BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION 695

and

KICKAPOO AREA SCHOOL DISTRICT

Case 19
No. 63636
MA-12653

(John Heal Grievance)

Appearances:

Ms. Andrea F. Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North River Center Drive, Suite 202, Milwaukee, Wisconsin, appearing on behalf of Teamsters Local 695.

Mr. Philip C. Stittleburg, Jenkins and Stittleburg, P.O. Box 9, La Farge, Wisconsin, appearing on behalf of Kickapoo Area School District.

ARBITRATION AWARD

Teamsters Local 695 hereinafter "Union," requested that the Wisconsin Employment Relations Commission appoint a WERC commissioner or staff member to hear and decide the instant dispute between the Union and the Kickapoo Area School District, hereinafter "District" or "Employer," in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Susan J.M. Bauman, a member of the Commission, was designated to arbitrate the dispute. The hearing was held before the undersigned on June 9, 2004, in Viola, Wisconsin. The hearing was transcribed by Laurie A. Johnson, who filed the transcript on June 29, 2004, at which time the record was closed. In lieu of post-hearing briefs, the parties made oral arguments at the close of the hearing. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties were unable to agree on a statement of the issue and agreed that the undersigned would formulate the issue after the hearing.

The Union would frame the issue as:

Did the School District violate the collective bargaining agreement by terminating John Heal; and, if so, what is the appropriate remedy?

The Employer would frame the issue as:

Was the employee properly terminated for failure to report for work?

For the reasons stated below, the undersigned accepts the Union's statement of the issue.

BACKGROUND AND FACTS

The essential facts of this case are not in dispute. John Heal has been employed as a custodian for the Kickapoo Area School District since approximately 1981. Initially a part-time employee, he subsequently became a year-round full-time custodial employee covered by the collective bargaining agreement between the Union and the District. Although there is evidence that Mr. Heal's work attendance may have been problematic at some time in the past, this dispute centers on the fact that he has been unable to work on a regular basis for a significant period of time during the most recent five year period.

From November 30, 1998 to June 30, 1999, the Grievant was absent from work due to back problems. From July 1, 1999 through March 5, 2000, Mr. Heal continued to be away from work due to his back problems. He subsequently had back surgery and was absent from work from July 18, 2000 to January 2, 2001. He was absent from work from March 7, 2001 to March 12, 2001, a time during which Mr. Heal recalls he suffered from pneumonia. During the 1998-99 school year, Mr. Heal worked 107 of 260 possible days. During the 1999-2000 school year, he worked 179 of a possible 262 days. During the 2000-01 school year, Mr. Heal worked 143.5 of a possible 262 days. Mr. Heal was never disciplined for any of these absences and, in fact, was on approved leaves of absences or extensions thereof for all times that he was away from work.

During the 2001-02 school year, Mr. Heal worked 260 of a possible 260 days.

In November 2002, when riding an ambulance in his capacity as a volunteer Emergency Medical Technician, Mr. Heal was injured as a result of an automobile accident. This resulted in a dislocation of his shoulder and absence from work from November 18, 2002 to February 17, 2003. On November 25, 2002 he made a written request for a leave of absence

until approximately January 6, 2003 because of the dislocated shoulder. By letter dated December 11, 2002, Thomas Simonson, Superintendent of the Kickapoo Area School District, advised Mr. Heal that the Board of Education had approved his leave on December 9, 2002, and requested that the District be notified in the event the return to work date changed. Mr. Heal returned to work on February 17, 2003. One of the four surgeries to be performed on Mr. Heal's shoulder caused him to be absent from April 25, 2003 to May 5, 2003. Mr. Heal was on an approved leave of absence during this time. Mr. Heal was not subjected to discipline for any of these absences.

On October 10, 2003, the third of the four surgeries was performed on Mr. Heal's shoulder, resulting in Mr. Heal's being on another leave of absence. On November 13, 2003, Mr. Heal's physician indicated that Mr. Heal was on "work restriction with left-handed work primarily, and he has a lifting limit on his right arm of 3-5 pounds." The District continued Mr. Heal on leave as he could not perform his job duties with these restrictions. No discipline was administered to Mr. Heal at that time.

Another surgery was performed in January 2004. Mr. Heal's leave had been extended as in the past. By written communication dated March 2, 2004, Mr. Heal requested a leave of absence from March 8, 2004 to approximately April 12, 2004 due to the January 30, 2004 surgery and lifting restrictions that had been placed upon him. By letter dated March 12, 2004, Superintendent Simonson advised Mr. Heal that the School Board approved his request for an additional leave of absence "from March 8, 2004 to March 16, 2004, which is the last day of your 12 weeks of Family and Medical Leave."

Mr. Heal did not return to work on March 16, 2004. By letter dated March 17, 2004, Mr. Heal was advised that the School Board was going to "consider and act upon a possible termination of your employment for habitual tardiness or absence from work" at its meeting of March 25, 2004. As of March 25, Mr. Heal had not been released to return to work. At its March 25 meeting, the School Board voted to terminate Mr. Heal's employment with the District, effective immediately. This fact was conveyed to Mr. Heal by a letter from Philip C. Stittleburg, attorney for the District, dated March 26, 2004.

On April 2, 2004, Mr. Heal filed a grievance pursuant to the terms of the collective bargaining agreement between the Union and the Employer, alleging that the termination was unjust under Article 12.01 of the Agreement. The Step II response to the grievance from Supt. Simonson, dated April 14, 2004 reads as follows:

> I am responding on behalf of the Kickapoo School Board who received your grievance filed on April 2, 2004. The board met in executive session on April 12, 2004 and denied your grievance based on your work attendance record for the past five years, the uncertainty of the timeline for you being able to return to work, your physical limitations, and the continued problem of not having a consistent custodial staff to do the job that is required of them.

I am sorry that you didn't have the information from the doctor to me on Monday April 12, 2004 instead of 3:30 PM on Tuesday April 13, 2004 which I could have presented to the school board. If you wish to have the board reconsider your grievance request I would suggest that you submit that request in writing. They will meet again on Monday April 26, 2004.

The information from the doctor referenced in the above is the fact that on April 12, Mr. Heal had been released to return to work without restrictions. In accordance with the Superintendent's suggestion, the Union made a request for reconsideration by letter dated April 19, 2004. The Board reconsidered the grievance in executive session on April 26 and again denied the grievance based on Mr. Heal's work attendance record for the past five years.

Mr. Heal was absent from work from October 10, 2003 until the date of his termination. On April 12, 2004, Mr. Heal was released to return to work without restrictions on his ability to perform any of his job functions.

RELEVANT CONTRACT LANGUAGE

Article 2 – Management Rights

2.01 Management retains all rights or possession, care, control and management that it has by law and retains the right to exercise these functions under the terms of the Collective Bargaining Agreement except to the precise extent such functions and rights are restricted by the express terms of this Agreement. These rights include, but are not limited by enumeration to, the following:

. . .

(b) to establish and require observance of reasonable work rules and schedules of work

(d) to hire, promote, transfer, schedule and assign employees in positions within the school system;

(e) to suspend, discharge and take other disciplinary action against employees;

. . .

Article 4 – Grievance and Arbitration

4.01 A grievance is defined as a complaint or controversy as to the interpretation or application of this Agreement. In case any dispute relative to the provisions of this Agreement arises, grievances shall be handled in the following manner:

. . .

Step 3. . . . an arbitrator shall be selected on application to the Wisconsin Employment Relations Commission. . . . The decision of the arbitrator shall be final and binding on both parties.

Article 10 – Probationary Period and Job Security

10.02 No employee shall be disciplined or discharged without just cause. …

Article 11 – Seniority, Layoff and Recall

11.03 Seniority shall only be broken by discharge, voluntary quit or more than a one (1) year layoff.

Article 12 – Leave of Absence Without Pay

12.01 Any employee desiring leave of absence from their employment shall secure written permission from both the Local Union and Employer. The maximum leave of absence shall be for one (1) year and may be extended for like periods. Permission for extension must be secured from both the Local Union and Employer. During the period of absence, the employee shall not engage in gainful employment. Failure to comply with this provision shall result in the complete loss of seniority rights for the employee involved. Inability to work because of proven sickness or injury shall not result in the loss of seniority rights, except that the employee shall be required at not more than six (6) month intervals to provide such proof of the employee's inability to work as a result of such sickness or injury.

12.02 This Article shall be administered in conformance with federal and state law regarding family and child care leaves of absence, the provisions of which shall apply and extend to this bargaining unit.

POSITIONS OF THE PARTIES

The District

It is the position of the School District that Mr. Heal's failure to report for work on a regular basis over a period of years necessitated his termination. There is not much factual dispute in this matter, as the absences are uncontested. The issue is whether the Board can discharge based upon these absences.

Article 12.01 is the process by which an employee can get a leave of absence without pay. It requires permission, consent of both the Union and the Employer. That is an entirely different process than applies to termination. The section in Article 12.01 relating to a person not suffering loss of seniority rights bears no relationship to the School District's authority to discharge an employee. Article 12.01 merely provides that if an employee has secured a leave of absence without pay pursuant to the terms of that article, they do not forfeit their seniority during that leave time.

The contract specifically states in Article 2.01(b) that the School District has the right to establish and require observation of reasonable schedules of work. In (e) of that section, it provides that the employer has retained the right to discharge employees. Section 10.02 provides that such discharge must be for cause.

The District has cause to discharge in this case where there has been an inordinate number of absences which are not part of a leave of absence without pay that entitle the employer to enforce its right to establish work schedules and expect them to be observed.

The Union

The Union agrees that there are few factual disputes. The parties agree that there were significant absences and that Mr. Heal was absent from work because of sickness or injury. Up until a few weeks before his termination, these absences were covered by approved leaves of absence. The collective bargaining agreement between the parties here is unique in that Section 12.01 provides that "inability to work because of proven sickness or injury shall not result in the loss of seniority benefits except that the employee shall be required at not more than six month intervals to provide such proof of the employee's inability to work as a result of such sickness or injury."

As in all discharge cases, the employer has the burden of proof. Here, in addition to the just cause requirement, the employer has the burden of showing that it has not violated the clear contract language in Article 12.01. The District is imposing a limitation on that language that in not there. To say that the language only applies when the employer has voluntarily

agreed to give the employee a leave of absence makes this non-mandatory language, effectively making it meaningless and applicable only at the employer's discretion. But, the language clearly is mandatory.

Article 12.01 applies to any leave of absence, but it carves out an additional protection for an employee where the inability to work is based on medical reasons. The last part of Article 12.01 provides a clear, undeniable, unambiguous right to the employees. The language clearly prohibits Mr. Heal's discharge.

DISCUSSION

The District, like every employer, has legitimate concerns in wanting to be certain that its employees are consistently available to perform the duties for which they are hired. There is no question that over the past five years, the Grievant's ability to perform his job has been severely compromised as a result of injuries and illness. The District is a small one and has relatively few persons available to perform the Grievant's work in his absence. The District has shown that it has difficulty in hiring individuals on a temporary basis to perform the Grievant's work when he is absent due to illness or injury. When the Grievant has been unable to return to work at the end of an approved leave of absence, additional problems have occurred as temporary employees were not available beyond the period of time for which they were originally hired.

The evidence is clear that the District has afforded the Grievant numerous leaves of absence and extensions thereof, until March 2004. In response to Grievant's last request, the District granted an extension with an end date based upon the Family and Medical Leave Act provisions. In so doing, the District set the stage for the Grievant's termination, as he was not physically able to return to work by the date set by the District. On March 25, 2004, the District terminated the Grievant due to his attendance record.

The collective bargaining agreement between the District and the Union provides that the District may terminate an employee for just cause. The Grievant's inability to perform his job for a significant part of five years might constitute just cause for his termination. That is not, however, the issue before the arbitrator. In order to resolve the dispute between the parties, the undersigned must determine whether the termination resulted in a violation of any provision of the collective bargaining agreement between the Union and the Employer.

The collective bargaining agreement does provide that the Employer must establish just cause for termination, in Article 10.02. However, there is another clause in the collective bargaining agreement that takes precedence in this case. Article 12.01 provides a process for an employee to obtain a leave of absence:

> Any employee desiring leave of absence from their employment shall secure written permission from both the Local Union and Employer. The maximum leave of absence shall be for one (1) year and may be extended for like periods. Permission for extension must be secured from both the Local Union and Employer. During the period of absence, the employee shall not engage in gainful employment. Failure to comply with this provision shall result in the complete loss of seniority rights for the employee involved.

The Article goes further to provide:

> Inability to work because of proven sickness or injury shall not result in the loss of seniority rights, except that the employee shall be required at not more than six (6) month intervals to provide such proof of the employee's inability to work as a result of such sickness or injury.

The District argues that this language, as part of a larger paragraph, requires the mutuality of agreement between the Union and the Employer to grant a leave of absence. The District contends that this last sentence of Article 12.01 does not afford the Grievant the protection claimed by the Union. The undersigned finds the Union's position that the last sentence provides a benefit to employees who suffer from a proven sickness or injury over and above that provided in the first part of Article 12.01 to be persuasive. While the portion of Article 12.01 in question here might better have been written as a separate paragraph or separate article of the collective bargaining agreement, its inclusion in the paragraph in question cannot deprive it of meaning. Basic tenets of contract construction require that all language be afforded meaning. See, Elkori & Elkori, How Arbitration Works, 6th Edition, pp. 463-4.

The District's argument regarding the meaning of this section is undercut by the contradiction between the first portion that references a maximum period of a leave of absence to be for one (1) year, with permissible extensions for like periods, and the provision in the final section of the Article that allows the Employer to require the employee to provide medical proof of inability to work because of proven sickness or injury at not more than six (6) month intervals. Additionally, the mutuality of permission from the Union and the Employer that is required for a leave of absence (for unspecified reasons) or extension thereof, is not mentioned with regard to leaves due to inability to work because of proven sicken or injury. In fact, the evidence is clear that Mr. Heal's requests for leave of absence and extensions, based on his health status, were directed to the Employer; there is no evidence that the Union was ever asked to acquiesce to these leaves.

Article 12.01 refers to a loss of seniority rights in two distinct circumstances: in the event that a person on a leave of absence engages in gainful employment, complete loss of seniority shall ensue. On the other hand, the Article is clear that loss of seniority shall not occur in the event of proven sickness or injury, provided only that medical information is

provided at six month intervals. In the instant dispute, there is no allegation that the Grievant failed to supply medical information when requested by the Employer. Thus, it would appear that loss of seniority could not occur.

The collective bargaining agreement does not define loss of seniority, but it does provide that seniority shall be broken only in the event of a discharge, a voluntary quit, or a layoff of more than one (1) year. The common understanding is that when an individual suffers loss of seniority, without modifiers, one's employment relationship with the Employer ceases. The protections afforded by the last sentence of Section 12.01, no loss of seniority under the circumstances provided, means that a person unable to work because of proven sickness or injury shall not be discharged or deemed to have voluntarily terminated employment from the District. In this case, it means that Mr. Heal continues to be employed by the District.

Although not argued by the District at hearing, implicit in the limited extension of Grievant's last leave of absence is reliance on Article 12.02: "This Article shall be administered in conformance with federal and state law regarding family and child care leaves of absence . . ." The undersigned finds that Article 12.02 is a statement of employees' rights under state and federal law and is not a limitation of employee rights under Article 12.01. That is, the Employer could not limit Mr. Heal's leave of absence, as it attempted to do in its leave extension granted on March 8 and communicated to Mr. Heal by Supt. Simonson's letter of March 12, 2004, based upon the 12 weeks of Family and Medical Leave to which he is entitled under state or federal law.

There has been no showing that at any time in question Mr. Heal was not dealing with the effects of a proven injury, or that he was physically able to perform his job duties and refusing to work. Rather, the evidence is clear that the District established a return to work date for Mr. Heal that was based on the Family Leave Act, not on Mr. Heal's physical condition as established by a medical provider. Although there was testimony from Superintendent Simonson that he had not seen some of the medical records that the Union introduced as evidence at hearing, there was no evidence that the District had sought medical evidence that it had not received.

The day following the expiration of the last "approved" leave 1/, the District advised Mr. Heal that at an upcoming Board of Education meeting, consideration would be given to terminating Mr. Heal's employment. The notification of that hearing did not request that Mr. Heal provide information regarding his physical status, nor that there was any consideration to be given to his ability to return to work, with or without restrictions. At the March 25, 2004 meeting, the Board terminated Mr. Heal's employment. A grievance was filed.

1/ Because the undersigned is of the opinion that the contract language does not require approval by the Board and Union for leave in the event of proven injury or sickness, the quotation marks are used.

The Kickapoo School Board heard that grievance on April 12 and denied it. In the memo conveying the denial of the grievance, Supt. Simonson stated that he was sorry that he did not have information from the doctor available on April 12, information that he received at 3:30 pm on April 13. 2/ Supt. Simonson indicated that a request that the Board reconsider the grievance could be submitted. Such a request was submitted and, despite the information indicating that Mr. Heal was able to perform his duties without restriction as of April 12, the Board again denied the grievance.

/2 Although no writing was put into evidence by either party, the medical information referred to is the fact that on April 12, 2004 Mr. Heal was released to return to work, without restrictions.

The language contained in Article 12.01 provides extraordinary protections to employees of the District who suffer from proven illness or injury. At hearing, the Employer attempted to prove that in the past Mr. Heal sought to remain an employee while receiving social security disability benefits and/or long term disability benefits under an insurance policy provided by the District (Article 19.01(d)). There is nothing inherently improper in Mr. Heal's attempts to secure payments in lieu of salary at such times that he is unable to perform his job duties. In fact, that is the purpose of long term disability insurance. The language of Article 12.01 provides that absence because of proven illness or injury shall not cause a break in seniority. It does not require the District to pay Mr. Heal when he is unable to perform his job, but it cannot terminate him, provided he provides supporting medical information at six month intervals.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. The Grievance is sustained.

2. The Grievant shall be returned to work and be made whole for lost wages and benefits from the date he was certified by his physician to return to work without restrictions.

Dated at Madison, Wisconsin, this 13th day of July, 2004.

Susan J. M. Bauman /s/
Susan J.M. Bauman, Arbitrator

rb
6702