BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DOUGLAS COUNTY

and

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION/DOUGLAS COUNTY DEPUTY SHERIFF'S DEPARTMENT-JAIL DIVISION, LOCAL 441A

Case 269
No. 65612
MA-13269

(Short Term Disability Grievance)

Appearances:

Frederic P. Felker, Corporation Counsel, Douglas County, 1313 Belknap Street, Superior, Wisconsin 54880, on behalf of Douglas County.

Mark R. Hollinger, Staff Attorney, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, Wisconsin 53713, on behalf of Local 441A.

ARBITRATION AWARD

The County and the Association 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 Association requested and the County agreed that the Wisconsin Employment Relations Commission designate an Arbitrator to resolve a grievance filed by the Association on behalf of Jailer Molly Wickersham (Wickersham or Grievant, herein). The Commission designated Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing was held on the matter on September 29, 2006, in Superior, Wisconsin. A transcript was prepared and made available to the parties. A briefing schedule was set and, due to a medical condition of one of the advocates, extended, and the record was closed on June 14, 2007.

ISSUES

The parties did not stipulate to a statement of the issues. The Association stated the issues at the time of the hearing as

> Did the County violate Article 5 and/or Article 28 of the current Collective Bargaining Agreement by denying the Grievant short-term disability benefits under the insurance plan? If so, what is the remedy?

In its brief the Association stated the issue the same way the County did, which is

> Did Douglas County violate the Collective Bargaining Agreement in December of 2005 by assigning sick leave and one vacation day and three personal days to the period the Grievant was absent from work? If so, what is the remedy?

The County's statement of the issue is adopted as best reflects the record and is stated broadly enough to encompass the Association's original statement.

RELEVANT CONTRACT PROVISIONS

ARTICLE 4.

GRIEVANCE PROCEDURE.

. . .

Section 5. If the issue remains unsettled, the Union may, within ten (10) day following the meeting with the Human Resources Department Representative, petition the Wisconsin Employment Relations Commission (WERC) to appoint an arbitrator to conduct a hearing and issue a written decision on the matter. The Union shall provide the County with a copy of the petition for arbitration by mail at the same time the Union files the petition with the WERC. Each party shall be responsible for the costs it incurs through arbitration. The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. The Arbitrator shall not add to, subtract from, or modify the terms of this Agreement. Both parties to this Agreement agree that the decision of the arbitrator shall be final and binding. Both parties will attempt to mutually agree upon an arbitrator and if no agreement is reached, the Parties agree to WERC making the selection.

. . .

ARTICLE 5.

VESTED RIGHT OF MANAGEMENT . The County possesses the sole right to operate the County Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law, shall be vested exclusively in the Douglas County Board of Supervisors through its duly appointed Committees. The Department Head, through authority vested in him/her, by either the Douglas County Board or the State Statutes, shall have the right to exercise full control and discipline in the proper conduct of the Law Enforcement Department operations.

Management rights include:

A) To direct all operations of the county

. . .

C. To determine the hour of employment and the length of the work week and to make changes in the detail of the employment of the various employees from time to time as it deems necessary for the efficient operation of the Law Enforcement Department.

. . .

K) To establish reasonable work rules and schedules of work.

L) To maintain efficiency of County operations.

. . .

ARTICLE 28.

Section 1.

. . .

Definitions: Sick Leave is defined as an absence for personal illness or the illness of an immediate family member on any one occasion up to three (3) consecutive working days. Short-term disability begins on the fourth (4th) consecutive working day through the 179th calendar day, and long-term leave of absence is six (6) months and beyond.

. . .

Section 2. Family and Medical Leave. Family/Medical leave is available to all employees who meet the legal eligibility requirements. The WFMLA and FMLA will be administered according to the law. The Wisconsin leave is available over a twelve (12) month period beginning January 1st and ending December 31st of each year. The Federal Leave is available for each year over a twelve (12) month period on a rolling time frame. The County agrees to comply with the State and Federal FMLA provisions.

. . .

BACKGROUND AND FACTS

In March of 2003 Douglas County authorized a voluntary short-term disability insurance program for its employee whereby the employee pays the entire premium if they take the insurance. RESOLUTION #29-03, which carried, stated in pertinent part:

> RESOLVED, that the Douglas County Board of Supervisors accept the recommendation of the Administration Committee and approve offering a group short-term disability insurance program, on a voluntary basis, to all active, full-time employees of Douglas County, at no cost to Douglas County.
>
> BE IT FURTHER RESOLVED, that this voluntary insurance program be underwritten by Madison National Life Insurance Company.

The short-term disability policy contains several definitions. The parties stipulated that among those definitions is that the "Elimination Period", as set out in the first page of Joint Exhibit 5 (the joinder agreement between the County and the Insurance Trust), is, accident, one calendar day; sickness, four calendar days. The parties also stipulated that the definition of "Elimination Period" in Joint Exhibit 14 (the Company certificate of insurance), is and means "A period of consecutive dates of total disability for which no benefit is payable. The elimination period is shown in the Schedule of Benefits and begins on the first day of total disability". The record demonstrates that the Insurance Company considers that, under the terms of the policy a claimant must satisfy a 4-day elimination period due to illness during which time no benefits are paid, and that thereafter the policy does not provide for payments for days an employee receives employer-paid sick leave, personal leave and vacation benefits pay.

The parties have had a definition, by time periods, of short-term disability in their collective bargaining agreements for several agreements prior to 2003, but 2003 was the first time a short-term disability policy was offered through the County. The definition of short-term disability in the parties' agreements was changed from a seven day to a four day starting period for the January 2005-December 31, 2007 agreement. While that most recent agreement was negotiated the topic of short-term disability insurance was not discussed. The change in time period concerned a County effort to make it consistent with several of its collective bargaining agreements. The status of short-term or long-term disability maintains the employment relationship and the four day provision is also consistent with certain workers compensation provisions.

Approximately 70 to 80 out of approximately 300 Douglas County employees purchase the short-term disability insurance. Mollie Wickersham, the Grievant, is and has been a Douglas County employee working as a Jailer. In 2003 she began taking the voluntary short-term disability insurance and paid the entire premiums for coverage. She has maintained that coverage for all times relevant herein.

In August of 2005 the Douglas County Board established several policies, including one concerning leaves of absence. These policies were not negotiated with the Union. The policy for leaves of absence states in pertinent part

. . .

> **Family/Medical Leave** is available to all employees who meet the statutes eligibility requirements and will be administered accordingly. The Wisconsin Family Medical Leave (WFML) and the Federal Family Medical Leave (FFML) will be taken concurrently and simultaneously.
>
> The Wisconsin Family Medical Leave (WFML) is available for a twelve-month period January 1st of every year.

The Federal Family Medical Leave (FFML) is available each year for a twelve-month period on a rolling time frame.

a. Wisconsin Family Medical Leave

6 weeks of unpaid leave for birth or adoption of a child beginning within 16 weeks before or after birth or placement (does not include foster care) in a 12-month period.

2 weeks unpaid medical leave for care of seriously ill parent, child or spouse.

2 weeks unpaid medical leave for the employee's serious health condition.

b. Federal Family Medical Leave

12 weeks during any 12-month period, for birth, adoption, or foster placement, family, or personal medical leave. Spouses who work for the same employer are limited to a combined total of 12 weeks for birth, adoption or foster placement.

c. Substitution of Leave

Under the Federal and Wisconsin Family Medical Leave Acts eligible employees are not prevented from using leave accruals during the time of an authorized FMLA.

Under the FFMLA an employee may elect or employer may require accrued paid leave to be substituted.

Under the WFML an employee may elect to substitute accrued paid or unpaid leave of any other type provided by employer.

The County has elected to establish the standard that all employees' leave balances must be exhausted before any additional unpaid time may be taken beyond the required unpaid leave noted above. Considering the employee's option to take FML in an unpaid status as noted above, sick leave would be assigned first for medical related leave. Personal holiday/leave, compensatory time and vacation will then be assigned for a family leave. Once all leave is exhausted, the employee will be on unpaid leave.

(**emphasis** supplied).

The County's reason for adopting the above policy is based on its interpretation of the State and Federal FMLA provisions. Prior to adopting this policy the County had done some assignment of times for some employees, but not on a consistent basis.

In June of 2005 Grievant took two weeks of unpaid leave for a personal medical reason. She applied for short-term disability under the accident provisions of the insurance policy and was paid by the Insurance Company for nine working days after the elimination period. She did take a sick day during the one day elimination period that was applicable. The County did not require her to first take or exhaust any of her leave balances at that time because of the provisions of the Wisconsin FMLA allowing for such unpaid leave. She had not taken any State or Federal FMLA up to that point in the 2005 calendar year.

In December of 2005 Grievant had another leave for a medical illness. She requested leave under FMLA beginning December 7, 2005. December 7, 2005 was the first day of her leave and she returned to work on January 5, 2006. She applied for short-term disability insurance benefits for this time period, which had a four day elimination period. The County required her to use her accumulated paid sick leave, vacation and personal time and paid her for those benefits, with the balance of her leave time being without pay. The County sent her a memorandum on December 8, 2005 which reviewed, among other things, her earlier two week unpaid time off through the Wisconsin FMLA, the County policy that leave balances must be exhausted before any additional unpaid time may be taken beyond the required unpaid leave, and assigning her then current fringe benefits of 8 sick leave days (12/7-12/16/05), 1 vacation day (12/19/05) and 3 personal days (12/20-22/05) to her current leave. The memorandum noted she had ten weeks remaining under the Federal FMLA as calculated on a rolling time frame from her June 6-20, 2005 prior leave.

After Grievant returned to work she received a check from the Insurance Company for short term disability starting December 11, 2005 (after the 4 day elimination period) to January 5, 2006. The Insurance Company then stopped payment on that check and issued her a different check, reducing the time period of disability benefits by the number of days the County had paid Grievant her accrued fringe benefits. The Insurance Company sent her a letter on January 16, 2006 which stated in pertinent part:

> Under the terms of your policy, you must satisfy a 4-day elimination period due to illness during which time no benefits are paid. Your disability began on December 7, 2005; therefore, you were eligible for a benefit as of December 11, 2005. However your employer paid you sick and personal leave and vacation benefits through December 22, 2005. You were eligible for a benefit on December 11, 2005, but your benefit was reduced to $0 on that day. You were first eligible to receive benefits from us on December 23, 2005. Your scheduled weekly benefit amount is $550.35. Your benefit check in the amount of $1022.07 is enclosed with this letter. Benefits were paid from December 23, 2005 to January 5, 2006, which is the day you returned to work.

> A previous check (No. 616959) was issued to you on January 10, 2006 with an incorrect amount, due to the fact that sick, vacation and personal days were not deducted. A stop pay was placed on this check on January 13, 2006. We apologize for any in convenience this might have caused you.

On January 30, 2006 the Association filed a grievance on behalf of Grievant and the entire Association contending, in essence, that the employer violated the labor agreement when it refused to allow Grievant to access short term disability insurance until Grievant exhausted her compensable absence balances. The County denied the grievance, which then led to this arbitration. Further facts are as appear in the discussion.

POSITIONS OF THE PARTIES

County

The County's position at the hearing is that it has complied with State and Federal Family Medical Leave laws in the application of its substitution of leave policy and is not in violation of any provision of the agreement. It argues it has a right to require the use of accrued leave balances after Wisconsin's initial two week period before further non-paid leave is used within the respective time periods. The matter of payment of insurance benefits for short-term disability is beyond the collective bargaining agreement. The County's written argument is relatively short and can be substantially restated.

Several things are clear and beyond dispute. When the term "short-term disability" first appeared in the jailers/deputies contract twelve years ago, Douglas County employees had no short-term disability insurance available through their employer. It is also undisputed that that term has never appeared anywhere else in the contract. Not even the Union can argue that the term "short-term disability" was originally intended to refer to short-term disability insurance which was not made available to Douglas County employees on a voluntary basis until 2003.

To what thread can the Union possibly cling in asserting that the contract now forbids Douglas County from assigning unused leave days so that those employees with short-term disability insurance may collect benefits sooner? Indeed, the Union can point to no specific contractual provision which dictates this result. The Union can point to no contractual negotiations which would support this possible interpretation of the term "short-term disability", which existed nine years prior to the availability of short-term disability insurance. Further, the Union can point to no such past practice on not assigning leave days when an employee is out on leave or disability.

The only plausible interpretation of "short-term disability" as that term is used in the contract was offered by Mary Lou Anderson, who negotiated the last two jailers' contracts for the County. It was her opinion that the use of the terms "short-term disability" and "long-term disability" were used in the contractual sense as guarantees that Union members would not be terminated during those time frames for the simple inability to return to work. She stated that those terms had nothing to do with disability insurance.

The County has unilaterally sought to make a voluntary benefit available to those employees who wish to partake in it. The Union now seeks to punish the County by obtaining the further benefit of a more generous leave policy than is required by either the Wisconsin or the Federal Leave Acts. If that is what the Union desires, then they should bring it to the bargaining table rather than trying to wedge it into the contracts through the grievance process.

Association

In summary, the Association argues that the short-term disability insurance is referenced in the parties' collective bargaining agreement at Article 28, Definitions, making the issue arbitrable. Contrary to the assertions of the County's Counsel, this case is "a matter of what the County policy is in implementing the FMLA or the Wisconsin Medical Leave Act". It matters precisely because the County has contractually agreed to comply with the State and Federal FMLA provisions, and pursuant to its interpretation of same, Grievant was denied insurance coverage and required to burn other accrued paid leave that she might have used at another time.

The County Human Resources Specialist testified that if the County's interpretation of the FMLA law were incorrect, the issue should be decided in favor of the Union. What disposes of the question of whether the Arbitrator has jurisdiction over the issue is the fact that in the CBA the County agrees to comply with State and Federal FMLA provisions. Since the County agreed to comply with those provisions in the CBA, the County's interpretation of FMLA is within the jurisdiction of the Arbitrator and thus the matter at issue is arbitrable.

The substantive question is whether the County is complying with FMLA provisions. If the County's requirement of Grievant to substitute accrued paid leave, rather than receive short-term disability benefits she was otherwise entitled to, violated Medical Leave law, then it also violates the CBA and the arbitrator should award in the Association's favor.

Neither party asserted that Grievant was not eligible for coverage under either state of federal FMLA. The County claimed it was asserting its rights under FMLA when it required substitution of accrued paid leave, which then made Grievant ineligible for benefits under the disability insurance plan.

The County cannot require substitution, under FMLA, of any accrued paid time off during the absence that would otherwise be covered by payments from insurance plans covering temporary disabilities.

Under 29 U.S.C. sec. 2612(d)(2)(B) of the Federal Medical Leave Act, an employer may require an employee to substitute accrued paid vacation, personal or sick leave for any part of the 12-week period of leave provided by law. However, Department of Labor regulations provide an exception under 29 CFR Sec. 825.207(d) (1) which states in part:

> Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable….Under the plain meaning of this sentence the statute's provision concerning substitution of accrued leave for an FMLA unpaid leave is not applicable when the employee receives benefits from a temporary disability plan because such a leave is paid leave. The Regulation draws no distinction between a temporary disability plan run by the employer and one administered by a third-party.

The United States Supreme Court had declared that DOL opinion letters constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. SKIDMORE V. SWIFT & CO., 323 U.S. 134, (1944). Three such opinion letters support Grievant in this case. This is not unpaid leave within the meaning of FMLA. It makes no difference if such disability plan is provided voluntarily through insurance, under a self-insured plan or required to meet state mandated disability provisions. An employee's receipt of such payment precludes the employee from electing and prohibits the employer from requiring substitution of any form of accrued paid leave for any part of the absence covered by such payments.

In other words, if the employee is entitled to receive a temporary disability benefit from a temporary disability insurance plan, and in fact the employee chooses to receive the temporary disability benefit to which he or she is entitled, then the employer cannot require the employee to instead substitute accrued paid leave because the financial benefit the employee receives from the temporary disability plan prohibits the employer from characterizing the leave as unpaid in the first place.

The Association seeks a make whole order.

DISCUSSION

In June of 2005 Grievant used two weeks of unpaid FMLA to which she was entitled under Wisconsin and Federal law. Under Wisconsin law she elected to take unpaid FMLA and after her one day accident elimination period, as was her statutory right to do so, without having to use any accrued leave time. She made claim for and was paid disability insurance benefits under the voluntary disability plan she had purchased through the County. Before the end of the year, in December of 2005, she again took FMLA for a personal illness. Pursuant

to its policy of substitution, because Grievant had already used her 2 weeks of Wisconsin FMLA leave during the calendar year, the County required her to substitute accrued leave by assigning her 12 leave days which she had accrued at that time to the beginning of her December/January leave. Three of those days were personal leave days that could not have been carried over into the following year under the collective bargaining agreement. After the applicable four day elimination period in the policy, because she received another eight days leave pay from the County, the Insurance Company did not pay her for those first 12 days, but did pay her for days thereafter that she was on unpaid leave. The Association asserts that the County's substituting her accrued leave for unpaid FMLA is a violation of State or Federal FMLA laws. That, in turn is a violation of the collective bargaining agreement because the agreement requires the County to comply with State and Federal FMLA laws. The Association also argues that the short-term disability provisions in the agreement provide Grievant a right to take unpaid leave. The Association argues that assigning the accrued leave in December prevented Grievant from determining when she would use her leaves and prevented her from getting access to the disability insurance benefits for eight days longer than she would have otherwise.

The County first argues that this case does not concern the collective bargaining agreement, and that coverage and access to the disability insurance benefits is a matter that is not covered by the collective bargaining agreement. The County does not decide what payments the Insurance Company makes. The County argues that its policy requiring substitution for FMLA leave beyond Wisconsin's first two weeks is a right under federal law which it properly applied here.

The Association is correct in that this grievance does present an issue under the collective bargaining agreement. In Article 28, Section 2 the County agreed to comply with State and Federal FMLA provisions. It is the application of those provisions which determines whether Grievant's accrued leave can or must be substituted during the December/January FMLA. To be clear, the payment of disability insurance benefits or reduced insurance benefits is a ramification of that substitution of accrued leave, but the payment of insurance benefits themselves or access to such benefits is not a County decision and actual amounts or days of payments is not a matter covered by or implicated by the collective bargaining agreement. The County is correct in that Article 28, Section 1, defining short-term disability as beginning on the fourth consecutive day is not a disability insurance provision, but rather an employment status provision. That part of the agreement does not apply to this case. The change to four from seven days was not in contemplation of nor for the purpose of disability insurance. Thus, it is a matter of the application of FMLA provisions which will determine if the County violated the collective bargaining agreement.

The Parties arguments do not center on the Wisconsin FMLA. The Parties disagree on whether the Federal FMLA allows the County to substitute the accrued contractual leave for

unpaid FMLA.[1] It is the application of Federal provisions, as opposed to Wisconsin FMLA, upon which the Association bases its legal argument. The statutory provision at first appears to give the County the right to make such substitution. The provision states at 29 U.S.C. Sec. 2612(d) (2) (B) provide in pertinent part:

. . .

> (2) Substitution of paid leave
>
> (A) In general
>
> An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

---

[1] The purposes of the Federal FMLA are set out in 29 C.F.R. Sec. 825.101, which provides:

> **§ 825.101 What is the purpose of the Act?**
>
> (a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.
>
> (b) The enactment of FMLA was predicated on two fundamental concerns--the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.
>
> (c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

SOURCE: 60 FR 2237, Jan. 6, 1995; 60 FR 6658, Feb. 3, 1995, unless otherwise noted.

> (B) Serious health condition
>
> An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

This statutory right to require substitution is what is implemented in the County's 2005 leave policy requiring substitution. Substitution under the Federal statute, though, is limited by Department of Labor Regulations, specifically 29 CFR Sec. 825.207(d) 1. *See, e.g.* REPA V. ROADWAY EXPRESS, INC, 477 F. 3.RD 938 (7TH CIR., 2007). That Regulation addresses disability leave, among other things, and states in pertinent part:

. . .

> (d)(1) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

. . .

The focal point of the Association's argument is the sentence from the above subsection which states:

> Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable.

The Association then cites three authoritative Department of Labor Opinion letters which concern disability benefits to show that Grievant was on a paid leave, making substitution

inapplicable. The excerpts[2] from those Opinion letters as cited in the brief by the Association are set out as follows:

> Opinion Letter FMLA-92, December 12, 1997
>
> [a]s explained in the preamble to the regulations, leave under a temporary disability plan, whether public or private, or under a workers' compensation law is not a form of "accrued paid leave" within the meaning of the FMLA (see 60 Fed.Reg. 2180, 2205-06 (1995), preamble to 29 CFR 825.207). Nor is such leave under a temporary disability plan or workers' compensation law "unpaid" leave within the meaning of the FMLA (see 29 CFR 825.207(d)(1) and (2)). . . . Similarly, an employee is precluded from relying upon FMLA's substitution provision to insist upon receiving both temporary disability or workers' compensation and accrued paid leave benefits during such an absence.
>
> Opinion letter FMLA-52, December 28, 1994
>
> [a]n employer, however, cannot require the employee to substitute, under FMLA, any paid vacation or other leave during the absence that would otherwise be covered by payments from plans covering temporary disabilities. Whether such temporary disability plans are provided voluntarily through insurance or under a self-insured plan or required to meet state-mandated disability provisions (e.g., pregnancy disability laws) would make no difference. The employer may designate and credit the temporary disability leave of absence against the FMLA 12-week annual entitlement so long as the reason for the leave is qualifying, the employee has been properly notified of the designation prior to the start of leave, and the employee's health care benefits have been maintained during the leave of absence. An employee's receipt of such payments precludes the employee from electing and prohibits the employer from requiring the substitution of any form of accrued paid leave for any part of the absence covered by such payments.
>
> Opinion letter 2003-5, December 17, 2003
>
> Generally, pursuant to Regulations 29 CFR 825.207, an employer may require the employee to substitute accrued paid leave for unpaid FMLA-qualifying leave. However, an employer cannot require an employee to substitute, under FMLA, any paid vacation or other leave during the absence that would otherwise be covered by payment from plans covering temporary disabilities. Because the leave pursuant to a temporary disability benefit plan is not unpaid

[2] The entire paragraph from Opinion Letter FMLA-92, December 12, 1997, is set out following the remaining Opinion letter references.

> leave, the provision for substitution of paid leave is inapplicable. An employee's receipt of such payment precludes the employee from electing and prohibits the employer from requiring the substitution of any form of accrued paid leave for any part of the absence covered by such payments. However, the employer may designate the paid leave under a temporary disability plan as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement.

The entire paragraph in Opinion letter FMLA-92, December 12, 1997 states

> As explained in the preamble to the regulations, leave under a temporary disability plan, whether public or private, or under a workers' compensation law is not a form of "accrued paid leave" within the meaning of the FMLA (see 60 Fed.Reg. 2180, 2205-06 (1995), preamble to 29 CFR 825.207). Nor is such leave under a temporary disability plan or workers' compensation law "unpaid" leave within the meaning of the FMLA (see 29 CFR 825.207(d)(1) and (2)). Therefore, where a work-related illness or injury constitutes a serious health condition which triggers application of the FMLA, and the employee has elected to receive payments from a private disability plan or from a state workers' compensation plan, the employer cannot require the employee to substitute, under section 102(d), any paid vacation, personal, or medical or sick leave, for any part of the absence that is covered by the payments under the temporary disability plan or under a workers' compensation plan. Similarly, an employee is precluded from relying upon FMLA's substitution provision to insist upon receiving both temporary disability or workers' compensation and accrued paid leave benefits during such an absence. In accordance with the regulations, however, the employer may, at the beginning of the absence, designate the temporary disability leave or workers' compensation absence as FMLA leave and count the period of the absence under both the temporary disability plan or workers' compensation plan and FMLA (see 29 CFR 825.207(d)(1) and (2); 29 CFR 825.208; 60 Fed.Reg. at 2205-2206).

Turning to the facts in this case, the narrow issue is does Grievant's disability insurance coverage constitute paid leave so as to fit within the regulatory exception to the statutory substitution provision. The County's December 8, 2005 memorandum to Grievant invoked its substitution policy before the completion of the insurance policy elimination period and before any disability insurance payments were made.The regulation, Sec. 825.207(d)1, as explained by the Department of Labor Opinion Letters, would apply to voluntary disability insurance benefits administered by a third party, such as the Insurance Company here. But that does not end the inquiry. The exception is concerned with whether an employee on FMLA is on a "paid" leave status, so as to make substitution inapplicable. Payments under the insurance

policy are not automatic after the elimination period. The Insurance Company does not pay benefits under the policy if the employee is receiving contractually accrued leave benefits. Stated conversely, Grievant's entitlement to disability insurance benefits is conditional on her not receiving accrued leave pay. These requirements of the disability insurance plan, which is a condition set by the Insurance Company and not the County, are more stringent than the conditions qualifying for FMLA leave. Here there is no issue that Grievant qualified to be on FMLA, but the requirement to qualify for disability insurance payment is at least one component more stringent. That is, she must not be receiving any contractually accrued pay. The regulation specifically speaks to this. 29 C.F.R. Sec. 825.207(d)1 provides: "If the requirements to qualify for payments pursuant to the employers' temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave".

As long as Grievant is not already receiving disability insurance payments or is not automatically entitled to disability payments such as in a worker's compensation matter, she is not yet on a paid leave so as to make substitution inapplicable. This is illustrated by contrast with the June 2005 FMLA of Grievant under the Wisconsin FMLA, which is more liberal than Federal law and specifically allows an employee to elect unpaid leave (and then presumably be eligible for disability insurance benefits immediately after any elimination period). *See, e. g.* Milwaukee Transport Services, Inc, v. Department of Workforce Development, 241 Wis. 2nd, 336, 624 N.W. 2d 895 (Ct. App. 2001), citing Richland School District v. DILHR, 174 Wis. 2d 878, 498 N.W.2d 826 (1993).

Similarly by contrast is Repa v. Roadway Express, Inc, 477 F.3d 938 (7th Cir, 2007), where a short-term disability insurance policy for injuries incurring outside of work, funded by both the employer and bargaining unit members, paid benefits to an employee. Upon the employee's return from leave the employer paid her sick days and vacation days for the same time period. The employee received this pay in addition to the weekly short-term disability insurance payments she received through the insurance policy. At issue in the case was whether the employer had violated the FMLA by requiring her to use her sick and vacation leave days when she was receiving disability benefits during her FMLA leave. The employee there argued, citing 29 CFR Sec. 825.207(d)1, that because she was receiving temporary disability benefits through the [insurance provider] the FMLA "provision for substitution of paid leave is inapplicable," and therefore the employer should restore her vacation and sick time. The District Court agreed and the Court of Appeals affirmed. The significant contrast with the case here is that Grievant did not receive both short-term disability insurance payments and payments of accrued contractual leave for the same FMLA days. The Insurance Company here specifically stopped payment on the check that would otherwise have covered the same days that Grievant was paid her accrued leave by the County. For the days at issue here Grievant was not paid under the disability policy. The County had already required substitution of accrued leave. This is consistent with that part of Opinion Letter FMLA-52,

December 28, 1994, which noted "An employee's receipt of such payments precludes the employee from electing and prohibits the employer from requiring the substitution of any form of accrued paid leave for any part of the absence covered by such payments". Again, Grievant did not receive disability insurance payments for the days at issue because the County had already required substitution.

It is also instructive to see the context set out in the entirety of Opinion Letter FMLA-92, December 12, 1997, which included the sentence

> Therefore, where a work-related illness or injury constitutes a serious health condition which triggers application of the FMLA, and the employee has elected to receive payments from a private disability plan or from a state workers' compensation plan, the employer cannot require the employee to substitute, under section 102(d), any paid vacation, personal, or medical or sick leave, for any part of the absence that is covered by the payments under the temporary disability plan or under a workers' compensation plan.

This language is important. The Opinion letter was written in the context of a work-related illness or injury, a circumstance not present in Grievant's case. Also, the Opinion letter would support making substitution inapplicable where any part of the absence is covered by the payments under the temporary disability plan or under a workers' compensation plan. Here there is no worker's compensation plan involved and insurance payments did not cover that part of the Grievant's absence for which substitution was already made. This is not an employer provided benefit[3] required by the collective bargaining agreement. Thus, as to Sec. 825.2007(d)1, it is the regulation making substitution inapplicable which is itself not applicable here because the Grievant was not on paid leave due to payments from disability insurance for the days at issue.

---

[3] For FMLA purposes the definition of benefit is set out in 29 CFR 825.800 as

> Employment benefits means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an ``employee benefit plan'' as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. (See Sec. 825.209(a)).

It is true the County's requirement of substitution had the effect of delaying Grievant's eligibility for insurance benefits. That is a practical aspect of the grievance.[4] But there is nothing in the Parties collective bargaining agreement which either Party has argued that limits or requires the County to defer to the provisions of the disability insurance policy before it can choose to exercise its statutory right to require substitution. The parties would be free to bargain such a provision. As discussed above, Article 28, Section 1 of the collective bargaining agreement is an employment status provision and not one that involves disability insurance. There is no showing that that provision was violated by the County. The Association has not pointed to any other part of the collective bargaining agreement it claims was violated, other than the general provision that the FMLA will be complied with. *Cf.,* BMWE v. CSX Transp. Inc., 478 F. 3d 814 (7th Cir., 2007) (Union complained that substitution under 29 U. S.C. Sec. 2612(d)(2)(B) by the employer was a unilateral change of leave benefits in the collective bargaining agreement and was therefore prohibited by the Railway Labor Act). There has been no argument or showing that the County has failed to comply with the short-term disability insurance provisions or any requirements concerning that insurance policy within its control, let alone any provision in the collective bargaining agreement concerning short-term disability insurance.

Grievant was not in a paid leave status when the County required substitution of accrued leave. The County's statutory right to require substitution was not limited by the regulatory provision limiting substitution. The County complied with State and Federal FMLA provisions as required by the collective bargaining agreement. The County has not been shown to have violated any other provision of the collective bargaining agreement by requiring substitution. Thus, the County did not violate the collective bargaining agreement in December, 2005 when it assigned sick leave, a vacation day and personal days to a period the Grievant was absent from work. Accordingly, based upon the evidence and arguments in this case I issue the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 16th day of October, 2007.

Paul Gordon /s/
Paul Gordon, Arbitrator

---

[4] The impact of this type of circumstance has been noted in the commentaries on leaves under FMLA:

> **OBSERVATION:** Requiring use of paid leave may cause some disparity between employees who request an unpaid leave late in a vacation year versus those who request one early.
>
> 1. Employment Discrimination Coordinator, Analysis of Federal Law, Sec. 32:16, Part V. Subpart C, Chapter 32, III, B.

rb
7207