BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE AREA TECHNICAL COLLEGE

and

MILWAUKEE DISTRICT COUNCIL 48, LOCAL 587, AFSCME, AFL-CIO

Case 489
No. 61572
MA-11989

(N.M. Grievance)

Appearances:

Michael, Best & Friedrich, LLP, by **Attorney Amy Schmidt-Jones**, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, WI 53202-4108, on behalf of MATC.

Law Offices of Mark A. Sweet, LLC, by **Attorney Gene A. Holt**, 705 East Silver Spring Drive Milwaukee, WI 53217-5231, on behalf of District Council 48, Local 587 and the Grievant.

ARBITRATION AWARD

According to the terms of the 2001-03 labor agreement between Milwaukee Area District Board of Vocational, Technical and Adult Education (hereafter MATC) and Local 587, AFSCME, AFL-CIO, an affiliate of Milwaukee District Council No. 48 (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint an impartial arbitrator to hear and resolve a dispute between them regarding the discharge of employee N.M., on March 27, 2002. 1/ The Commission appointed a member of its staff, Sharon A. Gallagher, to hear and resolve the dispute. A hearing in the matter was originally scheduled for January 21, 2003, and canceled and rescheduled for February 7, 2003, and canceled again. Although the Arbitrator sought dates in March, 2003, the parties were unable to agree upon a March date. Thereafter, the Union changed counsel and the parties agreed that the arbitration hearing in this matter should be held in abeyance pending the completion of N.M.'s ERD proceeding before the State of Wisconsin regarding her termination.

1/ The initials of the dischargee shall be used in this Award.

On August 18, 2003, Union Attorney Holt contacted the Arbitrator and requested that a hearing be held in the matter. Hearing was then scheduled for October 30, 2003, by mutual agreement of the parties. The hearing was held on October 30, 2003, at Milwaukee, Wisconsin. A stenographic transcript of the proceedings was made and received by the Arbitrator on November 4, 2003. At the hearing herein, the parties originally agreed to post-mark their briefs for the Arbitrator's exchange on December 19, 2003, and they reserved the right to file reply briefs. The parties ultimately agreed to extend the timeframe for briefing and the Arbitrator received initial briefs on January 5, 2004, and reply briefs were received by the Arbitrator on January 30, 2004, whereupon the record herein was closed.

ISSUES

The parties were unable to stipulate to an issue or issues for determination in this case. However, the parties stipulated that the Arbitrator could frame the issues based upon the relevant evidence and argument herein as well as the parties' suggested issues. MATC suggested the following issues for determination:

> Did MATC have just cause to terminate N.M.? If not, what is the appropriate remedy?

The Union suggested the following issues for determination:

> Did the employee's actions surrounding her absence from work constitute just cause for discipline? If so, what is the appropriate discipline and if not, what is the appropriate make-whole remedy?

Based upon the relevant evidence and argument in this case and after having considered the parties' suggested issues, I find that MATC's issues reasonably state the controversy herein and they shall be determined in this case.

RELEVANT CONTRACT PROVISION

Article III – Management Rights

The Board retains and reserves the sole right to manage its affairs in accordance with all applicable laws and legal requirements, except as limited by the specific provisions of this Agreement. Included in this responsibility, but not limited thereto, is the right to:

a. Determine the number, structure, and location of departments and divisions.
b. Determine the kinds and number of services performed.

c. Determine the number of positions and classifications thereof, to perform such services.
d. Direct the work force.
e. Establish qualifications for hire.
f. Test and to hire.
g. Promote and retain employees.
h. Transfer and assign employees.
i. For just cause, suspend, discharge, demote, or take other disciplinary action.
j. Release employees from duties because of a lack of work or funds.
k. Maintain efficiency of operations by determining the method, the means, and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.
l. Make reasonable work rules.

The above rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union.

. . .

RELEVANT ADMINISTRATIVE REGULATION AND PROCEDURE

Code CC1701:

Regular attendance of employees at work is essential for the effective scheduling and completion of work.

Absence is the failure of employees to be at their work assignments during their regularly scheduled hours.

An excused absence from work may be prearranged with the approval of the supervisor or it may be due to an unforeseen need or problem which requires being away from the job. Employees are to notify their immediate supervisors of all absences.

Unexcused absence is being absent from work without leave or proper authorization. It is grounds for disciplinary action unless the employee can show cause that failure to be at work and failure to notify the supervisor was reasonable.

The immediate supervisor will maintain general absence records for all his/her employees and is responsible for reviewing work area attendance daily and maintaining appropriate records and reports for enforcing attendance requirements.

Excessive or willful absenteeism from work will be subject to discipline, including possible discharge.

A. Reporting Absences from MATC

1. When the need for being absent is known in advance, employees must notify their supervisor as far in advance as possible.

2. When employees find that they cannot report for work, they must notify the supervisor before their starting time.

    a. Employees must communicate to their supervisor personally or to the supervisor's designee.
    b. Employees must give specific reasons for their absence (which the supervisor will record) and indicate when they expect to return.

3. When employees return to work, they must complete the appropriate absence form and submit it to their supervisor. For illness or injury-related absences of four or more consecutive work days, a medical statement from a physician is required unless waived by the immediate supervisor after a satisfactory explanation. The medical statement should include the nature of the illness or injury and the dates the employee was unable to perform normal duties.

    a. Supervisors must attach, when applicable, any medical or other documentation to the absence form.
    b. Supervisors must determine if the employee meets all the conditions for absences with pay, prior to taking any action concerning entitlement.
    c. MATC may require further substantiation of reasons for absences, including further medical documentation where appropriate.

B. Reporting Unusual Absences from Work Area

1. When there is a need for employees to be absent from their work area for unusual reasons, they must obtain prior approval from their supervisor or designee.

2. Supervisors must determine if the nature of the request justifies approval with pay, approval without pay, or denial.

C. Reviewing and Controlling Absenteeism from MATC

1. Supervisors have the responsibility to review daily the absences occurring in their departments, paying particular attention to the reasons for absences and the employee's past absence record. The review should include unusual or excessive absences from the work area such as extended break times, extended lunch periods, or early departures.

2. Problem cases will be brought to the attention of the division head or designee by the supervisor for review and determination of appropriate course of action.

3. Employees with excessive or willful absenteeism, as identified by the immediate supervisor, will normally be subject to the following progression of disciplinary steps:

   a. Verbal warning
   b. Written warning

4. Employees who have received verbal and written warnings and continue to have absences will be subjected to the following disciplinary steps:

   a. Suspension
   b. Discharge

5. Depending upon the individual circumstances, disciplinary steps can be eliminated or repeated. For example, absences without leave for five consecutive workdays may be cause for immediate discharge.

. . .

BACKGROUND

The Grievant, N.M., was employed by MATC as a Bilingual Office Assistant in the Student Services Division, Assessment Center from her hire in March, 1996, until her discharge on March 27, 2002. N.M.'s duties included performing reception duties such as greeting people at the front desk, answering the telephone and setting up testing appointments at the Center for students. As many as 150 to 200 people come to the Center daily for services. N.M.'s direct supervisor was Maria Cruz. During her employment (in 1998 through 2001), N.M. had problems with absences and tardiness (Er. Exhs. 4, 5, 7, 8).

N.M. received one non-disciplinary counseling letter on July 28, 1998, which stated that during the period March 9, 1998 through July 28, 1998, N.M. had five absence occurrences (involving seven work days) 2/ and she was tardy twice. On December 9, 1998, N.M. received the following verbal warning (put into writing):

. . .

This memo confirms a verbal warning issued to you on 12/07/98. On 7/28/98, you were issued a counseling letter, in which you were reminded to use the proper procedure to report an absence. On 12/3/98, you called me at 10:40 am. Ms Cira told you, I was not in the office. You left your phone number with Ms. Cira. I tried to call you at 10:50 am. and received no answer. Subsequent calls to your home that day were also unanswered. You did not call any time that day to report your absence, or the reason for it. A phone message at 9:40pm. that evening refers to your expected absence on 12/04/98.

You are expected to report your absences and the reason for them in a timely and proper manner. Failure to do so could result in additional discipline.

. . .

2/ Only one absence occurrence is counted even if the absence stretches across several consecutive work days.

In 1999, N.M. received one non-disciplinary counseling letter for absenteeism during the period April 18 through August 16, 1999, indicating N.M. had 7 absence occurrences involving 13 workdays. On October 2, 2000, MATC issued N.M. another non-disciplinary counseling letter concerning N.M.'s absences/tardiness record for the period July 5 through October 1, 2000. The letter listed 23 tardies and 13 absences over the same number of workdays (Er. Exhs. 4 and 5).

On February 8, 2001, MATC sent N.M. a written reprimand indicating that N.M. had been tardy 14 times and had 7 absence occurrences (over 9 work days) during the period November 1, 2000, to February 7, 2001 (Er. Exh. 7). In this letter, MATC stated, "Please be advised that, should you fail to improve your attendance, you will receive further disciplinary action."

Some time prior to June 11, 2001, MATC and the Union agreed upon a new attendance policy with the goal of improving employee attendance. The parties agreed that MATC should review attendance each quarter and issue counseling letters to employees who were absent three or more times in each quarter with "additional steps of progressive discipline" applied to employees who had more than three absence occurrences in a quarter. Under the new policy, the first "quarter" the parties agreed to review was from January 1 through May 31, 2001.

On June 11, 2001, pursuant to the new policy, MATC sent N.M. a non-disciplinary counseling letter concerning the above-described "first quarter," which showed that N.M. had 9 absence occurrences (on 13 workdays) and 10 tardies (Er. Exh. 4). On October 1, 2001, MATC sent N.M. a verbal warning (in writing) showing that during the prior quarter she had had 5 absence occurrences (covering 12 workdays) and 3 tardies. In this letter, MATC included the above-quoted sentence warning of further discipline.

On February 19, 2002, N.M.'s supervisor, Maria Cruz sent a memorandum to upper management regarding N.M.'s absenteeism problem from December 26, 2001, through February 15, 2002. N.M. was absent on 5 workdays from December 26, 2001, through January 11, 2002, and on 16 workdays from January 14 through February 15, 2002 (Er. Exh. 8). This memo did not result in discipline due to N.M.'s submission of a Family and Medical Leave Request to MATC on January 18, 2002. 3/ Attached to N.M.'s FMLA request was Dr. Ray S. Bender's certification that N.M. (Bender's patient) needed FMLA leave for an indefinite period, commencing on January 14, 2002, for her own serious health condition. N.M.'s FMLA leave was ultimately granted by MATC effective January 14th (Jt. Exh. 5), and it was in effect until MATC discharged N.M. on March 27, 2002.

3/ N.M. had taken intermittent FMLA leave at MATC in 1999 to care for her husband and for her own serious health condition.

FACTS

On February 14, 2002, N.M. learned that her nephew was very ill in a hospital in Spain. 4/ On February 21, 2002, N.M. was scheduled to work but she never went to work that day. At mid-day on February 21st, N.M.'s sister called her from Spain to indicate that her son (N.M.'s nephew) was scheduled for brain surgery on February 22nd — to remove a cerebral abscess — which he might not survive. N.M. was devastated and immediately began making travel arrangements so that she could arrive in Madrid, Spain by 10:00 a.m. the next day before her nephew's surgery. N.M. then called Dr. Bender and left a message, the contents of which Dr. Bender confirmed to MATC by letter dated March 11, 2002, as follows:

> . . . I am writing to relay to you the content of the phone call my office received from Ms. M. on February 21, 2002 at 12:20PM. This is not a verbatim transcript of the call, but the gist of it as my secretary wrote on the phone message slip. It is probably quite close to Ms. M.'s words.
>
> "Cancel appt. 2/26/02 — Family emergency. Has to leave country — Not sure when she will be back. … Nephew has a brain infection [apparently not meningitis, 'but worse']. She also asks that if her employer calls you that you verify with them that she is off on family leave. Nephew is on death bed."

. . .

N.M. then called her Supervisor at MATC, Maria Cruz and got Cruz' voicemail. N.M. stated that she (N.M.) would be out on FMLA leave until March 12 and if Cruz had any questions she should call N.M.'s doctor, Dr. Bender. 5/ N.M. stated herein that she made these calls between 12 noon and 12:30 p.m. on February 21, 2002.

4/ N.M. stated herein that as of February, 2002, she knew she was in trouble for attendance and that to be absent for three weeks might put her job in jeopardy (Tr. 158).

5/ Cruz was not called to testify herein and no tape of this voicemail or a transcript thereof was placed in the record. Although MATC Director of Labor Relations, Michael Sujecki, testified regarding his conversation with Cruz about the voicemail left by N.M. for Cruz, Sujecki could not recall what Cruz told him regarding N.M.'s reason for requesting leave. Therefore, N.M.'s account of the message she left Cruz has been credited herein. I note that Dr. Bender's March 11th letter does not show that N.M. told Bender she was using FMLA leave for her own illness.

N.M. then packed and left for Spain. It is undisputed that N.M.'s nephew had a cerebral abscess, that he had surgery thereon on February 22nd, and that N.M. cared for her nephew in Spain from her arrival there on or about February 22, 2002, until she returned to Milwaukee on Thursday, March 14, 2002 (Jt. Exh. 97). N.M. stated herein that for various reasons, she never called MATC while she was in Spain to speak to her supervisor about her absence. These reasons included the following, she was too busy caring for her nephew when she was gone, that she had no cell phone with her, that there was no phone in her nephew's hospital room, and there is a seven hour time difference between Madrid, Spain, and Milwaukee, Wisconsin. However, N.M. admitted herein that her husband called her on her sister's cell phone some time in early March, 2002, and she told him he should call MATC for her with her new return to work date.

On March 5, 2002, N.M.'s husband called Cruz at MATC and left her a voicemail message, a transcript of which was put into this record as Employer Exhibit 2, as follows:

> . . . I'm calling on behalf of my wife, N.M., to advise you that she'll be returning to work from her family leave on Monday, March 18 or Tuesday March 19. It's of a confidential nature. She's under family leave. She'll be back to work at that time. Thanks a lot. If you have any questions, call me . . . .

Some time during N.M.'s absence from MATC but prior to March 11th, rumors began to circulate at the College that N.M. had traveled to Spain with her husband and that she was not actually ill. At this point according to Subjecki, MATC Manager of Compensation and Benefits, Laura Sutherland, called N.M.'s residence and she then called Dr. Bender to inquire

about N.M.'s need for FMLA leave. Dr. Bender wrote to Sutherland on March 11th indicating the content of N.M.'s phone message to his office on February 21st (quoted above). At this time, MATC also investigated N.M.'s request for leave of her supervisor Cruz.

On March 15, 2002, Associate Vice President of Human Resources and Labor Relations Joyner wrote to N.M. as follows:

. . .

> On January 18, 2002, you requested leave under the provisions of the Family and Medical Leave Act (FMLA), for your "own serious illness." Several days later, the College's Employee Benefits Coordinator granted you FMLA leave based upon the number of hours worked during the previous year and a certification of your serious medical condition from Dr. Ray Bender.
>
> You last day of work at MATC was February 5. On February 21 you called your immediate supervisor, Maria Cruz stating that you were out ill and would not return to work until March 12.
>
> On March 8, 2002, your husband (T.M.) left a telephone message with your immediate supervisor stating that you would return to work on either March 18 or 19, 2002.
>
> On March 12, 2002, we received written confirmation from Dr. Ray Bender that you in fact are neither being treated for a serious health condition nor caring for a member of your immediate family as stated in the eligibility requirements of both the Wisconsin and federal Family and Medical Leave Act.
>
> Therefore, be advised that you have been absent from work without authorization since February 5, 2002. Given this excessive absence from work without authorization, we intend to take disciplinary action up to and including termination from employment.

. . .

Joyner's letter also instructed N.M. to report to her office for a meeting on the day of her return to work. 6/

6/ Neither Joyner nor Sutherland was called as a witness herein.

After her return from Spain on March 14th, N.M. saw Dr. Bender on March 18th. On that date, Dr. Bender wrote the following letter to MATC:

. . .

I have met with Ms. M. and her husband and they have asked me to address two entirely separate issues:

1. My letter of March 11, 2002 to Ms. Sutherland stated that Ms. M. had to leave work to be with her nephew. I was not aware that FMLA specifies "immediate family." She has asked me to relate to you that no one else in her family was able to get away and that her sister was not able to be with her gravely ill son for most of every day because of her own obligations. She will supply you with a letter attesting to the fact that her nephew had a "cerebral abscess" that required surgery and that he is still hospitalized. She has also asked me to relate to you that she feels that her psychiatric condition made it impossible for her to refuse to go to help her sister. She feels that she could well have become suicidally agitated if she were constrained to worry about her sister and nephew from so far away and not have been able to help.

2. She has also asked me to speak to the matter of some intermittent absences from work between February 5 and the day she left, February 21, 2002. These were taken in the spirit of the FMLA papers she asked me to sign on January 18, 2002. The reason for these absences was spelled out in said documents, "anxiety symptoms, agitation, irritability, uncontrollable intermittent anger, decreased concentration and focus, depressed mood, frequent awakening, hopelessness, crying." These symptoms, when present on the job, make it nearly impossible to deal with the public and difficult staying on task.

. . .

On March 19th, N.M. went to MATC and met with Associate V.P. Joyner and her Union steward to answer questions regarding her leave. On March 21st, N.M. and her Union representatives met with MATC Director of Labor Relations Sujecki who asked her a series of printed questions, the answers to which Sujecki summarized on the pages next to each question. Question 25 and the answer thereto recorded by Sujecki, read as follows:

. . .

25. You called Maria Cruz on February 21, 2002 stating that you were out ill and that you would not return until March 12? *No — told her she would not*

be returning until 3/12/02; if any questions to call Dr. Bender; gave no reason for being out — it happened very quickly.

. . .

On March 25th, N.M. wrote to Sujecki, replying to MATC's charges as follows:

. . .

I am writing in regards to the pending disciplinary actions concerning my alleged misuse of FMLA. Please be advised that at no time past or present have I intentionally done anything to misuse or undermine the guidelines set forth in the FMLA.

I believe what occurred was the result of bad judgement and lack of communication on my part.
Please do not interpret this as any kind of excuse for the above mentioned, but, rather the only logical explanation available in my mind at the present time.

Upon my return to work I sought the advice of a different psychiatrist who indicated to me that the level and doses of my medications as prescribed by Dr. Bender did not seem to equate to a proper treatment plan. I feel very comfortable with my new doctor as she has recommended a much more aggressive approach to dealing with my illness and the many symptoms that go along with it. If things work out for me I am hoping for a complete turnaround in my attendance and the other troubling aspects of my life.

Furthermore, I would like to re-tract my response to question #25. I realized that I had stated in the phonemail message on February 21 that I had left for my supervisor Maria Cruz that I would be out on FMLA until March 12. However, I did not state that it was for my own illness. I just stated that I would be out on FMLA until March 12.

. . .

On March 27, 2002, Associate V.P. Joyner sent N.M. a letter of termination which read as follows:

. . .

This letter will serve as notice that you are being terminated from your employment at Milwaukee Area Technical College (Office Assistant, Student Services) effective today, March 27, 2002. The reasons for this action are enumerated below.

You are being terminated for violation of Administrative Regulation and Procedure CC1701 — Employee Absenteeism, and for misrepresenting your use of leave under the Family and Medical Leave Act. You were absent from work without proper authorization from February 21, 2002 until March 19, 2002.

On January 18, 2002, you requested leave under the provisions of the Family and Medical Leave Act (FMLA), for your "own serious illness." Certification of your serious medical condition was received from Dr. Ray Bender. However, the College learned shortly thereafter that you, in fact, were not absent due to your own serious illness, but that you left the country to care for a nephew. Your nephew does not fall into the category of an immediate family member that could warrant leave under the state or federal FMLA.

When you were interviewed on March 21, 2002 in the presence of your union representatives, you confirmed that you left the country on February 21, 2002, and returned on March 14, 2002. You left a voicemail message for your supervisor, Maria Cruz, on February 21, 2002, stating that "you would be out on FMLA" until March 12. No other reason was given. You further stated that if she had any questions that she should contact your doctor, Dr. Bender.

Dr. Bender informed MATC per a letter dated March 11, 2002, that you had called his office on February 21, 2002, and left a message for him. Part of your message to Dr. Bender's office was that "if her employer calls you that you verify with them that she is off on family leave. Nephew is on death bed."

Administrative Regulation and Procedure CC1701 states that in reporting absences from MATC, "Employees must communicate to their supervisor personally or to the supervisor's designee." In addition, "Employees must give specific reasons for their absence…' Also, "absences without leave for five consecutive workdays may be cause for immediate discharge."

You failed to seek proper approval from your supervisor, or any other manager at MATC, for your extended absence. The District cannot condone employees calling and leaving a voicemail message stating that they will be "out" for up to three weeks. Further, language in both the state and federal FMLA's clearly state that leave is available only to take care of either one's own serious health condition, or that of an immediate family member. Again, your nephew does not, under the law, fall into the immediate family member category. You did not truthfully inform the College as to the need for your leave. Additionally, even though you claimed on March 21, 2002, that you were out on "intermittent leave," you were, in fact, absent from work for seventeen (17) consecutive 8-hour workdays.

. . .

On April 4, 2002, the Union filed a grievance on behalf of N.M. N.M. did not attend her fourth step grievance hearing by agreement of the parties. At that hearing, N.M.'s Union representatives argued in part as follows on her behalf (as summarized in the Union's August 8, 2002 letter):

. . .

- Your termination letter alleges that N. violated the Family Medical Leave Act (FMLA) when she left the country for her nephew's illness, and that the absence was not for her "own serious illness" or for an "immediate family member." While the Union agrees that her nephew does not fall under the statute, we argue that her "own serious illness" played heavily in this situation.

  Because of N.'s mental/health condition, the severity of her nephew's illness became a "triggering event" rendering her incapable of performing her job functions regardless of whether she was in or out of the city, and, therefore, generating her own "serious health condition" as defined under the statute.

- On January 18, 2002, a request for FMLA was approved for an indefinite amount of time, that was verified by her doctor, Dr. Ray S. Bender, for N.'s own illness as documented in the termination letter. You, in turn, incorporated the action of N. leaving the country on February 21, 2002, with her original request of January 18, 2002, inferring that she was never absent due to her own serious illness. The Union doubts that N. could foresee her nephew's illness thirty-two days in advance.

  Since N.'s leave request was for an indefinite amount of time, she was not obligated to contact the employer on February 21, 2002, but she was forthright and did inform the employer. She is not being penalized, and that is a retaliatory action that violates the law.

- The employer has been aware of N.'s existing condition since 1998. She has been under the care of Dr. Bender and Dr. Gojko D. Stula since the fall of 1999 through March, 2002, when she changed doctors. She is now being seen by Dr. Marjorie Hawkins. All of the aforementioned physicians have diagnosed N. with the same condition.

- Per your request from Laura Sutherland, Benefits Coordinator for MATC, Dr. Bender wrote a letter on March 11, 2002, documenting the content of a phone call message left by Mrs. M. on February 21, 2002, that you cite in the termination letter of March 27, 2002. In this letter, Dr. Bender points out that his statements are "not a verbatim transcript of the call, but the gist of it," per his secretary, and is "probably quite close to Mrs. M.'s words."

You further cite that part of the message was that "if her employer calls you, that you verify with them that she is off on family leave. Nephew is on deathbed." Your inference was that N. was coaxing the doctor to lie, but, in essence, he would not have been because she was on family leave, as certified by Dr. Bender on January 18, 2002.

- In addition, if you read through the message, it is extremely erratic, which substantiates N.'s state of mind. This is also verified by Dr. Bender's letter of March 18, 2002, which the employer appears to be disregarding.

The Union feels that there is no basis for this termination since N.'s use of the FMLA was still timely under the twelve weeks, which was verified by a physician for her own serious health condition, as stated under the law, so it is our belief that the employer did not apply FMLA properly. The College is also applying its own policies and procedures to this instance, which is superseded by the law.

Therefore, we are asking that N.M. be reinstated and "made whole" with full back pay, benefits, etc.

. . .

On August 23, 2002, Joyner gave the Union the following "grievance disposition" regarding N.M.'s grievance:

Ms. M. was terminated for violation of Administrative Regulation and Procedure CC1701—Employee Absenteeism, and for misrepresenting her use of leave under the Family and Medical Leave Act. She was absent from work without proper authorization from February 21, 2002, until March 19, 2002.

M. requested leave as provided by the Family and Medical Leave Act on January 18, 2002, for her own serious illness. Certification was received from Dr. Ray Bender. M. called and left a voicemail message for her supervisor, Maria Cruz, on February 21, 2002, stating that she would be out until March 12. When it was discovered that Ms. M. may have left the country, Dr. Bender was contacted. Per the letter dated March 11, 2002, from Dr. Bender, to Laura Sutherland, Dr. Bender states that Ms. M. left the following message on February 21, 2002: "Cancel appt. 2/26/02 — Family emergency. Has to leave country — Not sure when she will be back. … Nephew has a brain infection [apparently not meningitis, 'but worse']. She also asks that if her employer calls you that you verify with them that she is off on family leave. Nephew is on death bed."

In Ms. M.'s letter to Mike Sujecki dated March 25, 2002, she states regarding the voicemail message she left for Maria Cruz, "I did not state that it was for my own illness. I just stated that I would be out on FMLA until March 12." As noted above, this contradicts the statement on Ms. M.'s FMLA certification form. M. also states, "I believe what occurred was the result of bad judgement and lack of communication on my part." Ms. M. also stated during the investigatory interview that she left the country on February 21, 2002, "to be with my nephew who was dying."

The Union contradicts Ms. M.'s statement, and argues that the reason for the leave was not to care for her nephew, but that the nephew's illness was "a triggering event" for Ms. M. That is, that she was unable to work because of her own health condition. Ms. M. never offered this explanation during the investigation of this matter and it contradicts her FMLA application. The Union points to the letter of March 18, 2002, from Ray S. Bender, MD to support its argument. In this letter, Dr. Bender states, "She has also asked me to relate to you that she feels that her psychiatric condition made it impossible for her to refuse to go to help her sister. She feels that she could well have become suicidally agitated if she were constrained to worry about her sister and nephew from so far away and not have been able to help." Notably, Dr. Bender states what Ms. M. "asked" him to relate. Dr. Bender does not express any medical opinion that Ms. M's non-medical opinion is correct. The Union also argues that she provided proper notice of her FMLA leave.

The District concludes based upon the facts as described above that Ms. M. left the country to care for her nephew. A nephew does not fall into the category of an immediate family member that could warrant leave under the state or federal FMLA. Ms. M. did not communicate directly with her supervisor and provide her explanation for her extended absence. The only explanation, given in a voicemail message, was that she would be out on FMLA.

The District requires more notice and explanation for an extended absence than what was provided by Ms. M. in leaving a voicemail message. Ms. M. did not obtain approval for her absence from her direct supervisor, or any other Student Services' Manager. The District is not persuaded that the reason for the leave was in fact for Ms. M.'s own health condition as argued by the Union. She received no treatment during her absence. In addition, the letter from Dr. Bender dated March 18, 2002, relied on by the Union as providing a medical justification that her absence was due to her own health condition, is a recitation of what Ms. M. asked Dr. Bender to relate to the District. Nothing has been provided from a medical professional to substantiate the medical conclusions the Union advances.

For all of these reasons, the District had just cause to terminate Ms. M. Therefore, the grievance is denied.

Bonnie Drabowicz, MATC Coordinator of Employee Benefits, stated herein that if MATC suspects an employee has not been truthful about his/her current FMLA leave, MATC will ask that the leave be re-certified by the employee's doctor; and that MATC supervisors can give an employee a "pass" and not discipline the employee if FMLA leave is denied or re-certification is denied, allowing the employee to take unpaid personal leave for the period of his or her absence. Drabowicz stated that MATC's practice is that when an employee requests FMLA or other leave, MATC management assumes the leave will be approved unless and until the employee gets notice from MATC that the leave has been denied (Tr. 126); and that if there is an emergency or an employee cannot come into the MATC office to complete the paperwork for a leave, MATC will send the paperwork to the employee and the paperwork can be submitted (and approved) after the leave has been taken. 7/ Drabowicz stated that she did not send N.M. new paperwork because she did not know that N.M. had requested a new FMLA leave and as N.M. already had an approved intermittent leave for her won serious health condition, N.M. did not have to get a new certification to take intermittent FMLA leave therefor. Finally, Drabowicz stated that MATC only trains its supervisors in the requirements/use of FMLA leave; there is no training offered to employees on the subject.

7/ This was corroborated by Human Resources Director Sujecki (Tr. 83-84).

Human Resources Director Sujecki stated herein that an employee who is absent for 17 days would not automatically be fired by MATC (Tr. 80); that unless an absence of one or more consecutive days is protected by FMLA, MATC will count it as one occurrence under its Attendance Policy; that employees can have more than one FMLA leave at the same time and that N.M. had done this in the past. During his interview of N.M. on March 21st, Sujecki stated that N.M. told him that she went to Spain because she had to be with her nephew; that on March 21st, N.M. never said she went to Spain for her own serious health condition (Tr. 36-37); and that N.M. stated on March 21st that she thought nephews were covered by FMLA (Tr. 72). 8/ Sujecki stated that in MATC's contact with Dr. Bender, Bender never suggested that N.M. asked him to lie or misrepresent the facts and that Bender never stated that N.M. asked him to certify her February 21st absence as having been for her own serious health condition (Tr. 70). Finally, Sujecki stated that Joint Exhibit 3 was not considered in MATC's decision to terminate N.M.

8/ N.M. stated herein that she did not know nephews were not covered by FMLA when she took her leave (Tr. 158).

Union President Haglund stated herein that there were at least five prior cases where employees who had been absent repeatedly were treated less harshly by MATC than was N.M. Haglund stated that in general, MATC may issue a non-disciplinary informational letter to initially inform employees of attendance problems. Disciplinary action can begin thereafter with a verbal warning (confirmed in writing), a written reprimand, and then a three-day suspension. Haglund stated that MATC has given employees three, five, ten and twenty-day suspensions prior to discharge, although the Attendance Policy only provides for three and 10-day suspensions prior to discharge. Haglund stated that MATC supervisors have issued counseling letters followed by verbal and written warning letters, but that sometimes supervisors issue more than one counseling letter rather than issue or increase discipline. Haglund also stated that disciplinary action was frequently expunged after nine months without new violations. 9/

9/ None of the documents submitted by the Union (Union Exhs. 3-7) supported Haglund's assertions that MATC has issued five and twenty-day suspensions (in addition to the policy's stated three and 10-day suspensions) prior to discharge, and there was no evidence submitted to show that disciplinary actions are expunged after nine months without a new violation.

The Union submitted the following examples of past discipline issued to other MATC employees, which it urged were relevant to this case. Union Exhibits 6 and 7 concerned discipline issued in 1999, before the parties agreed (prior to June, 2001) on a new attendance/tardiness policy. Union Exhibit 7 concerned the discharge of Juanita Franco on June 24, 1999. Franco had received a counseling letter on March 10, 1998, for ten absence occurrences (covering 16.5 days) during the period of December 9, 1997, through March 9, 1998. Thereafter, Franco received the following discipline on the dates listed below:

1. 6/17/98 Verbal warning letter for six absence occurrences (over fourteen days) from 3/26/98 through 6/12/98;
2. 9/25/98 Written warning for five absence occurrences (over ten days) and six tardies;
3. 12/28/98 Three-day suspension for six absence occurrences (over thirteen days) and twenty-one tardies;
4. 2/16/99 10-day suspension for six absence occurrences (over five full and two-and-one-half half days) and seventeen tardies;
5. 4/21/99 Last chance letter for being absent more than three days and tardy two days.

The termination letter also noted that after April 21, 1999, Franco was absent on four days and tardy on three days, and that she left early on one day.

Union Exhibit 6 concerned the November 10, 1999 discharge of Rick Crume "for excessive and willful absenteeism." Crume had apparently received two counseling letters: one in November, 1997, for being absent 20 days; and the other in September, 1998, for being absent 15 days. MATC also issued Crume the following formal discipline:

1. 6/98 Verbal warning for being absent fourteen full days and two half days;
2. 12/98 Written warning for being absent twenty-one days;
3. 1/99 Three-day suspension for being absent eleven days;
4. 2/99 10-day suspension for being tardy five days and absent two days.

From September, 1999, through mid-October, 1999, Crume's termination letter also noted that Crume had been absent 17 full days and 2 partial days (over 10 occasions) and that Crume had been absent 100 days since 1997.

In 2002, MATC issued a 10-day suspension to Leonard Jones (Union Exh. 5) for the following conduct. On or about July 8, 2002, Jones called his supervisor, asserting he had a serious dental condition. On July 10th, Jones' supervisor told Jones he had to get a dentist's slip to return to work. Jones returned to work, on July 16th with a dentist's slip that stated he was off until July 15th due to his dental problem. However, as two different colors of ink were used to write the "July 15" return date on his slip, MATC contacted Jones' dentist, who confirmed that the slip had originally read "July 5," requiring a conclusion that the slip had been altered by Jones. On August 9 and September 4, 2002, Jones missed work again and although he called his supervisor each day, he did not give a reason for his absences. Based on the above, MATC suspended Jones for ten days. No evidence was proffered herein to show that Jones had received any other discipline before his 2002 suspension.

On September 22, 2003, MATC issued Rochelle Crawley a 10-day suspension (Union Exh. 4), based upon her attendance record:

1. 6/15/01 Non-disciplinary counseling letter for attendance;
2. 10/2/01 Written warning for violating call-in procedures;
3. 10/8/01 Verbal warning for attendance;
4. 1/15/02 Written warning for attendance.

Also listed on the suspension letter were disciplinary actions taken for non-attendance misconduct: On August 18, 2001, Crawley received a three-day suspension for "abusive language." On February 12, 2002, she received a written warning and on October 15, 2002, she received a three-day suspension for "job performance." The suspension letter also stated that from April 1 through June 30, 2003, Crawley had had three absence occurrences (over six days); and that although Crawley had indicated that one of these occurrences was covered by FMLA, she had not been able to get it certified even after MATC gave her additional time to

get a doctor's certification. After Crawley failed to gain certification, she was issued the 10-day suspension.

Finally, on September 24, 2003, MATC issued Louise Monroe a 10-day suspension for attendance problems (Union Exh. 3). MATC issued Monroe two non-disciplinary counseling letters for her attendance on June 15, 2001 and again on October 15, 2002. MATC issued Monroe the following discipline for attendance:

1. 11/15/01 Verbal warning;
2. 1/15/03 Verbal warning;
3. 3/10/03 Written warning.

From March 13 through 31, 2003, Monroe had three absence occurrences (over four days), and she left work early on one day. On April 8, 2003, MATC met with Monroe and the Union at which time Monroe asserted that one of the three occurrences was due to FMLA. MATC then allowed her time to secure certification thereof. However, Monroe had not submitted certification on July 16, 2003, when MATC held another meeting with Monroe and the Union regarding Monroe's attendance. From April 1 through June 30, 2003, Monroe had three more absence occurrences (over five days). As no certification of FMLA was received prior to September 24, 2003, MATC then issued Monroe a 10-day suspension.

Employer Exhibit 3 is an excerpt from the transcript of N.M.'s deposition regarding her ERD complaint, taken on March 19, 2003, almost one year after her discharge. This transcript was used by Attorney Schmidt-Jones to try to impeach N.M. herein. On this point, N.M.'s testimony at her deposition was wrong at pages 31 and 41-42, when N.M. stated that she had never been disciplined at MATC prior to her discharge. However, at pages 89, 90 and 91, N.M. maintained (as she did herein) that she took "medical leave" on February 21st but did not give a reason why she was taking medical leave. At pages 120-21, N.M. also admitted that the information she gave MATC regarding her leave was misleading and incomplete.

It is significant that N.M.'s ERD attorney submitted a position letter (Er. Exh. 6) in support of her ERD claim that argued that N.M. was fired for having attempted to use FMLA leave in February, 2002, for her own serious health condition. The Union made essentially the same argument in its August 8, 2002 Step 4 Letter (Jt. Exh. 3). The Union has not raised this argument in this instant case.

POSITIONS OF THE PARTIES

MATC

MATC argued that N.M. engaged in "a deliberate course of deception," that N.M. was an opportunist and that she lacked any credibility, requiring a conclusion that MATC was justified in firing N.M. in part, for misrepresenting her use of FMLA leave. MATC asserted that N.M. never provided a medical certification that she had to go to Spain for her own

nephews are not covered by the FMLA definition of immediate family; and that N.M. never claimed before her termination that she mistakenly believed nephews were covered by FMLA.

MATC also contended that N.M.'s reasons for taking leave had shifted or changed during her testimony herein from that in her ERD hearing which showed that N.M. had "lied." At pages 18 through 22 of its brief, MATC listed places in N.M.'s testimony herein and in her ERD proceeding (Er. Exh. 3) that demonstrated this. The reasons N.M. gave ranged from N.M.'s claims that she gave Cruz no reason for her absence on February 21st, that the leave was FMLA but she did not state a reason, that she would be out on medical leave or FMLA for her own serious health condition (ERD hearing at pages 89, 90-91; Jt. Exh. 6 and Step 4 hearing), that she went to Spain to be with her dying nephew (Tr. 141 and March 21 meeting), and that she needed to go to Spain in part due to her own serious health condition and in part to be with her nephew (Tr. 191-192; 203-04). However, because of Dr. Bender's failure to back up N.M.'s original reason(s) for her leave and workplace gossip, N.M.'s attempt to deceive MATC was foiled, according to MATC.

In regard to Dr. Bender's letters to MATC (dated March 11th and 18th), MATC asserted the these letters failed to show that Bender certified (or otherwise justified), N.M.'s absence as due to her own serious health condition. In addition, MATC pointed out that N.M. asserted that she had never authorized Dr. Bender to write the March 11th letter and that on March 18th, the facts showed that N.M. and her husband went to Dr. Bender to try to get him to support N.M.'s claims but that Bender refused to do so, as evidenced by his letter of March 18th.

MATC urged that N.M. was well aware of the requirements of FMLA as she had taken such leave at times during the three years before her termination, each time filling out a form like Joint Exhibit 5 which lists the definition of "immediate family." MATC noted that as of February 21st, N.M. also knew that she had no time off accrued, that she had received discipline for absenteeism in the past and that a multi-week absence could cost her her job unless she could convince MATC she was taking FMLA leave. MATC argued that the voicemail message that N.M. left for Cruz was timed so that she would not have to talk to Cruz and explain herself, that N.M. never offered any reason why she failed to come to work as scheduled on February 21st and that her message that she would be out on FMLA and to call Dr. Bender for details, was misleading, at the very least. MATC questioned why N.M. could not have called MATC after her arrival in Spain and why N.M.'s husband did not clear up where N.M. was and what she was doing in his call to MATC to inform MATC that N.M. was extending her leave. MATC strongly urged that because the Union had not raised the argument that N.M. had mistakenly believed that nephews are covered by FMLA, the Union cannot now fairly raise this defense herein, citing several arbitration awards.

MATC also argued that N.M. had failed to get prior authorization for her "month-long absence" as required by MATC's Administrative Leave Policy which was sufficient to justify her discharge especially in light of N.M.'s "substantial" absenteeism problem (admitted herein

unacceptable. Nonetheless, MATC gave N.M. time to substantiate her FMLA leave but N.M. failed to do so. Because there was no evidence in this case of mitigating circumstances, the Arbitrator should uphold N.M.'s discharge for the reasons given by MATC.

In regard to the defenses raised by the Union that N.M. was treated unfairly compared to other MATC employees in similar circumstances, MATC argued that the past cases cited by the Union were largely distinguishable. Only the Franco and Jones situations involved misrepresentation and the Crume case involved extended absences, making these cases similar in part to N.M.'s case. However, MATC asserted that N.M. clearly misrepresented her leave and she admitted the misrepresentation, while Jones and Franco had not. The facts submitted regarding Crume also failed to demonstrate sufficient similarity to N.M.'s situation, in MATC's view.

Union President Haglund's assertion that progressive discipline is not followed by MATC in cases like N.M.'s and that MATC never terminates employees immediately except for theft were not backed up by any evidence. Thus, MATC urged that Haglund demonstrated "inherent bias and a lack of credibility" on these points. In regard to the Union's other defense — that of N.M.'s impulse control problems, MATC asked the Arbitrator to draw an adverse inference against N.M. as the Union had failed to prove that N.M.'s impulse control problems caused her to engage in "intentional deception" or that it otherwise interfered with her "ability to tell the truth." MATC also noted that the Union did not call N.M.'s physician as a witness herein to address this issue. MATC, therefore, sought denial and dismissal of the grievance.

The Union

The Union asserted that MATC did not have just cause to discharge N.M. Here, the facts showed that N.M. mistakenly believed that she could take FMLA leave to care for her nephew and MATC mistakenly concluded that N.M. had requested leave for her own serious health condition, as MATC assumed that N.M. knew that nephews were not covered by FMLA. The Union contended that MATC failed to prove that N.M. engaged in any misrepresentation by her leave request and it failed to prove that N.M. asked Dr. Bender to cover-up for her. In this regard, the Union observed that N.M.'s message to Cruz stands uncontradicted on this record and that Dr. Bender's record of N.M.'s message to him supports N.M.'s testimony on this point. Indeed, the only person that could have contested N.M.'s testimony was Cruz and MATC chose not to call her as a witness. The Union urged that this record also supports N.M.'s assertion that she viewed her nephew as part of her immediate family and it is undisputed that N.M. has serious mental health problems that were known to MATC. In addition, the fact that N.M. has taken FMLA for different reasons in the past at the same time (for her husband and herself), would lead N.M. to believe that she could do so again in this case.

The Union also noted that MATC failed to follow its own policies and practices in N.M.'s case. In this regard, the Union observed that the evidence showed that in every case but N.M.'s, MATC has granted FMLA leave after the leave began or after it had been taken; that in other cases, MATC had merely sent employees FMLA forms and presumed that a leave would be approved until it was actually denied; that when a leave was ultimately denied, MATC simply counted the absence as one occurrence and allowed the direct supervisor to decide whether or not discipline therefor should be meted out. In N.M.'s case, none of these alternatives was even considered — N.M. was immediately presumed to have engaged in misrepresentation and she was terminated.

The Union argued that MATC's treatment of other employees showed that it treated N.M. more harshly. In regard to the Monroe case, the Union noted that when Monroe failed to get certification for FMLA leave, MATC simply counted the days missed as one occurrence under its Attendance Policy. Regarding Crawley, MATC gave Crawley a 10-day suspension after he failed to get certification for FMLA leave, counting the days missed as one occurrence. In neither case did MATC issue the employees separate punishment for failure to obtain FMLA certification. In the Jones case, MATC obtained proof that Jones had falsified his return to work slip, giving himself 10 extra days of leave. Yet, MATC did not terminate Jones — it merely gave him a 10-day suspension. In the case of employee Crume, the Union noted just how much misconduct MATC has put up with in the past — 4 warnings, 2 suspensions and a total of 100 days missed in just over 2 years, before MATC terminated him. Regarding Franco, the Union observed that Franco had been absent more than 50 days in 1 year, (multiple tardies and many unauthorized days off) and MATC had issued 2 suspensions and a last chance agreement before it terminated Franco.

The Union urged that N.M.'s acts were not intentional and they did not involve theft, which is the only reason MATC has used in the past for immediate discharge. At the worst, MATC should have treated N.M. as it had treated other employees in the past and counted only one occurrence against her for the 17 days she was absent to care for her nephew after she was unable to get FMLA certification for that absence. In any event, the Union sought reinstatement and full backpay for N.M.

Reply Briefs

MATC

In its reply brief at pages two and three, MATC posed a series of questions it asserted the Union never answered. This series of questions read as follows:

. . .

- If M. was not trying to hide the true purpose of her absence, why did she

wait until the middle of the lunch hour on February 21, 2002 to call her employer, given that she was absent the entire day? (Tr. 161.)

- If M. wanted to let her supervisor know about her nephew's illness, why didn't she just say "my nephew is dying" on her voicemail?
- If M. truly intended to request a new FMLA leave on February 21, 2002, why did she not request any FMLA paperwork at the time she left, or simply indicate that she would fill out the necessary forms upon her return? She had taken FMLA many times before, for different reasons. (Tr. 116.) Why the sudden forgetfulness regarding the procedures applicable to such requests? 1/
- If M. fully expected that Dr. Bender would tell MATC that she had flown to Spain to see her nephew (instead of just confirming that she was on FMLA leave as she instructed), why did she object at her deposition that she had not "authorized" Dr. Bender to send the March 11, 2002 letter or "do anything" on her behalf? (Er. Ex. 3 at 124.)
- If M. really told Dr. Bender upon her return that she had made a mistake about coverage under the FMLA, why did he not include that in his March 18, 2002 letter? He noted his own misunderstanding on that point, and he went to great lengths to communicate other self-serving information provided by M. about her state of mind. (Jt. Ex. 8.) Why did he not state the simple explanation for M.'s conduct now presented by the Union?
- For that matter, if M. simply made a mistake, why did she feel the need to go to Dr. Bender and ask him to write a letter on her behalf in the first place? She was in as good a position as anyone to express any confusion about the scope of the FMLA — why would she need backup from her treating physician if she was not claiming the leave related to her own illness?
- If M. made a mistake about the scope of the FMLA, why did she not confess to her error at the March 21, 2002 meeting or in her March 25, 2002 letter? (Jt. Exs. 10, 12.)
- If M. told Malou Noth — an experienced Union representative — about her alleged good faith mistake, why did the Union stake its entire case during the Step 4 hearing on the argument that her absence was for her own health condition? (Jt. Ex. 3.)
- If M. took leave only to care for her nephew, as the Union now claims, why did she file a claim of disability discrimination, under penalty of perjury, claiming that MATC fired her for taking a disability-related leave? (Er. Ex. 6.) Why did she adamantly testify in that proceeding — under oath — that she told her supervisor on February 21, 2002 that she was taking "medical leave" for her own mental health issues? (Er. Ex. 3 at 85, 90-91.)

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1 On this point, MATC must take issue with the Union's representation that "MATC Policy" states that a request for FMLA is presume to be approved,

unless it is denied. (U. Br. 11) No such written "Policy" appears anywhere in

> the record. Ms. Drabowicz gave testimony that this was the general practice at the time, but she did so in the context of discussing M.'s January 2002 request for FMLA leave, which included both a written application and medical certification. (Tr. 126; Jt. Ex. 5) She did not testify that if an employee simply says "FMLA" on a voicemail, that employee could consider the leave approved until told otherwise.
>
> . . .

MATC argued that the words N.M. used on February 21 in her voicemail to Cruz could only be interpreted as a request to take FMLA leave for her own serious health condition. In addition, MATC again cited N.M.'s ERD deposition and complaint in which N.M. claimed she took "medical leave" for her disability or condition (Er. Exh. 3 at 85, 90-91 and Er. Exh. 6). MATC urged that N.M. never claimed she made a mistake until the hearing in this case. MATC argued that the record shows that N.M. did not make any effort to inform MATC about her leave after she left for Spain. In MATC's view, the only reasonable interpretation of N.M.'s actions is that she "deliberately attempted to use an approved leave for an unapproved purpose to avoid being fired for a month-long absence" (Er. Reply, p. 5).

MATC contended that the only policy violations at issue in this case were committed by N.M., not MATC. MATC noted that its Policy required N.M. to personally notify her supervisor before taking leave and to give a specific reason therefor. N.M. failed to do this. MATC Policy also allows MATC to terminate employees who are absent without authorization for five consecutive days. MATC urged that it had no reason to send FMLA forms to N.M. because it properly assumed from N.M.'s message that she was requesting a resumption of her own intermittent FMLA leave.

MATC urged that the past cases of discipline cited by the Union are totally distinguishable and these cases failed to prove that MATC treated N.M. more harshly than other employees. In addition, Union President Haglund admitted that a case like N.M.'s has never arisen. Here, N.M. lied to MATC and stole time off (albeit unpaid); she also chose not to be clear about the reason for her leave prior to her departure for Spain; and she chose to leave the U.S. before she received approval for her leave, and not to keep MATC informed about the progress of her leave. Upon her return, N.M. also chose not to "come clean" with MATC about her leave. In these circumstances, sympathy for N.M. (who admitted she would do anything to save her job) would be misplaced, and her termination should be sustained.

The Union

The Union argued that MATC failed to meet its burden of proof to show just cause for N.M.'s discharge. The Union urged that as all relevant conduct was uncontested and had

discounted. The Union pointed out that no evidence was presented to show that N.M. had stated on February 21st in her voicemail to Cruz that she was taking FMLA for her own health condition. The Union urged the Arbitrator to take notice of the many factual misstatements and inaccuracies in MATC's initial brief.

The Union also reiterated that other MATC employees (Crume and Jones) were not terminated for engaging in more egregious misconduct than that N.M. engaged in and it pointed out that still other employees (Crowley and Monroe) merely had their absences counted against them when they failed to obtain FMLA certification for their leaves. The Union noted that MATC failed to prove the central allegation in its case — that N.M. was willfully dishonest with MATC — which the Union believed demonstrated that MATC's decision to terminate N.M. was too severe.

The Union urged the Arbitrator to fully consider its "mistake" argument in this case. On this point, the Union argued that the cases cited by MATC to the contrary are distinguishable. In GE RAILCAR REPAIR SERVICES, CORP., 112 LA 632 (O'GRADY, 1999), the union raised the argument (later thrown out by the arbitrator) for the first time in its brief. In HENNEGAN CO., 116 LA 1457 (LALKA, 2002), the arbitrator refused to consider an argument/issue regarding an attendance policy not raised in the grievance or during the processing thereof in a case where the attendance policy was never made a part of the record.

In the Union's view, these cases are factually distinguishable from the instant case. Here, the Union raised the "mistake" argument at the instant hearing, MATC did not object thereto and MATC had a full and fair opportunity to submit evidence and argument thereon. In the circumstances of this case, the Union asked the Arbitrator to sustain the grievance to reinstate N.M. and make her whole.

DISCUSSION

MATC discharged N.M. for violating Administrative Regulation and Procedure, CC1701, and for "misrepresenting" her use of FMLA leave on February 21, 2002. Each charge will be dealt with separately herein. In regard to the former charge, CC1701, Section A2, requires employees to "personally" notify their supervisor (or his/her designee) of their absence "before their starting time" and to "give specific reasons for their absence . . . and indicate when they expect to return" to work. N.M. admitted herein that her sister first called her on February 14th with the news that N.M.'s nephew was ill and in the hospital. Although N.M. was admittedly very close to her nephew, N.M. did not speak to her supervisor, Maria Cruz, or any other MATC manager, about the possibility that she (N.M.) might need to go on leave to be with her nephew during his illness. 10/ Rather, N.M. waited until the middle of the lunch hour on February 21st to call Supervisor Cruz.

10/ N.M. admitted that she told some co-workers about her nephew's illness prior to February 21st.

N.M. also stated that her sister had to work during the day, and she could not be present at the hospital

with her son during the day. N.M. stated that she cared for her nephew during the day while he was in the hospital during her visit to Spain in February-March, 2002.

At this time of day, N.M. must have known that it was likely that Cruz would not be present to answer her telephone and that she (N.M.) would simply be able to leave Cruz a voicemail message without having to explain herself. N.M. admitted herein that she was then aware that she had attendance/tardiness problems. N.M. might have feared (on February 21st) that Cruz would not approve her leave to begin that day. At this point, N.M. had no time to lose — her nephew was scheduled for surgery at 10:00 a.m. the next day and she had to travel to him across a significant distance (and an eight-hour time change).

The parties have hotly contested the content of the voicemail N.M. left for Cruz on February 21st, what N.M.'s actual words were in that message, what meaning N.M. intended to convey by her words and what a reasonable person would understand N.M.'s words to mean. N.M. was the only person who testified herein that was present when she left the voicemail. Cruz was not called as a witness and Sujecki specifically stated that he could not recall what Cruz told him N.M. said in the voicemail message. In addition, the ERD deposition of N.M. was not available to MATC management at any time relevant to this discharge case, making N.M.'s testimony therein irrelevant and immaterial on this point. 11/ In my view, the relevant documents before me, as well as N.M.'s testimony herein make clear that N.M. in fact left Cruz a voicemail message on February 21st not asking for leave but merely announcing that she would be going on FMLA leave or medical leave that day and would not return for 2.5 weeks.

11/ Nonetheless, N.M.'s deposition on this point does not vary substantially from her testimony herein.

This conclusion is also supported by the February 21st message that N.M. left for Dr. Bender. It is significant that N.M. had, in the past, been granted two FMLA leaves to care for her husband and for her own serious health condition which might have lead N.M. to believe that she could get a second FMLA leave on February 21st. In addition, N.M. could have reasonably believed that she could begin a new FMLA leave and return to fill out the paperwork thereon, as she had just done in January, 2002, when her own FMLA leave had been granted on January 18th going back to January 14th. Thus, the content of the message N.M. left for Dr. Bender when closely analyzed shows that N.M. believed she could get family leave for the care of her nephew. Furthermore, the content of N.M.'s husband's message to Cruz on March 5th although cryptic, also supports this conclusion as he used the

words "family leave."

However, based upon the facts regarding the "notice" given by N.M. on February 21st, it is clear that the message N.M. left on Cruz' voicemail met almost none of the requirements of CC1701, Section A: N.M. did not speak to Cruz personally, she did not call Cruz before her start time that day, and she did not give specific reasons for her absence except to say she was taking FMLA or medical leave, which in the circumstances, understandably mislead MATC. Even under CC1701 Section B, N.M. should have obtained "prior approval" from Cruz or her designee for an absence from her work area "for unusual reasons." N.M. failed to meet these requirements and therefore N.M. clearly violated CC1701 by the manner in which she took leave on February 21, 2002.

It should be noted that N.M. had been placed on notice of the proper way in which to notify MATC of her absences, based upon a counseling letter she received on July 28, 1998, and a verbal warning (confirmed in writing) dated December 9, 1998, which clearly directed N.M. to call in her absences to her supervisor in a timely fashion and give a specific reason therefor. N.M. cannot claim she was unaware of MATC policy on this point. Thus, MATC had just cause to discipline N.M. for her violation of CC1701 by the manner in which she notified MATC of her February, 2002, leave.

Ultimately, N.M. did not get her February 21st leave certified as FMLA leave. Based upon the content of Dr. Bender's March 18th letter it was reasonable for MATC to conclude that Dr. Bender had not certified N.M.'s February 21st through March 14th absence as due to her own serious health condition. 12/ Therefore, MATC concluded that N.M. was not entitled to FMLA leave for the 17 workdays of her absence because nephews are not considered immediate family members under the FMLA. I turn now to the second reason given for N.M.'s discharge — her "misrepresentation" of her use of FMLA leave.

12/ There is no evidence herein that proves that N.M. asked Bender to certify her February, 2002, leave as being for her own serious health condition. N.M. and Sujecki's testimony herein, and Dr. Bender's March 18th letter, do not prove N.M. ever made such a request.

In its termination letter of March 27th, MATC specifically charged N.M. with "misrepresenting" her use of leave under the FMLA. MATC argued herein that N.M. deliberately deceived MATC, and that she intentionally mislead MATC by her course of conduct concerning the leave of absence she took beginning on February 21st, pointing to N.M.'s ERD deposition and her attorney's position statement in that proceeding. I note that N.M. denied herein engaging in any misrepresentations, any intentional acts or omissions regarding her FMLA leave.

Therefore, the question that must be answered is whether N.M.'s statements and

actions on February 21st and thereafter amounted to misrepresentation. Black's Law Dictionary, (6th Edition, 1990) p. 1001, defines "misrepresentation" as follows:

> Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An incorrect or false representation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead.

Black's, SUPRA, also makes clear that misrepresentations must be of material, presently existing or past facts and made "with knowledge" of the "falsity" of the facts asserted "and with intention that the other party rely thereon. . . ." In contrast, also at page 1001, Black's, SUPRA, defines a "mistake" as follows:

> Some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence. A mistake exists when a person, under some erroneous conviction of law or fact, does or omits to do, some act which, but for the erroneous conviction he would not have done or omitted. . . . A mistake of law happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect.

Based upon my review of the evidence submitted regarding N.M.'s ERD proceeding, and after having read all 134 pages of N.M.'s deposition (Er. Exh. 3), and the record documents surrounding her leave-taking in February, 2002, I conclude that the reasons N.M. gave for her leave were essentially consistent in both proceedings. On this point, I note that in neither proceeding (nor in her voicemail to Cruz) did N.M. state that she was taking medical leave or FMLA leave for her own serious health condition, contrary to MATC's assertions herein (See, Er. Exh. 85-87; 90; 106-107). Joint Exhibit 3, the Union's 4th Step letter, is essentially an argument on behalf of N.M. in which the Union correctly states that N.M.'s mental health condition "played a heavy role" in her actions of February 21st. On this point, N.M. stated in her deposition that her nephew's illness triggered her disorder, that there was more to the story than just her concern over her nephew, and that had she stayed in Milwaukee, she could not have worked due to her anxiety and depression over her nephew (Er. Exh. 3, 107-108; 111-112; 114; 116). Also, contrary to MATC's assertions herein, N.M. clearly stated at her March 21st meeting with Sujecki that she took leave to be with her nephew, not for her own health condition. In addition, my interpretation of Dr. Bender's March 18th letter was that he did express that he had believed, in error, that nephews were covered immediate family members under the FMLA, which to me implies that N.M. had also been mistaken on that point. N.M. stated in her ERD deposition (Er. Exh. 3, p. 117) and in her testimony herein that she had thought nephews were covered by FMLA when she took leave in February, 2002.

MATC appears to require by its arguments herein that all communication between people concerning statutory rights must be precise. This is simply not reasonable, given the fact that MATC does not hold any training for employees regarding the use and requirements

of FMLA and that N.M. and Dr. Bender are not attorneys. Based upon N.M.'s demeanor at the instant hearing as well as her well-documented mental health problems, I believe that N.M. was unable to give much if any thought to what her words or actions might mean or what their ramifications would likely be at the time she left the voicemail messages for Cruz and Dr. Bender.

Clearly, N.M.'s attorney's arguments in the ERD proceeding were not successful and are in direct conflict with the arguments made by the Union herein. I note that N.M. justified her pursuit of her ERD claim on the ground that she felt she was being "crucified for her disability" when other employees have not been treated so harshly. (Tr. 191-2) Although N.M.'s stated reaction is a very human one, the conflicting arguments made on N.M.'s behalf in the ERD proceeding and in the earlier steps of the grievance procedure cannot be ignored and they reflect upon N.M.'s character. 13/ However, it is significant that N.M.'s arguments in her ERD proceeding and her failure to win her ERD case were not relied upon as reasons for her termination in this case and they cannot and do not foreclose her from proceeding on the instant grievance.

13/ MATC argued that N.M.'s testimony herein that her own serious health condition was "interlaced" with her need to be with her nephew and that both of these concerns drove her to request FMLA leave (Tr. 191-7 and 203-4) showed that N.M. should not be credited herein. I disagree. N.M.'s statements were logical, given how her mental health problems would affect her perception of her nephew's serious illness.

It appears to this Arbitrator that MATC initially overreacted to rumors that began to circulate about N.M. having left with her husband to travel to Spain after she had requested FMLA leave in her voicemail message to Cruz. Certainly had this been true, MATC would have been justified in terminating N.M. for misrepresenting her FMLA leave. But, significantly, N.M. submitted proof that she had cared for her nephew in the hospital while she was gone (Jt. Exh. 9) and that she had had insomnia and nervousness problems while in Spain which Spanish doctor, Dr. Villalba, attributed to N.M.'s depression (Union Exh. 2).

As neither Dr. Bender nor MATC manager Sutherland testified herein, we have no idea what their conversation was regarding N.M. In addition, although Sujecki asserted that Sutherland called N.M.'s residence prior to March 11, 2002, there is no evidence that she actually spoke to anyone there (Tr. 50). MATC argued that the voicemail message that N.M. left for Cruz on February 21st, could only be interpreted as a request for FMLA leave for N.M.'s own serious health condition. I disagree. The fact that N.M. asked Cruz to call Dr. Bender if she had any questions makes such a narrow interpretation of N.M.'s message to Cruz untenable. In my view, the content of N.M.'s voicemail to Cruz left MATC with the responsibility to inquire further. MATC then had the responsibility to try to determine the true

facts regarding N.M.'s leave before it assumed that she had misrepresented her use of FMLA leave.

Having said this, I also believe that N.M. was culpable in failing to be specific about her reason for leave in her voicemail to Cruz, and in her failure to attempt to contact MATC while she was in Spain to explain herself. Had N.M. left a message like the one that she left for Dr. Bender and not assumed that MATC would call Bender with questions, this case might have been different indeed.

MATC has argued that the Union waited too long to raise the "mistake" defense on behalf of N.M. and the Arbitrator should therefore disregard that defense. However, I note that N.M. herself raised this defense early on — at the March 21st meeting with Sujecki — and that he recorded it clearly in his notes and he recalled it just as clearly in his testimony herein. MATC chose to ignore this argument and to believe instead that N.M. had intentionally attempted to deceive MATC about the reason for her leave. In addition, the mistake defense was raised by the Union at the instant hearing, no objections were made thereto, witnesses were called by the Union thereon who were cross-examined by MATC and both parties argued regarding this defense in their post-hearing briefs. Thus, the cases cited by MATC 14/ for the exclusion of the evidence regarding this defense are factually distinguishable and do not support MATC's argument on this point.

14/ Cited at page 25 of this Award.

What affect N.M.'s deposition should have on this proceeding. That deposition was not considered by MATC in its decision to terminate N.M., as it had not been taken at that time. As noted above, at most, N.M. wrongly denied therein that she had been disciplined by MATC prior to her discharge. 15/ This has an affect on N.M.'s credibility herein but not a severe one, as her prior discipline is not before me except for purposes of background and the appropriate remedy herein. Therefore, although I am mindful of N.M.'s statements regarding her prior disciplinary record at MATC, they will not significantly affect the Award herein. Based upon the above analysis and conclusions, I am constrained to hold that MATC did not have just cause to discharge N.M. as the evidence herein failed to prove that N.M. had misrepresented her use of FMLA leave, as charged.

15/ No definition of discipline was given to N.M. during this questioning.

The question then arises what discipline should be meted out against N.M. for her failure to properly notify MATC of her leave and for her failure to gain certification of that

leave under the FMLA. The Union put into this record a series of past discipline cases which it asserted are instructive of discipline MATC has given in prior, similar cases (Union

Exhs. 3-7). MATC, on the other hand, asserted that the cases placed in the record by the Union were factually distinguishable from this case and therefore inapplicable.

In the absence of any examples of past discipline which support MATC's assertions herein and based upon my analysis of the Union's evidence on this pint, I agree with the Union that the examples it placed in the record herein are similar to the instant case and instructive herein. Regarding Union Exhibits 6 and 7, I note that Franco and Crume's absenteeism problems manifested themselves over much shorter periods of time than did N.M.'s — Franco was absent 63 days from December 7, 1997, to April 21, 1999; Crume was absent 100 days from November, 1997, through October, 1999. Here, N.M. was absent 72 days from March 9, 1998, through January 11, 2002 (after which her most recent FMLA leave was approved). Therefore, N.M. averaged 14 days per year absent, while Crume averaged 33 days and Franco average 22 days absent per year. 16/ In addition, I note that Franco received verbal and written warnings as well as a three-day and a 10-day suspension before she was issued a last chance letter, all prior to her discharge. N.M. was never once suspended by MATC prior to her discharge. MATC's lax approach in the past to N.M.'s absentee problem did not serve to impress N.M that such behavior is serious and that MATC would not tolerate it. Clearly, Union Exhibits 6 and 7 show that MATC has tolerated worse absenteeism — in the Crume and Franco cases — in the past.

16/ I do not mean to imply that N.M.'s 72 days of absence over almost four years is not serious. It certainly is.

Regarding Union Exhibits 3 through 5, I note that all of these cases occurred after MATC and the Union had agreed to redouble their efforts to get absenteeism under control by having MATC review such records for each employee quarterly and issue discipline whenever an employee had amassed 3 occurrences of absence. The example of Leonard Jones is important to analyze here. In that case, Jones had received no discipline prior to July, 2002. But, Jones was caught falsifying his return to work slip after he had claimed that his absence in July, 2002, was for medical reasons. MATC did not terminate Jones, however, despite his falsification of his return to work slip. Rather, MATC gave Jones a 10-day suspension. In this case, I have found that the evidence failed to show that N.M. misrepresented her use of FMLA leave.

The Monroe and Crawley cases (Union Exhs. 3 and 4) demonstrate what MATC did before N.M.'s situation arose, when an employee cannot (for whatever reason) acquire certification for an absence under the FMLA. It is significant that in neither the Crawley nor the Monroe case did MATC list the number of days each employee had been absent prior to

cases, the employees had had absenteeism problems from 2001 through 2003 and they had received discipline therefor, and (like N.M.) neither employee had been suspended before MATC suspended them for 10 days. No additional discipline was meted out against Crawley or Monroe for failing to acquire certification under FMLA for their absences. Indeed, Monroe who had two non-disciplinary counseling letters, two verbal warning letters and one written warning received the same 10-day suspension as did Crawley who had received one counseling letter, one verbal warning and two written warnings for absenteeism prior to her 10-day suspension.

In all the circumstances of this case, the appropriate discipline for N.M.'s misconduct based upon past practice was a 10-day suspension for her violation of CC1701 and one occurrence (albeit 17 days long) of unexcused absence. N.M. should not take this 10-day suspension as any affirmation of appropriate conduct on her part in this situation. Rather, this Award stands as a last chance for her to mend her ways and demonstrate that she can be relied upon to arrive at work on time when scheduled and if she needs to be absent, that she will call in and properly notify MATC of her absences as required by CC1701. I, therefore, issue the following

AWARD

MATC did not have just cause to terminate N.M. as the evidence failed to prove that she misrepresented her use of FMLA leave. However, as N.M. violated Administrative Regulation and Procedure CC1701 by her failure to properly call in and notify MATC of her absence on February 21, 2002, MATC had just cause to discipline N.M. therefor. In addition, her failure to gain certification under FMLA of her absence beginning on February 21, 2002, must therefore be counted as one absence occurrence under MATC policy and practice. N.M. shall therefore serve a 10-day unpaid suspension effective March 27, 2002, after which she shall be reinstated with full backpay and benefits. 17/

17/ I shall retain jurisdiction of the remedy only in this case for 60 days following the date of this Award should the parties have difficulty agreeing upon same.

Dated at Oshkosh, Wisconsin, this 14th day of May, 2004.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

SAG/anl
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