BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NEW BERLIN PUBLIC EMPLOYEES UNION LOCAL 2676, DISTRICT COUNCIL 40, AFSCME, AFL-CIO

and

CITY OF NEW BERLILN

Case 105
No. 64242
MA-12848

Appearances:

John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, appearing on behalf of the Union.

Attorney Alan E. Seneczko, Seneczko Law Offices, S.C., 1860 Executive Drive, Suite E-1, Oconomowoc, Wisconsin 53066, appearing on behalf of the Employer.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Employer" or "City" are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in New Berlin, Wisconsin on June 13, 2005. The hearing was not transcribed. The Union made oral argument at the close of the hearing. The Employer filed a brief that was received on July 15, 2005.

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

STIPULATED ISSUES

1. Whether the Employer violated the collective bargaining agreement by requesting a doctor's slip to verify the Grievant's June 30, 2004 request for sick leave on July 3, 2004?

2. If so, what is the appropriate remedy?

DISCUSSION

Kristen Pergande ("Grievant") has been employed as a dispatcher in the Police Department since May 2000. She works the third shift (10:45 p.m. – 7:00 a.m.). She is familiar with all of the Police Department's policies and procedures, including its sick leave policy and fictitious illness work rule, as well as the scheduling procedures in the dispatch department. She acknowledges that the proper operation of dispatch requires a minimum of two dispatchers per shift, and that public safety would be jeopardized if the Department failed to staff dispatch at that level.

Prior to her request for sick leave on June 30, 2004, the Grievant called in sick or missed work due to illness for less than three days on at least twenty-six (26) occasions. Not once did the Employer ask her to produce a doctor's slip to verify her absence on any of those occasions.

However, on October 28, 2003, Gary Blunt, the Chief of Police, criticized the Grievant for her conduct in connection with scheduling time off:

> [Y]our actions demonstrate a lack of concern or common courtesy relating to your co-workers and their needs and plans. You would be wise, in the future, to consider how your actions affect others and the impact of your decisions on the operations of this department.

Yet, the Grievant has received no discipline for her use of sick leave during the term of her employment with the City.

On Wednesday, June 30, 2004, the Grievant sent the following email to her supervisor, Lieutenant Linda Szewczykowski:

> I wanted to tell you ahead of time that I will be taking a sick day on Friday, my Saturday, July 3. I will be in the hospital having a surgical procedure done. I thought I would give some notice in case it will cause overtime where coverage will be needed.

The request concerned Szewczykowski for several reasons. First, the Grievant was requesting a sick day on short notice for the Saturday of July 4th weekend, the day before she had two scheduled days off. Second, in order to grant the request and maintain proper staffing levels, Szewczykowski would have to revoke the overtime-off day she had already granted another employee. Third, if the Grievant was having surgery, Szewczykowski needed to know if she would require any restrictions upon her return to work.

Thereafter, Szewczykowski sent the Grievant an email indicating that she would mark the day off as sick, but that she needed to obtain a slip from her doctor verifying her absence and advising of any work restrictions.

The Grievant responded by stating that, under the contract, she did not need a doctor's excuse unless she was going to be out for three (3) consecutive days or more, and further asking her to explain why this time was any different. Szewczykowski spoke with the Grievant the next day. During their conversation, the Grievant wanted to know if she was being asked for a doctor's slip because no one believed her due to the fact that it was the 4th of July weekend.

On July 1, 2004, Szewczykowski sent the Grievant a note confirming that she needed to produce a note from her doctor "verifying a procedure and clearance for return to duty, with/without restrictions for your sick day request on July 3, 2004. If a note is not produced, your sick day will be denied." The Grievant said she would obtain the requested doctor's excuse.

The Grievant provided the City with a note from a doctor stating: "Please excuse from work – may return Monday 7/5/04 [w/o] restrictions." As a consequence, the City granted the sick day.

On July 21, 2004, the Union filed a grievance challenging the City's request. In it, the Union demanded that the Employer: "Stop the practice of requesting doctor's excuse for one day of sick off. Stop singling out this one employee." Captain Frank Zsohar Jr., responded to the grievance, citing the unique and suspicious circumstances surrounding the Grievant's sick day request as the reason for the City's action, and further explaining that the Department needed to request such documentation in order to properly manage employee time and use of sick leave.

The matter proceeded to arbitration as noted above.

At issue is whether the Employer violated the collective bargaining agreement by requesting a doctor's slip to verify the Grievant's June 30, 2004 request for sick leave on July 3, 2004.

The Union argues for such a violation while the Employer takes the opposite position.

The Employer basically argues that it is a legitimate exercise of management authority to prevent sick leave abuse and as such, management may establish reasonable work rules or other methods of monitoring so long as the method is not arbitrary, discriminatory or unreasonable. MARATHON COUNTY, Case 295, No. 61752, MA-12055 (Millot, 06/03). As a general proposition, the Arbitrator agrees. The Employer opines that it had compelling reasons to request verification for the Grievant's sick day request, and that the circumstances surrounding her request were suspicious. As noted by the Employer, the Grievant acknowledged that staffing of the dispatch department was critical; that public safety could be jeopardized if staffing levels were not met; that there was only a small pool of employees available to staff the department; and that all of this could turn into chaos if absenteeism went unchecked.

In addition, the Grievant's request for a sick day was for the day before July 4, and she has a history of using sick leave in less than three (3) day increments.

Furthermore, the Union did not present any evidence to support its claim that the Employer had "singled out" the Grievant for other than legitimate reasons. There is no evidence that the City's request was arbitrary, discriminatory, or unreasonable.

The Employer next argues that documentation may be required under suspicious circumstances, such as an absence before a vacation or mass absences on a holiday. "Moreover, it has been stated that "*where there is a claim under suspicious circumstances . . . the documentation required may be more exacting than might otherwise be the case."* (Emphasis in the Original); Elkouri and Elkouri, *How Arbitration Works*, (BNA, 6th Ed., 2003), p. 1087.

The Arbitrator again is in agreement with the general principle noted above. However, it has also been held that "*except as restricted by the agreement*, the granting or denial of leaves of absence is a prerogative of management." (Emphasis added); Elkouri and Elkouri, *supra*, p. 1083. In the instant case, the parties' management rights clause, Article II, specifically provides that the Employer may not exercise its management rights "for the purpose of invalidating any contract provisions." Consequently, the Arbitrator turns his attention to Article XVI – Sick Leave to see what it says about the Employer's ability to prevent abuse of sick leave claims and require a doctor's slip to verify the reason for the Grievant's absence.

Article XVI , Section 16.02, provides generally that employees shall be entitled to sick leave pay in the event that absence from work is necessitated due to personal illness or personal injury. Section 16.09 – Doctor's Certificate provides that "[A]ny employee absent for more than three (3) consecutive workdays who applies for sick leave may be required to provide a doctor's certificate attesting to his/her disability." This is one of three sections in Article XVI that expressly provides for the Employer's right to require "a doctor's certificate." Section 16.03 – Pregnancy Situations provides that the sick leave of a pregnant employee shall begin when her attending physician "certifies" she is no longer able to work and "[t]he sick leave of an employee who has been absent from work because of pregnancy shall terminate when her attending physician "certifies" that such employee is capable of resuming her normal duties. Section 16.10 – Exhaustion of Sick Leave provides that "[a]n employee absent because of illness or injury who has consumed all of his/her sick leave accumulation shall be considered on a leave of absence . . . , providing that his/her attending physician has 'certified'" that the employee probably will be able to return

Frequently, arbitrators apply the principle that "when parties list specific items, without any more general or inclusive term, they intend to exclude unlisted items, even though they are similar to those listed. Elkouri and Elkouri, *supra*, p. 467. From this assumption comes the rule *expressio unius est exclusio alterius* ('the expression of one thing is the exclusion of another')." Elkouri and Elkouri, *supra*, pp. 467-468. In other words, contracts that specify

certain exceptions imply that there are no other exceptions, and those that expressly include some guarantees in an agreement are thought to exclude other guarantees. Elkouri and Elkouri, *supra*, p. 468.

Applying the above standard to the instant case, the Arbitrator finds that Article XVI provides the City the right to require a physician's certification or note when an employee is off sick or injured for more than three consecutive workdays, pertaining to pregnancy leaves, and following exhaustion of sick leave where an employee wants to be considered for a leave of absence. However, Article 16 does not expressly provide the City with the right to require the Grievant to provide a medical excuse for her one day of absence on July 3, 2004, under the circumstances described above. (Emphasis added). If the parties had intended such a result, they were fully capable of including language to that effect in Article XVI as they did in the other instances. The Arbitrator is not going to read something into the collective bargaining agreement that the parties themselves did not put there. Since the parties included in the contract certain situations where the City could require a doctor's certification, the Arbitrator finds it reasonable to conclude that they intended to exclude all other situations from such a requirement including the one day sick leave asked for by the Grievant. Consequently, the Arbitrator concludes that the City violated the agreement when it required the Grievant to provide a physician's verification for her absence on July 3rd.

The Employer, however, argues that the Arbitrator should reconcile the disputed contract language (Article II – Management Rights and Article XVI – Sick Leave), which recognizes "the Employer's legitimate right to manage its workforce and police the use of sick leave, as well as the employees' right to be free from intrusive and harassing requests for doctors' slips," in the manner suggested by Elkouri and Elkouri – by acknowledging that the Employer retains this right, as long as it is not exercised in an arbitrary, discriminatory or unreasonable manner.

The Employer claims that this approach has already been suggested, and adopted, by another WERC arbitrator who addressed this same issue while dealing with virtually identical language. In MARATHON COUNTY, Case 295, No. 61752, MA-12055 (Millot, 06/03), the Union contended that the following contract language prevented the county from *ever* requesting a doctor's excuse for absences of less than three days, since it specifically spelled out the only circumstances under which a doctor's excuse could be requested: "If sick for more than three (3) consecutive workdays, the employee may be required to furnish the supervisor with a certification of illness signed by a physician if requested by the department head or his/her immediate supervisor." (Emphasis in the Original). MARATHON COUNTY, *supra*, pp. 2-3.

The Employer points out that Arbitrator Millot rejected this contention, finding that this provision did not apply to the county's request for verification under the circumstances in the case in hand:

> Provided there are no specific provisions in the labor agreement or a past practice to the contrary, an employer has the right to verify absenteeism and specifically, sick leave use. *Common Law of the Work Place*, (St. Antoine, 1998) p. 321. Article 13, Section C, is a specific provision that addresses a specific situation. The inclusion of this section by the parties does not negate management's right to manage its workforce. Lacking clear contract language which denies the County the right to monitor employee sick leave usage, the management right clause applies. MARATHON COUNTY, *supra*, p. 9.

The Employer believes that the same reasoning applies here. The Employer points out that the Union is not contending that the City's request was unreasonable. Instead, the Union "is simply claiming that Article 16.09 contains a blanket prohibition against *any* requests for doctor's excuses when dealing with absences of less than three days." (Emphasis in the Original). The Employer states that that is not what the contract says. The Employer opines:

> The contract says that any employee who is going to be absent for more than three days can expect a request for a doctor's excuse to verify his/her absence. In other words, Article 16.09 governs the procedure to be followed when employees are going to be off of work for a relatively long period of time. It does not, however, *prohibit* the Employer from requesting documentation in other circumstances, when appropriate, or otherwise limit the Employer's right to manage the work, direct its workforce, or implement *reasonable* rules under Article II. (Emphasis in the Original).

However, for the reasons discussed below, the Arbitrator finds the MARATHON COUNTY case distinguishable from this dispute.

Arbitrator Millot found that the contract provision in question did not apply to the facts of that case. MARATHON COUNTY, *supra*, p. 8. In this regard, Arbitrator Millot noted, as claimed by the City, that said contract provision was a specific provision that addressed a specific situation – sick leave abuse. MARATHON COUNTY, *supra*, p. 9. Arbitrator Millot pointed out that the grievant in that case had not been found to be a sick leave abuser, had not been absent nor in sick leave status for three consecutive days and her sick leave benefits had not been denied for a period of six months. *Id*. Consequently, Arbitrator Millot stated that inclusion of the section by the parties did not negate management's right to manage its workforce. *Id*. Arbitrator Millot concluded that: "[L]acking clear contract language which denied the County the right to monitor employee sick leave usage, the management right clause applies." *Id*.

Here, Article XVI, Section 16.09 is not limited to one specific situation like sick leave abuse. It covers any situation where an employee is absent due to personal illness or injury from work more than three (3) consecutive workdays who applies for sick leave. In addition, it is clear that the parties have addressed in Article XVI, three (3) entirely different specific situations where the City has the authority to require a doctor's certificate. Reading the

contract provision as a whole, it is clear that the parties intended to expressly include those situations where they wanted to provide such authority to the City and no others. Here, unlike MARATHON COUNTY, clear contract language read as a whole restricts the Employer's authority to require a doctor's certificate except as expressly set forth.

In addition, the Arbitrator has reviewed the cases cited in Elkouri and Elkouri, *supra*, for the proposition that it is a legitimate exercise of management authority to require documentation to prevent sick leave abuse especially under suspicious circumstances. None of those cases include contract language like the parties have in the instant case. The parties in Article XVI have agreed upon language that provides for specific instances where the City can require a doctor's certificate to document personal injury, pregnancy or illness but no others. Under such contract language, suspicious circumstances alone are insufficient to defeat employees' positive contractual right to receive sick pay for one day without presenting certification of illness. LACLEDE GAS CO., 63 LA 928, 930 *(*Edelman, 10/74*) citing* BRIDGEPORT GAS CO., 31 LA 253 (Connecticut State Board of Mediation and Arbitration: Stutz; Curry; McDonough, dissenting, 9/58). In BRIDGEPORT GAS CO.*, supra,* p. 255, the arbitration board concluded that there existed a contractual right to one day's pay without proof of illness where the sick leave clause stated that a doctor's slip may be required for absences in excess of one day. When the company refused payment for one day absences unless proof was supplied it violated the agreement. BRIDGEPORT GAS CO.*, supra,* p. 256.

In the instant case, there exists a contractual right for employees to use sick leave for three (3) or less consecutive workdays without presenting certification of the reason. When the Employer refused the Grievant a sick day without verification from her doctor, it violated Article XVI.

Such a conclusion is consistent with the standard noted above by Arbitrator Millot, that clear contract language can restrict management's right to request verification of the reason for sick leave use.

The Employer worries that an interpretation of the contract in the restrictive manner offered by the Union would lead to the type of "unfettered abuse" that the Grievant acknowledged would exist if employee could simply call in sick whenever they please. The Employer asks rhetorically: "Given the unique scheduling of the dispatch department, if employees knew their 'sick' leave could never be questioned, what would stop them from calling in on every" holiday? The Employer adds: "How would the employer 'manage' its workforce and prevent employees from 'falsely reporting themselves ill' or 'deceiving or attempting to deceive' the Department as to a condition of their health?"

Article II – Management Rights provides that "the management of the work and the direction of the working forces, including the right to . . . discipline or discharge employees for just cause" is vested in the Employer. Article II also provides that the "Employer may adopt reasonable rules." This contract language provides the City with the authority to prevent sick leave abuse. If an employee is excessively absent and/or always absent on or immediately

before or after holidays or other paid time off, the City may progressively discipline an employee up to and including termination.

Based on all of the above and the record as a whole, the Arbitrator finds that the answer to the issue as stipulated to by the parties is YES, the Employer violated the collective bargaining agreement by requesting a doctor's slip to verify the Grievant's June 30, 2004 request for sick leave on July 3, 2004.

In light of the foregoing, it is my

AWARD

That the grievance is sustained and the Employer is ordered not to require a doctor's certificate when a bargaining unit employee applies for sick leave for three (3) or less consecutive workdays.

Dated at Madison, Wisconsin, this 28th day of November, 2005.

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

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