BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CALUMET COUNTY

and

CALUMENT COUNTY LAW ENFORCEMENT EMPLOYEES UNIT, WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LEER DIVISION

Case 133
No. 65389
MA-13212

Appearances:

Pamela A. Captain, Corporation Counsel, Calumet County, 206 Court Street, Chilton, Wisconsin, 53014, appearing on behalf of Calumet County.

Nicholas Fairweather, Cullen, Weston, Pines & Bach LLP, 122 West Wisconsin Avenue, Suite 900, Madison, Wisconsin, 53713, appearing on behalf of Calumet County Law Enforcement Employees Unit, Wisconsin Professional Police Association/LEER Division.

ARBITRATION AWARD

Calumet County, hereinafter County or Employer, and Calumet County Law Enforcement Employees Unit, Wisconsin Professional Police Association/LEER Division, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission provide a list of five WERC commissioners/staff arbitrators from which they could jointly select an arbitrator to hear and resolve a dispute between them regarding the instant grievance. Commissioner Susan J.M. Bauman was so selected. A hearing was held on March 28, 2006 in Chilton, Wisconsin. The hearing was not transcribed. The record was closed on May 12, 2006, upon receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties were unable to stipulate to the issues to be determined in this case. However, they agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument as well as the parties' suggested issues. The Union suggested the following issues for decision:

> Did the County violate Articles XIII and VIII of the January 1, 2002 – December 31, 2003 Collective Bargaining Agreement ("the Contract") when it,

> in concert with Sheriff Gerald Pagel, implemented a policy requiring employees to provide medication certification for absences from work? If so, what is the remedy?[1]

The Employer frames the issue as:

> Does the County have a right to impose a reasonable work rule under the bargaining agreement?

Based upon the relevant evidence and argument and having considered the parties' suggestions, I find the issues to be:

1. Is the rule requiring medical certification after four (4) unexcused uses of sick leave reasonable?

2. If not, what is the appropriate remedy?

BACKGROUND

Factually, this is a rather straightforward case. Gerald Pagel is a long time employee of the Sheriff's Department who, comparatively recently, was elected Sheriff. Over time, he observed that certain employees were utilizing their sick leave in order to extend their time off from work, calling in sick the day prior to their regularly scheduled days off, or calling in sick for the first day they were supposed to return for regularly scheduled work hours. The Sheriff's Department is a 24/7 operation that must be fully staffed on all shifts. Thus, absenteeism creates overtime situations and scheduling problems. In 2004, both management staff and certain bargaining unit members brought the situation to the Sheriff's attention. A discussion with one of the persons thought to be engaging in this activity, Mary Nicolais, brought about no change in behavior. Rather than single out individual employees, the Sheriff issued an oral directive on January 11, 2005, to all members of the Sheriff's Department, including members of the Calumet County Law Enforcement Unit. That directive required bargaining unit employees to provide a physician's excuse/certificate for the fifth and subsequent incidents of use of sick days in any calendar year.

Prior to issuance of the new directive, employees were able to utilize sick leave for uses delineated in the collective bargaining agreement without restrictions, other than providing medical certification for absences of three or more consecutive days.[2]

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[1] At hearing, the Union stated the issue to be as stated in the Grievance:

> Did the Employer violate the terms and conditions of the Agreement when it unilaterally imposed a departmental policy requiring that bargaining unit employees provide a physician's excuse/certificate for the fifth and subsequent sick days used in any calendar year? If so, what is the appropriate remedy?

[2] Although the requirement for a physician's certificate for absences of three or more days is not spelled out in the collective bargaining agreement, this appears to be a work rule of long standing that is not contested by the Union.

RELEVANT CONTRACT PROVISIONS

ARTICLE VII – GRIEVANCE PROCEDURE

7.08 Arbitration

a) Only grievances that constitute a violation of a specific provision of this Agreement may be submitted to arbitration as provided below.

ARTICLE VIII – MANAGEMENT RIGHTS RESERVED

8.05 The Employer has the right to establish reasonable work rules. The Association has the right to grieve the reasonableness of a work rule.

. . .

ARTICLE XIII – LEAVES

13.01 Sick Leave

a) No employee shall be absent from the job unless for unavoidable circumstances without first notifying the Employer.

b) Accrual**:** All employees shall earn one (1) day of sick leave per month to a maximum of twelve (12) days per calendar year. Total sick leave accumulation shall not exceed one hundred twenty (120) days. Said leave shall continue to be earned when employees are on any paid leave authorized under the provisions of this Agreement.

c**)** Utilization. Accrued sick leave may be used for the following reasons:

1. Personal illness
2. Bodily injuries
3. Maternity or paternity
4. Medical or dental appointments not able to be scheduled outside of working hours.
5. Required attendance for the care of immediate family as allowed above. Immediate family includes mother, father, spouse, son or daughter, including stepparents and stepchildren.

6. Other leaves taken under Federal Family and Medical Leave Act and Wisconsin Family and Medical Leave Act as allowed by law.

d) Sick leave will be administered in accordance with the Federal/Wisconsin Family Leave Act.

e) Upon retirement an employee shall receive one month's paid insurance for every six (6) days of unused accumulated sick leave.

FACTS

On January 11, 2005, Sheriff Pagel issued a directive to members of the Sheriff's Department at a departmental meeting to the effect that if an individual exceeded use of four unexcused/undocumented sick incidents, consisting of up to three days per incident, an employee was required to submit a medical statement. Exclusions to this policy were FMLA leaves or "anything like that". The Sheriff issued this directive to address excessive use of sick leave in the department. He felt that if an individual was sick that often, they should see a physician. He also felt that there were certain department employees abusing sick leave that created overtime and scheduling problems.

According to the Sheriff, after the work rule was implemented, there were only two grievances, the Grievants herein. Others have gotten to four incidents, received a memo indicating the need for a doctor's note upon the next incident, and brought in a medical excuse without request thereafter. If an employee brings in a medical note, the absence becomes "excused" and it does not count against the four.

The Sheriff also indicated that the sick leave problem was brought to his attention due to usage by, among others, Grievant Mary Nicolais. He attempted to address the matter by having administrative staff speak with her, but she shredded the information. He determined to deal with the matter in a "fair and equitable" manner by issuing the work rule, after considering options that included speaking with Nicolais and adopting the rule. Sheriff Pagel felt that allowing four instances of "unexcused" sick leave incidents in a calendar year was not restrictive.

Mary Nicolais has been employed by the Calumet County Sheriff's Department as a Deputy Sheriff since 1991. In January 2005, she, along with other members of the Sheriff's Department, was orally advised that if an employee utilized more than four (4) incidents of sick time in a calendar year, a doctor's excuse would be required. In June 2005, Nicolais used one of her sick days as she felt she was not fit for duty due to illness. When she called in to report her absence, she was advised that she would need a doctor's excuse in order to be paid for a sick day. As her condition did not require medical attention, Nicolais did not plan to see her medical provider. If she went to the doctor for a medical excuse, she would be required to

make a co-payment. In fact, if under the third party exemption the insurer did not pay, she would have to pay for the medical appointment. Nicolais had used sick leave several times earlier in 2005 and had not been asked for medical documentation. She did not provide a medical excuse for this absence and believes she was not paid for the day in question.

Nicolais had been questioned in the past by her Employer regarding her usage of sick leave, in particular the fact that she took off time at the beginning and the end of the work cycle. At one time, the Employer provided her with documentation regarding her sick leave usage that she shredded. Nicholas has never been disciplined for abuse of sick leave.

Cheryl Mason has been employed by the County as a Correctional Officer since June 1997. Mason was in attendance at the Department meeting in January 2005 when it was announced that if an employee used more than four incidents of sick time in a calendar year, a doctor's excuse would be required. This policy was never put into writing.

In July 2005, Mason used a sick day. She was called at home by her supervisor and was told to bring a doctor's note when she returned to work. Mason told her supervisor that she was home with a sick child and had not been to a doctor. She was advised to bring a note from March when she was out sick with strep throat. Mason went to Neenah, about a 30 minute trip, to get the note. Mason was advised that if she hadn't brought the note, she would have had her sick leave denied and the day off would have been subtracted from her accrued vacation time. Since she brought the note, her sick and vacation leave balances were corrected to reflect the use of a sick day.

At some point during 2005, administrative staff began to provide members of the department with notification that they had used four (4) sick leave incidents during the calendar year. The notification read:

> Our records indicate that you had used 4 sick leave events this calendar year. As of this notice you will need to provide a doctors excuse for subsequent events during the remainder of this calendar year.

Neither Nicolais nor Mason received such a written notice prior to the sick leave events giving rise to these grievances.

POSITIONS OF THE PARTIES

The Union argues that the rule adopted by the County requiring medical certification for the fifth and subsequent sick leave events in a calendar year is not a reasonable work rule and that it must be bargained with the Union. The subject of sick leave is a mandatory subject of bargaining. BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43, 50-51, 242 N.W. 2D 231, 234 (1976) and the County cannot unilaterally implement such a change in the manner

in which the sick leave policy is administered. Article XIII of the collective bargaining agreement provides for paid sick leave, accruable up to one hundred and twenty (120) days, usable under specific circumstances, delineated in the Agreement. Further, the County's requirement does not define "sick leave events" and several of the permitted uses of sick leave under the contract do not require the involvement of a doctor. There is cost to an employee in obtaining a medical excuse that is unnecessary and should not be imposed on the members of the bargaining unit. The Union also argues that the new requirement goes beyond the County assertion that the rule was promulgated to monitor sick leave usage and is a substantive change to the contract between the parties, one that is primarily related to wages, hours and working conditions. Accordingly, the grievance should be sustained, the affected employees' sick leave restored, and the policy rescinded.

The County initially states that the question of whether a particular policy is a mandatory subject of bargaining is not properly before the arbitrator, as the appropriate forum for such questions is circuit court, for a "declaratory ruling,"[3] and that the collective bargaining agreement provides that "[o]nly grievances that constitute a violation of a specific provision of this Agreement may be submitted to arbitration. . . ." It is the County's contention that it has the authority to establish work rules, pursuant to section 8.05 of the contract, and the rules it adopts can only be challenged if the rules are not reasonable, are inconsistent with the bargaining agreement, or are not reasonably related to the safe, orderly and efficient operation of the work force. The rule in question was developed as a method by which to monitor sick leave usage. It requires medical substantiation for the fifth and subsequent sick leave instance, after four sick leave instances without medical documentation are used in a calendar year. The rule was implemented after noticing a pattern of sick leave absences by employees, immediately before or after vacation and other off-time, as a means of limiting what might have been sick leave abuse. The policy does not result in a loss of a substantial benefit to the employees and is reasonable. The grievance should be denied.

DISCUSSION

At the heart of the issue to be decided is the question of what is to be decided. That is, what is the issue before the arbitrator? According to the Employer, the issue is "Does the County have a right to impose a reasonable work rule under the bargaining agreement?" The answer to that question can be found in Article VIII – Management Rights of the collective bargaining agreement, at Section 8.05: "The Employer has the right to establish reasonable work rules." The answer to the Employer's question is YES.

The Union has stated the issue in a number of different ways. In its written argument, the Union frames the issue as: "Did the County violate Articles XIII and VIII of the January 1, 2002 – December 31, 2003 Collective Bargaining Agreement ("the Contract") when it, in concert with Sheriff Gerald Pagel, implemented a policy requiring employees to

[3] The WERC is an appropriate forum for a declaratory ruling to determine whether a particular matter is a mandatory subject of bargaining, but an arbitration proceeding such as this one, is not.

provide medical certification for absences from work? If so, what is the remedy?" Section 8.05 of the agreement is not quoted in its entirety in the above paragraph. The section goes on to state: "The Association has the right to grieve the reasonableness of a work rule." The Union's statement of the issue would lead one to believe that it was contesting the reasonableness of the rule promulgated and implemented by the Sheriff. However, although the Union presented evidence of the additional cost to employees of obtaining a doctor's note when required, even if the absence does not require seeing a medical provider, the Union does not appear to argue that the rule is unreasonable. It, instead, argues that the Sheriff's rule is not a work rule but a unilateral change in working conditions, a mandatory subject of bargaining.

In support of its argument, the Union cites BELOIT, SUPRA, for the proposition that sick leave is a mandatory subject of bargaining and CITY OF WAUSAU V. WAUSAU FIREFIGHTER ASSOCIATION (CHAD EBERLE GRIEVANCE), WERC CASE 107 NO. 63348 (12/04) for the proposition that the Employer cannot implement a rule of the nature at issue here. In the Chad Eberle matter, the collective bargaining agreement contained a specific contract provision that stated: "The City will not unilaterally change any benefit, practice or condition of employment which is mandatorily bargainable." No such language is present in the collective bargaining agreement between the parties here, nor is there a substantial loss of a benefit in the requirement to provide medical documentation for illness.

As a preliminary matter, it is undisputable that sick leave is a mandatory subject of bargaining, and that the parties have bargained about it. Article XIII of the collective bargaining agreement between the parties describes leaves, and Section 13.01 is a comprehensive summation of the agreement the parties reached with respect to the use of sick leave. As noted above, the collective bargaining agreement also contains a provision reserving to the County the right to establish reasonable work rules, an acknowledgment that the collective bargaining agreement does not anticipate every detail of what may transpire in the workplace. Notably, the collective bargaining agreement does not contain a maintenance of standards clause nor any affirmation that past practices between the parties shall not be unilaterally modified by the Employer. Thus, the Union's reliance on the CITY OF WAUSAU, SUPRA, matter is misplaced.

Although not raised until the briefing stage of this proceeding, the Employer appears to make an arbitrability argument, relying on the definition of a grievance in the collective bargaining agreement wherein it states: "Only grievances that constitute a violation of a specific provision of this Agreement may be submitted to arbitration as provided below." Inasmuch as the Union has couched its arguments in terms of mandatory/permissive subjects of bargaining, the County contends that this is not the appropriate forum in which to resolve the matter. However, I note that the initial grievances allege violations of Article VIII – Management Rights; Sections 8.04 and 8.05, Article XIII – Leaves; Section 13.01 and any other Articles and/or Sections of the Agreement that may apply, thereby satisfying the definition of a grievance. Further, Section 8.05 states: "The Employer has the right to

establish reasonable work rules. The Association has the right to grieve the reasonableness of a work rule." Thus, the undersigned finds that the issues before her are:

1. Is the rule requiring medical certification after four (4) unexcused uses of sick leave reasonable?

2. If not, what is the appropriate remedy?

In light of these facts, the Employer had the right to establish its rule, and, in accordance with Section 8.05 of the contract, the Union has the right to grieve the reasonableness of the rule. It is well established that, absent contract language to the contrary, management has the right to establish rules in the workplace as long as such rules are not in conflict with the terms of an existing collective bargaining agreement. See, generally, Elkouri and Elkouri, How Arbitration Works, 6th Edition, p. 771 et seq. In determining whether the rule is reasonable, it is necessary to evaluate whether there is a legitimate purpose in adopting the rule, whether the rule as promulgated accomplishes that purpose, what other options were considered by the Employer prior to adopting the rule, and whether the promulgation and implementation of the rule fairly put employees on notice of the rule.

In general, in grievance arbitrations, other than in discipline or discharge cases, the Union has the burden of proof to establish that there is a contract violation. In the matter before me, the issue is whether a rule adopted by the Employer is a reasonable rule, not whether there has been a contract violation. The considerations in ascertaining whether a rule is reasonable put the burden on the Employer to demonstrate that there is a legitimate purpose in adopting the rule, that the rule accomplishes the purpose, that other options were considered prior to adoption of the rule, and whether there was sufficient and clear notice to employees regarding the rule.

Here, the Sheriff implemented the rule after noticing a pattern of sick leave absences by employees, immediately before or after vacation and other off-time, thereby extending the period of off-duty time and putting pressure on other employees to work extra shifts to cover the time in question, often with extra cost to the County. Without a doubt, the Sheriff has a legitimate purpose in addressing abuse of sick leave. Although the undersigned believes it to be a better practice to address such apparent sick leave abuse with the individuals who appear to be abusing the leave, the Sheriff determined to establish a rule regarding the fifth and subsequent incidents of sick leave use in a calendar year. This decision resulted, in part, from the behavior of one of the alleged abusers, and grievant herein, Nicolais, who shredded the documents provided to her when approached regarding her pattern of sick leave usage.

The Sheriff credibly testified that after the discussion with Nicolais had no discernible effect, he decided that he would not single out individuals but, rather, would adopt a rule that applied to all Sheriff's Department personnel. He proceeded to issue a directive at the

January 11, 2005 departmental meeting requiring medical documentation after the fourth instance of sick leave usage in a calendar year. The directive was never put into writing. Sheriff Pagel only considered the two options: speaking with Mary Nicolais and the rule. His reasoning was that four instances in a calendar year was not restrictive: if one was ill more, perhaps the individual should see a doctor.

The failure of the Sheriff to provide any rationale for his choice of four incidents of sick leave usage, apparently with up to three consecutive days off counting as one incident, is fatal to a finding that the rule is reasonable. The collective bargaining agreement provides numerous reasons that an employee might utilize sick leave, excluding FMLA approved absences that are exempt from the rule. The valid reasons for use of sick leave include personal illness; bodily injuries; maternity or paternity; medical or dental appointments not able to be scheduled outside of working hours; and required attendance for the care of immediate family for these reasons, with immediate family defined as including mother, father, spouse, son or daughter, including stepparents and stepchildren. Although a doctor's or dentist's note is easily obtainable if one has an appointment, there are many times that a person does not feel well enough to work, even though the individual is not ill enough to be seen by a medical professional. Examples include bad colds, upset stomach, and the like. Oftentimes an individual will recuperate sufficiently to return to work after a day or two. Individuals who are particularly susceptible to colds and upset stomachs could easily have such symptoms more than four times in one year without the need to seek medical assistance.[4] A requirement that an employee see a medical professional, thereby incurring the cost of an insurance copayment, is inherently unreasonable, absent a specific set of facts appearing to support a suspicion of sick leave abuse.

Further, the collective bargaining agreement provides for employees to earn one (1) day of sick leave per month, to a maximum of twelve (12) days per calendar year, with an allowable sick leave accrual of up to one hundred twenty (120) days. The agreement does not limit the number of accrued days that an employee is able to utilize within a calendar year and, in fact, provides a reward in terms of a post-retirement health insurance benefit for unused accumulated sick leave. In order for the County to impose a rule of the type that it has sought to impose here, it is necessary for the County to establish why the number of instances of use has been limited to four. That is, while the Sheriff may very well have done some type of analysis of the departmental sick leave usage and found that few individuals, other than those he suspects of sick leave abuse, use more than four instances within a calendar year without medical documentation due to an absence of three or more days, such information was not presented. The Sheriff has not established why the number he chose, four, is more reasonable than three instances, or six instances. In fact, the Sheriff provided no reasoning whatsoever as to why he selected four instances of sick leave usage prior to the requirement for a medical excuse.

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[4] Given the skyrocketing cost of health insurance and health care, it is difficult to imagine that the County is encouraging employees to seek medical attention in the absence of real need. The existing rule requiring medical documentation for absences of three (3) or more consecutive days recognizes that an illness of such duration does warrant medical attention. Colds, upset stomachs, etc. are readily treated by over-the-counter medications and do not warrant medical attention unless symptoms persist for several days. Requiring employees to see a physician for symptoms requiring a one day absence would appear to unnecessarily require the use of expensive resources.

The Sheriff did testify that employees, other than the Grievants herein, had no problem with providing a medical excuse after they were advised of the need for same. While this might support a conclusion that the rule is reasonable, it is after-the-fact evidence and cannot be utilized to support the reasonableness of the rule at the time that it was adopted. In other words, it may very well be that the rule adopted by the Sheriff is a reasonable one, but the County has failed to establish that fact on this record.

In addition, the rule adopted by the Sheriff, while related to sick leave usage, does not appear to address the matter that the Sheriff was, apparently, concerned about: use of sick leave at the beginning or the end of an off-duty period. If the request for medical documentation had been connected, in some manner, to sick leave usage at the beginning or end of an off-duty period, the issue that the Sheriff sought to correct, it is more likely that the rule would have been found to be reasonable.

While not squarely before me, the manner of promulgating and implementing the rule is also of concern. There is little doubt that an Employer might adopt a reasonable work rule but fail to provide sufficient notice to employees, resulting in a finding that the implementation of the rule is not reasonable. In this case, I have found that the rule was unreasonable, largely because the Sheriff failed to provide sufficient justification for the specific rule that he adopted. As indicated above, the Employer does have the right to establish work rules, including work rules regarding the usage of sick leave. Therefore, I note that assuming *arguendo* that the rule was a reasonable rule, the manner in which it was promulgated and implemented also appears to be lacking.

Although both the Union and the Employer agree that there is nothing inherently wrong in promulgating a rule and not reducing it to writing, when an employee benefit is affected by the rule, the notice should be clear and unequivocal. At hearing, there seemed to be some confusion on the part of the Grievants regarding whether it was four days of sick leave or four instances of sick leave usage, of up to three days each, which triggered the need for a medical excuse. It remains unclear to the undersigned if using a few hours of sick leave, for example, for a dental appointment, would be considered one instance of sick leave usage. For the rule to be considered reasonable, it must be clear and unequivocal. There should be no confusion about its meaning, or how it would be applied. Grievant Mason, when told she needed a medical excuse because she had utilized her fourth instance, was surprised to hear that she could obtain a medical excuse for a <u>prior</u> unexcused absence and, months later, turn that absence into an excused absence thus not triggering the need for a medical excuse for the immediate absence.

The Employer's decision, apparently made after Mason's fourth unexcused absence, to advise individuals in writing that the next absence would require documentation should have been made as soon as the rule was adopted. Again, it is imperative that in order for a rule to be reasonable, it must be fair and fairly applied to all employees. The after-the-fact decision to provide written notice should have been an integral part of the promulgation and implementation of the rule.

As I have found that, on this record, the work rule adopted by the Employer was not reasonable, the Grievants, Nicolais and Mason, must be made whole for any wages or benefits lost as a result of application of the rule.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The work rule is not a reasonable rule.

2. Grievants are to be made whole for the denial of their use of sick leave for the days in question.[5]

Dated at Madison, Wisconsin, this 10th day of July, 2006.

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

[5] It is my understanding that Mason has already had her vacation balance restored and was permitted to utilize sick leave after supplying medical documentation for a prior absence. The record is not clear as to whether Nicolais was not paid for the day in question or whether she was required to utilize a vacation day to cover the day off. If she was not paid, she is to be paid for that day. If she was required to utilize a vacation day, that day is to be restored and her sick leave bank is to be debited for the day in question.

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