BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHOOL DISTRICT OF FLORENCE COUNTY

and

FLORENCE EDUCATION ASSOCIATION

Case 36
No. 70251
MA-14921

Appearances:

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

Fred Andrist, Executive Director, Northern Tier Uniserv, P.O. Box 1400, Rhinelander, Wisconsin 54501 at hearing and **Christine Galinat**, Attorney, Wisconsin Education Association Council, 33 Nob Hill Road, P.O. Box 8003, Madison, Wisconsin 53708-8003 on the briefs, appearing on behalf of Florence Education Association.

ARBITRATION AWARD

School District of Florence County (District) and Florence Education Association (Association) are parties to a collective bargaining agreement providing for final and binding arbitration of grievances. On October 18, 2010, the Association filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission regarding the severance of Grievant's employment with the District. The Association further requested a panel of five Commission staff members and commissioners from which the Parties could select an arbitrator. The undersigned was selected from the panel.

Hearing was held on March 18, 2011 in Florence, Wisconsin. The hearing was transcribed by a court reporter with the stipulation that the transcript, along with admitted exhibits, constitute the official record of the proceeding. The Parties further stipulated that there are no procedural issues related to the grievance. The Parties submitted post-hearing written arguments in support of their positions, the last of which was received on June 10, 2011, thereby closing the record in the matter.

Now, having considered the record as a whole, I make and issue the following award.

ISSUE

At the hearing, the Parties authorized the undersigned to formulate the issue, which I frame as follows:

> Did Grievant voluntarily resign her teaching position with the District? If not, did the District violate the collective bargaining agreement by discharging Grievant without just cause and, if so, what is the remedy?

RELEVANT CONTRACTUAL PROVISION

ARTICLE IX – DISCIPLINE PROCEDURE

. . .

B. No teacher shall be dismissed, suspended, reprimanded, reduced in rank or compensation or deprived of any professional advantage or otherwise disciplined without just cause.…

. . .

BACKGROUND FACTS

Grievant Janice Roberts taught 1st and 2nd grade math and reading at the District's elementary school. She began full-time employment with the District in August 1979. No evidence was presented at hearing indicating that Grievant had any performance problems or previous discipline.

Grievant suffered an injury on March 17, 2009 when she slipped and fell in a wet hallway at school causing her to be unable to work and went on leave until October 1, 2009. On October 8, 2009, she suffered another injury at work when her back began to spasm while reaching for supplies. She was unable to work and went back on leave. She was under the care of doctors at U.P. Rehabilitation Medicine Associates (UPRMA) in Marquette, Michigan for both injuries.

While on leave, Grievant submitted updates to the District as to her status, including medical certifications confirming her inability to work. These certifications were issued by UPRMA. As part of its treatment of Grievant's injuries, UPRMA referred her to Marquette General Rehabilitation Center (Marquette General) to undergo a functional capacity examination (FCE) for the purpose of determining Grievant's "abilities, impairments and functional limitations." She underwent the FCE on April 1, 2010.

On April 12, 2010, Grievant accepted the District's offer to renew her teaching contract for the 2010-2011 school year.

In a form dated April 15, 2010, UPRMA instructed Grievant not to work and ordered a reevaluation of her physical condition in two months from that date, i.e., mid-June 2010. Grievant submitted the form from UPRMA to the District. In the instructions section of the form, UPRMA indicated the following: "No work. Awaiting test results FCE" and that Grievant was "totally incapacitated at this time. Patient will be reevaluated on [sic] 2 months." Grievant followed up in a letter to the District dated April 16, 2010. In that letter, Grievant confirmed that she and UPRMA were "awaiting results of that series of tests [FCE] to determine what, if any, my restrictions or strengths are as related to my ability to return to work" and concluded that she would "be in contact with you when the results of the Functional Capacity Exam are in."

The FCE results were prepared by Marquette General in a report dated May 11, 2010. In the section of the report headed "Summary or Recommendations," the report concluded "[t]here do not appear to be any contraindications to Ms. Roberts continuing in her occupation of school teacher." The report further recommended nine restrictions on her physical activity, all of which the District later indicated it was willing to accommodate. The report was sent via courier to Grievant's doctors at UPRMA, whose offices were in the same medical complex as Marquette General. Marquette General also sent the report by mail to Grievant and Grievant's attorney as indicated on the "CC" line of the report. The District assumes that Grievant received the results on or about May 11, 2010 but Grievant testified that she did not receive the results until mid-June 2010. She also testified that her attorney's office informed her in August 2010 that the results were not in their file.

On June 2, 2010 and June 9, 2010, while Grievant remained on approved leave, the District sent her letters requesting copies of the FCE results. The June 9 letter requested that Grievant provide the District with a copy of the results by June 15, 2010. She did not immediately respond to the District's June 2 or June 9 letters, but testified that she instead sought to obtain a copy of the FCE results and that she received the FCE results sometime after June 9, 2010. She submitted the FCE results to the District on or around June 17, 2010.

On June 16, 2010, Grievant met with UPRMA to evaluate the FCE results and her ability to return to work. She testified that UPRMA wanted to issue another order not to work while the work restrictions were being finalized but that she asked them to return her to work based on the existing restrictions. UPRMA then released her to work in a form dated June 15, 2010.[1]

[1] The June 15, 2010 date on the release was likely an error and should have been June 16, 2010, the date of her office visit.

The form stated in the instructions section that "Per IME [independent medical examination][2] sedentary work – restrictions per functional capacity evaluation 4-1-10." Grievant brought the return to work release form to the District on June 17, 2010.

On June 18, 2010, the day after Grievant met with the District and provided the return to work certification and restrictions from UPRMA, the District sent a letter to Grievant indicating that Grievant had informed the District during the June 17, 2010 meeting that her condition prevented her from returning to her job and that she did not know when or if she would be able to return to work. Grievant responded by voicemail to the District and a letter dated June 21, 2010 reiterating that she intended to return to work per the restrictions of the June 15, 2010 release, but also noting that her work restrictions would likely be modified:

> I fully intend to return to work as a classroom teacher following the modified work restriction that have been set but will be modified by Dr. Moisio/Eiben pending their further interpretation and analysis of the complex results of the Functional Capacity Exam of April 1, 2010.

No further communications occurred between the District and Grievant until August 11, 2010. On that date, the District sent Grievant a letter informing her that she had voluntary resigned her employment when she did not return to work after Marquette General sent the May 11, 2010 FCE results:

> You received the results of FCE on May 11, 2010, and it set forth a number of accommodations the District was prepared to make to facilitate your return to work. However, you did not return to work and you did not contact us to let us know that you had been released to return to work. Consequently, we believe you voluntarily quit your employment at that time.

In a letter dated August 12, 2010, Grievant responded by denying that she had resigned her position and confirming that she planned to return to work for the 2010-2011 school year:

> I fully intend to return to work on the first day of inservice as I indicated when I turned in my intent to renew my contract for 2010-2011 which your office received on April 14, 2010. I again made that clear in my letter of June 21, 2010…

The letter did not address the District's contention that she received the FCE results on May 11, 2010.

[2] The record indicates that Grievant underwent an IME related to her claim for long term disability benefits on April 30, 2010.

On August 20, 2010, the District sent Grievant a letter reiterating its position that Grievant had voluntarily terminated her position when she did not return to work in May 2010. The District further noted that it had not received the modified work restrictions that Grievant indicated her doctors were developing in her June 21, 2010 letter. Grievant subsequently did not return to work for the 2010-2011 school year.

Grievant has not worked since her October 8, 2009 injury. She exhausted her sick leave bank in December 2009 and, at the time of the hearing, had not received payment of any wages, workers compensation benefits, long term disability payments, or unemployment insurance benefits. She has taken loans from friends and family to cover living expenses. She also owes the District $1,163.13 for her share of health insurance premiums for the 2009-2010 school year.

The Association filed a grievance on Grievant's behalf claiming that Grievant was discharged without just cause in violation of the Contract. The grievance was denied by the District, resulting in these proceedings.

DISCUSSION

The District advances two theories to support its decision to end Grievant's employment: 1) that Grievant voluntarily terminated her employment when she did not return to work after receiving the FCE results in May 2010 that indicated she was able to return to work with restrictions or 2) that the District had just cause to discharge her for failing to report to work or to notify the District that the FCE results released her to return to work with restrictions. Both theories rely on the assumption that the FCE released Grievant to return to work. Because I find that Grievant could only be released by the doctors that put her on leave in the first place, i.e., UPRMA, and UPRMA did not release her to return to work until June 16, 2010, neither theory supports upholding the District's decision to terminate Grievant's employment or concluding that she voluntarily terminated her employment.

It is unclear on this record why the District placed so much importance on the FCE results. The FCE was ordered by UPRMA as part of its treatment and evaluation of Grievant. The only way the District was aware that the FCE took place was by Grievant's April 16, 2010 letter and an indication on the April 15, 2010 leave form that UPRMA was "awaiting test results FCE." Although Grievant in her letter stated that she would be in contact with the District when the results were in, she did not promise to provide a copy of the results to the District nor did she indicate that the FCE results would serve to release her to return to work. UPRMA's April 15, 2010 leave form only indicated that UPRMA was awaiting the FCE results, not that the FCE results would release the Grievant to return to work. I find no basis for the District's contention that the FCE results served to release Grievant to return to work.

The District knew that Grievant's doctors at UPRMA were her primary caregivers related to her injuries. Throughout both leaves, UPRMA provided medical authorizations for her leave. UPRMA released Grievant to return to work on October 1, 2009 and identified restrictions on her physical activity. UPRMA placed Grievant on leave on April 15, 2010. UPRMA was going to reevaluate her physical condition in mid-June to determine Grievant's ability to return to work. And UPRMA released Grievant to return to work on June 16, 2010 with restrictions and subsequently modified those restrictions on August 23, 2010. With this background, I find it unreasonable that the District would interpret the FCE results, a document prepared by a third party at the request of UPRMA as part of UPRMA's treatment of Grievant, as a self-executing release to return Grievant to work.

The FCE results were intended to be recommendations to UPRMA as part of its treatment of Grievant and not a release to return to work. It was addressed to Grievant's doctors at UPRMA, not the District, and its conclusions were characterized as recommendations. The conclusions are in a section of the report entitled "Summary of Recommendations." The proposed limitations on Grievant's physical activity are also characterized as recommendations. There is no reasonable basis for the District to rely on these equivocal statements, clearly characterized as recommendations to be evaluated by UPRMA, as an order releasing Grievant to return to work.

There is also no basis for the District's contention that Grievant held back the FCE results from the District because of "her apparent desire not to return to work." In fact, she had a strong financial incentive to return to work and the record clearly indicates that she did intend to return to work for the 2010-2011 school year. Grievant directly indicated her intent to return to work by accepting the District's offer to renew her teaching contract for the 2010-2011 school year on April 12, 2010. Further, her correspondence with the District during the relevant timeframe includes statements that she intended to return to work including: 1) "…I do fully intend to return to work [following any medical restrictions] and I'm excited to do so…" in her June 21, 2010 letter; 2) "I fully intend to return to work on the first day of inservice..." and "I look forward to returning to work on 8-26- 10…" in her August 12, 2010 letter; and 3) "…I do plan to return to work…" in her voicemail in response to the District's June 18, 2010 letter.

Grievant's interactions with her UPRMA doctors also suggest that she was making efforts to return to work. Notes from her December 11, 2009 office visit state that "[s]he is very positive that she is going to recover from her injury and be able to return to work.…" Also, during a June 16, 2010 office visit, her UPRMA doctor wanted to continue her leave while fine-tuning the work restrictions, but Grievant asked to be released to return to work based on the existing restrictions. She then personally submitted that release to the District on the following day. The evidence convinces me that Grievant was willing to return work.

It is true that Grievant did not immediately respond to the District's June 2 and June 9 letters requesting the FCE results. However, she did provide a copy of the results on or around June 17, 2010 after obtaining a copy. At the time she received the letters, Grievant was on approved leave until her mid-June reevaluation as ordered by UPRMA on April 15, 2010. The record indicates to me that she did not perceive that the District might consider the FCE alone as releasing her to return to work. To Grievant, the FCE was only one part of the analysis of her ability to return to work and her UPRMA doctors (the doctors who placed her on leave in the first place) would be evaluating the FCE results along with other considerations and making a final determination as to her physical abilities.

The District's reliance on SHEBOYGAN COUNTY, MA-13839 (Houlihan, 8/08) is misplaced. In that case, the grievant did not return to work from leave on a return date that was previously identified to the employer and did not make any attempt to communicate with his employer regarding his absences past that date. In this case, Grievant was never absent from work without also being on doctor ordered and approved leave.

CONCLUSION AND REMEDY

For the foregoing reasons, I conclude that Grievant did not voluntarily terminate her employment with the District and that the District did not have just cause to discharge Grievant. The grievance is sustained and, as remedy, Grievant shall be made whole.

Dated at Madison, Wisconsin, this 6th day of October, 2011.

Matthew Greer /s/
Matthew Greer, Arbitrator

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