BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN COUNTY

and

SHEBOYGAN COUNTY HIGHWAY DEPARTMENT EMPLOYEES
AFSCME LOCAL 1749, AFL-CIO

Case 388
No. 67336
MA-13839

(P. F. Grievance)

Appearances:

Mr. Michael Collard, Personnel Director, Sheboygan County, 508 New York Avenue, Sheboygan, Wisconsin 53081-4692, appeared on behalf of the County.

Mr. Samuel Gieryn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 187 Maple Drive, Plymouth, Wisconsin 53073, appeared on behalf of the Union.

ARBITRATION AWARD

On October 8, 2007 Sheboygan County and the Sheboygan County Highway Department Employees, Local 1749, AFSCME, AFL-CIO filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of the Commission's staff to hear and decide a grievance pending between the parties. Following appointment, the matter was heard on December 13, 2007 in Sheboygan, Wisconsin. No formal record of the proceedings was made. Post-hearing briefs and reply briefs were filed and exchanged by February 8, 2008.

This Award addresses the termination of employee P.F.

BACKGROUND AND FACTS

P.F., the grievant, was hired by the Sheboygan County Highway Department, on February 12, 2001. During the course of his employment with Sheboygan County, Mr. F. received good performance evaluations. Mr. F. has had discipline related to his attendance. On September 7, 2006 he was given a verbal warning which indicated:

P. has violated the attendance and sick leave policy when he called in sick on June 5th, 6th, 21st, 29th and 30th, July 10th, 11th, and 20th, and August 14th, 2006. This is considered a pattern of use, when the majority of the days called in were days directly preceding or following scheduled days off. It has been determined that you have excessive absenteeism at the Highway Department, which is defined as occurrences at a rate of more than one per month.

On December 7, 2006 Greg Schnell, Sheboygan County Highway Commissioner, and Ed Karsteadt, Shop Superintendent, met with the grievant to discuss his attendance. The conversation was back and forth, with the managers expressing concern that the grievant had taken over a quarter of the year off with leave, and the grievant indicating that he had health issues that contributed to his absenteeism. The discussion was not disciplinary in nature, but did conclude with the managers directing the grievant to speak with either Karsteadt or his assistant when he calls in sick, and not use the voice mail.

On March 26, 2007 the grievant was given a written warning relating to making direct contact with his supervisor when calling in sick. Karsteadt believed that the grievant was repeatedly not making contact with his supervisor when calling in, and wanted the practice stopped. The warning provided;

On September 7, 2006, Ed Karsteadt met with P. about his temporary modified work. At this meeting Ed explained the importance of making direct contact with your supervisor when calling in sick. P. had acknowledged this with his signature. On December 7, 2006 Ed Karsteadt and I met with P. to talk about his absenteeism. At that point P. was told again of the importance of talking to his supervisor directly when calling. On March 21, 2007 P. violated this procedure.

P.F. has a history of illness and injury-related absences. He was hurt on the job in 2001. In March, 2004 he had fusion surgery. The record indicates a leave of absence following back surgery from March 2, 2004 to May 10, 2004. There is a medical excuse from May 31 – June 3, 2005 for pain arising from an injury. There is an off-work medical statement for the last week of July, 2005. There is a release from work for the period August 12 - 29, 2005 for a staph infection. There is a release for April 10 - 19, 2006 and a second medical release for the period April 23 - May 2, 2006 for mental health treatment stemming from the grievant's physical condition. There is a continuation of that leave which appears to have ended on June 5, 2006.

The noted leaves do not represent a comprehensive review of the grievant's medical history, nor do they reflect his use of sick leave or vacation. The grievant suffered from serious medical conditions. He was an aggressive user of paid time off.

On Friday, April 13, 2007 the grievant was working with a tractor tire, and strained his back. The pain was such that he had to leave work. He went to the doctor, and kept his supervisor apprised of his situation for the first week away from work. The grievant understood that he would be off work for some undefined period of time and filed an

application for a leave of absence, which indicated that his leave would begin on April 16 and that his "expected return to work date" was June 11, 2007. When he filed the document the grievant did not know when he could expect to return to work. He testified that he called the Human Resource office and asked how to handle the uncertain date and was told that they just needed a date, and that an exact date wasn't necessary. His doctor indicated that June 11 was appropriate, and the grievant deferred to the doctor. As a part of his Family and Medical Leave Act leave application the grievant had his treating physician submit a Certification of Health Care Provider document to the County. That document indicated ongoing treatment and further indicated that the "Patient was initially seen on 4/30/07 & advised that he was off work from 4/16/07. He will have epidural steroid inj. on 5/18/07 & will be re-evaluated on 6/7/07". The Certification indicated that the grievant was unable to perform work of any kind. It is unclear from the record when the leave request and Certification document were received by the employer. They appear to have been prompted by Human Resource Director Collard's May 15 letter, which provided:

> Dear Mr. F.
>
> It is my understanding you have been absent from work since April 17, 2007. On April 25, 2007 you were mailed a packet of Family and Medical Leave forms for completion. As of today we have not received any of the Family and Medical Leave paperwork from you nor your doctor. It is necessary for you to complete your portion of the papers and for your doctor to complete the Certification of Health Care Provider. It is also necessary for your doctor to complete the Fitness for Duty Certification when you are able to return to work with no limitations.
>
> Please be advised that these forms need to be returned to the Human Resources Department by May 30, 2007.
>
> If you have any questions, please feel free to contact the Human Resources Department.

Following his first week off work, the grievant did not call his employer. It was his belief that the employer understood that he was disabled and that he was undergoing medical treatment. It was the grievant`s testimony that he was in communication with two bargaining unit employees during the period of his leave. Neither of those individuals testified during the hearing.

The grievant saw his doctor on May 3, 2007 and the doctor's report indicated that the grievant could return to work on 5/21/07, full-time, sooner if able. The doctor indicated that there would be neck restrictions and that the patients' next appointment was on 6/7/07. It is unclear when that document was provided to the County. It appears that the original anticipated return to work date, June 11, was not modified at the time. The grievant did not return to work. He did go to his 6/7/07 appointment.

It was the grievant's testimony that he saw the doctor on June 7, and that the doctor indicated that he should not return to work on June 11, but rather that he should look to return on July 2, 2007. The grievant did not return to work on June 11. He did not call his employer to indicate that he was not returning. He believed that the doctor would send the employer documentation, including the modified return date. He testified that he was in contact with two co-workers. He regarded the expected date of return to be approximate. At the time, the grievant was taking a number of powerful drugs to control pain. He testified that he was taking Percacet-325, Vicadin-10-325, Valium, Prozac, and Adaral. It was his testimony that he was out of it, and spent his days lying in bed.

When the grievant did not show up for work on June 11, neither Schnell nor Karsteadt had been contacted about a delayed return. Neither had been in contact with the grievant during his leave. Schnell testified that he expected the grievant to return to work on June 11. On June 12 Schnell called the grievant on both his home and cell phone. He did not reach the grievant and did not leave a message. On June 14 Schnell called the grievant and left a message to call. On June 18 Schnell called the grievant and left a message to call. Schnell could not recall whether he called the grievant's home or cell phone on June 14 and 18. It was the grievant's testimony that he has directed callers to use his cell phone, because his young children play with the home phone and erase messages. The grievant indicated that he did not receive any messages.

On, or about June 14 Michael Collard met with Greg Schnell and discussed whether or not the grievant could be terminated under Article 30 (set forth below) for not showing up to work for three consecutive days without an explained absence. Collard determined to hold off on such a determination in order to determine whether or not an explanation for the lack of notice would be provided in response to having the grievant fill out the FMLA forms. To that end, Collard sent the following letter;

June 14, 2007

RE: Family and Medical Leave

Dear Mr. F:

> Enclosed is a packet of Family and Medical Leave forms. You previously had Family and Medical Leave papers approved with an expected return to work date of June 11, 2007. I have been informed by Greg Schnell, Highway Commissioner, that you did not return to work as anticipated. It is necessary for you to complete your portion of the Family and Medical Leave forms and return them to my office. There are two forms for your doctor to complete, please take them to your doctor for completion and have them returned to my office also.

As of June 11, 2007 you are absent without leave, it is extremely important that you have these papers completed and returned to my office no later than Friday, June 29, 2007.

If you have any questions, please feel free to contact the Human Resources Department.

Collard did not call the grievant. The grievant did not call Collard.

On June 27 the grievant called Schnell, and indicated that he had the paperwork. He further indicated that the doctor would send the paperwork to the employer. Schnell advised the grievant he would be disciplined upon his return, but did not indicate that he would be terminated. Schnell did not identify what it was the grievant would be disciplined for. Schnell asked the grievant why he did not return his phone calls. The grievant said that he did not get the messages.

The grievant testified that he saw the doctor on June 28, which was the earliest appointment he could get. It was his understanding that the doctor would fax in the FMLA and return to work forms.

The grievant arrived for work on July 2, and was directed to Schnell's office. Schnell advised the grievant that he was being terminated. The men talked about the grievant's performance and absenteeism. Schnell gave the grievant the two reasons for his termination that are set out in the discharge letter. The grievant had a return to work release effective July 2, 2007. It indicated that the Doctor had seen the patient on June 7, and that the grievant could return to work; "Start with 5/ hours daily & progress to full days over 2 weeks time." Schnell asked about the FMLA form, and the grievant replied that the doctor was supposed to have sent it. The grievant indicated that he would go get the paperwork. Schnell indicated something to the effect we would see from there.

That same day the doctors office faxed a Certification of Health Care Provider form to the County. The report repeats the "Start with 5/hours daily…" schedule, is dated 6/28/07, and signed by the grievant, but not the doctor. At the grievant's request, the following letter was faxed to the County on July 2, 2007;

July 2, 2007

Re: P.
DOB:

To Whom It May Concern:

Our patient, P. picked up FMLA and return to work paperwork from our office on June 28, 2007. The patient understood that the paperwork was to be faxed

on that day to Sheboygan County Human Resources, fax 920-459-4306. Our office did not fax the paperwork. Please be aware of the misunderstanding.

If you need additional information call (414) 649-3232.

Thank you.

Melinee Burnett, PA-C

There is no indication in the record that the County called the Doctor's office. The grievant never filed a request for leave for the period following June 11. The grievant's termination was confirmed by the following letter:

July 2, 2007

Dear Mr. F:

The reason for this letter is to inform you that as of July 2, 2007, you are no longer a Sheboygan County employee.

The justification for this decision is as follows; Article 30, "Any unexplained absences from work for more than three (3) days shall be construed as voluntary termination of employment." On June 7, 2007 your injury was scheduled for re-evaluation. Your doctor had taken you off work through June 11, 2007. We did not hear from your doctor as to your status until June 27, 2007. It is your responsibility to keep your employer informed of your status.

The second reason for your termination is you were sent the proper paperwork to request Family and Medical Leave and those papers were never returned to Human Resources by the deadline imposed.

You have the opportunity to clean out your locker and pick up your tools today or we can make arrangements to have you pick them up after hours no later than 4:30 p.m. Monday through Thursday.

Sincerely,
Sheboygan County Highway Department

Greg Schnell
Highway Commissioner

A grievance was filed on July 16, 2007 protesting the termination. The substance of the grievance provides "P.F. was terminated due to unexplained absences. P. was told by Greg Schnell that if he was to produce the proper medical documents to prove these unexplained absences, he could keep his job. Now P. has these documents, Greg Schnell changed his mind and will not acknowledge them."

The County denied the grievance by the following answer:

August 28, 2007

Sam Gieryn
AFSCME Staff Representative

. . .

Re: Grievance No. 2007-1749-04
P. F.
Termination

Dear Mr. Gieryn:

This matter was scheduled for a meeting at Step 2 of the grievance process on August 15, 2007. In this grievance the union challenges the termination of P.F.'s employment with the county.

F. had an approved leave of absence starting on April 16, 2007, with an expected return to work date of June 11, 2007. F. did not report to work on June 11, and did not contact the Highway Department that day. Several attempts to contact F. by telephone made by the Highway Commissioner were unsuccessful. In fact, F. did not contact the department until June 27, 2007. When he attempted to report for work on July 2, he was informed that his employment had been terminated.

F. claimed at the Step 2 meeting that he had called the Human Resources Department on about June 12 to request papers to extend his leave. However, every member of the Human Resources Department denies receiving such a call. A call requesting leave papers would have been logged, and the log does not reflect any request from F. F. was asked to produce cell phone records documenting such a call, but has not done so.

F. was the subject of two previous disciplinary actions relating to calling in to work when absent due to illness. In connection with those disciplines, he was directed to speak personally with a supervisor when calling

in. Even if he had made a call to the HR department, that would not have met this directive.

Article 30 of the collective bargaining agreement provides that "Any unexplained absences from work for more than three (3) days shall be construed as voluntary termination of employment." F. has offered no explanation for his failure to contact the department on June 11.

The grievance is denied.

Very truly yours,

Michael J. Collard
Human Resources Director

ISSUE

The parties stipulated the following issue:

Did the Employer violate the collective bargaining agreement when it terminated P.F.?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified the employees shall receive all wages and benefits due him for such period of time involved in the matter.

. . .

ARTICLE 16

INCOME PROTECTION PLAN

I. Sheboygan County shall provide an Income Protection Program to all permanent full time employees of the Highway Department.

. . .

III. SHORT TERM PROGRAM

A. Short Term Protection Plan

1. An employee under this plan is eligible to receive short term income protection up to a period of one hundred eighty (180) calendar days.

. . .

4. The benefit payment schedule for approved short term absence is as follows:

a. Thirteen (13) Weeks – Sixty-five (65) Work Days – One Hundred Percent (100%) of Current Wage

b. Thirteen (13) Weeks – Sixty-five (65) Work Days Seventy-Five Percent (75%) of Current Wage

5. Employees will continue to receive full benefits while on sickness or accident leave at the level commensurate with their employment status prior to the illness or accident until the employee goes into the long term disability insurance plan.

. . .

IV. LONG TERM DISABILITY

C. Employees under the long term disability plan shall be compensated the rate of sixty-six and two-thirds percents (66-2/3%) of their basic salary*, to a maximum of five thousand dollars ($5,000.00) per month.

. . .

ARTICLE 30

TERMINATION

Termination reports shall be in triplicate and signed by the Employer and the employee, when an employee is separated from the Department for any reason except sick leave, vacation, or other legitimate leave. One (1) copy shall be retained by the Employer, one (1) filed with the Union, and one (1) given to the terminated employee. An employee leaving the Department except for legitimate reason, such as sickness, vacation or granted personal leave, shall be considered a terminated employee. Any unexplained absences from work for more than three (3) days shall be construed as voluntary termination from employment. It is, however, understood that on any work day any employee unable to perform his duties shall advise his foreman or patrol superintendent or shop superintendent prior to the commencement of said work day if possible.

POSITIONS OF THE PARTIES

It is the view of the County that the grievant failed to return to work on June 11. There was no contact with the County Highway Department. There was no request for additional leave. There was no response to the June 14 letter. The County notes that the grievant has signed a leave form which acknowledges that a failure to return to work upon expiration of a leave could be considered a resignation.

It is the County's view that under article 30 the grievant has terminated his employment. Under Article 30, the grievant was required to inform his supervision of his absence prior to the commencement of the work day. There was no reason the employer should have known what the grievant's status was following his failure to return to work on June 11. The County claims that there is nothing in the record to support the grievant's contention that he arranged to have the doctor's office send status documents to the employer. It is the position of the employer that the grievant admitted that he could have called the employer on June 11, notwithstanding his various medications.

The County argues that the grievant should have requested a continuation of his leave following his June 7 doctor appointment. He never requested a continuation of his leave. The County expresses skepticism as to the July 2 doctor's note. It is the view of the County that the note does not establish that it was the doctor and not the grievant that failed to submit the medical documents.

The County contends that any remedy ordered should be limited to the period of FMLA protection. The county contends that the grievant would have lost his job by July 9, given the limitations on his return to work.

In its reply brief, the County takes issue with the Union's construction of Article 30. It is the view of the County that Article 30 has no "intent" provision. Rather, Article 30 is the negotiated agreement between the parties as to what occurs when an employee doesn't show up for work for three consecutive days. It is the view of the County that a traditional just cause analysis is inapplicable. If it were to the contrary, Article 30 would have no meaning.

It is the view of the Union that the Collective Bargaining Agreement requires just cause for the termination of the grievant. Nothing in Article 30 relieves the employer of establishing cause. It is the view of the Union that the employer knew that the grievant had a history of illness and had been on a protracted leave as a consequence of an aggravation of his work related injury. The employer could have asked co-workers as to the status of the grievant's return, but failed to do so. It is the view of the Union that Schnell's efforts to contact the grievant were limited. Schnell failed to leave a message on the 12th, and did not tell the grievant on the 27th that his job was in jeopardy.

The Union contends that Collard's letter of June 14 was misleading and designed to jeopardize the grievant. The letter does not request that the grievant make contact. The union contends that the employer ambushed the grievant. If the employer wanted to know if there was a medical reason for the grievant's failure to call or otherwise contact the employer on June 11, the employer should have asked that question. The Union argues that the employer did not act as if the grievant had quit. There was no intent to quit, and so the just cause standard is applicable.

The Union acknowledges that the grievant should have done certain things differently, but contends that discharge is too severe a penalty. It is the view of the Union that the employer was not harmed by the lack of communication from the grievant. Even if the grievant's actions could be considered a voluntary termination, the employer did not accept the termination, but rather prompted and invited the submission of FMLA forms. The grievant provided the forms, and so explained his absence. Once provided with an explanation, the employer was not free to terminate the grievant under Article 30.

The Union points to Article 16, and the extensive income protection provision. The grievant has been an expensive employee, and promises to continue to be so. The Union believes this explains the employers' eagerness to rid itself of the grievant under the three-day no-show provision. It is the view of the Union that the July 2 medical fax was accompanied by an invitation to call the doctor's office with questions. If the employer had doubts as to the understanding between the grievant and the doctor's office a call could have been made. It was not. The union points to Article 3 and notes that the appropriate remedy in this matter is full back pay.

DISCUSSION

Article 30 forms the basis for this termination. I do not agree with the Union that Article 30 is subordinate to the just cause provision of the contract. I agree with the County's

construction of the Agreement that Article 30 represents the parties agreement that three unexplained days away from work constitutes just cause for termination. I further agree with the County that there is no "intent" feature of Article 30. By its very nature Article 30 addresses a scenario where the employer has not heard from an employee for three days without explanation. If the employee's intent were to govern the application of Article 30, the clause would be stripped of its meaning.

Article 30 addresses an unexplained absence from work. For the provision to have meaning the explanation must be contemporaneous with the absence. The last sentence of the clause provides as much. It makes sense in the context of the workplace where the employer must make decisions as to work assignments and staffing levels.

The grievant was absent from work from April 16 through the date of his termination, July 2. He supplied a Leave of Absence application, and supporting medical verification, which explained his absence through June 11. June 11 was identified as an expected date of return to work by the attending doctor. When the date was first identified it was speculative. It was not intended as a hard and fast date. The date reflected the doctor's estimate as to the probable duration of the underlying condition.

From the perspective of the County, the expected date of return represented the date it should anticipate operating without the grievant, and the date that it could anticipate his return to work. As such, the absence from April 16 – June 11 was explained. During that period the condition underlying the leave was treated and the grievant`s response and recovery was measured. By June 7 the grievant and his doctor understood that he would not return to work on June 11, but rather his return date was delayed to July 2. Neither advised the County of that fact.

There was no explanation of the absence beginning June 11. The grievant was due back from his leave on June 11. He did not return nor did he call his employer. By June 14, he was absent without an explanation for more than 3 days.

It is the view of the Union that the employer should have known what was going on with the grievant. This knowledge would come to the employer from its knowledge that the grievant was on an approved leave, coupled with the grievant's history of failing to communicate with supervision. I believe the employer had an idea as to the grievant's status. This is not a case where the employee mysteriously stops coming to work, leaving the employer in the dark as to whether the employee will ever return, and if so, when. The grievant was coming off a lengthy leave brought about by injury. He had a history of failing to contact supervision. That said, Article 30 addresses "Any unexplained absences from work…" The fact that the employer had a basis to surmise the whereabouts of the grievant is not the equivalent of an explanation as to why the grievant was not at work.

It is the view of the grievant that the Doctor should have contacted the employer. While that is possible, there is nothing in the record to support a finding that the Doctor

undertook to do so. There was no information provided after the June 7 visit. There was no information provided after the June 28 visit. The July 2 fax does not acknowledge responsibility on the part of the doctor's office to supply the paperwork. The grievant testified that he understood that the doctor's office was going to forward his medical forms to his employer. He did not testify that there was a commitment to do so. The fax indicates that the grievant picked up the paperwork.

The Union contends that the employer could have made greater efforts to contact the grievant. I agree that Schnell could have, and should have, left a message on his June 12 call(s). I credit Schnell's testimony that he called and left messages on June 14 and 18. Those calls were not returned. The grievant testified that he did not receive the calls, and suggests that perhaps his children deleted them. Perhaps this is so, but that does not diminish the fact that the employer attempted to contact the grievant. Nothing in Article 30 obligates the Employer to search out explanations for employee absences. Here, the explanation for the extended absence was within the knowledge of the grievant.

As the Union points out Collard's letter does not direct a response. It does, however, indicate that the grievant was "absent without leave". That should have been alarming to someone on an extended leave who believed that someone else was attending to his workplace affairs. This is particularly so in light of the grievant`s testimony that he did not believe that he needed verification to continue his leave.

The grievant never testified that he was unable to call his employer on June 11-13. He indicated that he was in a lot of pain, that he was knocked out – on the couch, that he was drowsy and had a bad memory. The record is silent as to how long the heavy drug regimen was in place, but the grievant had from June 7 on to inform his employer as to his status. It is noteworthy that the grievance answer indicates that the grievant previously indicated that he attempted to call the H.R. office on June 12.

The Union suggests that the employer could have contacted the grievant's co-workers to determine his status. It is unclear from the record how the employer was aware of which co-workers had been in touch with the grievant. It is also unclear just what those co-workers knew. One of the employees the grievant testified he called sat through the proceedings, and was not called as a witness. There is no indication in the record that any bargaining unit employee came forward to advise the employer as to the grievant's status. I think it is unlikely that there were employees who were aware that the grievant would not return to work on his scheduled return date who would not, in some way, indicate that fact to the employer.

The Union contends that the grievant did not follow the collective bargaining agreement earlier in his leave, and was not sanctioned. This is alleged to have lulled him into a sense that he did not have to comply with the contractual provisions relating to contacting his employer while on leave. This claim ignores the objective reality surrounding this event. The grievant had an approved leave through June 11. He had advance knowledge that he would not be

returning to work on June 11, he knew he was expected back, he did not return phone calls, he had been disciplined for similar behavior in the past.

The application form for a leave of absence from the County contains the following paragraph:

> I understand that a failure to return to work when this leave period expires for any reason other than those protected by FMLA laws, may be considered a resignation unless an extension has been agreed upon and approved in writing by the County.

The grievant testified that he never read this paragraph of the leave request, though he had signed requests such as the one for his leave on a number of occasions. The Union argues that the grievant may have believed that his return was protected by FMLA, thus eliminating the potential that this could be treated as a resignation. I think this is unlikely. However, it is irrelevant. The grievant testified on cross-examination that he knew the leave was granted for a certain period and that for it to continue it had to be extended. He testified that he had to return to work or get a new leave.

The grievant was aware of his return to work date. He was aware that he had to arrange for an extension of that date. The various explanations for his failure to do so lack all credibility.

As a practical matter, I believe the employer set out to terminate the grievant once he failed to return from his approved leave. It does not appear that they made inquiry as to his status among his co-workers. There was no call to the grievant on the first day. There was a call, but no message on the second day. There was no call on the third day. Schnell waited until June 14th to call and leave a message. The 14th would be more than 3 days under Article 30.

June 14th was the day Collard and Schnell talked about the grievant's status under Article 30. It was on that date that Collard wrote the letter, directing the grievant to fill out and return the FMLA forms. The second paragraph of that letter inferentially links the submission of the forms with the grievant's status as absent without leave. In that respect the letter is much like the May 15 letter, which itself followed up on the April 25 mailing. There is no inquiry as to where the grievant is, or as to his intentions about returning to work. Nothing in the letter mentions the passage of the three days or seeks an explanation as to the failure to return to work or to call in. The letter does not use the contractual term "unexplained" nor does it mention discipline, even though the three days had passed. It was Collard's testimony that the purpose of the letter was to determine whether or not there was a medical explanation for the failure to return to work or to call. The generic request for the FMLA forms is not reasonably calculated to elicit the latter.

As the Union contends, the employer could have sought out an explanation as to the grievants absence. The Union complains that the employer did not make much of an effort to seek out such an explanation. I agree. The County was not aggressive in its search for an explanation for the grievant's absence. However, the County did not have an obligation to come forward with the explanation.

The County wanted to evaluate the medical basis, if any, for the failure to call or return to work. Upon receipt of the return to work slip and the subsequent receipt of the Certification of Health Care Provider forms, the County had an explanation as to why the grievant failed to return to work. It did not have an explanation as to why no call was made. I don't think the forms asked that question. In light of the limitations in Collard's June 14 letter, I think it is appropriate to consider, *de novo*, the grievant's explanation as to why he did not advise his employer that he was not returning to work on June 11.

The grievant implied that the reason he didn't call was the debilitating drug regimen he was on. He did not raise that with the employer at either step 2 or step 3 of the grievance procedure. His explanation for failing to point that out was that no one asked. I don't find that convincing. If he would have called but for the extraordinary impact of the drugs, that is too important a fact to have been omitted throughout the course of his termination and the grievance procedure. Furthermore, is not consistent with his testimony at hearing. At some point he was not on the overpowering dosage of drugs. There is no explanation as to why no call was ever made.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 28th day of August, 2008.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

WCH/gjc
7336