BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RHINELANDER EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

SCHOOL DISTRICT OF RHINELANDER

Case #62
No. 65741
MA-13309

(Judy Michaels Sick Leave Documentation Grievance)

Appearances:

Ted Lewis, Director, Northern Tier UniServ, Post Office Box 1400, Rhinelander, Wisconsin 54501-1400 appearing on behalf of the Rhinelander Educational Support Personnel Association.

Daniel Mallin, Staff Counsel, Wisconsin Association of School Boards, 122 West Washington Avenue, Suite 400, Madison, Wisconsin 53703, appearing on behalf of the School District of Rhinelander.

ARBITRATION AWARD

Pursuant to the terms of their collective bargaining agreement, the School District of Rhinelander (hereinafter referred to as either the District or the Employer) and the Rhinelander Educational Support Personnel Association (hereinafter referred to as the Association) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, a member of its staff, to serve as the arbitrator of a dispute concerning the District's requirement that Library Media Para-Professional Judy Michaels provide medical documentation for her use of sick leave. The undersigned was so designated. A hearing was held on June 26, 2006 at the District's offices, at which time the parties submitted such exhibits, testimony and other evidence as was relevant to the dispute. A stenographic record was made of the hearing, and a transcript was received on July 13. The parties submitted briefs, and reply briefs, the last of which were received on September 18, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the contract language, and the record as a whole, the Arbitrator makes the following Arbitration Award.

ISSUE

While there was no substantial dispute between their formulations of the issue, the parties could not stipulate to a statement of the issue, and agreed that the arbitrator should instead frame the issue in his award. The issue may be fairly stated as:

1. Did the District violate the collective bargaining agreement when, at a meeting on December 5, 2005, it directed Judy Michaels to provide certification of medical inability to work for days on which she wished to use paid sick leave?

2. What is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

. . .

Article 17

Sick Leave

. . .

B. Sick Leave Usage: . . .

The District would have the right in the event of use for serious illness in the immediate family, defined above, to require a physician's statement that the employee's presence is necessary.

C. Notice: At least sixty (60) minutes in advance of their regularly scheduled starting time, employees unable to report in work at the designated time due to illness shall notify their immediate supervisor or the school office their payroll check is delivered to.

D. Advance Notification: In the event that an employee is aware in advance that sick leave benefits will be needed or due, it shall be the duty of the employee to notify the Assistant Superintendent – Personnel as far in advance as possible, in writing, of the anticipated time and duration of such sick leave, the reasons 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 after which their doctor certifies that they are medically unable to perform their normal duties. An employee on sick leave is required to notify the Assistant

Superintendent-Personnel at the earliest time of the anticipated date on which the employee will be able to resume his/her normal duties. The Assistant Superintendent-Personnel may require a certificate from the employee's physician that an employee on sick leave is medically unable to perform his/her normal work duties. In the event that an employee on sick leave fails to return to work as soon as he/she is medically able to perform his/her normal work duties, he/she may be deemed to have resigned his/her position from the District and have waived all employment rights. Sick leave benefits under this provision shall be paid to the employee on sick leave only for the actual work days missed due to medical inability to perform his/her duties.

. . .

G. Abuse: Any employee obtaining sick leave benefits by fraud, deceit, or falsified statements shall be subject to disciplinary action including, but not limited, to suspension or dismissal.

. . .

BACKGROUND

Prior to the start of the 2005-2006 school year, the School District of Rhinelander closed three elementary schools and consolidated and reconfigured the elementary program at the remaining elementary schools. As part of the consolidation, Pelican Elementary School was forced to devote a portion of its library space to a new classroom, and to find housing for a speech pathologist. The need for an office for the speech pathologist arose shortly before the start of the school year. Linda Ruohoniemi, the District's Library Media Specialist, determined that the best space would be a work room in the library, formerly used by the Grievant, Judy Michaels. Michaels' equipment, materials and possessions were removed, and piled on a table outside the room, and the space was changed to an office.

Another change affecting Michaels related to her class schedule. As a Library Media Para-Professional, Michaels was responsible for teaching classes about library usage prepared by classroom teachers and Ruohoniemi. The consolidation resulted in more classrooms at the building, and more classes for Michaels to teach. Because of the scheduling of other specials, Michaels' classes were all concentrated on Tuesdays and Fridays, with six classes in a row on both days, leaving little time for her other work.

August 31 was the first work day of the year. Ruohoniemi went to Pelican for a breakfast the school was holding to mark the start of the work year, and meant to speak with Michaels about the changes. However, Michaels did not go to the breakfast before reporting to what had been her work space. She also received her class schedule before seeing Ruohoniemi. When Ruohoniemi encountered her in the hall after the breakfast, the Grievant was quite angry and emotional. The Grievant told Ruohoniemi she felt that the changes were directed at her personally, as a result of the Principal's dislike for her. Ruohoniemi assured her that was not the case. The Grievant then told Ruohoniemi that she would be using her sick days during the year.[1] Ruohoniemi took this to mean that she would be calling in sick on Tuesdays and Fridays, the two heavy teaching days. She also assumed, though, that the Grievant was just blowing off steam because she was angry.

Ruohoniemi ultimately felt that the Grievant was too upset with the changes, and suggested that she work at the High School with her for awhile. The Grievant did report to the High School, but not until September 7. She took sick leave on September 1, 2 and 6, the first three days of the student year.

The Grievant worked at the High School until early November, then reported back to the library at Pelican Elementary. On Friday, November 11, she took a sick day for a doctor's appointment. She had arranged a substitute two weeks earlier, but did not inform her supervisor or her principal that she would be absent that day or that a substitute would be covering her classes. The substitute did not have the lesson plans for the day, and had substantial difficulties with the classes. The Grievant also took sick leave the following Friday, November 18, calling in with a reported stomach flu. The next Friday was the Thanksgiving break. On Thursday, December 1 she used 45 minutes of sick leave.

On December 5, the Grievant was directed to meet with Assistant Superintendent-Personnel Charles Radtke. Radtke informed her that she would be required to provide medical documentation for all future sick leave usage, stressing any usage on Tuesdays and Fridays. She objected, but complied. The instant grievance was thereafter filed on her behalf. It was not resolved in the lower stages of the grievance procedure and was referred to arbitration.

At the arbitration hearing, in addition to the facts recited above, the Association presented the testimony of its two Presidents since 1990, to the effect that no employee had, to their knowledge, ever been required to provide medical documentation for intermittent, or "normal", use of sick leave. For its part, the District, through Charles Radtke and Food Service Supervisor Kathy Ehlers, provided evidence of six prior

[1] The grievant testified that she told Ruohoniemi "If I'm going to be stressed out this year, I'm going to be using my sick leave." Ruohoniemi recalled the remark as "You can be sure that I'm going to be using my sick days."

instances in which staff members had been required to provide medical documentation for sick leave. Three custodians had been placed on proof status in response to patterns of heavy sick leave usage and rumors that each was moonlighting at other work during District work hours. A food service worker was placed on proof status because of a pattern of taking Fridays off, and reports that she had been seen working at a restaurant when she was supposedly at doctor's appointment. Another custodian was required to provide medical verification because she had been a heavy leave user and her doctor was not cooperating with the District in providing information about her recovery from an injury. A sixth worker was required to provide medical documentation to support her request for an unpaid leave of absence. Radtke also testified that he felt the Grievant's usage of sick leave in the first semester of 2004-2005 could be characterized as excessive, since if she continued to use her leave at that rate it would annualize to 20 days of sick leave.

On cross-examination, Radtke agreed that sick leave usage tends to be sporadic, rather than constant, and that using his methodology. if someone was sick on the first day of the school year, that person's leave usage could be annualized to 180 days. He also agreed that the Grievant did not exceed her annual accumulation or dip into her sick leave bank during the 2004-2005 school year.

Director of Buildings and Ground Mark Stephens testified that the five custodial workers who had been told to document their absences had all been asked to do so by him, and had voluntarily complied. Two of them had chronic medical conditions, and all had histories of heavy sick leave usage. None had filed grievances over the requirement of a doctor's slip.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Association

The Association takes the position that the District exceeded its authority by requiring Michaels to furnish documentation of illnesses. The contract has a narrow and specific provision allowing for a demand for medical documentation, but only where the employee seeks time off for a family illness, or where the employee is absent for a serious illness or surgery. Neither of those circumstances is present in this case. The Grievant merely seeks to make normal use of sick leave, while the District asserts a broad and unsubstantiated right to demand documentation because it wrongly suspects sick abuse. That extravagant claim flies in the face of the normal rule that to express one thing is to exclude others. It also runs counter to the experience of Association officials, that no bargaining unit member has ever been required to provide medical documentation for any personal illness other than a serious condition.

Even if the District has some residual right to seek documentation of illness, the exercise of that right must depend upon some reasonable cause to suspect abuse. There is none in this case. The Grievant used a total of six and one half days of sick leave in the 2005-2006 school year when the District acted to restrict her contractual rights to sick leave. She had three and one half days remaining from her annual allotment, and ample additional time in her sick leave bank. In short, her use of sick leave was hardly excessive. Neither was there anything suspicious about her pattern of usage. She took three days at the start of the year, because she was distraught by the unexpected and unwelcome change in her duties and working conditions. The District made no objection, nor did it seek documentation. Over the next three months, she used three and a half additional days. There is nothing unusual about the rate at which she used sick leave after the start of the year.

The District's attempt to muddy the waters by annualizing her rate of usage is simply nonsensical. The District's own witness admitted that sick leave is used intermittently – several days may be used for an illness, followed by months with no usage. Thus annualizing makes no sense at all. Likewise, the District's attempt to manufacture a past practice should be unavailing. The District pointed to six cases in which it demanded documentation from other employees. Each one of the six had either a chronic condition, or had objectively excessive sick leave usage. Neither factor applies to the Grievant.

The Position of the District

The District takes the position that the grievance lacks merit and must be denied. There is no provision of the contract prohibiting what the District did here. The Association assumes that, because the contract does not expressly authorize the District to demand medical proof of illness, it prohibits such a demand. There is no authority for that proposition, which is, in any event, wrong. In fact, the contract states, without restriction, that the District "may require a certificate from the employee's physician that an employee on sick leave is medically unable to perform his/her normal work duties." Even without such an express authorization, the District would have the inherent right to police sick leave abuse unless there is something in the contract that forbids that action.

Article 17(D) provides, in part "The Assistant Superintendent-Personnel may require a certificate from the employee's physician that an employee on sick leave is medically unable to perform his/her normal work duties." There is nothing ambiguous about this language. There is nothing about it that suggests it is limited to serious or long term illnesses, as suggested by the Association. It says what it says, and absent some compelling proof that something else was meant, the arbitrator must accept it at face value.

The Association's attempt to draw a distinction between long term and serious illnesses, and the normal use of sick leave, has no basis in the contract. Certainly the contract speaks to different circumstances in which sick leave might be used, but it does not distinguish between them when it speaks to requiring a doctor's slip. The claimed contextual ambiguity of this language exists only in the Association's mind, and has no support in either contract language or past practice. Indeed, past practice solidly supports the District's view that it can require a doctor's slip in cases other than long-term and serious illnesses.

Even if the arbitrator were to determine that the contract does not expressly authorize the District to require doctor's slips, there is an inherent management right to do so. Sick leave is a valuable benefit and is available only for a limited purpose – illness of the employee and her family. Management has the authority to run the District, and part of that is enforcing rules and policing benefits. Any other interpretation leaves the employer helpless in the case of all but the most careless and flagrant abusers. The contract itself provides discipline for anyone who abuses sick leave benefits, and implicit in that provision is the right to investigate and prevent abuse. Absent any contract provision expressly prohibiting a request for doctor's slips, the arbitrator must conclude that the District has such a right.

The District's management rights are, of course, subject to review for arbitrariness and discrimination. Neither are present here. The Grievant effectively announced her intention to abuse sick leave at the beginning of the year, then engaged in a pattern of calling in sick on days when she would have to handle classes. The District was entitled to respond to this apparent pattern, and confirm the claim of illness. The issue here is not whether the Grievant actually abused sick leave. It is whether the District had a reasonable basis to suspect sick leave abuse. It did, and the arbitrator should therefore deny the grievance.

The Association's Reply Brief

The Association takes the position in reply that the District considerably overstates the Grievant's sick leave usage, and recites irrelevant facts to make up for the weaknesses in its case. Again, the Grievant's use of sick leave was not excessive by any normal measure. She took sick days on consecutive Fridays, once for medical tests and then because she was ill. She had the right to use her sick leave for medical tests, and she had the right to use it for personal illness. There is absolutely nothing, aside from the District's intense hostility to the Grievant, that justifies placing her under a microscope.

The District's Reply Brief

The District dismisses the Association's arguments as misplaced and misleading. The great weight of arbitral opinion holds that employers have a general right to police sick leave abuse, and require doctor's slips when the circumstances warrant and the contract does not forbid it. This contract expressly allows for doctor's slips, and the Association admits that there is no distinction between long-term, serious, and "normal" sick leave usage anywhere in the agreement. Thus, there can be no such distinction drawn between cases when the District can and cannot ask for a doctor's slip. It can require slips for any use of sick leave. The District also reminds the arbitrator that there is a past practice supporting its requirement of doctor's slips, and contrary to the Association's arguments, there is nothing in the record to show that that practice has been in any way limited to chronic conditions.

DISCUSSION

The issue in this case is whether the District has the right to demand a doctor's slip to support a sick leave request. The District asserts that it has such a right with respect to sick leave generally, and also in specific cases where circumstances give rise to suspicions of abuse. As to the first of these claims, I find that the contract does not support the claim that a doctor's excuse may be demanded as a matter of course. Article 17 of the collective bargaining agreement addresses sick leave. It is a very carefully written and detailed provision, and it speaks to doctor's excuses in three areas. Subsection E states that, where sick leave is requested for a serious illness of a family member, the District has the right to "require a physician's statement that the employee's presence is necessary." Subsection G provides that, in cases of a planned sick leave usage, "it shall be the duty of the employee to" .. [provide] .. "medical certification that the employee will be unable to perform his/her normal work function." Several sentences later in that section is the sentence on which the District focuses its argument: "The Assistant Superintendent-Personnel may require a certificate from the employee's physician that an employee on sick leave is medically unable to perform his/her normal work duties." The District reads this as a stand-alone provision, directed at sick leave in general. The Association argues that it applies to employees on extended leaves for major surgeries and chronic conditions. Either interpretation is permissible, but it appears from the context of this provision that the general right to demand a doctor's slip is aimed at planned usages, which is the subject heading of the provision. The first reference to doctor's certification is in the context of an initial request to schedule sick leave, and it seeks to insure that the requested leave is in fact medically necessary. This second sentence goes to certifying the continuing necessity of sick leave while the employee is off work. Thus it fits within the scheme for policing planned sick leave usage and is not, contrary to the District's argument, mere surplusage.

The conclusion that this language is aimed at planned leaves is buttressed by the evidence of practice presented by the Association, to the effect that the District has not, at least in the past 15 years, ever required a doctor's slip for intermittent or "regular" sick leave usage. For its part, the District provided evidence of six cases in which it had required doctor's slips. In five of those cases, however, the District had substantial grounds to suspect abuse of sick leave.[2] This leads to the second aspect of this dispute, and to my ultimate conclusion that this grievance should be denied.

To say that the contract does not contemplate routine demands for doctor's certifications in cases other than long term or planned absences is not to say that it precludes the District from exercising its inherent right to police against abuse of the negotiated sick leave benefit. By the specific terms of the contract, and by the nature of sick leave, it is a valuable benefit that is offered for a specific limited purpose. It is not a personal leave provision, or a grant of time off because an employee just does not feel like coming to work. The use of sick leave carries a cost for the District, in lost productivity or the cost of a substitute, or both. If the contract does not expressly forbid a demand for a doctor's slip in cases where the District has a reasoned basis for believing that sick leave is being abused, that tool must be considered available to the District. Otherwise the parties' agreement to a limited sick leave benefit loses its meaning, and management's rights to make and enforce work rules, discipline for just cause, and direct District operations are all eroded. There is nothing in this contract, nor in the history of the parties' administration of the sick leave provisions, to suggest that the District ever agreed to forfeit its right to self defense.

While the Association argues passionately that the Grievant never gave the District any cause to suspect that she was abusing sick leave to express displeasure at the restructuring of her work environment and/or avoid her heavy class schedule on Tuesdays and Fridays, the record in fact amply justifies the District's concerns. While the specifics of her comment to Ruohoniemi on the first work day of the year are in dispute, there is no dispute that she made a linkage between the new work arrangement and the possible use of sick leave. She then used sick leave on the first two Fridays she was to teach the heavier than normal class load, including one day on which she had arranged a substitute in advance and failed to either notify the District or provide a lesson plan for the substitute.[3] This would have led a reasonable person to conclude that she was using her sick leave to express resistance to the new arrangement. That is the conclusion the District drew, and it responded by imposing a doctor's slip requirement on her use of sick leave. In so doing, it acted reasonably, and within its rights under the collective bargaining agreement.

---

[2] In the sixth case, the medical documentation was requested in support of a request for an unpaid leave of absence. From the language of Article 21, it appears that unpaid leaves are within the discretion of the Superintendent. Conditions on a discretionary leave would not shed light on the conditions that may be placed on a contractual entitlement such as sick leave.

[3] On one of these days she had a doctor's appointment, and on another she was legitimately ill with stomach flu. That is beside the point. This is not a discipline case, and the issue here is whether the District has reasonable grounds to suspect abuse, not whether it secured evidence to prove abuse.

The test for whether the District may require a doctor's slip for "normal" sick leave usage is whether the conduct of the employee would lead a reasonable person to believe that sick leave abuse is occurring. It is not possible to specifically define the parameters for such a standard, any more than it is possible to state with absolute clarity what will or will not constitute "just cause" for discipline. On the facts of this case, I conclude that the District had good cause to question the Grievant's use of sick leave during the first semester of 2005-2006, and did not violate the collective bargaining agreement when it placed her on proof status. It is not clear from the record how long she was to remain on that status. The parties characterized the requirement as applying to "all" days after December 19, 2005. A permanent requirement would plainly exceed the bounds of reasonable cause, particularly as the District did not provide any proof of actual abuse. Aside from that general observation, however, the record is not sufficiently developed on this point to allow for any firm conclusions.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

Based upon reasonable evidence to indicate sick leave abuse, the District did not violate the collective bargaining agreement when, at a meeting on December 5, 2005, it directed Judy Michaels to provide certification of medical inability to work for days on which she wished to use paid sick leave.

The grievance is denied.

Dated at Racine, Wisconsin, this 30th day of January, 2007.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator

DN/dag
7090