

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LINCOLN COUNTY

and

**LINCOLN COUNTY COURTHOUSE EMPLOYEES,
LOCAL 332-A, AFSCME, AFL-CIO**

Case 236
No. 64556
MA-12935

(Hafeman Medical Leave Grievance)

Appearances:

Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin, appeared on behalf of Local 332-A and Grievant Cherie Hafeman.

Attorney Nancy Bergstrum, 1110 East Main Street, Merrill, Wisconsin, appeared on behalf of Lincoln County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested and the County agreed that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed on behalf of Cherie Hafeman, who is referred to below as the Grievant. The Commission appointed Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing on the matter was held on June 30, 2005 at the Lincoln County Courthouse in Merrill, Wisconsin. No transcript was prepared. A briefing schedule was set and the parties filed briefs by August 22, 2005, closing the record.

The parties did not stipulate to the issues to be decided. The Union stated the issues as:

Did the employer violate the collective bargaining agreement when it denied the Grievant a leave on October 11, 2004?¹

If so, what is the appropriate remedy?

¹ The Union does not disagree that the actual dates of the requested leave and the date of the request may be different than that stated in the issue, and the parties do not hold the dates to be determinative.

The County stated the issue as:

Did the County violate the collective bargaining agreement when it refused to grant an unpaid leave of absence because the employee refused to provide additional medical information to prove the necessity of the leave?

The arbitrator selects the County's statement of the issue as to the merits and the Unions statement of the issue as to remedy.

RELEVANT CONTRACT PROVISIONS

ARTICLE 12 - LEAVE

12.02 Employees shall be granted leaves of absence of up to twelve (12) months for medical reasons. A doctor's statement shall be required to verify the necessity for the leave.

...

ARTICLE 24 - SICK LEAVE

24.02 If an employee uses sick leave, the employee shall furnish his/her supervisor with a certificate of illness signed by a licensed physician when necessary.

...

24.05 Advance Notice and Use: In the event an employee is aware in advance that sick leave benefits will be needed, it shall be the duty of the employee to notify his/her supervisor as far in advance as possible in writing of the anticipated time and duration of such sick leave; the reason for requesting such sick leave and medical certification that the employee will be unable to perform his/her normal work function. Employees will be required to begin using sick leave on the date which their doctor certifies that they are medically unable to perform their normal duties. An employee on sick leave is required to notify the department head at the earliest possible time of the anticipated date on which the employee will be able to return to his/her normal duties.

BACKGROUND AND FACTS

This case centers around a request of Grievant for a half time leave of absence without pay for medical reasons which is first reflected in a September 22, 2004 faxed letter from her

husband with an attached doctor's note written on what appears to be a prescription form.² A leave of absence for medical reasons is provided under section 12.02 of the collective bargaining agreement.

Grievant is a full time program assistant in the Lincoln County District Attorney's office. She had been a County employee for approximately ten years. As of the Summer and Fall of 2004 there was a degree of personal conflict in that office between Grievant and her supervisor, the then District Attorney. During the same time period Grievant had used and was using Family Medical Leave Act time and sick leave available to her under the collective bargaining agreement. The County was in possession of a letter (Jt. Exhibit 12) dated August 24, 2004 from one of her Doctors, Ronald G. Cortte, M.D. to the County Administrative Coordinator, John Mulder, concerning Grievant's time off of work. Among other things, that letter referenced Grievant's medical condition, treatment, a prior medical note for her to be off of work and her inability to return to work. Near the end of August and beginning of September, 2004, Grievant was exhausting her available sick leave. Sick leave is provided under Article 24 of the collective bargaining agreement.

The Doctor's prescription form note which was attached to the September 22nd letter (Jt. Exhibit 1) contained a 3 month work restriction to 50% and other physical work limitations, along with a generalized medical condition.

By letter of September 27, 2005, Mulder informed Grievant that the September 22nd faxed doctor's note by itself was not adequate to grant a leave of absence request. Mulder suggested she write a letter to the Personnel Committee explaining her request and the reasons for it, and that further medical information is necessary to justify a leave of absence on a part-

² This arbitration award goes to great lengths to avoid stating the particulars of Grievant's medical condition which are set out with specificity in the exhibits admitted into evidence in this case. All the parties herein have those exhibits. The particulars are not stated herein to protect the privacy interest of the Grievant and those who may be similarly situated. Any reference to a specific exhibit in this award shall be construed to be an incorporation by reference of the entire document. However, in the Union brief there is set out a part of joint exhibit 3B, which is an October 4, 2004 letter from Dr. Pallagi. Because Grievant has specifically referenced that passage, and to give some further indication of the nature of the medical information supplied to the County, that part of the letter will be set out below:

The above named patient is followed in the neurology clinic at the Ministry Medical Group Northern Region. The patient is followed for several concerns including neck pain, left arm heaviness, and weakness symptoms, and headaches with workup revealing several neurology diagnoses. The patient was advised because of the results of imaging and her exam that she is limited in regard to her work. The patient does have changes in the cervical spine producing left arm symptoms and therefore physical therapy has been recommended. The patient was allowed to return to work 50% work duty with a lifting restriction of no greater than 10 pounds with the left arm. The patient has other changes in her imaging that are likely contributory to her severe headache complaints and medications have been prescribed. Overall there has been improvement. We have requested multiple images in order to more fully evaluate these changes.

other things, the County letter referenced the County not considering a "bridge" position for her in some other office until the end of the year and that the level of stress in the District Attorneys' offices is not an undue hardship or burden. The County and Grievant did work out a work schedule that allowed her to maximize her available sick leave.

It is the County Personnel Committee which must approve leave requests made under section 12.02 of the collective bargaining agreement.

By letter of October 4, 2004, to the Personnel Committee, Grievant requested a leave of absence consistent with her doctor's order of 50% time for three months. She gave her reason for seeking medical leave and referred to an attached letter from Doctor Pallagi, M.D. as to the medical reasons for the leave. Grievant did refer to the conflict, tension and stress in the District Attorney's office and that the leave is necessary to recover from the symptoms this environment has caused her. The letter from Dr. Pallagi (Jt. Exhibit 3 B) summarized her symptoms, findings, diagnoses and treatment. The Doctor makes the statement "It is my medical opinion that the patient should remain on a 50% work schedule."

The Personnel Committee approved the leave of absence on a part time basis through November 15th, contingent on Grievant submitting a medical release form from her to the County by October 13th3. On October 15th Grievant submitted an authorization for disclosure of protected health information (County Exhibit 1) authorizing disclosure by her medical care providers to her, the patient. Attached to the authorization were two medical follow up notes from Dr. Pallagi dated 9/21/04 and 10/7/04 which referenced subjective statements, history, examination, assessment and plan. One note, September 12, 2004, contained the statement: Back to work 50% schedule x 3 mos.

Grievant was then informed by Nancy Bergstom in person and by Mulder in writing that the release was not adequate and that the County needed a release of medical information to the County by October 18th or it would be recommended that her leave of absence should be terminated. Grievant then wrote to the Personnel Committee on October 16th contending that she had provided the requested additional information and the appropriate release, that she had provided all the medical information pertinent to the leave, that further medical information was confidential, and that she will not just issue a release to the County or anyone else that is open to just go through the record, among other things.

At its October 21, 2005 meeting the Personnel Committee terminated the leave for failing to meet the condition of providing a release to the County. Grievant was so informed and that effective October 25, 2005 she was expected to return to her full time position, and that failure to do so and/or any unpaid leave in the future will be considered an unexcused absence and will be considered a voluntary "quit".

3 The Personnel Committee was not scheduled to meet until after that date.

Grievant returned to work full time on October 25, 2005 and continued to work full time thereafter. She is not now seeking further time off. She filed a grievance over this matter which was denied and led to this appeal.

Further matters appear as set out in the discussion.

THE PARTIES POSITIONS

Union

The Union contends that the contract is very clear. It provides that the County should provide a leave of absence for medical reasons for up to 12 months providing that the employee has a medical reason for such a leave. The employee provided the County with such medical necessity provided by her doctor. The County demanded more specific diagnostic information. The employee believed that was confidential information and did not provide a release for that other information but did provide a doctor's statement that it was necessary leave.

County

The County contends that section 12.02 of the contract states that a doctor's statement shall be required to verify the necessity for the leave. What the County received was inadequate to verify the necessity for the leave. The doctor's report given to the County simply requested the leave and did not give what medical condition required the leave. The doctor's statements did not give the County the information necessary to verify the necessity for the leave or why a leave on a part time basis was a necessity.

Furthermore, the County concluded that the reason for the leave is stress related. The refusal to grant the leave on that basis is reasonable because if stress in an elected office is enough to get a leave of absence than they will never be able to staff positions in elected offices and many offices.

DISCUSSION

The issue in this case requires a determination as to what information is required to verify a medical necessity for a leave of absence for medical reasons under section 12.02 of the collective bargaining agreement. If the required information is provided then the leave shall be granted. Use of the word "shall" twice in the section eliminates discretion. The employee must present a doctor's statement to verify the necessity for the leave, and the County must then grant the leave.

The historical context of this case shows that the County already had some information from Grievant's medical providers immediately prior to the leave of absence request. This was in the form of the August 24th letter from Dr. Cortte. That was when Grievant was using sick leave under Article 24 of the contract. Those sick leave provisions contain the elements of a certificate of illness signed by a licensed physician, necessity (sec. 24.02), the reason for requesting such sick leave and medical certification the employee will be unable to perform his/her normal work function (sec. 24.04). There are other timing considerations. Apparently there was no issue between the County and Grievant as to these matters in that she was able to take existing sick leave under those provisions of the contract.

The collective bargaining agreement does not define doctor's statement and there is no particular form or content required under Section 12.02 of the agreement. Whether considered for purposes of sick leave under Article 24, or for purposed of a leave of absence for medical reasons under Article 12, the County did have Dr. Cortte's August 24th letter. It was written in regard to Grievant and her time off work. It speaks generally to symptoms, a history, diagnosis, causal references, referrals to specialists, and treatments. The doctor wrote that he "perceived that her problem was really quite serious". He wrote that "things needed to be resolved before it would be reasonable for her to return to the workplace". There was a reference to another of Grievant's health care providers which referenced that grievant "probably needed to be off work for some time". Dr. Cortte then encouraged the workplace to take certain actions to help get her back to full employment. The letter is more than an office note or other isolated matter which may appear in a medical chart. The inescapable conclusion here is that it is a doctor's statement.

In requesting a leave of absence for medical reasons Grievant then provided the County with the attachment to the September 22nd letter, which was in the form of a September 21, 2004 prescription, signed by Dr. Jeanne Pallagi, M.D. That contained a three month work restriction of back to work 50% with some physical lifting limitations. It also very briefly and generally referenced a diagnosis and treatment. Given the brevity of the September 21st prescription, it is reasonable for the County to question the sufficiency of that document itself to verify the necessity for the leave. Given that this was a request for leave for medical reasons, as opposed to a sick leave request, it is understandable that the County sought further medical information to justify a leave of absence. Yet, the County did accept the physical limitations in the September 21st prescription. Apparently the County accepted the September 21st prescription as a doctor's statement, at least as far as the physical limitations were concerned, but physical limitations area not a leave from work itself.

Grievant then did provide a written request to the Personnel Committee explaining her request and the reasons for it. She attached an October 4, 2004 letter from Dr. Pallagi. That letter was to provide additional medical information to help guide the decision in regard to further part-time status. It speaks to symptoms, history, diagnosis, treatment and makes the statement that it is the doctor's "medical opinion that the patient should remain on a 50% work

schedule". The letter does not reference the cause of Grievant's medical condition. Similar to

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Dr. Cortte's letter, this letter is a "doctor's statement". It is consistent with the doctor's September 21st prescription and it is consistent with Dr. Cortte's August 24th statement. Whether the September 21st prescription was sufficient or not, and whether Dr. Cortt's letter is considered or not, with the October 4th letter Grievant had submitted a doctor's statement for her request under sec. 12.02 of the agreement.

The County then insisted that Grievant sign an authorization for it to obtain her medical information. Under the terms of the contract the County did not have a right to do this and Grievant had no obligation to provide the County with an authorization to access her medical information. The contract does not say medical authorization or release of information. It says "doctor's statement". This is much narrower in scope.

Grievant maintains that after the County requested a medical release form from her to the County that she did so by submitting the authorization for disclosure of protected health information with two attachments of Dr. Pallagi's follow up notes. (Co. Exhibit 1). This was not what the County requested and it did not authorize the County to get medical information. The authorization is to the patient, Grievant herself, not to the County. That form in its submitted condition does not authorize the County to obtain any medical information. However, as noted above, the contract does not require her to submit an authorization. Even though she did not comply with the County's request, that is not a reason under sec. 12.02 to deny the leave in the face of the previously submitted doctor's statement.

Under the contract the doctor's statement is to verify the necessity for the leave. It is the proof that there is a medical necessity. It is a doctors statement that is used and not that of employees themselves or some other person without the capacity to determine a medical necessity.

Reading sec. 12.02 as a whole, it is a medical necessity which must be verified by the doctor's statement. The determination of necessity is, thus, for the doctor to make, not the County. If the doctor's statement verifies a medical necessity for leave then the leave shall be granted. It is not up to the County to make medical decisions as to necessity. The medical statement of October 4, 2004 from Dr. Palliga clearly stated that it was her medical opinion that the patient should remain on a 50% work schedule. (emphasis added). The statement contained a medical explanation. There is no evidence in the record of contrary or inconsistent medical information. Sec. 12 does not require Grievant to submit nor authorize the County to obtain anything more.

The County argues that the doctor's report given to the County simply requested the leave and did not give what medical condition required the leave. Sec. 12.02 does not specifically require that the doctor's statement contain the medical condition that requires leave. Regardless of whether that term should be inferred into section 12.02, in this case Dr. Palliga's medical statement did contain her medical condition. And the County did have the statement from Dr. Cortte which also set out the same medical condition in reference to

Section 12.02 does not require the employee to submit a reason for the medical leave of absence, as section 24.05 does for sick leave. Yet Grievant did submit her reason in the October 4th request. Even if the County did not and does not agree with her reason for seeking the leave, it is the medical statement which is required under sec. 12.02 and which, therefore, controls.

It is clear that the County has some healthy skepticism of the necessity for the leave as it relates to the conflict that existed in the District Attorneys office. But that is a question of cause. Sec. 12.02 does not deal with cause. Under the section it does not matter what the cause of a medical condition is. It can be from anything or even idiopathic, as long as there is a medically diagnosed necessity for the leave. Moreover, the question of cause is a medical question for the doctor to decide, not the County. The County is free to disagree with the doctor that a certain condition, be it a work environment, stress, or anything else, is a cause of a medical necessity for leave. But it is the medical statement which verifies the medical necessity. The County has a legitimate concern that many employees in stressful situations may seek leaves of absences and render governmental functions inoperable. The check on this is the requirement that there be doctor's statements that verify the necessity for the leave. In any event, in this case Article 12 does not disqualify a medical leave of absence for any particular reason, including work site related stress.

When the County ended the medical leave because Grievant did not provide a medical release form to the County, it did so for a reason outside of and in violation of the contract. At noted above, grievant did supply a doctor's statement to verify the necessity for the leave. She has met her burden of proof to show that the County violated the collective bargaining agreement and that she was entitled to the leave of absence for medical reasons.

REMEDY

Having found a violation of the collective bargaining agreement it must next be considered what is the remedy. Here, Grievant returned to work full time after being notified by the County of the termination of her temporary conditional leave. The requested leave was for three months and that time period has long passed. There is no evidence of any pending medical leave of absence request by her. The requested remedy in the original grievance was to make the employee whole by reinstating leave per doctor's orders. The grievance was made on November 2, 2004, when such relief would have been within the times stated by the doctor. To order the leave now would not be in compliance with an existing medical necessity. The Union recognizes that a remedy in this case would be difficult, if not impossible to provide.

In as much as a grievance arbitration award can aide the parties in the future interpretation and application of contract provisions between themselves, the decision of the merits of this grievance is the remedy in this case.

Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The grievance is sustained.

Dated at Madison, Wisconsin, this 7th day of September, 2005.

Paul Gordon /s/

Paul Gordon, Arbitrator

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