

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
WISCONSIN INDIANHEAD TECHNICAL COLLEGE

and

AFT – WISCONSIN, LOCAL 395, AFL-CIO

Case 92
No. 67157
MA-13779

Appearances:

James Mangan, Staff Representative, AFT-Wisconsin, 2462A Parkview Lane, Menomonie, Wisconsin 54751, on behalf of Local 395 and the Grievant.

Victoria L. Seltun, Weld Riley Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the College.

ARBITRATION AWARD

Pursuant to the request of the parties, the Wisconsin Employment Relations Commission, on July 31, 2007, provided the parties with a panel of five Wisconsin Employment Relations Commission staff arbitrators. Thereafter, the parties notified the Commission that they had selected Coleen A. Burns as Arbitrator to hear and resolve a grievance involving the status of the Grievant's employment with the College. A hearing on the grievance was held on October 31, 2007 in Shell Lake, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing written argument, the last of which was received by the Arbitrator on January 17, 2008.

ISSUES

The parties were unable to stipulate to a statement of the issues. The Union frames the issues as follows:

Did the College violate the Collective Bargaining Agreement, Article IV, Section A(2), when it "resigned" Fae LaForte based on their contention that she failed to keep the college notified of her status while ill?

If so, what is the appropriate remedy?

7320

The College frames the issues as follows:

Whether WITC had “cause” to accept the Grievant’s resignation when she failed to submit adequate medical certification to support the need for a leave of absence from employment?

If not, what is the appropriate remedy?

CITED CONTRACT PROVISIONS

ARTICLE IV – WORKING CONDITIONS

Section A. Discipline and Discharge

...

2. After the probationary period, a teacher shall not be disciplined, discharged, or non-renewed except for cause. In the event a teacher is disciplined, discharged, or non-renewed, the full grievance procedure as set forth in ARTICLE III herein shall not be followed. In such event, the following procedure shall apply:
 - a. The teacher and the Union shall be promptly notified in writing of the discipline, discharge, or non-renewal, which shall contain a statement of the basis for the action. The teacher or the Union shall have five (5) school days within which to request a meeting with the College President (Step b).
 - b. The College President and/or representative shall meet upon request of the teacher within five (5) school days of such request for the purpose of discussing the action taken and the basis therefore. The teacher may have representation and counsel present at such meeting. Within five (5) school days following said meeting, the College President shall notify the teacher and the Union of any change in the employer’s position.
 - c. If the teacher and/or the Union remain dissatisfied with the action taken after the meeting with the College President, either of them may submit the decision within ten (10) work days to the Wisconsin Employment Relations Commission for final and binding arbitration, pursuant to the provisions set forth herein; provided, however, that in grievances processed hereunder, this remedy of final and binding arbitration shall be exclusive of any other procedures or remedies afforded to any teacher by law.

Failure to comply with the ten (10) day time limit set forth above shall be deemed a waiver of the right to arbitrate the issue.

...

Section S. Management Rights

1. Recognition of Board Rights. The Union recognizes the right of the Board and the College President to operate and manage the affairs of the Wisconsin Indianhead Technical College District, in accordance with its responsibilities under law. The Board and the College President shall have all powers, rights, authority, duties and responsibilities conferred upon them and invested in them by the laws and the Constitution of the State of Wisconsin.
2. Board Functions: The Board possesses the sole right and responsibility to operate the college and all management rights repose in it, subject to the express provisions of this agreement. These rights include, but are not limited to the following:

...

- f. The right to enforce the rules and regulations now in effect, and to establish, revise and delete rules and regulations from time to time not in conflict with this agreement or the rights of management.
- g. The direction and arrangement of all working forces in the system, including the right to hire, suspend, discharge or discipline or transfer employees.

...

- i. The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, and the establishment of quality standards and judgment of employment performance.

...

- k. The right to establish hours of employment, to schedule classes and assign workloads; and to select textbooks, teaching aids and materials.

...

3. Exercise of Management Rights: The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board; the adoption of policies, rules, regulations and practices in furtherance thereof; and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement.

...

ARTICLE VI – LEAVE OF ABSENCE

Section A. Rules Governing

1. The Board shall continue to pay all benefits that accrue to any teacher covered by this contract on leave with pay.
2. All teachers covered by this contract, on leave, shall retain seniority rights.
3. Any person on leave of absence shall be returned to their original campus and to their original position, or a position equivalent to the one previously held.

...

Section B. Sick Leave

1. All faculty members shall be credited with twelve (12) days of sick allowance per year, with maximum accumulation up to 120 days. Sick leave must be utilized within an individual's regular defined work year, but may accrue from one work year to the next.
2. Each faculty member will be informed as of September, by the Campus Administrator, of the status of accumulated sick leave during each academic year.
3. An employee who is absent more than five (5) days because of illness shall submit a physician's certificate attesting to the illness.

...

Section L. Health Leave

1. Upon request and application, a teacher shall be granted such leave without pay.
2. Such leave includes physical and mental illness.
3. Such leave of absence shall be granted only upon the recommendation of a physician.
4. Such leave shall be for not more than one (1) year unless by mutual agreement.
5. A statement from the physician recommending return to work must be presented to the Board prior to reinstatement. The Board reserves the right to obtain their own physician if the situation warrants it.
6. A teacher shall be returned to their original position or to a position equivalent to the one previously held.
7. Reinstatement shall occur after one (1) year of date of leave or at the beginning of this school year.

BACKGROUND

Fae LaForte, hereafter the Grievant, began her employment with Wisconsin Indianhead Technical College, herein College, Employer or WITC, in 1998. In February 2005, while employed as a Counselor at New Richmond, the Grievant received a notice of lay-off. Thereafter, the Grievant applied for a transfer. In the subsequent grievance arbitration award, dated February 10, 2006, the Grievant was reinstated to a full-time Communications Instructor position at the New Richmond campus and the College was ordered to make the Grievant whole for losses resulting from the College's contract violation. The Grievant returned to work in March 2006.

Joseph Huftel, the Administrator of the New Richmond Campus, had intended to meet with the Grievant and the Grievant's immediate supervisor, Larry Gee, on October 5, 2006, to discuss Employer perceived performance issues, but the Grievant called-in sick. In a letter dated October 6, 2006 and addressed to Gee, Wisconsin Licensed Psychologist J.H. described his contacts with the Grievant; provided an opinion that the Grievant was highly stressed; and also stated: "I recommended to her to take time off from her employment in order to resolve issues which are interfering with her productive behavior." (Dist. Ex. #5)

...

In a letter dated October 6, 2006, Gee advised the Grievant that he had received the letter from Psychologist J.H. Gee's letter also includes the following:

. . . Due to the vagueness of this letter and your absence from work this past week, I have hired a substitute instructor to teach your classes for the week of October 9-13.

I need to ascertain whether it is your intent to request a leave of absence or return to work. Again, due to the vague nature of your psychologist's letter and very limited communication from you, I am unsure of how to proceed in preparing a plan that will allow your current students to successfully complete their classes.

Please contact me no later than 12:00 p.m. on Wednesday, October 11, 2006, to arrange for a meeting with myself and campus administrator, Joe Huftel, to discuss concerns we have with your absences and job performance. . . . (Dist. Ex. #6)

...

In a letter dated October 9, 2006 and addressed to the Grievant, Dawn L. McDonough, the Employer's Human Resources Specialist-Benefits, states:

This letter is to inform you that you have been placed on a leave of absence for your medical condition under the Family Medical Leave Act (FMLA) pending receipt of the doctor's Certification of Health Care Provider form documenting your serious medical condition as defined under FMLA.

Your leave has been tentatively approved effective October 6, 2006 (the date of admission to the hospital) running for the maximum of 12 weeks (maximum time allowed under FMLA) or December 29, 2006 at the latest or until your doctor states that you are able to return to work if earlier. You will be allowed to utilize sick leave hours for the time from the admission to the hospital to the point that the doctor's states that you are able to work in addition to any available personal leave hours. If you do not have sufficient leave to cover your hours off, you will be placed on an unpaid leave under FMLA. Your leave is being tentatively approved under the federal FMLA which allows you paid benefits (medical, dental, life, income disability) for up to a period of 12 weeks from the start of your leave (October 6, 2006), whether it is paid or unpaid leave.

You are required to provide WITC a return to work/release from medical care slip from you doctor upon his/her release from his/her care and prior to your

return to work. This should be sent to my attention at Shell Lake with a copy to your supervisor. You will be unable to do any work for WITC until this form is received.

Entries for your time off will be made through Human Resources. Your supervisor, Larry Gee, has entered time off for time you had missed previous to October 6, 2006. Based on sick leave hours utilized through October 6, 2006, you have 27.5 hours remaining of sick leave and 7 hours of personal leave. All of these hours will be utilized for the week of October 9-13, 2006. You will then be placed on unpaid leave at the point these hours are exhausted until the day that you return to work. (Dist. Ex. # 24)

...

In a letter dated October 19, 2006, addressed to the Grievant, Perry Palin, the College's then Vice-President of Human Resources, states:

You left a voice-mail message for your supervisor Larry Gee on Monday, October 16, saying that you would be absent for the entire week of October 16 due to illness.

The last medical statement that you have provided to the college indicates that you could return to work without restrictions on October 16. It is your responsibility to provide the college with medical documentation of your current illness, and the opinion of your doctor as to when you will be able to return to work.

Dawn McDonough has tentatively placed you on FMLA leave, pending receipt of your Certification of Health Care Provider form. Ms. McDonough faxed you the Certification Form, but we have not received a reply.

Your paid sick leave expired on October 12. You are currently without an approved leave status with the college. The faculty contract provides for a Health Leave in Article VI, Section L, a copy of which is enclosed for your reference. If we do not have an approvable leave request from you by October 27, I will assume you have abandoned your job with WITC and place your resignation before the Board at the November Board meeting. (Dist. #15)

Huftel, Gee and Union Representative Mangan were cc'd on this letter.

In a letter dated October 31, 2006 and addressed to the Grievant, Palin states:

...

I have not received a response from you to my letter of October 19, a copy of which is enclosed for your reference.

As of October 12 you were without paid sick leave, and as of this date we have not received an approvable leave request as outlined in Article VI, Section L of the Faculty Contract.

Yesterday, October 30, 2006, your supervisor Larry Gee received a faxed copy of a letter signed by (J. H. and J.B. MD) which recommends that you be off work for "two additional weeks." The letter is dated October 18.

Will you be prepared to return to work on November 2, 2006, upon the expiration of the doctor's recommendation?

If you are prepared to return to work on November 2, you must provide a doctor's certification that you are medically able to return to your normal work duties. This certification must be provided before your return.

If you are not prepared to return to work on November 2, you must provide a request for Health Leave, as outlined in the Faculty Contract. The request for Health Leave must be accompanied by a statement from your medical practitioner detailing the need for the leave, and include a projected end date for the Health Leave.

You were scheduled for a meeting with your supervisor Larry Gee and New Richmond Campus Administrator Joe Huftel on October 16. You cancelled that appointment with a voice mail message to Mr. Gee. This meeting must take place before you can return to your teaching duties at WITC. It is imperative that you notify us in advance of your plan for return, so that meeting can be rescheduled.

In addition, we have not received from you a completed Certification of Health Care Provider form, which is necessary for the college to place you on FMLA. Unless you provide this completed form, we will not be able to approve your request for FMLA leave.

The US Department of Labor form is critical for a decision on your FMLA request. The statements we have received from your care providers "recommend" time off, but they do not indicate that you are in fact unable to work, or that you suffer from a "serious health condition" as defined on page 4 of the form. (Dist. Ex. #16)

...

The October 18, 2006 letter referenced above is addressed to Gee and includes the following:

Fae LaForte has asked for a letter of support for extending her medical leave for two additional weeks. Her request is recommended. . . . (Dist. Ex. #8)

This letter also indicates that the Grievant had been hospitalized and released; that, since this release, the Grievant has been under outpatient treatment with Psychologist JH; and that the Grievant needed additional time to adjust to her medical management, as well as to cope with a number of identified issues, including stress.

The Grievant responded to Palin's letter of October 31, 2006 with an e-mail dated November 2, 2006 that includes the following:

In consulting with my doctors yesterday, it was established that, "no", I will not be returning to work today, November 2, 2006.

The doctors are generating the needed documentations and will be forthcoming. (Dist. Ex. #17)

...

In a letter dated November 8, 2006, McDonough advised the Grievant that the original letter sent regarding the Grievant's request for FMLA was sent certified and returned to WITC because the Grievant had not picked up the letter from the post office. (Dist. Ex. #25) McDonough also stated that it had been one month since the Grievant was provided with FMLA "Certification of Health Care Provider" form; that this form was needed to finalize the request for FMLA; and that if McDonough did not receive this form by November 22, 2006, she would not be able to grant the Grievant's request for FMLA beginning October 6, 2006. McDonough also explained certain insurance premium implications; and enclosed an FMLA "Certification of Health Care Provider" form in case the doctor had misplaced the previously provided form.

Attached to a FAX dated November 21, 2006, identified as FMLA papers, was a completed USDOL "Certification of Health Care Provider" form indicating that the Grievant had been hospitalized and the dates of the hospitalizations; and that the present duration of the Grievant's condition/incapacity was October 9, 2006 through December 15, 2006; and that medical leave was required. (Dist. Ex. #26)

In a letter dated December 1, 2006 and addressed to the Grievant, Palin states:

...

Your doctor has provided medical certification for your FMLA leave through December 15, 2006, and under separate cover Dawn McDonough has confirmed to you that your FMLA request has been approved.

Please notify me of your plans for after December 15. Will you be returning to work at that time?

Please respond by return mail or e-mail to me by December 11 2006. (Dist. Ex. #18)

In a letter dated December 4, 2006, McDonough acknowledges receipt of the medical documentation of FMLA leave from October 9, 2006 through December 15, 2006; states that additional medical documentation would be required if the leave needs to extend past December 15; and explains how various insurances are paid. (Dist. Ex. #27) McDonough further states that she is enclosing LTD paperwork; that the Grievant and her doctor need to fill out the appropriate portion; that once these forms are received by the carrier, the Employer will submit its portion of the form; that the carrier determines eligibility; and that

You are required to provide WITC a return to work/release from medical care slip from your doctor upon his/her release from his/her care and prior to your return to work. This should be sent to my attention at Shell Lake with a copy to your supervisor. You will be unable to do any work for WITC until this form is received.

In an e-mail dated December 18, 2006, the Grievant advised Gee that she had been in and out of the hospital; that she was unable to return to work at this time; that she would not be able to meet with her doctors until December 27, 2006 and January 3, 2007; and that she then would send documentation to Shell Lake. (Dist. Ex. #11)

In a letter dated December 21, 2006 and addressed to the Grievant, Palin states:

...

I have been copied on your e-mail of December 18 2006 to your supervisor Larry Gee, wherein you state that you are unable to return to work at this time, that you will be able to meet with your doctors on December 27 and January 3 (I assume two different doctors, on two different dates), and that you will then send medical documentation to Shell Lake. Your approved Family and Medical Leave Act leave expired on December 15 2006.

Please direct this documentation to Dawn McDonough by December 29, in the case of the first doctor, and by January 5, in the case of the second doctor. We need that documentation to assess whether additional leave time is indicated. If

your doctor(s) indicate that additional medical leave is necessary, then appropriate paperwork will need to be completed by you in a timely fashion to request any potential leave time that may be available to you.

It is critical for us to have your medical information as we plan for spring semester. If we do not hear from you by January 5, we will have to assume that you have elected to end your employment with WITC, and we will place your resignation on the next regular Board meeting agenda. (Dist. Ex. #19)

In an e-mail to Gee dated January 11, 2007, the Grievant states:

Sorry for not getting back to you sooner. As I had stated, I have been in and out of the hospital sick and unable to get to mail sent to my home as quickly as the turn around time WITC expects-and is not healthy and unreasonable. I have already provided my cell and home phone numbers for you and I was real I could have been reached in the hospital. It is actually very dangerous for me to be expected to continue this five year battle when I am ill and out on FMLA.

As I had stated to Dawn M. at Shell Lake last week I would be getting in the appropriate documentations on the continuation of my FMLA this week as I need to get the doctors to get the documentation as appropriate. She was in agreement with this and so will be seeing two of my doctors tomorrow.

I hope to be returning in February 2007. In the interim, I believe the retaliation, hostile environment and violations under my protection with the Americans with Disability Act remain in full force and I have filed with the ADA and the EEOC. Hopefully, you have received a copy. This will make the 4th filing of discrimination and violation of last years Union agreement. This is a lot of tax payers \$\$\$ and they should be made aware. . .

If you have any further questions please do not hesitate to phone my home at (telephone number). (Dist. Ex. #12)

In a letter dated January 16, 2007 and addressed to the Grievant, Palin states:

. . .

The College is in receipt of your January 11, 2007 e-mail to Larry Gee in which you indicate that you will be submitting the appropriate medical documentation to substantiate a leave of absence under the Americans With Disabilities Act (ADA). Please note that under both ADA and the Family Medical Leave Act (FMLA) appropriate medical certification must be provided to the employer by the employee in a prompt manner in order for the leave to be counted against the requisite statutory entitlements.

While the College has received the appropriate documentation for leave under FMLA that was approved October 9, 2006 through December 15, 2006, we have not received subsequent documentation indicating that you 1) are able to return to work or 2) require additional leave beyond December 15, 2006. As such, the College does not currently have sufficient medical information to assess whether you are currently suffering from a physical or mental impairment that substantially limits one or more major life activities (or a “serious health condition” in connection with your FMLA leave). You indicated in your January 11, 2007 e-mail that you will be seeing two of your doctors on January 12, 2007. Therefore, we need certification from your doctor(s) as to whether additional leave is necessary and appropriate paperwork will need to be completed by you to request any leave that may be available to you. It is critical that we receive this medical information by January 29, 2007. If we do not receive this documentation by that date, we will assume that you do not have a physical or mental impairment that requires use of additional unpaid leave.

The College has been very accommodating in connection with your leaves of absence in the absence of medical documentation and has given you several opportunities to provide the College with this necessary documentation. If we do not receive this medical documentation by January 29, 2007, we will assume that you are unable to return to work and have elected to end your employment with WITC, and we will place your resignation on the next regular board meeting agenda. (Dist. Ex. #20)

...

In an e-mail dated January 30, 2007, the Grievant states:

...

I sent an e-mail on the 28th. I also copied to Dawn M. and Jim Mangan.

I had stated that I would not see my doctors until 1-30-07 and 1-29-07 as Mr. Palin was told. I have verification of the appropriate FMLA document ions faxed as stated on 1-30-07. Please e-mail your response. (Dist. Ex. #13)

...

The copy of this e-mail that was forwarded by Gee to John Will, the College’s Vice President Administrative Services, and McDonough on January 31, 2007 included a statement that the last e-mail that Gee had received from the Grievant was on January 11 and that he had not received the mentioned fax. (Dist. Ex. #13)

A prescription form dated January 30, 2007 and signed by JP MD states that the patient (identified as the Grievant) continues to need FMLA from 12/15/06-2/28/07 and contains a diagnosis. (Dist. Ex. #21)

In a letter dated February 7, 2007 and addressed to the Grievant, Palin states:

...

The College is in receipt of your January 30, 2007 e-mail, as well as your doctor's note of the same date.

Based on the documentation provided, your FMLA leave is being extended from December 15, 2006 to January 17, 2007. This will exhaust your 12 weeks of leave available to you under federal FMLA. Since you have not worked 1,250 hours in the last 52 weeks as required under federal FMLA, you are not eligible for further benefits under this provision. A letter detailing your COBRA rights for medical and dental insurance was sent today.

Listed below are the options that are available to you at this time:

1. Health Leave as provided by Article VI – Section L. of the Faculty Contract. To apply for this unpaid leave we would require a letter requesting a health leave accompanied by a doctor's letter stating the need for the leave of absence. The contract states that "A statement from the physician recommending return to work must be presented to the Board prior to reinstatement. The Board reserves the right to obtain their own physician if the situation warrants it. A teacher shall be returned to their original position or to a position equivalent to the one previously held. Reinstatement shall occur after one (1) year of date of leave or at the beginning of the school year."
2. An accommodation (unpaid leave of absence) under the Americans with Disabilities Act (ADA). Documentation from a physician that describes the nature, severity and duration of the impairment, the activity that the impairment limits (e.g., the ability to work) and the extent to which the impairment limits your ability to work is required to apply for such an accommodation. A second medical opinion may also be requested if your documentation is insufficient to substantiate the need for a reasonable accommodation. Medical documentation stating that you are able to work would be required prior to your return. You would be entitled to return to your original or equivalent instructional position at the beginning of the school term.
3. Long-Term Disability (LTD). Please refer to Dawn McDonough's letter of December 4, 2006, in which she provided you with the appropriate forms to complete to apply for Long-Term Disability benefits. We are including a

second set of forms in the event you have misplaced the forms previously sent to you. The deadline for submitting these forms to the LTD carrier is February 28, 2007. The forms should be sent directly to the company (address listed on top of form).

If you choose to apply for a health leave as provided by union contract or an ADA accommodation (leave) you must submit a request in writing to Human Resources accompanied by complete and appropriate medical documentation by February 28, 2007.

If we do not hear from you by February 28, we will have to assume that you have elected to end your employment with WITC, and we will place your resignation on the March 12 Board meeting agenda. (Dist. Ex. #22)

McDonough mailed a letter to the Grievant, dated February 8, 2007, acknowledging receipt of documentation from her doctor certifying the Grievant's medical absence from December 15, 2006 to February 28, 2007. (Dist. Ex. #28) In this letter, the Grievant was advised that, under the Federal FMLA, the Grievant was eligible for only twelve (12) weeks of leave; which twelve (12) weeks had expired on January 17, 2007. McDonough also discussed the payment of various insurance premiums; stated that the Grievant must have her LTD forms completed and submitted to the carrier by February 28, 2007; and reiterated information previously provided to the Grievant regarding LTD.

In a letter dated February 20, 2007 and addressed to Palin, the Grievant states:

...

Per our conversations and your requests, I have enclosed my EMPLOYEE'S STATEMENT OF CLAIM FOR LONG-TERM DISABILITY BENEFITS with some attachments. I believe Dr. (P) will have his portion in on time as I just need to go down to his office before February 28 (due date) and sign the release.

You have stated to get this to you to forward as I want to have my proof to WITC that it met all requirements and deadlines. I also spoke with Dawn regarding the fact that I can not control the timeline once this goes out and she stated that I only have to have requirements in, and that others take over with decisions. (U. Ex. #4)

...

Attached to the letter of February 20, 2007 is an "Employee's Statement of Claim for Long-Term Disability Benefits" prepared and signed by the Grievant. Attached to FAX cover sheet dated February 27, 2007 from Dr.P to McDonough is an "Attending Physician's Statement Long-Term Disability Benefits" signed by Dr. P. (U. Ex. #5)

In a letter dated March 7, 2007 and addressed to the Grievant, a representative of the LTD insurance carrier states that the carrier had received an "Attending Physician's Statement" completed by Dr. P, but had not received a copy of the "Employee's Statement of Claim;" that another copy of this form was being enclosed, as had been discussed with the Grievant in a telephone conversation of that date; that a completed employee statement was needed to begin processing the Grievant's claim; and that, by this letter, the carrier was requesting that the Employer send a completed Employer Verification Statement so that the carrier can begin to evaluate the claim. This letter indicates that McDonough was copied on this letter. (Dist. Ex. #30)

In an e-mail dated March 8, 2007, Mangan advised Will as follows:

John, following up on our call today, I want to alert you to the fact that Fae will be requesting a Health Leave, pursuant to the faculty contract.

We were not expecting the College to move forward on March 12 with board action in regard to Fae, and certainly disagree with the contention that Fae is in anyway resigning her job. In a letter to Fae on February 7th, Perry Palin said Fae's case would be brought to the board on March 12, "If we do not hear from you by February 28. . ." Fae was in touch with the college several times before February 28, and as you know has applied for a disability benefit with the income protection program (long term disability).

I hope this note, along with Fae's request for Health Leave, will remove any doubt that Fae has not resigned her position, but is unable to work because of medical reasons, and furthermore hopes to return to work when her medical condition allows. (Dist. Ex. #39)

...

In an e-mail dated March 12, 2007 8:45 AM, the Grievant advised Will as follows:

...

Pursuant to Article VI, Section L of the Faculty Contract, I am requesting a Health Leave since I am unable to work at this time. A letter from my doctor in support of this request is being sent directly to you. I am also sending this correspondence by fax and US mail. (Dist. Ex. #40)

...

In a letter dated March 14, 2007 and addressed to the Grievant, Will states:

In Perry Palin's letter of February 7, 2007, you were notified that you had until February 28, 2007, to submit a written request **accompanied by adequate medical documentation** applying for a health leave or an accommodation under the Americans with Disabilities Act (ADA). You were also informed that your FMLA leave expired on January 17, 2007.

Your March 12 e-mail requesting a health leave was not received by the deadline and therefore your resignation was placed on the March 12 board agenda. The board accepted your resignation from WITC effective February 28, 2007.

My understanding is that you are pursuing Long-Term Disability as provided by the faculty contract. If it is determined that you meet the eligibility requirements for long-term disability you will have the right to return to work for up to two (2) years from the date you become eligible for disability benefits, pursuant to faculty master contract provision. (Dist. Ex. #41)

By e-mail dated March 19, 2007, Mangan advised Will of the following:

I have received a copy of the March 24 letter, in which you informed Fae LaForte that the WITC Board has accepted her resignation.

Please accept this message as notice that the union is grieving this decision of the board, since Ms.LaForte has not offered her resignation, and has no intention of resigning her position. (Jt. Ex. #2)

...

In an e-mail dated March 26, 2007, Mangan confirms the parties' agreement to hold the Grievant's grievance in abeyance pending a decision by the LTD carrier on her application for LTD. (Jt. Ex. #3) In a letter dated May 11, 2007 and addressed to the LTD carrier, McDonough states that she is enclosing the "Employer Verification Statement" for the Grievant. (Dist. Ex. #34)

In a letter dated May 13, 2007, Mangan advised Will of the following:

...

In speaking with Fae LaForte recently, I've learned that her doctors will clear her for a return to work if certain medically-required conditions can be met.

I would like to set up a meeting to discuss Fae's return to work at WITC, at which meeting we will present the medical conditions and the supporting doctor's letters.

Please call me so that we can set a time that is mutually convenient. Thank you.
(Dist. Ex. #42)

...

In a letter dated June 8, 2007, Mangan advised Will that he was requesting a meeting to discuss the Grievant's return to work. Mangan states that the Grievant has recently learned that her doctors will clear the Grievant to return to work, but require that certain medically-required conditions be met and describes these conditions. (Dist. Ex. #43)

In a FAX dated June 22, 2007, Mangan advised Will of the following;

John: I'm sending the attached letter in support of our earlier request for a meeting to discuss Fae LaForte's return to work. My understanding is that there will be one more letter from another Doctor, also speaking to the issue of Fae's ability to return to work, and under what conditions.

...

The attached letter, dated May 23, 2007, is from Dr. P. This letter from Dr. P. identifies a diagnosis; states that difficulties in the workplace may certainly worsen the Grievant's condition; contains suggestions/recommendations regarding factors that would maximize the success of the Grievant returning to work.; and ends with the following:

In summary, I feel it is possible that Fae LaForte may return to the workplace. *at this time*. I will be evaluating her on an on-going basis particularly if a work plan for her to return to work is agreed upon. I appreciate your special consideration in this matter.

...

In a letter dated June 29, 2007, Will advises Mangan that, based upon the request to return to work, it has become clear that the Grievant has abandoned her LTD claim; that the Employer has received notification that LTD carrier considers the case closed; and that, since the LTD is no longer pending, the College will consider July 3, 2007 as the end of the abeyance period for the grievance. Will further states "The college maintains its position that Fae has chosen to end her employment by failing to report to work or providing the required documentation for a medical leave." (Jt. Ex. #5)

Thereafter the grievance, which was denied at all steps, was submitted to arbitration.

POSITIONS OF THE PARTIES

College

Arbitrators generally hold that “just cause” requires that the discipline imposed is reasonable and not excessive, arbitrary or capricious. It also entails a showing that the conduct occurred.

It appears that the Grievant had performance problems in her awarded position that caused the Grievant stress. When her supervisors attempted to address these problems with the Grievant, she stopped coming to work and claimed that she was ill. As management testified, teacher absences are hard to cover and cause hardship for students in the class.

The Union states that the Grievant was absent from work due to illness. WITC is not obligated to hold open a job for an employee absent due to illness unless that illness rises to the level of a “serious health condition” under the Family and Medical Leave Act or a “disability” under the ADA or Wisconsin Fair Employment Act.

The Grievant exhausted her contractual sick leave on October 12, 2006. The College sent the Grievant four (4) letters before she complied, in an untimely manner, with her obligation to provide certification to substantiate her need for FMLA leave. Despite this untimely filing and the Grievant’s failure to provide medical documentation that her alleged illness was a “serious health condition,” WITC granted FMLA through December 15, 2006.

Once her FMLA leave expired, the Grievant did not return to work. Although the College could have terminated her employment when the Grievant failed to return to work, the College attempted to work with the Grievant to obtain the medical documentation necessary to extend her FMLA and sent the Grievant four more letters requesting the required medical documentation. The Grievant waited 47 days before submitting additional documentation.

WITC was under no legal obligation to maintain the Grievant’s employment unless an approvable leave request was submitted to WITC in a reasonably prompt manner. The Grievant was informed on least seven (7) occasions by way of formal letters that she needed to apply for some type of approved leave to maintain her employment with WITC. The leave options were a Health Leave under the faculty contract, an unpaid leave of absence under the ADA, or a long-term disability leave. Each of these three leave options mandate adequate medical certification by a health care provider.

The Grievant did not request a leave of absence under the ADA. Nor did she make a timely request for a Health Leave under the faculty contract. An application for long-term disability benefits is not an approvable leave request sufficient to maintain employment status.

The Grievant was advised regarding the procedure to follow in claiming LTD benefits, *i.e.*, that the method of application for long-term disability leave is made directly to the LTD

carrier. WITC does not have documentation that the Grievant sent her statement of claim to Palin; as claimed by the Grievant. The LTD carrier closed its file when it did not receive this documentation.

The Grievant abandoned her claim for LTD benefit and did not pursue disability under WRS. It is likely that this abandonment was because she did not have sufficient medical evidence.

The Grievant was provided 42 days to request an approvable leave of absence. Despite being advised that if she did not respond by February 28th, her lack of inaction would be deemed to be a resignation, the Grievant waited until March 12, 2007 to request a Health Leave under the Faculty Contract. The Grievant did not substantiate the March 12th request with medical documentation. The medical documentation subsequently provided by the Grievant was dated May 23, 2007, but not provided to WITC until June 22, 2007.

The Grievant had been warned on more than one occasion that failure to submit the requested medical documentation by the imposed deadline could lead to separation from employment. The Grievant, who had no difficulty in complying with the rules and deadlines to preserve COBRA rights and benefits, did not meet any of the deadlines imposed by WITC. The fact that WITC overlooked previously missed deadlines does not mean that WITC was obligated to overlook the February 28, 2007 deadline. As of February 28, 2007, WITC was not aware that the Grievant had no intention of resigning.

WITC did not harass the Grievant with requests for information. An employer has a legitimate business interest in requesting and receiving medical certification as to extent of disability, when the disability commenced; the impact of the disability upon ability to perform work, and expected return to work date. Notwithstanding the Union's assertion to the contrary, the Grievant did not supply requested information on time or within a few days of when it was required.

The Grievant's claim that her workload was excessive is not substantiated by record evidence. The Union's assertion that the Grievant could not apply for unemployment insurance benefits because she was "resigned" and not "discharged" is fatally flawed.

WITC is unaware of any legal requirement to accommodate the Grievant by providing a stress free work environment. The contractual leave provisions clearly provide that employees be returned to their original campus and position.

The Grievant had no employment status as of January 17, 2007. The Board's decision to accept the Grievant's resignation was based upon the fact that the Grievant had been given more than adequate notice as to the steps needed to be preserve her employment. If the Grievant had wanted to preserve her employment with WITC, she had only to (1) request a leave of absence and (2) substantiate the need for a leave of absence with adequate medical certification by February 28, 2007. The Grievant elected not to do this. WITC acted fairly

and reasonably when it treated the Grievant's failure to respond to legitimate requests for information as a resignation from employment.

However the Grievant's separation from employment is characterized, WITC has "cause" to take the action that it did. The grievance should be denied in its entirety.

Union

At the time that the College "resigned" the Grievant, the College had knowledge that the Grievant had no intention of resigning and was pursuing a health leave as well as a long-term disability leave. (Dist. Ex. #39 and 40) In light of this knowledge, the College's letter accepting her "resignation" makes no sense.

In the letter accepting her "resignation," the College also states that the Grievant will have a right to return to work for up to two years if her application for long term disability is approved. Accepting a resignation and then giving information about a possible return date is contradictory.

The College raised the issue of the Grievant's performance at the arbitration hearing. As reflected in each party's statement of the issues and the College's letter accepting the Grievant's "resignation," the sole reason for the acceptance of the "resignation" was the allegation that the Grievant failed to provide adequate and/or timely documentation about her illness.

Arbitral precedent supports the Union's claim that the College may not fashion reasons for a discharge after the fact. Additionally, the evidence regarding the alleged performance failures was based, in large part, upon hearsay.

On the facts of this case, the College could not reasonably conclude that the Grievant had resigned her employment. The College's action must be considered to be a discharge, subject to "cause" requirements of Article IV, Section A(2).

During her absence from work, the Grievant regularly informed the College of her medical status and responded to each of the four deadlines given between October 2006 and February 2007. (Dist. Ex. #5, 6, 7, 8, 12, 13, 17, 21, 26, 40; U. EX. #4, 5, and 6) In its correspondence with the Grievant, the College establishes a clear pattern of issuing deadlines and threats of "resignation" and then ignoring the deadlines when the Grievant supplied information regarding her illness and availability for work. (Dist. Ex. 15, 19, 20)

Under arbitral precedents, lax enforcement of rules may lead employees reasonably to believe that the conduct in question is tolerated by management and signal that the conduct will not be penalized. In this case, the College gave the Grievant every reason to believe that her responses were adequate.

The Grievant did not, as the College argues, elect to do things her way. Nor was the Grievant lackadaisical. Rather, at a time in which the Grievant was seriously ill, the Grievant submitted medical documentation when requested to do so by the College.

There are no grounds for the College to question the legitimacy of the Grievant's illness. The Grievant's illness should be considered a mitigating factor in her ability to provide requested information.

The Grievant has almost ten years seniority and no disciplinary record that has been shared with the Union. A penalty of discharge is too harsh a penalty for the allegation that the Grievant failed to meet a deadline for information.

The Grievant has maintained that she wishes to return to work. The Grievant was well enough to return to work in May 2007. The College's argument that the Grievant requested to be returned to a stress free environment twists the facts. The doctor's letter makes the reasonable statement that reducing work-related stress will help the Grievant to successfully return to work.

As soon as her doctors told the Grievant that she was well enough, she contacted the Union to begin discussions regarding her return to work. The Grievant abandoned her LTD claim because she was well enough to return to work and wished to meet with the College to discuss her medically-related conditions for a return to work. The Grievant's conduct is consistent with her claim that she had no intention of resigning and was out of work because she was too ill to work.

The College acted unreasonably and without cause, as defined by the College, when they imposed the penalty of discharge for missing another deadline. The grievance should be sustained.

The Arbitrator should order the College to reinstate the Grievant; make her whole for any loss of pay, benefits and seniority; and to make her whole for any lost unemployment benefits she may have been entitled to had the College discharged her instead of "resigning" her in March of 2007. The Arbitrator should retain jurisdiction for a period of ninety days from the date of the Award in the event that a question arises as to the implementation of the award.

DISCUSSION

The parties were unable to stipulate to a statement of the issue. The Union frames the issues as follows:

Did the College violate the Collective Bargaining Agreement, Article IV, Section A(2), when it "resigned" Fae LaForte based on their contention that she failed to keep the college notified of her status while ill?

If so, what is the appropriate remedy?

The College frames the issues as follows:

Whether WITC had “cause” to accept the Grievant’s resignation when she failed to submit adequate medical certification to support the need for a leave of absence from employment?

If not, what is the appropriate remedy?

As set forth in Union Representative Mangan’s e-mail of March 19, 2007, the grievance was filed in response to the March 14, 2007 letter issued by John Will, the College’s Vice President Administrative Services, informing the Grievant that the WITC Board had accepted the Grievant’s resignation. As is also set forth in this e-mail, the grievance challenges this action of the WITC Board on the basis that the Grievant had not offered her resignation.

While this grievance was pending, the parties, individually or jointly, considered other issues related to the Grievant, such as LTD or a return to work. Mangan’s letter of March 23, 2007 reasonably indicates, however, that the subject matter of the instant grievance continued to be “the action the WITC Board took at its March 12th meeting, regarding Fae LaForte’s employment status with the College.” The undersigned concludes that the issues are most appropriately framed as follows:

Did the Grievant resign, as concluded by the WITC Board on March 12, 2007?

If not, what is the appropriate remedy?

The March 14, 2007 letter issued by Will reasonably establishes that the Board accepted the Grievant’s “resignation” because the Grievant’s request for contractual “Health Leave” was not received by February 28, 2007; the deadline established in then Employer Vice-President of Human Resources Perry Palin’s letter of February 7, 2007. At hearing, Will states that the Grievant’s work performance was not considered by the Board when it accepted the Grievant’s “resignation.” The record does not establish otherwise.

Generally speaking, a resignation occurs because an employee has clearly expressed intent to resign. This is not the circumstance in this case. Rather, as set forth in Will’s letter of March 14, 2007, the WITC Board concluded that the Grievant’s failure to request a contractual “Health Leave” by February 28, 2007 constituted a resignation.

An employee who engages in conduct that evidences a clear intent to resign and sever the employment relationship may be considered to have “resigned” even though the individual never expresses intent to resign. Elkouri, *How Arbitration Works*, (BNA, 6th Ed.) at 936-7. The question to be decided is whether or not the Grievant’s failure to submit a request for a

contractual "Health Leave" by February 28, 2007 evidences a clear intent to resign and sever the employment relationship.

In his letter of February 7, 2007, Palin states, *inter alia*:

If we do not hear from you by February 28, we will have to assume that you have elected to end your employment with WITC, and we will place your resignation on the March 12 Board meeting agenda.

As a review of the February 7, 2007 letter reveals, the February 28, 2007 deadline established by Palin was not limited to a request for contractual "Health Leave," but also included requests for LTD and ADA accommodation. Will's letter of March 14, 2007 reasonably establishes, however, that the Grievant's resignation was placed on the March 12, 2007 agenda because the Grievant's request for a contractual health leave was not received by the February 28, 2007 deadline.

By e-mail dated January 11, 2007, a date that is prior to the time that Palin issued his letter of February 7, 2007; the Grievant placed the Employer on notice that the Grievant did not always receive her mail within a time frame that permitted her to respond within the deadlines established by the Employer. (Dist. Ex. #12) Given this notice, it would not be reasonable for WITC to make any assumption regarding Grievant intent that is based upon a Grievant failure to meet the February 28, 2007 deadline established in Palin's letter.

In an e-mail dated March 8, 2007, Union Representative Mangan advised Will that the Grievant intended to request a "Health Leave, pursuant to the faculty contract. At 8:45 a.m. on March 12, 2007, the Grievant sent Will an e-mail that states:

Pursuant to Article VI, Section L of the Faculty Contract, I am requesting a Health Leave since I am unable to work at this time. A letter from my doctor in support of this request is being sent directly to you. I am also sending this correspondence by fax and US mail.

The above e-mails refute the "assumption" that the failure of the Grievant to submit her request for contractual health leave by the February 28, 2007 deadline is an election to end her employment with WITC.

The failure of the Grievant to submit her request for contractual health leave by the February 28, 2007 deadline established in Palin's letter of February 7, 2008 is not conduct that evidences a clear intent to resign and sever the employment relationship. The Grievant did not resign, as concluded by the WITC Board on March 12, 2007.

By accepting a resignation that was not offered, the WITC Board discharged the Grievant. Under Article IV, Section A(2), a non-probationary employee, such as the Grievant, shall not be discharged except for cause.

There may be instances in which a continued absence from work would provide the College with cause to discharge an employee. In the instant case, however, the parties' collective bargaining agreement provides a right to a "health leave." This right is independent of any statutory rights, such as may be provided by FMLA, ADA or the Wisconsin Fair Employment Act.

Article VI, Section L, which addresses contractual "Health Leave," states "Upon request and application, a teacher shall be granted such leave without pay." This provision does not express any time limit for requesting contractual "Health Leave." To give effect to the Article VI, Section L, imperative to grant health leave upon request and application of a teacher, the Article IV, Section S, "judgment and discretion" provided to the Employer must be subject to a rule of reasonableness.

In his letter of February 7, 2007, Palin acknowledges receipt of the Grievant's doctor's note of January 30, 2007 and confirms that this note has been used to extend the Grievant's FMLA to January 17, 2007. This doctor's note states that the Grievant continues to need FMLA to February 28, 2007.

Although Palin's letter is silent with respect to the issue of the Grievant's status from January 17, 2007 to February 28, 2007, McDonough's correspondence confirms that, as of February 8, 2007, the College had received documentation from the doctor certifying the Grievant's medical absence to February 28, 2007. Palin's and McDonough's letters, as well as the Employer's conduct in effectuating the Grievant's discharge as of February 28, 2007, reasonably establish that the College considered the Grievant to be on documented medical leave after the expiration of her FMLA on January 17, 2007 and that this documented medical leave extended until February 28, 2007.

On March 8, 2007, the Union notified the College that the Grievant would be requesting a contractual "Health Leave" and, on March 12, 2007, the Grievant confirmed she was requesting a contractual "Health Leave" and that her doctor would be sending the Employer a letter in support of this request. In the absence of a contractually established deadline for submitting a request for contractual "Health Leave," a request for a contractual "Health Leave" submitted less than two weeks after the expiration of the employee's most recently documented medical leave is not an untimely request for Article VI, Section L, "Health Leave." To hold otherwise would be to ignore the fact that the contract does not require health leave requests to be prospective only; as well as the fact that an employee, such as the Grievant, may not be able to control the timing of medical examinations/appointments that may be necessary to substantiate a need for a medical leave.

The Grievant's conduct prior to February 28, 2007 was not cited in the March 14, 2007 letter as a reason for the WITC Board's decision to "accept" the Grievant's resignation. Thus, such conduct may not be relied upon to argue that the Grievant's discharge was for cause.

The WITC Board did not have cause to discharge the Grievant on the basis that the Grievant's "March 12 e-mail requesting a health leave" was not timely received. Accordingly, the WITC Board has discharged the Grievant in violation of Article IV, Section A(2) of the parties' collective bargaining agreement.

After the discharge the Grievant provided the Employer with certain medical documentation and the parties had discussions regarding the Grievant's return to work. The record fails to establish, however, that the Grievant's March 12, 2007 request for contractual health leave and any subsequent return to work request was processed or determined in accordance with the requirements of Article VI, Section L. Until the Grievant's Article VI, Section L, rights to a health leave and/or return to work are determined, it would be premature to conclude, as the Union argues, that the Grievant is entitled to reinstatement to a position or payment of any make whole wages and benefits.

Given that the Employer chose to discharge the Grievant rather than to consider her March 12, 2007 request for a contractual health leave, the Employer has no reasonable basis to complain about the timeliness of any subsequently submitted medical documentation. The Union argues that, due to the fact that the College "resigned" the Grievant, she was denied unemployment compensation benefits to which she was entitled. Whether or not the Grievant was entitled to unemployment compensation benefits is a question that must be decided in the appropriate forum, *i.e.*, the unemployment compensation section of the State's Department of Workforce Development.

In discharging the Grievant without cause, the Employer denied the Grievant a reasonable opportunity to exercise her Article VI, Section L, rights to request and obtain a "Health Leave," as well as a return to work. Under the facts of this case, the appropriate remedy is to reinstate the Grievant to her medical leave of absence status as it existed on February 28, 2007 and to order the Employer to accept the Grievant's March 12, 2007 request for a contractual health leave and to act upon this request, as well as any subsequent return to work request, in accordance with the applicable provisions of the parties' collective bargaining agreement, including Article VI, Section L. The Employer may not assume that it has already received all relevant documentation from the Grievant.

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

AWARD

1. The Grievant did not resign, as concluded by the WITC Board on March 12, 2007.
2. In accepting a resignation that had not been offered by the Grievant, the WITC Board has discharged the Grievant, effective February 28, 2007, without cause in violation of Article IV, Section A(2) of the parties' collective bargaining agreement.

3. In remedy of the WITC Board's violation of the parties' collective bargaining agreement, the Employer shall immediately:

- a) Reinstatement the Grievant to her medical leave of absence status as it existed prior to her discharge that was effectuated February 28, 2007.
- b) Accept the Grievant's March 12, 2007 request for a contractual health leave and act upon this request, as well as any subsequent return to work request, in accordance with the applicable provisions of the parties' collective bargaining agreement, including Article VI, Section L.

Dated at Madison, Wisconsin, this 30th day of July, 2008.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
7320

