hourly rate.

(c) Benefits under this plan are not limited to one (1) accident or one (1) illness per year, but are available any time an employee has an accident or becomes ill; provided that if an employee has received benefits hereunder

and there should be a recurrence of the same condition or illness, no waiting period will apply if there is a recurrence within two (2) weeks of return to work. If there is a recurrence after two (2) weeks on the job, another waiting period will apply.

(d) No payments will be made under the Accident and Sickness Insurance plan unless the employee submits an application for benefits and a doctor's statement shall be submitted to the Personnel Department who will make the necessary arrangements for the payment of benefits.

(e) If, while an employe is being paid under the Accident and Sickness Insurance Program, a wage increase occurs during his absence, he will be paid benefits reflecting such increase.

(f) Benefits will be paid under the Accident and Sickness Pay Maintenance Plan for pregnancy or for any matter relating to pregnancy. The benefits will start after a physician has certified that the employee is no longer able to work on account of disability resulting from pregnancy, and shall continue until such time as the doctor certifies that the employee is able to return to work.

. . .

Section 12.3. Proof of Disability. The County shall have the right to require the submission of adequate medical proof of the employee's disability due to accident or illness. Should there be an extended period of disability, the County shall have the right to require periodic medical proof of the employee's disability.

. . .

BACKGROUND

The Union represents a bargaining unit of non-supervisory personnel employed by the County at its Brookside Care Center in Kenosha. The Union and County have been parties to a series of collective bargaining agreements covering that unit. For many years, those agreements have included a benefit plan of the sort provided in Agreement Art. XII, referred to herein as A&S.

The Grievant is employed at Brookside as a Nurse's Aide, and has been employed there for approximately 20 years.

Shortly after October 25, 2001, the Grievant's family care physician Dr. James Santarelli provided Grievant and the County with a letter which read as follows:

> To Whom It May Concern:
>
> I am the family physician for Mrs. H__ and her family. Her husband has had a recent medical illness and has required hospitalization and her assistance at home. She does need a leave of absence from October 14, 2001 through October 28, 2001, to return to work October 29, 2001 due to stress.
>
> I trust that this will be sufficient for you. If I can be of any further help to you, please feel free to call at 656-[. . .].

On October 26, 2001, Grievant signed an application for A&S benefits as regards an absence from work due to an illness from October 14 through 28, 2001. On that form, Grievant described her disability resulting in the absence as "[u]nder severe stress with occurrences happening to husband's health. Have to care & provide support of two children 2 months & 2 years." Grievant's A&S form included a statement signed by Dr. Santarelli on October 29, 2001, specifying a "Diagnosis and description of illness/injury" as "[p]t. is on stress leave due to husband DVT off work 10-14th 10-29" and in which he further stated "[p]t may RTW as of 10-30-01." (It is undisputed that "DVT" referred to deep vein thrombosis, another term for blood clot, and "RTW" referred to return to work.) The printed boilerplate on the A&S form also included Grievant's authorization to medical providers to release medical records if requested by the County.

After Grievant's completed application for A&S benefits was submitted to the County, the County denied that request for payment of benefits, but the County granted Grievant leave without pay throughout her absence October 14-28, 2001.

The grievance giving rise to this arbitration was filed on November 5, 2001, by Local 1392 President Linda Ingram. The grievance asserts that the County violated Agreement Sec. 12.1(2) and any and all sections that apply by denying Grievant benefit of accident and sickness under the Agreement. The grievance notes that Grievant "received documentation from physician 'stating' employee unable to perform duties due to stress. Management refuses to accept M.D. diagnosis." The grievance requests that the County make the Grievant whole, cease and desist from the above practice; correct Grievant's attendance points; and assure that Grievant receives all monies owed her.

The grievance remained unresolved during further processing and was ultimately submitted for arbitration as noted above.

At the hearing, the Union presented testimony by the Grievant and (by telephone) Dr. Santarelli. The County presented testimony by County Personnel Analyst Robert Riedl.

Grievant testified that, on October 14, 2001, her husband was hospitalized for what turned out to be two previously undiagnosed blood clots that unexpectedly developed from earlier treatment of a work-related knee injury. He was confined to complete bed rest, and the hospital nursing staff advised Grievant and her husband to get their affairs in order because of the potential that Grievant's husband might not survive due to the blood clots. Grievant spent five days and four nights in the hospital with her husband before he was discharged on October 18, 2001. Grievant's husband was unable to drive following his release from the hospital, and his post-discharge treatment included a variety of outpatient services to which Grievant drove and otherwise accompanied and assisted him.

Grievant further testified that on October 18, 2001, Grievant phoned the office of Dr. James Santarelli, a family practice physician who has been both Grievant's and her husband's family physician for several years. At that time, Grievant talked to one of Dr. Santarelli's nurses, explained her husband's hospitalization experience and asked that Dr. Santarelli authorize her to take time off from work because of stress, exhaustion, worry and a need to attend to various appointments for her husband's post-discharge treatment.

Grievant further testified that on October 24, 2001, Grievant and her husband saw Dr. Santarelli for an appointment related to Grievant's husband's follow-up care. During that office visit, Dr. Santarelli asked how Grievant was doing. Grievant said she was feeling better and feeling reassured about her husband's prognosis. Dr. Santarelli commented that Grievant's husband was lucky to be alive and told Grievant that he would do whatever was necessary to assure her time off from work as she had previously requested. Dr. Santarelli thereafter submitted his letter of October 25, 2001, and his physician's statement dated October 29, 2001, and, at Grievant's request, he also submitted another statement to the County dated May 21, 2002, which read as follows:

> To Whom it May Concern:
>
> I am the family physician for Mrs. H__. She has recently gone through a very stressful time between October 18, 2001 through October 29, 2001. Her husband, Chuck, at that time had some very serious medical issues. She was extremely stressed out due to this. Therefore, she was off work between the above noted dates.
>
> I saw her at that time and recommended that she be off work as she was under an extreme amount of stress and unable to perform her regular work duties at full capacity.
>
> I trust this is of help to you. If you have any questions or concerns, please feel free to call at 656-[. . .]."

(It is undisputed that the date references in Dr. Santarelli's October 25, 2001 letter were the correct ones, and that those in his May 21, 2002 letter were not correct.)

Dr. Santarelli testified that he has been Grievant's and her husband's family care physician for at least four years. He based his two letters and his physician's statement on various telephone conversations with the Grievant about her husband's condition and treatment and his observations of and conversation with her on the occasion of her husband's office visit in his office on October 24, 2002. Dr. Santarelli could not state the date and time of any of the telephone conversations, but he asserted that they must have occurred both before and during the period of time he authorized Grievant not to work, or he would not have been in a position to make that authorization.

Dr. Santarelli acknowledged that the references to "stress" in his letters and statement did not amount to a medically-recognized diagnosis. He asserted, however, that what he had referred to as "stress" in his paperwork was, in more technical terms, an adjustment disorder with anxiety and depressive symptoms, DSM IV code number 309.28. He further testified that he based that diagnosis on the fact that when he spoke with her and when he saw her, Grievant had been distraught, showed signs of stress caused by the various events involving her husband's medical condition and care, showed signs of detachment, and showed depressive symptoms including crying and mood swings. He also acknowledged that with regard to those symptoms, he prescribed no drugs, scheduled and had no separate office visit, created no medical record, billed for no services, and conducted no physical examination of the Grievant. Dr. Santarelli further acknowledged that his motivation in attesting to Grievant's need for time off work was to enable Grievant to care for her ailing husband. He also admitted that he was not then aware that the Grievant would have been entitled to unpaid leave for that purpose whether she received A&S benefits or not.

Riedl testified that he has administered the County's A&S plan for the past four years. After receiving Dr. Santarelli's October 25, 2001 letter and the Grievant's application for A&S benefits, Riedl requested Grievant's medical records from Dr. Santarelli's office and spoke to a nurse in that office. Riedl testified that he denied the Grievant's request for A&S benefits and did not request either a conference with Dr. Santarelli or a second opinion concerning the Grievant's claim of illness for the following reasons: Grievant's application provided no medically-recognized diagnosis; there was no record of Grievant being examined or treated for a stress related illness at any material time by Dr. Santarelli; and Grievant's application for A&S amounted to a request to enable the Grievant to care for her husband and family due to her husband's health problems, for which purpose Grievant had previously requested and been granted a blanket approval for unpaid Family and Medical leave through January of 2002.

Additional factual background is noted in the summaries of the parties' positions and in the discussion, below.

POSITIONS OF THE PARTIES

The Union

The County's denial of Grievant's request for A&S benefits violated Agreement Sec. 12.1. Grievant supplied a doctor's statement to the effect that Grievant's absence during the time period in question was "stress . . . due to husband DVT." Under the language of

Sec. 12.1, the County has no right to question the wisdom, accuracy or sufficiency of the physician's diagnosis. Rather, as stated in Sec. 12.1(d), "a doctor's statement shall be submitted to the Personnel Department who will make the necessary arrangements for the payment of benefits."

The Union has shown that in the past the County has, in this and other AFSCME units of County employees, granted A&S benefits in cases of stress, including stress caused by a spouse's medical condition. Because of the confidentiality of medical information about other employees, the Union has been able to produce only a small sampling of what it believes to be a much larger set of similar situations. Those examples support the Union's contention that "stress" is a sufficient basis for payment of benefits under Sec. 12.1.

It should also be noted that, despite the closing paragraphs of both of Dr. Santarelli's letters inviting the County to call him if his letter was not sufficient, the County did not contact Dr. Santarelli himself concerning the matter.

In any event, Dr. Santarelli's arbitration hearing testimony clearly established that Grievant' absence resulted from a disability due to illness. He testified that from his telephone conversations with her and seeing her in connection with providing care to her husband, he concluded that Grievant was in no condition to work and that she was suffering from adjustment disorders and displayed signs of anxiety and depression associated with crying and mood changes.

For those reasons, the County should be ordered to pay the Grievant the five days pay that she lost by reason of the wrongful denial of her request for A&S benefits, and otherwise make her whole.

The County

Section 12.1 provides that A&S benefits will be paid only "in a case of non-occupational accident or illness." "Stress," without more, is not an "illness" recognized in medical parlance and is not specific enough to permit the County to meaningfully assess the legitimacy of the claim by further research or second opinion. If a diagnosis of "stress" alone were sufficient to require benefits, the County would be exposed to widespread and uncontrollable abuse of the A&S plan.

The County's denial of benefits in this case was also appropriate because the Grievant's application indicated she was seeking A&S benefits to enable her to provide assistance and support to her husband and for children in her household. A&S benefits are not available for that purpose. However, the evidence shows that Grievant had been granted blanket use of unpaid family and medical leave to assist her husband with his medical needs.

Dr. Santarelli's attempt in his hearing testimony to change his diagnosis from "stress" to a medically-recognized diagnosis must be rejected for several reasons. Dr. Santarelli is not a mental health specialist. He did not treat or meaningfully examine the Grievant for the "stress" he states she suffered from. The alleged illness involved: no appointment for an office visit by the Grievant either for diagnosis and treatment or for determining the propriety of returning the Grievant to work; no creation of any medical record; no prescription for any medication; no bill for medical services; no physical examination of the Grievant; and at most a few minutes of conversation by phone and during the husband's office visit. Dr. Santarelli admits that he sent the paperwork to the County for the sole purpose of enabling the Grievant to adequately care for his truly injured and ill patient, her husband. The evidence also indicates that Dr. Santarelli was unaware that Grievant would have been entitled to unpaid family and medical leave for that purpose whether she received A&S benefits or not. Finally, the medically-recognized diagnosis offered by Dr. Santarelli in his testimony was given far too late to permit the County to obtain a second opinion regarding that diagnosis.

The previous instances in which the County has been shown to have granted A&S benefits do not support granting it to Grievant in this case. In all of those cases, unlike this one, the employee involved was in fact examined and treated by the attending physician for the illness attested to by the attending physician. Moreover, in all but one of those other cases, the attending physician diagnosed the employee with one or more other specific medically recognized illness(es) in addition to "stress"; and/or the stress diagnosis was stated in a specific and medically-recognized form such as "309.0 Acute Grief" or "Acute Stress Disorder", etc. In Grievant's case, none of the various documentation submitted by Dr. Santarelli to the County identified any medically-recognized illness.

In the only instance of record in which benefits were granted for "stress" alone, the payments resulted from an administrative mistake which the County chose not to correct because benefits had already begun to be paid to the employee involved. However, it is undisputed that Riedl met with the AFSCME local leadership involved and made it clear both that the benefits paid in that case were paid by mistake and that, in the future, the County would not consider "stress" alone to be a sufficient basis for payment of A&S benefits.

In sum, the Grievant presented the County with an insufficient diagnosis that formed the basis for a reasonable denial of her request for A&S benefits. The County's expectations that a qualified physician must make a medically-recognized diagnosis at the time of the application for A&S benefits for an employee to be eligible are reasonable and consistent with the Agreement as it has been applied. The County acted reasonably and fairly in response to the application and supporting information submitted to it by the Grievant and Dr. Santarelli. Based on the information given the County in the original application for benefits, the County was justified in the denial of benefits.

For all of those reasons, the grievance should be denied.

DISCUSSION

Section 12.1 makes benefits payable only "in a case of non-occupational accident or illness." Section 12.1(d) adds that an employee will not be eligible for A&S benefits without first submitting both an application for benefits and a doctor's statement in support of that application.

While the doctor's statement is a necessary procedural requirement, compliance with that requirement does not automatically require the County to pay A&S benefits without a right to question the adequacy of medical proof submitted regarding the existence of a disability due to non-occupational accident or illness. To conclude otherwise would render meaningless the language of Sec. 12.3, providing that "[t]he County shall have the right to require the submission of adequate medical proof of the employee's disability due to accident or illness."

Section 12.1(d), calls for "a doctor's statement." It does not specify the nature or extent of examination on which the statement must be based or the level of technical specificity of diagnosis the statement must contain or that the doctor must be a specialist. For those reasons, the Arbitrator concludes that the doctor's statement will be sufficient to meet the procedural requirement of Sec. 12.1(d) if it is issued by a licensed doctor and if, on its face, it tends to support the employee's claim that the employee's absence resulted from a disability due to accident or illness.

In this case, despite its lack of technical specificity, Dr. Santarelli's October 19 statement, on its face, tends to support the Grievant's claim that her absence resulted from a disability due to accident or illness. That doctor's statement is therefore sufficient to meet the limited procedural requirement of Sec. 12.1(d).

The case does not end there, however. Section 12.3 reserves to the County "the right to require the submission of adequate medical proof of the employee's disability due to accident or illness." Because Dr. Santarelli's written diagnosis was not stated in a specific enough form to constitute a medically-recognized illness diagnosis, the doctor's written letters and statement of record do not, by themselves, constitute adequate medical proof of Grievant's disability due to illness.

Indeed, while there is no Agreement provision requiring a personal office visit appointment, a medical record, a physical examination, a bill for services, or a drug prescription, the absence of those factors make it quite understandable that the County would deny benefits in the circumstances, especially absent a more technically definitive diagnosis in the paperwork submitted by Dr. Santarelli. In other circumstances, that combination of factors might well form a persuasive basis for concluding that the employee involved was not disabled due to an illness.

In this case, however, Dr. Santarelli's arbitration testimony resolves questions about whether Grievant's absence resulted from a disability due to illness. Dr. Santarelli persuasively testified that Grievant's absence was due to an illness which he identified using a medically-recognized diagnosis. He also persuasively described how he had opportunities by telephone and in his office to observe Grievant's symptoms, and he described the symptoms that he observed in Grievant and on which his diagnosis was based. The symptoms described by the doctor appear persuasively consistent with the circumstances surrounding Grievant's husband's hospitalization and recovery, and there is no medical evidence contrary to that offered by Dr. Santarelli's sworn testimony. The fact that Dr. Santarelli admitted that he was motivated to support Grievant's A&S application by Grievant's need for time off from work to care for her husband is not sufficient to overcome the other record evidence supporting the conclusion that the Grievant was, in fact, disabled due to illness.

The County's Sec. 12.3 right "to require the submission of adequate medical proof of the employee's disability due to accident or illness" would have authorized the County to take steps such as the one the Union brief criticizes the County for not having taken, to wit, contacting Dr. Santarelli himself to ask him to clarify his paperwork references to "stress." While the Agreement did not require the County to take that or any other such step, by choosing not to take that step, the County ran the risk that the Union would later present uncontradicted clarifying medical testimony from the physician involved, as the Union did in this case.

The fact that Grievant had been granted a wide-ranging right to take unpaid family and medical leave as needed to care for her husband during a his recuperation from knee surgery does not persuasively indicate that her absence at issue did not result from a disability due to illness. The Grievant's reference in her A&S application to her need to care for two young children did not provide a basis in addition to her stress-related illness for claiming A&S benefits. However her inclusion of that reference in addition to her reference to being "[u]nder severe stress with occurrences happening to husband's health" does not persuasively undercut the legitimacy of her claim of illness any more than the fact that she has only requested A&S benefits one other time during her 20-year career persuasively supports its legitimacy.

Thus, when all of the evidence presented at the arbitration hearing is considered, the Arbitrator is satisfied that the Union has presented adequate medical proof of Grievant's disability due to illness.

Accordingly, the County's continued denial of Grievant's request for A&S benefits violates Sec. 12.1. By way of remedy, the County has been ordered to make Grievant whole for the five days of pay lost and to otherwise restore to her any credits, status or other benefits lost by reason of the denial of the request for A&S at issue in this case.

DECISION AND AWARD

For the foregoing reasons, and based on the record as a whole, it is the decision and award of the Arbitrator on the ISSUES noted above that

1. The County is violating the Agreement by continuing to deny R__ H__ Accident & Sickness benefits as regards her absence from work during the period October 14 through October 28, 2001.

2. By way of remedy for the violation noted above, the County shall immediately make Grievant whole, without interest, for her loss of five days pay and restore to her any credits, status or other benefits that she lost as a result of the denial of her request for A&S benefits as regards her absence from work during the period October 14 through October 28, 2001.

3. The Arbitrator retains jurisdiction for 45 calendar days from the date of this Award for the sole purpose of resolving, at the request of either party, any dispute(s) that may arise regarding the meaning and application of the remedy set forth in 2., above.

Dated at Shorewood, Wisconsin, this 1st day of December, 2003.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator

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