BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN COUNTY HEALTH CARE FACILITIES EMPLOYEES, LOCAL 2427, AFSCME, AFL-CIO

and

SHEBOYGAN COUNTY

Case 364
No. 63944
MA-12754

Appearances:

Helen Isferding, Staff Representative, Wisconsin Council 40, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

Michael Collard, Human Resources Director, Sheboygan County, Sheboygan County Courthouse, 508 New York Avenue, Room 336, Sheboygan, Wisconsin 53081-4692, appearing on behalf of the County.

INTERIM ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County" or "Employer", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held on March 8, 2005, in Sheboygan, Wisconsin. At hearing, the County raised a substantive arbitrability issue. The hearing was not transcribed and the parties completed their briefing schedule on the matter by July 1, 2005.

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

ISSUES

The Union poses the following issue:

Did the Employer violate the just cause provision of the contract and FMLA when it terminated the Grievant, Darla Bishop-Fengier, on June 17, 2004?

The County objects to any allegations regarding a violation of either the federal or state Family and Medical Leave Act ("FMLA") being properly before the Arbitrator.

DISCUSSION

At issue is whether the Arbitrator has the authority to enforce, to interpret and/or to apply the FMLA in the context of reviewing the Grievant's termination. Also at issue is the proper framing of the substantive issue before the Arbitrator related to the aforesaid termination.

The County argues that the Arbitrator does not have any authority to resolve the question of whether an FMLA violation occurred. The County also argues that the collective bargaining agreement does not incorporate the provisions of the FMLA. In this regard, the County contends that the just cause provision of Article 3 does not entitle the Union to bring the FMLA issue before the Arbitrator when addressing the reasonableness of the County's action terminating the Grievant. The County further submits that the Grievant did not make any just cause claim related to her discharge.

The Arbitrator agrees with the County's argument that Article 29 of the parties' collective bargaining agreement limits the ability of the undersigned to consider possible statutory violations. In this regard, Article 29 restricts the Arbitrator's authority to the resolution of disputes between the Union or an employee "and the County concerning the effect, interpretation, application or claim of breach or violation of this Agreement." The Union concedes that the contract contains no language referencing FMLA. Since the FMLA is statutory law, and not part of the agreement, a claim of a FMLA violation is not subject to arbitration. However, a question remains as to whether the Arbitrator can interpret and/or apply the FMLA in the context of deciding if the County violated the collective bargaining agreement when it terminated the Grievant's employment. That question can be answered in the context of reviewing the arbitration decisions cited by the County in support of its basic position that the Arbitrator has no authority to consider statutory provisions.

The County initially cites Arbitrator Daniel J. Nielsen in LACROSSE CITY EMPLOYEES UNION, LOCAL 180, SEIU, AFL-CIO, CLC AND CITY OF LACROSSE, Case 287, No. 54407, MA-9670, p. 12 (8/97) for the general proposition that:

> The arbitrator is not a judge of general jurisdiction, and cannot rely on external law as the substantive basis of rights underlying an Award. The question is what the parties meant by their contract, not what the legislature meant by its statute.

However, the County failed to point out that Arbitrator Nielsen also said that there may be certain circumstances where an arbitrator will consider external law. *Id*. For example, "if the contract is ambiguous, the parties may be presumed to have intended that their contract be legal and enforceable." *Id*. Moreover, where an arbitrator "has a choice between two possible

interpretations of the ambiguous language, one of which is consistent with external law and the other of which requires or sanctions an illegal act, the former interpretation will be favored." *Id*. In the above case, while interpreting ambiguous contract language pertaining to the City's provision of income continuation insurance, Arbitrator Nielsen found that the City's interpretation of the disputed contract language was "contrary to the state statute governing Family Medical Leave, as the Supreme Court has determined that the use of paid time off benefits during a medical leave is within the discretion of the employee." CITY OF LACROSSE, *supra, p.14*. That finding was a factor considered by Arbitrator Nielsen in arriving at his conclusion that the City violated the collective bargaining agreement by requiring the grievant to use all of his accumulated sick leave, vacation and comp time as a pre-condition to letting him draw income continuation insurance benefits. Id.

More directly on point, according to the County, is the decision of Arbitrator Raleigh Jones in MANITOWOC COUNTY HEALTH CARE CENTER EMPLOYEES, LOCAL 1288, AFSCME, AFL-CIO AND MANITOWOC COUNTY (HEALTH CARE CENTER), Case 324, No. 54968, MA-9843 *(10/97)* where he states at page 11:

> However, it is not up to an arbitrator to enforce those statutory provisions [the FMLA or ADA]. Thus, even if the County does violate those statutes, an arbitrator is not empowered to remedy same. This is because my authority is limited to interpreting the labor agreement in resolving questions of contractual rights. Any alleged statutory violation is separate and distinct from an alleged contractual violation.

Arbitrator Jones reached the above conclusion because he had previously found that the contractual provisions in question did "not expressly incorporate those laws into the labor agreement." MANITOWOC COUNTY (HEALTH CARE CENTER), *supra*, p. 10. As noted above, the instant agreement contains no language referencing FMLA and the Arbitrator agrees with the County's position that the undersigned cannot make findings regarding possible statutory violations.

However, the County's viewpoint that the Arbitrator may not consider the FMLA in reviewing the Grievant's termination for poor attendance is not supported by arbitral authority. Only a minority of arbitrators have refused to rely on the statute or refer to the FMLA in discipline cases involving attendance based, for example, on a lack of "authority" in the contract to do so. Elkouri and Elkouri, *How Arbitration Works*, 6th Edition, pp. 520-521 (2003). In the majority of cases involving the FMLA, arbitrators rely on the provisions of the FMLA and the Department of Labor ("DOL") regulations without regard to whether the collective bargaining agreement says anything about the FMLA. Elkouri and Elkouri, *supra*, p. 520. Arbitrators also look to the statute for guidance in attendance cases, even if not citing specific provisions of the FMLA. Elkouri and Elkouri, *supra*, pp. 520-521.

Finally, the County cites a statement made by Arbitrator Amedeo Greco in CHIPPEWA COUNTY DEPUTY SHERIFFS' ASSOCIATION AND CHIPPEWA COUNTY, Case 213, No. 58375,

MA-10934, p. 5 (9/00), when considering a claim that the county had violated the Fair Labor Standards Act ('FLSA"): "Absent clear contractual language giving me that authority, and absent the County's agreement that I apply federal law, it is beyond my authority to determine whether the County's actions violated the FLSA."

However, as also pointed out by Arbitrator Greco in CHIPPEWA COUNTY, *supra, p. 6*, arbitrators in certain cases involving ambiguous contract language do apply the FLSA. The parties' collective agreement does not expressly define the term "just cause."

Based on the foregoing, the Arbitrator finds it reasonable to conclude that he may rely on or look to the FMLA for guidance when deciding whether the County violated the collective bargaining agreement when it terminated the Grievant.

Lastly, the County argues in an attempt to limit the scope of the grievance that the Union "has not directly challenged the existence of just cause to terminate the grievant's employment." Instead, according to the County, the Grievant simply states that the "employee was discriminated against for a[n] illness."

However, as pointed out by the Union, the County terminated the Grievant for having "used unearned sick time on 5/8/04, 5/9/04, and 5/10/04. This is considered excessive and is a violation of the Sheboygan County Personnel Policies." The Grievant immediately challenged this by writing on the termination notice: "I do not agree with the action." In addition, when the Grievant filed her grievance, she wrote that she "was discriminated against for a[n] illness." Unequal or discriminatory treatment is a component of the disciplinary review under the just cause standard. Elkouri and Elkouri, *supra*, p. 995. Finally, at hearing the Union framed the issue, in part, as: "Did the Employer violate the just cause provision of the contract when it terminated Darla Bishop-Fengier on June 17, 2004?" Generally, "a liberal and broad construction should be given to the term 'grievance' in the interest of encouraging the use of machinery which the parties themselves have set up for the peaceful settlement of disputes." Elkouri and Elkouri, *supra*, p. 201, footnote 13. Applying this standard and the grievance history, the Arbitrator finds that the Union can challenge the Grievant's termination based on the just cause standard contained in the collective bargaining agreement.

A question remains as to the proper framing of the issue. As noted above, the Union poses the following issue: "Did the Employer violate the just cause provision of the contract and FMLA when it terminated the Grievant, Darla Bishop-Fengier, on June 17, 2004?" However, the Arbitrator has no authority to determine whether the County violated the FMLA by its action so the undersigned rejects that part of the Union's proposed issue. The County, on the other hand, frames the issues as follows:

1. Did Sheboygan County violate the collective bargaining agreement when it terminated the employment of Darla Bishop-Fengier?

2. If so, what is the appropriate remedy?

The County's framing of the issue is broad enough to encompass the just cause provision (Article 3) of the agreement and any other contractual provision the parties may wish to argue about in regard to the Grievant's termination. Therefore, the Arbitrator will adopt the County's framing of the issue as the substantive matter before the Arbitrator for decision.

Based on all of the above, it is my

INTERIM AWARD

1. The Arbitrator has no jurisdiction to determine whether the County violated the FMLA when it terminated the Grievant and, therefore, will not decide that statutory issue at hearing on the merits.

2. The Arbitrator will consider the provisions of the FMLA and the DOL regulations when deciding whether the County violated the collective bargaining agreement when it terminated the employment of the Grievant.

3. The issues before the Arbitrator are the issues framed by the County and noted above.

Dated at Madison, Wisconsin this 23rd day of August, 2005.

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

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