

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**JACKSON COUNTY HUMAN SERVICES CLERICAL
AND PARA-PROFESSIONAL EMPLOYEES,
LOCAL 2717-B, WCCME, AFSCME, AFL-CIO**

and

JACKSON COUNTY

Case 185
No. 67160
MA-13780

(C. Medical Leave Grievance)

Appearances:

Daniel R. Pfeifer, Staff Representative, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appearing on behalf of Local 2717-B.

John J. Prentice, Attorney, Simandl & Murray, S.C., 20975 Swenson Drive, Suite 250, Waukesha, Wisconsin 53186, appearing on behalf of Jackson County.

ARBITRATION AWARD

Local No. 2717-B, Jackson County Human Services Clerical and Para-Professional Employees, hereinafter referred to as the Union, and Jackson County, hereinafter referred to as the County or the Employer, are parties to a Collective Bargaining Agreement (agreement, contract or CBA) which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. On July 30, 2007 the Union filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Union's grievance regarding the medical leave of C. (Grievant or C.). The undersigned was appointed as the arbitrator. Hearing was held on the matter on January 31, 2008 in Black River Falls, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. The hearing was not transcribed. The parties filed initial post-hearing briefs by April 11, 2008. The Union chose not to file a reply brief and the County's reply brief was filed on June 19, 2008, at which time the record was closed. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties were unable to stipulate to the issues to be decided by the Arbitrator at the hearing, however, the post-hearing briefs filed in this matter reflect agreement on a statement of the issues as follows:

1. Did Jackson County violate the Collective Bargaining Agreement when it unilaterally placed the Grievant on unpaid medical leave?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 2 - MANAGEMENT RIGHTS

SECTION 1. The County possesses the sole right to operate County government and all management rights repose in it, but such rights must be exercised consistently with the provisions of this Contract. These rights, which are normally exercised by the Employer, include, but are not limited to, the following:

- A. To direct all operations of County government.
- B. To hire, promote, assign and retain employees in positions with the County and to suspend, demote, discipline or discharge for just cause.
- C. To relieve employees of their duties because of lack of work or for other legitimate reasons.
- D. To maintain efficiency of County government operations entrusted to it.

...

- H. To determine the methods, means and personnel by which such operations are to be conducted.

...

ARTICLE 21 - MISCELLANEOUS PROVISIONS

...

SECTION 4 - Americans with Disabilities Act.

The Union and the Employer recognize the legal obligation to make reasonable accommodation for all employees with disabilities as defined by the Americans with Disabilities Act.

. . .

The Employer in its sole discretion may make reasonable and necessary accommodations which do not impose hardship as defined by the ADA including but not limited to modified work schedules. . .

BACKGROUND

C. has been employed by the County since 1979 and has worked in the positions of Clerical, Social Services Aide, Child Support Specialist and, at the time of the events giving rise to this grievance, held the position of Economic Support Specialist. In July, 2006, she was diagnosed with a serious disease which required prolonged treatment. As a result of her treatments she suffered from various side effects causing her to have difficulty with the demands of her job duties. In January, 2007 she returned to work and was placed on light duty.

In March, 2007, the County sought information about her medical condition for the purpose of attempting to tailor her job duties. On April 17, 2007 the County received notice from her neuropsychologist that the Doctor would not respond to their request and suggesting that the County's request would be more properly answered by C.'s attending physicians. In April, 2007 the County received a medical status report from C.'s attending doctor advising that her limitations were "as outlined by psychology evaluation." The psychology evaluation suggested that C. was "discouraged from taking on case work. . . for the time being" and was dated February 22, 2007. The County then instituted a plan whereby C. would perform in-take duties and begin taking on case work at the rate of 25 cases per week until she reached the normal case load level of about 280 cases. In this way she could build her caseload while she recovered from her illness.

On April 23, 2007, the County determined that C. was unable to adequately do even the light work she had been given and placed her on Family Medical Leave effective April 24, 2007. The County found that they could not comply with her current restrictions and based its decision to place her on medical leave on the needs of the agency and the work load surrounding the Economic Support Department "both now and in the future." Her FML was to end on June 4, 2007. C. returned to work part time of May 21, 2007 and began full time status on June 4, 2007. This grievance followed. The Union claims a make whole remedy for the time the County unilaterally placed C. on unpaid medical leave on April 24, 2007 and the time she returned to work on May 21, 2007.

THE PARTIES' POSITIONS

The Union

Contrary to the position of the County, this matter is appropriately before the Arbitrator because it involves the interpretation and application of the terms of the Collective Bargaining Agreement, specifically Article 21, Section 4.

The Greivant's condition was caused by the treatment she received and not by the disease itself. The question is whether reasonable accommodations are required under these circumstances. According to the ADA "An employer must provide a reasonable accommodation that is needed because of the limitations caused by the cancer itself, the side effects or treatment for the cancer, or both." That is the case here. Such a reasonable accommodation did not place an undue hardship on the Employer.

Article 21, Section 4 states "The Employer in its sole discretion may make reasonable and necessary accommodation..." It did initially make such an accommodation for the Grievant but later placed her on unpaid leave. This move followed the County's receipt of medical information to the effect that C. was improving. This begs the question whether the County can take away the reasonable accommodation previously provided when the Grievant's condition remained the same or had actually improved. The County substituted its judgment for that of the medical providers because C. was seen by the medical provider on 3/15/07 but the medical report was not generated until 4/19/07. The County placed her on leave on 4/24/07 and there appears to have been no medical examinations between 3/15/07 and 4/23/07. The County should have sought a medical update rather than place her on leave.

The County's argument that C. made mistakes on the job and that it needed a full-time worker to address the heavy workload is belied by the testimony of the Economic Support Manager who conceded that other workers made mistakes and that another full-time worker was not hired because C. came back to work in May, 2007. Also, the Manager testified that more work would get done with C. there than without her there. Regarding the mistakes, reasonable accommodations cover that concern. Such an accommodation could have included checking her work for accuracy. The grievance should be sustained and C. should be made whole.

The County

The issue is: Did Jackson County violate the Collective Bargaining Agreement when it unilaterally placed the Grievant on unpaid leave? Article 21 is operative. The Grievant was unable to perform her job duties. Her supervisor, Kara Jenkins, testified that C. wanted to be placed on light duty after receiving a poor performance evaluation in January, 2007. C. admitted at hearing that her treatment had an unanticipated consequence of making it difficult to do her job. Due to her deteriorating performance she was placed on light duty doing in-take work. The original plan was that she was to slowly take on more and more work and build back up to her original workload. However, she was unable to do even the in-take duties satisfactorily.

The County has never before offered light duty assignments to any other employee, nor does it have a policy or program for it. It has no contractual duty to provide a light duty assignment but because the Grievant was going through a difficult time and because she was a long

term employee, the County made provision for her. Article 21, Section 4 does not establish a duty to provide light duty. It does not provide any substantive rights. It merely recognizes the parties' duty to make reasonable accommodations to unit members with disabilities as defined by the ADA. Even if it did establish such a duty, the explicit language states that "[T]he Employer in its sole discretion may make reasonable and necessary accommodations which do not impose an undue hardship as defined by the ADA..." So, the Union has no standing to grieve the County's failure to provide light duty work because it (the Union) has agreed that the provision of such duty lies within the sole discretion of the County.

Neither the Collective Bargaining Agreement nor federal law requires the County to provide light duty as a reasonable accommodation. The ADA requires reasonable accommodations for employees with disabilities, but the question of whether the County has met this obligation requires the interpretation of federal law and that task is outside the jurisdiction of the Arbitrator. Even if the federal law were applied it is unlikely that the County would be required to provide the accommodations sought by the Grievant. Since it would be inappropriate for the County to discipline the Grievant for poor performance, it instead placed her on medical leave. There may have been some busy work she could have done, but it would not have kept her busy full-time.

The grievance should be denied.

The County's Reply: (The Union chose not to file a reply.)

The County re-asserts its objection to the jurisdiction of the Arbitrator on the basis that Article 21 is not arbitrable because it merely reflects the parties' recognition of the legal obligations under State and federal law to reasonably accommodate employees with disabilities. The Union argues that the Grievant required a reasonable accommodation and that allowing her to work on light duty did not impose an undue hardship. The application of these principles requires an interpretation of federal and state law and is not arbitrable.

Article 21 clearly gives the County the discretion to make necessary accommodations. So, it may also decide to take them away because Article 21 also provides that "no accommodation made under this paragraph shall be deemed an amendment or breach of this agreement or otherwise treated as precedential."

The Arbitrator must decide whether placing C. on medical leave constitutes a violation of the Collective Bargaining Agreement. It did not. The Union argues that the County substituted its judgment for that of the medical provider. Placing her on medical leave did not supplant the judgment of the medical provider, but was actually consistent with it.

It eventually became clear that the Grievant was unable to do even light duty. She made numerous basic mistakes and checking her work, as the Union suggests it should have done, would have been tantamount to doing it for her.

While there is always work to be done, the County had no duty to provide work to the Grievant because the County possesses the sole right to "...operate County government and all management rights repose in it," plus all of the other management rights retained by the County in the CBA.

DISCUSSION

Although the County did not argue that the jurisdictional issue regarding arbitrability be specifically placed before the Arbitrator as a stipulated issue in the case, and although, in its initial post hearing brief, it set forth the only issue as "Did Jackson County violate the Collective Bargaining Agreement when it unilaterally placed the Grievant on unpaid medical leave?", it nonetheless questions the Arbitrator's jurisdiction and argues that the case is not arbitrable. It bases this assertion on two grounds: first, Article 21 of the Collective Bargaining Agreement imposes no obligation to reasonably accommodate the Grievant's disability and so the Union has no "standing" to bring this grievance, and second, that because Article 21 refers to the Americans with Disabilities Act, a federal statute, the Arbitrator has no authority to interpret or apply that Article because it is federal law. The County asserts that Article 21 merely reflects the parties' recognition of the legal obligations under state and federal law to reasonably accommodate employees with disabilities. Accordingly, the undersigned will initially address this issue.

The Union obviously has standing to bring grievances under the terms of the CBA. It may do so at any time it believes that the parties have a disagreement regarding the interpretation, application or enforcement of the CBA. So may the County. Once the dispute reaches arbitration, if it ever does, it then becomes the arbitrator's responsibility to determine the outcome based upon his or her interpretation and application of the contractual provisions found in the CBA.

The Arbitrator reads the County's second argument as addressing the question of whether the Arbitrator has the authority to enforce and interpret or apply the ADA within the context of the review of the grievance. In part, the undersigned agrees with the County's position. The undersigned does not have the authority or the duty to enforce federal law. That function is reserved to other forums. As Arbitrator Daniel J. Neilsen observed in CITY OF LA CROSSE, Case 287, No. 54407, MA-9670, (8/97):

The arbitrator is not a judge of general jurisdiction, and cannot rely on external law as the substantive basis of rights underlying an Award. The question is what the parties meant by their conduct, not what the legislature meant by its statute.

Arbitrator Raleigh Jones reached the same conclusion in MANITOWOC COUNTY (HEALTH CARE CENTER), Case 324, No. 54968, MA-9843 (10/97):

However, it is not up to an arbitrator to enforce those statutory provisions [the FMLA or the ADA]. Thus, even if the County does violate those statutes, an arbitrator is not empowered to remedy same. This is because my authority is limited to interpreting the labor agreement in resolving questions of contractual

rights. Any alleged statutory violation is separate and distinct from an alleged contractual violation.

Arbitrator Jones drew the above conclusion based on his finding that the contractual provision operative in MANITOWOC, *supra*, did not refer to the FMLA or the ADA and thus was not expressly incorporated into the contract. Unlike MANITOWOC, the agreement here *does* expressly refer to the ADA. The CBA defines a grievance as “. . .any difference or dispute regarding the interpretation, application or enforcement of the terms of this agreement.” As such, the undersigned is limited to the interpretation, application and enforcement of the CBA. That means the *entire* CBA, not just parts of it. To the extent that Article 21, which includes reference to the ADA, is part of the *entire* CBA, I am required to interpret Article 21 and to apply and enforce its terms. Said another way, the Arbitrator has the authority to resolve disputes arising between the parties concerning the interpretation of the entire CBA and then to apply that interpretation by means of an award enforcing it. To that extent the undersigned sides with the Union’s position on the matter.

The circumstances under which an arbitrator could or should consider external law in deciding a grievance were considered in some detail in DURALOY, 100 LA 1166, 1172 (Franckiewicz, 1993). There the Arbitrator said in pertinent part:

First, the Agreement itself might incorporate various laws, or authorize an arbitrator to consider them. Second, the Agreement might forbid the arbitrator from giving any consideration to outside law. Since the role of an arbitrator is to give effect to the Agreement, few would dispute that the arbitrator should consider external law in the first situation, and should not in the second.

The Agreement here falls within the first situation referred to by Arbitrator Franckiewicz and the undersigned will thus consider the ADA to the extent required to allow him to give effect to the Agreement. The factual dispute in this matter does not require the undersigned to act beyond that authority and so I find this grievance to be substantively arbitrable.

The evidence demonstrates that C. was unable to perform her duties as an Economic Support Specialist following the treatment she received for her disability (cancer). Once she returned to work on a limited basis she was assigned to perform in-take duties and to gradually take on a small case load in order to slowly bring her up to speed. It became apparent to her supervisor, however, that she was having difficulty with the work she was given on this limited basis. She was making many mistakes and entering incorrect notes and she was late with filing her reports. Because of her inability to work even on this limited basis, she was placed on medical leave effective April 24, 2007, pending her recovery and eventual return to work. She returned to full time employment on May 21, 2007. The question becomes whether the agreement required the County to provide light duty of some kind to C. during that period of time when she was unable to perform the duties of in-take. In other words, once having demonstrated that she was unable to handle the already reduced workload doing in-take, was the County duty-bound to put her to work full time doing even less? The answer is no. The reason is because the agreement specifically

reserves the decision to create light duty work to the County. Article 21, Section 4 states: “The Employer in its sole discretion may make reasonable accommodations which do not impose an undue hardship as defined by the ADA including but not limited to modified work schedules, reassignment to a vacant position within or outside the bargaining unit.” Here, the County chose not to make further accommodations to C. This was within its discretion under Article 21 and under its general management rights found in the Agreement and these rights are not modified elsewhere in the Agreement.

Union Exhibit 1, entitled **Questions and Answers About Cancer in the Workplace and the Americans with Disabilities Act (ADA)** is published by the U.S. Equal Opportunity Commission. This publication contains a review of the accommodations required by the ADA of an employer regarding employees with cancer. It says that “An employer must provide a reasonable accommodation that is needed because of the limitations caused by the cancer itself, the side effects of medication or treatment for the cancer, or both.” The record clearly reveals that C.’s difficulties in doing her regular job were caused by her cancer or the treatment and medication she received as a result of the cancer, or a combination of both. The County then was under a duty imposed by the ADA to provide a reasonable accommodation for her which did not pose an undue hardship for the County. So, in an attempt to conform to that duty, it offered C. a position allowing her to do in-take work and to gradually take on case work at a slow pace. Unfortunately, she was unable to do even this reduced amount of work and the County then placed her on medical leave. About a month later she was able to return to her normal duties. The undersigned believes that the initial accommodation afforded to C. fully complied with the ADA standards and that the Union’s argument that the County was duty bound to find even lighter work for her after she demonstrated her inability to do the in-take work must fail. It must fail because, under the Union’s theory, the modifications to C.’s job would have been never ending. If the County gave her even less to do and she could not perform those duties, the Union would have had the County reduce the duties even further until, theoretically, C. could have become a full time employee doing nothing. The Arbitrator concludes that the accommodation originally provided to the Grievant was reasonable under Article 21 and further modifications to it were not required under the terms of the contract. When the County determined that C. was unable to do even the limited duty she had been given, it acted within its contractual rights to terminate the accommodation and place her on medical leave. The County exercised its discretion and provided the accommodation and that is all it had to do.

If the Union, or C., believes the ADA was violated because of the County’s actions here, any remedy for such a violation must be obtained elsewhere.

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

AWARD

1. The County did not violate the Collective Bargaining Agreement when it unilaterally placed the Grievant on unpaid medical leave.

2. The grievance is dismissed in its entirety.

Dated at Wausau, Wisconsin, this 25th day of August, 2008.

Steve Morrison /s/

Steve Morrison, Arbitrator