BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ARROWHEAD AREA SCHOOL DISTRICT EMPLOYEES UNION LOCAL 3833

and

HARTLAND/LAKESIDE SCHOOL DISTRICT

Case 22
No. 63896
MA-12740

Appearances:

Lee Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 727, Thiensville, Wisconsin 53092-0727, appearing on behalf of the Union.

Kramer & Brownlee, LLC, by **Attorney Eileen A. Brownlee,** 1038 Lincoln Avenue, P.O. Box 87, Fennimore, Wisconsin 53809, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "District" or "Employer," are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, the parties selected the undersigned as arbitrator. Hearing was held on November 15, 2004, in Hartland, Wisconsin. The hearing was transcribed and the parties thereafter filed briefs that were received by February 17, 2005.

By letter dated May 10, 2005, I asked the parties to submit additional argument on the question of interpreting the regulations pertaining to an early return from family and medical leave. The parties filed their supplemental argument by June 1, 2005.

Based upon the entire record and arguments of the parties, I issue the following decision and Award.

ISSUES

The parties were unable to stipulate to the issues. The Union poses the following issues:

1. Did the Hartland/Lakeside School District arbitrarily, capriciously and discriminatorily deny R. G. 1/ five days pay when he was returning from sick leave in March 2004?

2. If yes, what is the remedy?

The District frames the issues in the following manner:

1. Did the District violate Article 23 of the collective bargaining agreement by not returning R. G. to work until March 23, 2004?

2. If so, what is the appropriate remedy?

Having reviewed the entire record, the Arbitrator adopts the District's framing of the issues.

FACTUAL BACKGROUND

On October 31, 2003, the Grievant, a custodian with the District, submitted a written request for family and medical leave for an unknown time frame commencing on October 29, 2003. In the request, the Grievant indicated that he needed a leave for his own serious health condition. The District also received a letter dated October 31, 2003, from the Grievant's physician indicating that the Grievant needed a medical leave "until further notice."

On November 6, 2003, Peter J. Balzer, business manager for the District, responded to the Grievant's request. First, Balzer noted that because the Grievant had been on an unpaid suspension from October 29 through October 31, his request for leave for those days would be denied. Second, Balzer denied the request for family and medical leave on the basis that the Grievant had not provided sufficient information to the District that would indicate that he was unable to perform his job. Balzer provided the Grievant with a form for his health care provider to complete that would give the District the information it needed to evaluate the leave request. The Grievant's physician submitted the form to the District the following week and estimated that the Grievant would require leave for at least six weeks.

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1 Following the lead of the parties, this Award will refer to the employee by his initials or "Grievant" rather than to his name to insure his privacy due to the medical nature of the grievance.

In response, District Administrator Dr. Jeffrey M. Gruber wrote a letter dated November 13, 2003, indicating that the Grievant would be placed on family and medical leave through December 12, 2003. He indicated: "The requested leave will be counted against your annual state and federal FMLA leave entitlement." In that letter Dr. Gruber also requested that the Grievant "furnish us with periodic reports of your status and intent to return to work no more frequently than every 30 days." Dr. Gruber further requested: "If the circumstances of your leave change and you wish to return to work, you will be required to notify us at least five work days prior to the date you intend to report to work."

On December 5, 2003, the Grievant's physician wrote to the District updating the Grievant's status and requesting that the Grievant be transferred to a different facility "due to his concerns about the interactions and observations of his co-workers."

By letter dated December 11, 2003, the District denied the Grievant's request to transfer to a different school and stated that it "anticipated" his return on December 15 but that his placement upon return to work would "be at North Shore Middle School with the day position that you held prior to your leave." The District also asked that in the event the Grievant was able to return to work, that a release be provided. If the Grievant was unable to return to work on December 15 as anticipated, the District offered the Grievant some additional time to provide this documentation and indicated that he could use paid sick days during that additional time.

By letter dated December 18, 2003, the District informed the Grievant that it would use vacation days and holidays to compensate him through January 1, 2004 and that as of January 2, 2004, he had to provide the District with a doctor's note advising the District of his ability to return to his position at the North Shore Middle School. The next day the Grievant's physician advised the District that the Grievant "would need to continue the medical leave beyond the December 22, 2003 return to work date." The physician added: "His return to work is estimated to be an additional six weeks. If there is paperwork that needs to be completed for disability purposes, please mail or fax it to me."

On December 20, 2003, the District informed the Grievant that due to conflicting information received from the Grievant's physician as to whether or not he could return to work (the December 19, 2003, letter from the Grievant's doctor requested an additional six weeks of leave due to a serious health condition while the December 5, 2003 letter said the Grievant would be able to return to work at a different school) it wanted more information indicating whether or not he was or was not available to return to work.

By letter dated January 6, 2004, the Grievant's attorney, Robert M. Mihelich, characterized the December 5th letter from the Grievant's physician as a request for a reasonable accommodation for the Grievant's disability and renewed that request for an accommodation. Attorney Mihelich criticized the District for not interacting with the Grievant or his physician to discuss a reasonable accommodation for the Grievant's disability. Attorney Mihelich requested that the District directly contact the Grievant's physician to discuss a

reasonable accommodation and offered a face to face meeting to facilitate the discussion. He also noted that the Grievant would be visiting his physician on January 6th and would thereafter anticipate providing additional medical information documenting his need for additional medical leave.

By letter dated January 13, 2004, the Grievant's attorney again contacted the District enclosing a certification from the Grievant's physician indicating that the Grievant would require "FMLA for approximately 9 to 12 months from August 29, 2003." In the letter the attorney also stated that he and the physician would be interested in discussing a reasonable accommodation. Correspondence followed regarding the establishment of a date when the parties could get together to discuss accommodating the Grievant's disability.

On February 2, 2004, a second letter was sent to the Grievant from Balzer identifying the fact that the Grievant was entitled to twelve weeks of family and medical leave during the 2004 calendar year. In the letter, Balzer indicated that the Grievant was "required to furnish us with periodic reports of your status and intent to return to work no more frequently than every 30 days." Balzer also indicated that should the Grievant's anticipated leave exceed the leave being granted or be shorter than the leave being granted, he should provide the District with five days' notice of either change.

On February 11, 2004, a meeting was held between the District, the Grievant and his attorney to discuss possible accommodations for the Grievant in the event that he was able to return to work. In follow-up, the District had a phone conference call with the Grievant's physician on February 13, 2004.

On March 6, 2004, Dr. Gruber and his wife were involved in an automobile accident in which Dr. Gruber's wife was killed.

On March 8, 2004, the Grievant's attorney wrote to the District's attorney indicating that the Grievant's physician "may release" the Grievant "to return to work on Tuesday, March 16, 2004 subject to the accommodations that he and [the Grievant] have requested during our meeting and teleconference." The Grievant's attorney identified a number of possible accommodations that had been discussed to facilitate the Grievant's "return to work if the school is unwilling to transfer [the Grievant] to a different location," and stated that the Grievant had an appointment with his physician on March 12, 2004. His attorney further stated that he understood that the Grievant's physician would be issuing a return to work authorization "listing any other requests for accommodations for [the Grievant] that are not stated in this letter." Finally, the Grievant's attorney indicated that he would be out of the office the remainder of that week.

The letter was transmitted to the District on March 9, 2004. As of that date, the District had not yet received any release from the Grievant's physician but did anticipate that a release would be forthcoming. The unknown was what additional restrictions would be placed by the Grievant's physician on the Grievant's return to work. Balzer was out of the District

the week of March 15th. In anticipation of the release and the need for a meeting to discuss possible accommodations, and in further anticipation of the probability that Dr. Gruber would be unable to return to the District the following week, Balzer scheduled a meeting for the date of his return, March 22, 2004.

The release was submitted by the Grievant's physician sometime after the close of the District's business day on March 12, 2004. The release indicated that the Grievant would be able to return to work on Tuesday, March 16, 2004, with the restrictions identified in the Grievant's attorney's letter dated March 8th. The District received this notice on Monday, March 15, 2004.

A meeting to discuss accommodations for the Grievant and his return to work was held on Monday, March 22, 2004. The parties agreed on a plan and the Grievant returned to work on March 23, 2004.

By letter dated March 26, 2004, the District denied the Grievant pay for the following five work days: March 16-19 and March 22. The District took the position that the Grievant was "not released to return to employment until the meeting held March 22, 2004 had concluded with an agreement on the implementation of accommodation acceptable to both parties."

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 4
GRIEVANCE PROCEDURE

. . .

H. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted to the interpretation of the relevant portions of the labor agreement. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

. . .

ARTICLE 23
FAMILY AND MEDICAL LEAVE

A. It is the intent of the District and Local 3833 to abide by the minimum requirements of the State and Federal Family and Medical Leave Act.

. . .

ARTICLE 27
MANAGEMENT RIGHTS

The Board possesses the sole right to operate the school system and all management rights repose in it. These rights include, but are not limited to, the following:

. . .

The Board further agrees it will exercise the rights enumerated above in a fair and reasonable manner. Further, nothing contained in this Article shall be construed as divesting an employee of rights granted elsewhere in this Agreement or under statutes, and the rights contained herein shall not be used to discriminate against any employee or to undermine the Union.

PERTINENT FEDERAL LAW

29 C.F.R. §825.309 What notice may an employer require regarding an employee's intent to return to work?

. . .

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (i.e., within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

PARTIES' POSITIONS

Union's Position

The Union argues that the District improperly prevented the Grievant from returning to work on March 17, 2004, and did not allow him to return to work until March 23, 2004.

In support thereof, the Union contends that the five day notice rule was arbitrarily, capriciously and discriminatorily imposed on the Grievant; that there is no contractual or statutory basis for this rule; that it is in violation of the Federal Family and Medical Leave Act ("FMLA"); and that the rule was not applied in a reasonable manner. The Union adds that the Grievant complied with the rule and still the District kept him off work an additional five work days.

The Union also contends that reasonable notice is two business days.

For a remedy, the Union requests that the Arbitrator order the District to pay the Grievant for the five days he was prevented from returning to work after his release from his physician – March 17-20, and 22, 2004.

District's Position

The District basically argues that it did not violate Article 23 of the collective bargaining agreement when it did not return the Grievant to work until March 23, 2004

In support thereof, the District initially points out that under normal circumstances the Grievant was not entitled under the federal FMLA to return to work until Thursday, March 18, 2004 (the third business day after receipt of the release). However, the Grievant was not able to return to work without accommodation. Consequently, the District opines that it acted reasonably in asking for additional time from the Grievant in order to ensure both his fitness to return to work and to be certain that any accommodations that were agreed upon would, in fact, meet the Grievant's and District's needs.

In its supplemental argument, the District acknowledges federal case law holding that when an employee returns early from family and medical leave and appears for work, the employer is on notice as of that date that the employee intends to return to work and is entitled to reinstatement two days later.

The District also argues that it acted reasonably when it asked for additional time from the Grievant due to the difficulty in communicating with him regarding his status.

The District further notes that the Grievant did not object to the District's request for five days' notice of his anticipated return to work at the time the request was made.

The District adds that the Grievant was neither discriminated against nor differentially treated.

The District believes that the grievance should be dismissed. However, if the District violated the agreement, the District states that the appropriate remedy is to either pay the Grievant for three days' lost compensation, less any compensation he may have received from any other employment over that time, or restore paid leave for those days.

DISCUSSION

At issue is whether the District violated Article 23 of the collective bargaining agreement when it did not allow the Grievant to return to work until March 23, 2004.

The Union argues that there was such a violation while the District takes the opposite position.

Article 23 provides that the parties "abide by the minimum requirements of the State and Federal Family and Medical Leave Act." The District concedes, and the Arbitrator agrees, that the state family and medical leave law is not applicable to the instant dispute. The Arbitrator, therefore, turns his attention to the federal FMLA.

The Code of Federal Regulations recognizes as it pertains to the FMLA that "it may be necessary for an employee to take more leave than originally anticipated" or, conversely, "an employee may discover . . . the amount of leave originally anticipated is no longer necessary." 29 C.F.R. Sec. 825.309(c). If an employee wants to return from FMLA earlier than originally anticipated, "the employer may require that the employee provide the employer reasonable notice (i.e. within two business days) of the changed circumstances where foreseeable. (Emphasis added). Id. The Code emphasizes that "an employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave." Id.

The District argues that under 29 C.F.R. Sec. 825.309(c) the Grievant would not have been entitled under the federal family and medical leave law to return to work until Thursday, March 18, 2004 (the third business day after receipt of the release). However, the District received notice on Monday, March 15, 2004 that the Grievant was able to return to work on Tuesday, March 16, 2004. "If the employee is able to return to work earlier than anticipated, the employee shall provide the employer two business days where feasible; the employer is required to restore the employee once such notice is given." 29 C.F.R. Sec. 825.312(e). Wednesday, March 17, 2004, is the second two business day after notice was provided to the District on Monday, March 15 that the Grievant was able to return to work and that is the date the District is obligated to restore the Grievant to his former position. HOGE V. HONDA OF AMERICA MFG., INC., 384 F.3D 238, 2004 U.S. App. LEXIS 19384, 2004 FED App. 0317P (6th Cir.) (September 16, 2004). If the District waited until Thursday, March 18, 2004, to reinstate the Grievant that would violate the two business days notice requirement and force the Grievant to take more FMLA leave than was required and interfere with the Grievant's exercise of FMLA rights. Id.

The District argues that it acted reasonably in asking for additional time in order to ensure the Grievant's fitness to return to work. The District has the right to ensure that an employee returning from FMLA leave is able to perform his previous or an equivalent position. However, "if an employee returning from FMLA leave can perform the essential functions of his previous or an equivalent position, the right to restoration is triggered on the employee's timely return from leave. 29 U.S.C. Section 2614(a); 29 C.F.R. Section 825.214(b). If the Congress had intended to permit employers to restore employees within a reasonable time after their need for FMLA leave had ended, it would have so stated. HOGE V. HONDA OF AMERICA MFG. INC., *supra*. The text of the FMLA makes restoration required once an employee's entitlement arises (i.e., once he is capable of performing the job's essential functions). Id.

There is some dispute over whether the Grievant was able to perform the essential functions of his job on March 16, 2004. In this regard, the District correctly points out that accommodations to allow the Grievant to return to his position were not finalized until the Monday, March 22, 2004 meeting between the parties. However, the Grievant was released to return to work in his former position on March 16, 2004. (Joint Exhibit Nos. 19 and 21). The release referenced certain accommodations that needed to be made in order for the Grievant to be able to perform his former job. Id. These accommodations were modest in nature and had to do with the nature and manner of communications between the Grievant and his supervisor rather than to the essential functions of his position. (Joint Exhibit No. 19). It is clear to the Arbitrator that pursuant to his physician's release the Grievant was able to perform the essential functions of his job on March 16, 2004.

The District also argues that it had an obligation under both the Americans with Disabilities Act ("ADA") and the Wisconsin Fair Employment Act to engage in an interactive process with the Grievant in order to determine whether the his disability could be reasonably accommodated without undue hardship to the District. However, although the ADA may permit a reasonable time to make accommodations for statutorily disabled employees, it does not impact the FMLA's right to restoration. HOGE V. HONDA OF AMERICA MFG., INC., *supra*. Therefore, the Arbitrator rejects the District's claim that it did not violate the agreement by taking additional time beyond the required two business days notice of changed circumstances and a desire to return to work to accommodate the Grievant's disability and return him to work.

The District further argues that it acted reasonably under the circumstances because it had no clear notice that the Grievant would be able to return to work on March 16th, and if so, under what conditions. However, the District knew as early as March 9th that the Grievant likely would be released to return to work on March 16th. (Tr. p. 56). The District also received written notice on March 15th that the Grievant was able to return to work on March 16th "with the restrictions in place as detailed in the March 8, 2004 letter from Atty. Robert Mihelich." (Joint Exhibit No. 21). Consequently, the Arbitrator finds that the District should have anticipated the Grievant's return to work on or about March 16th.

In addition, the conditions under which the Grievant would be able to return to work were not problematic. Accommodations to address those restrictions were discussed between the parties at a meeting and teleconference prior to March 16th. (Joint Exhibit No. 19). The District acknowledges it had earlier "batted around some options of what we might be able to do to accommodate [the Grievant], provided that when we actually came to the meeting the requested accommodation wasn't a transfer." (Tr. p. 60). The Grievant was not insisting that he be transferred to another facility. In addition, the parties were able to reach a consensus plan to accommodate the Grievant in his prior position on March 22, 2004 and he returned on March 23, 2004. This series of events indicates the parties were closer on the issue of accommodation than the District suggests. The Arbitrator understands why Dr. Gruber was not available during the week of March 15th to finalize the arrangements to restore the Grievant to his former position. However, the District offered no explanation as to why Balzer wasn't

available during this time by phone, fax or e-mail to sign-off on the necessary accommodations other than to say he was out of town for the week.

In any event, the Grievant's restoration rights are pursuant to FMLA and Section 23 of the collective bargaining agreement and not dependent on the ADA and the Wisconsin Fair Employment Act as noted above.

Finally, the District argues that it was entitled to take a longer period of time to restore the Grievant to his former position due to the difficulty in communicating with him regarding his availability to return to work. The Arbitrator agrees that communication between the parties in this matter was overly difficult, cumbersome and legalistic and the Grievant shares some of the blame for these problems. However, once the Grievant informed the District that he was capable of returning and performing the essential functions of his old job the District had an obligation to restore him to his position or an equivalent position within two business days.

Based on all of the above, and the record as a whole, the Arbitrator finds that the answer to the issue as framed by the District is YES, the District did violate Article 23 of the collective bargaining agreement by not returning R. G. to work until March 23, 2004.

Having reached the above conclusion, it is unnecessary to address the other issues raised by the parties regarding the merits of the case.

A question remains as to the appropriate remedy.

The Union requests that the Grievant be made whole for the following five days that he was prevented from returning to work after his release from his physician: March 17, 18, 19, 20 & 22, 2004. However, March 20th was a Saturday and there is no indication that the Grievant was regularly scheduled to work on Saturdays during the time in question. In addition, the grievance requests that the Grievant be made whole for refusing payment to him "for the days of March 16, 17, 18, 19 and 22." (Joint Exhibit No. 2). There is no request for a make whole remedy for March 20. Based on the foregoing, the Arbitrator rejects the Union's request for make whole pay for March 20, 2004.

The District argues that if a contract violation is found the Grievant's only remedy is for March 18, 19 and 22. However, as noted above, the Grievant was entitled to be restored to his position or an equivalent position on March 17, 2004. Therefore, the Grievant is entitled to a make whole remedy for four days (March 17, 18, 19 and 22) that he was prevented from returning to work by the District after his release from his physician.

The District also requests that the make whole remedy be reduced by any compensation the Grievant may have received from any other employment over that time. The Arbitrator agrees that this is appropriate.

Finally, the District submits that if the Grievant substituted paid leave for unpaid family and medical leave during the days in question, "the better remedy would be to restore the sick, personal and/or vacation days substituted by R. G. for the unpaid leave as R. G. has, under that circumstance, already received compensation for those days." The Arbitrator agrees that would be an equitable approach.

In light of all of the foregoing, it is my

AWARD

The instant grievance is sustained. The District is ordered to make the Grievant whole for all wages and benefits lost while he was prevented from returning to work on March 17, 18, 19 and 22, 2004 by the District in violation of Article 23 of the collective bargaining agreement. If the Grievant received unpaid family and medical leave during those four days, the appropriate remedy would be to pay him the lost wages and benefits, less any compensation he may have received from any other employment over that time. If the Grievant substituted paid leave for unpaid family and medical leave during those four days, the District should restore the sick, personal and/or vacation days substituted by the Grievant for the unpaid leave. The Arbitrator will retain jurisdiction for at least sixty (60) days to resolve any issues over remedy that may arise.

Dated at Madison, Wisconsin, this 6th day of June, 2005.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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