

BEFORE THE IMPARTIAL HEARING OFFICER

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In the Matter of the Grievance of

MICHELLE JAKSIC

Under the Grievance Procedure of

MILWAUKEE PUBLIC SCHOOLS

Case ID: 22.0031

Case Type: IHO

DECISION NO. 37463

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**Appearances:**

Michelle Jaksic, 5101 Russell Court East, Greendale, Wisconsin, appearing on her own behalf.

Eloisa De Leon, Employment Relations Specialist III, Milwaukee Public Schools, 5225 West Vliet Street, P.O. Box 2181, Milwaukee, Wisconsin, appearing on behalf of the Milwaukee Public Schools.

**DECISION OF THE IMPARTIAL HEARING OFFICER**

On March 8, 2018, Michelle Jaksic and the Milwaukee Public Schools requested that the Wisconsin Employment Relations Commission appoint Raleigh Jones, a member of the Commission's staff, to serve as the Impartial Hearing Officer (IHO) in a proceeding involving Ms. Jaksic's termination. A hearing was held on May 11, 2018, in the offices of the Milwaukee Public Schools. The hearing was transcribed. No briefs were filed in this matter. Having considered the evidence, the arguments of the parties, and the record as a whole, I issue the following decision.

**ISSUE**

As will be explained later, the sole issue to be determined by the IHO is this:

Whether there is sufficient evidence to establish that Michelle Jaksic was AWOL and abandoned her job with the District.

The hearing officer is expressly prohibited from issuing any opinion or award on whether the discharge action was appropriate.

## **BACKGROUND**

The Milwaukee Public Schools (District) operates a public school system. The Milwaukee Teachers' Education Association (MTEA) is the collective bargaining representative for the District's teachers.

The District's Employee Handbook specifies that absences of more than three consecutive days require a statement from a physician. This means that when employees are off work for a personal illness for more than three continuous days, they have to provide medical documentation afterwards which substantiates the absence. This medical documentation has to be by a health care professional licensed to treat the medical condition at issue.

The Handbook further provides that when an employee fails to report for work without authorization, that is considered to be an unexcused absence that is designated as an absence without approval (AWOL). It further provides that employees who are AWOL in excess of three consecutive workdays shall be deemed to have committed job abandonment and may be disciplined for the same – up to and including termination.

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Prior to March 1, 2017, Michelle Jaksic was a teacher with the District. On that date she was discharged for being absent without approved leave (AWOL), as referenced in the paragraph above. After she was discharged, she filed a grievance challenging same. Her grievance was withdrawn after all the parties – Jaksic, the MTEA, and the District – agreed that Jaksic would be reinstated as a teacher with no backpay and would be subject to a Last Chance Agreement (LCA). The written LCA provided in pertinent part:

\* \* \*

1. In consideration of the terms and conditions set forth below, Michelle Jaksic shall cancel and otherwise forfeit any and all rights to proceed with grievance 17/074 pertaining to her March 1, 2017 discharge. Ms. Jaksic agrees to withdraw this grievance.
2. On a last chance basis, Michelle Jaksic shall be returned to work as a teacher within her licensure. She shall be permitted to return to work as soon as practicable following receipt by the Board of one original copy of this settlement agreement with all signatures affixed. Michelle Jaksic understands and agrees that a subsequent violation of the terms of this agreement shall constitute just cause for, and result in, her immediate discharge.

3. Michelle Jaksic shall be in a summary evaluation year for the 2017-2018 school year.
4. Michelle Jaksic understands and agrees that if she is considered to be absent without approved leave (AWOL) and to have committed job abandonment, she is subjected to summary discharge as the consequence. In such event, should she file an appeal, all parties agree that the sole issue to be determined by the hearing officer is whether there is sufficient evidence to establish that she was AWOL and abandoned her job with the District. The hearing officer is expressly prohibited from issuing any opinion or award on whether the discharge action was appropriate. This provision will be in effect for one (1) full calendar year following the date of the grievant's return to work.
5. Michelle Jaksic's absence as a result of the discharge shall be recorded as an unpaid leave of absence from March 1, 2017, until Michelle Jaksic's actual return to work. Michelle Jaksic shall not receive any back pay as a result of her leave of absence. All Board-paid benefits in effect at the time of the grievant's discharge will be reinstated in accordance with established re-enrollment procedures upon her return to work and completion of all necessary benefit enrollment applications and receipt by the Board of one original copy of this settlement agreement with all signatures affixed. The discharge letter dated April 11, 2017 shall be removed from Michelle Jaksic's personnel file and replaced with a revised leave of absence letter.

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The Grievance Settlement/LCA – which Jaksic signed – was implemented in August 2017, and Jaksic returned to work at a different school. The school that she was assigned to work at was the LaFollette School.

About a month after the LCA was signed, the following events unfolded.

## FACTS

In September, 2017 – all dates hereafter refer to 2017 – Jaksic had a skin infection which caused multiple sores on her face and body. The sores were uncovered.

Early in the afternoon of Wednesday, September 27, the school nurse at LaFollette came to Jaksic's classroom to talk to Jaksic about her skin infection and open sores. In this conversation, the nurse told Jaksic that she (Jaksic) needed to get medical attention for her skin infection and open sores. While the nurse did not say that Jaksic was to get medical attention immediately, that was what Jaksic thought the nurse said. Consequently, Jaksic decided on the spot – and on her own volition – to leave the building. Jaksic told a couple of people – including the school secretary in the office – that she was leaving the building to go get medical attention. However, Jaksic did not tell the one person who mattered – school principal Marny Donaldson-Gamble. As the school principal, Donaldson-Gamble was the only person empowered to excuse an employee in the middle of the school day. Since Jaksic never spoke with Donaldson-Gamble that day, Jaksic left the school without authorization/approval. Jaksic also left her classroom unattended. Donaldson-Gamble subsequently learned from the school secretary that Jaksic had left the school building.

After Jaksic left the school, she tried to get an appointment with her dermatologist for that same day but could not do so. Jaksic then decided to seek treatment for her open sores at Aurora Urgent Care in Milwaukee. There, she was given an antibiotic for treatment of the open sores. Jaksic also got a “return to work” letter completed while she was there. This letter, which was signed by an Aurora Urgent Care nurse, said the following:

This is to certify that Michelle R. Jaksic was seen in Urgent Care  
and can return to WORK per dermatology's recommendation.

The date which appeared after the nurse's signature was “9/27/2017.” That was also the date at the top of the letter. While this letter expressly said that Jaksic could return to work on the date on that letter – September 27, 2017 – that was not how Jaksic interpreted it. She interpreted the letter to mean that she was to be off work on sick leave – and to stay away from the school – until her dermatologist cleared her to return to work.

When teachers are going to be absent from work due to an illness, they have to do the following. First, they are to call the school office 30 minutes before the start of the workday to report this absence. Employees are to call in each day they are absent. Second, they are to call the substitute teacher automatic system (known as AESOP) or enter their absence information online. Reporting their absence to AESOP is not a substitution for and does not remove the requirement to call the school office to report their absence.

Consistent with Jaksic's view that she was supposed to stay away from the school until she was cleared by her dermatologist to return to work, Jaksic called the school office the next workday – Thursday, September 28 – and reported that she was sick and would be absent that day. She also entered her absence online on AESOP.

That same day (September 28), Jaksic sent a 2-page email to Donaldson-Gamble and another employee (Jane Utnehmer) wherein Jaksic summarized her medical situation. Therein, Jaksic told them that she had put in for a substitute for “Thursday, Friday, Monday, and Tuesday.” While the email did not reference any specific calendar dates, it can be inferred from looking at a calendar that the last day just referenced was Tuesday, October 3. Thus the email’s inference was that Jaksic would return to work on Wednesday, October 4. Her email also provided in pertinent part:

I will also leave a message on Ms. Pat’s phone, each day that I am going to be out. Please let me know if I need to do anything else. Given my previous situation, I can not take a chance of having a mis-documented absence. I will also contact the union rep. ...

Later that same day, Jaksic sent her lesson plans to Donaldson-Gamble via another email.

Later that same day (September 28), Jaksic called her dermatologist’s office about her situation. A nurse from that office told Jaksic that it would take the antibiotics she was taking a minimum of one week to work.

The next school day was Friday, September 29. That day, Jaksic called the school office and reported that she was sick and would be absent that day. She also entered her absence online on AESOP.

The next school day was Monday, October 2. That day, Jaksic called the school office and reported that she was sick and would be absent that day. She also entered her absence online on AESOP.

The next school day was Tuesday, October 3. That day, Jaksic called the school office and reported that she was sick and would be absent that day. She also entered her absence online on AESOP.

That day, Jaksic called her dermatologist’s office and was told that the dermatologist wanted to see Jaksic before he would give her a return to work release.

The next school day was Wednesday, October 4. Early that day, Jaksic sent an email to Donaldson-Gamble and Utnehmer that said: “I hope to see you both this morning.” Jaksic also sent another email to Donaldson-Gamble which provided in pertinent part: “I will plan on coming in, unless I hear differently.” While these two lines imply that Jaksic was going to report to work that day, that did not happen. Instead, after Jaksic sent both emails, she called the school office and reported that she was sick and would be absent that day. She also entered her absence online on AESOP. After she had done that, Jaksic sent Donaldson-Gamble two more emails. In one, she said: “This will be the last early morning email ... I think I should see my doctor and get a shot to be safe.” In the other email, Jaksic said “This is the last email until I have news from the doctor.” Jaksic attached her lesson plans to that email.

The next school day was Thursday, October 5. Jaksic was absent that day but did not call the school office to report her absence. She did enter her absence online on AESOP.

The next school day was Friday, October 6. Jaksic was absent that day but did not call the school office to report her absence. She did enter her absence online on AESOP.

The next school day was Monday, October 9. That day Jaksic went to the school and asked the school secretary if the school had received her return to work paperwork from the doctor. The school secretary replied in the negative and told Jaksic that she (Jaksic) had to supply that paperwork before she could return to work. Jaksic then left the building.

Later that same day, Jaksic sent an email to Donaldson-Gamble which provided in part: "I have been waiting for the doctor's office to email the return to work letter. I still have not received it."

Later that same day, Jaksic saw her dermatologist, and he gave her a document which said that: "Michelle is not contagious and is okay to work." That document was dated October 9.

The next school day was Tuesday, October 10. Early that day, Jaksic sent an email to Donaldson-Gamble telling her that she (Jaksic) had received her return to work letter and would bring it in that morning. Later, Jaksic went to LaFollette School. When she arrived there, Donaldson-Gamble told Jaksic that the District considered Jaksic to be AWOL and, as a result, she was to leave the school. Donaldson-Gamble then handed Jaksic a letter which provided in pertinent part:

You are notified that you have been absent without leave (AWOL) in excess of three consecutive days beginning September 28, 2017 to present day due to your failure to provide a medical excuse from a doctor substantiating the absences. Per the Employee Handbook you are required to submit the excuse to your supervisor within seven calendar days of the first day of absence. As a result, you are being placed out of your assignment and you may not report to your position pending a final decision by me, Saveon D. Grenell, Employment Relations Specialist.

You are directed to comply with the following instructions no later than the close of business on October 19, 2017.

- Written Explanation Requirement. You must provide me with a detailed written explanation regarding why you were not at work and did not comply with call-in procedures, during the AWOL absences. This written explanation must be received by my office by the Designated Due Date specified above. Your home telephone number or cell number should be included in the statement.

- Medical Documentation Requirement (applicable only if your absences were due to a medical condition). If you have been absent for medical reasons, you are directed to submit medical documentation to me which verifies that your AWOL absences were medically necessary. This medical documentation must be received by my office by the Designated Due Date specified above.

*Caveat: If you are unable, for reasons beyond your control, to submit medical document by the deadline specified above, then you must provide me with a supplemental written statement explaining in detail your unsuccessful efforts to meet the deadline. Your supplemental written statement must be received by my office by the Designated Due Date specified above. You will be notified if your explanation is accepted, at which time you may be granted an extension (not to exceed 30 days) to submit the required medical documentation.*

Failure to comply with the directions in this letter by the Designated Due Date specified above will result in a determination that you have committed job abandonment and your employment with the District shall end.

(Emphasis in original). This letter was signed by a District Employment Relations Specialist.

On October 16, Jaksic submitted two medical documents to the District. One document was dated September 27, 2017 and stated that “Jaksic was seen in Urgent Care and can return to work per dermatology’s recommendation.” The other document was dated October 9, 2017 and stated that Jaksic “is not contagious and is okay to work.” She also submitted a series of emails she sent to Dr. Donaldson-Gamble and Jane Utnehmer. There were no medical verification forms attached to any of those emails.

On October 20, the District sent Jaksic the following termination letter:

You received a letter dated October 9, 2017 stating you were required to submit a medical excuse from a doctor substantiating your absences from September 28, 2017 through October 9, 2017. You were informed that, per the Employee Handbook, you would be required to submit a medical excuse to your supervisor within seven calendar days of your first absence date. You were further informed that you would be considered to be absent without leave (AWOL) if you failed to submit this required documentation.

On October 16, 2017, you submitted two medical documents to our office. One document, dated September 27, 2017, stated that you were seen in Urgent Care and allowed to return to work per dermatology's recommendation. The other document, dated October 9, 2017, stated that you were not contagious okay to work. You also submitted a series of emails between you, Dr. Donaldson-Gamble, and Jane Utnehmer. You did not include any medical excuses in any of these emails to your supervisors.

Having reviewed this information, I do not find that you have submitted an adequate excuse to substantiate your absences. Both letters you submitted cleared you to return to work, including the letter dated September 27, 2017, the day before your first absence date. Neither of the documents submitted indicate that your absences were medically necessary. As a result, you have committed job abandonment with the District and are terminated from your employment as a teacher with Milwaukee Public Schools effective September 28, 2017.

If you wish to appeal this decision, you may file a written complaint with the Department of Employment Relations within 15 work days of the date of this letter.

This letter was signed by a District Employment Relations Specialist.

Jaksic grieved her discharge, and it was appealed per the District's grievance procedure to an IHO.

## **DISCUSSION**

### **The Standard of Review**

I begin my discussion by first addressing the standard of review that is going to be used herein.

The District's Employee Handbook specifies in Part II, B, that "non-probationary employees shall only be disciplined or discharged for just cause." Thus, the Employee Handbook says that employee discipline will be reviewed under a just cause standard. While the Handbook does not define what is meant by just cause, one commonly accepted approach – and the approach the undersigned has applied in hundreds of cases – consists of addressing these two elements: first, did the employer prove the employee's misconduct and, second, assuming the showing of misconduct is made, did the employer establish that the discipline it imposed on the employee was commensurate with the offense given all the relevant facts and circumstances. Subsumed into this second element are the notions of due process, progressive discipline and disparate treatment. It should be apparent, just from a listing of these steps and/or hoops, that a just cause standard sets a



relatively high bar for an employer to clear. For example, if an arbitrator or hearing examiner found some flaws in an employer's investigation, or found, say, disparate treatment, the arbitrator or hearing examiner could overturn the employee's discipline on that basis alone. Not surprisingly then, employees and their unions want discipline reviewed under a just cause standard because of the relatively high level of protection it affords them.

While one would think that the language in the Employee Handbook specifying a just cause standard would apply to Jaksic's discharge, it does not. The following discussion explains why.

In March of 2017, Jaksic was discharged for attendance reasons, specifically being AWOL. Her subsequent grievance challenging her discharge was resolved when all parties involved – Jaksic, the MTEA, and the District – entered into a grievance settlement whereby Jaksic got her job back without any backpay. Her return to work was part of a comprehensive written document known as a Last Chance Agreement (LCA). Such agreements are sometimes used in labor relations to resolve discharge cases. Essentially, such documents say that the employee goes back to work, subject to whatever conditions the parties negotiate. The parties to a LCA also sometimes include language that specifies a different standard of review from what is included in their collective bargaining agreement or employee handbook.

That is exactly what happened here. In Section 2 of the LCA involved here, the parties agreed that Jaksic got her job back (meaning she was returned to work as a teacher). Then, Section 4 of the LCA went on to address what would happen to Jaksic in the event she was subsequently considered (by the District) to be AWOL and to have committed job abandonment. It provided thus:

4. Michelle Jaksic understands and agrees that if she is considered to be absent without approved leave (AWOL) and to have committed job abandonment, she is subjected to summary discharge as the consequence. In such event, should she file an appeal, all parties agree that the sole issue to be determined by the hearing officer is whether there is sufficient evidence to establish that she was AWOL and abandoned her job with the District. The hearing officer is expressly prohibited from issuing any opinion or award on whether the discharge action was appropriate. This provision will be in effect for one (1) full calendar year following the date of the grievant's return to work.

Since Jaksic was terminated a second time for being AWOL, Section 4 of the LCA obviously applies here and supersedes the just cause language referenced in the Employee Handbook. Pursuant to Section 4 of the LCA then, the sole issue that I am to address herein "is whether there is sufficient evidence to establish that Jaksic was AWOL and abandoned her job with the District." Obviously, that's a much narrower question than whether there was just cause for the discharge.

### **The Merits**

The focus now turns to addressing the narrow question put before me via Section 4 of the LCA.

At the outset, I'm going to comment on the following because it is important for the purpose of context.

The discharge being reviewed here was Jaksic's second in 2017. The first occurred in March when she was terminated for being AWOL. As previously noted, she subsequently got her job back via a settlement agreement/LCA. The record indicates that when the MTEA and the District enter into a LCA that returns a discharged employee to work, an MTEA representative tries to impress upon the employee that their job is on thin ice, so to speak; if the underlying problem repeats itself, the employee will be discharged again. The LCA involved here was signed in late August (i.e. at the start of the 2017-2018 school year). Thus, just a month later, Jaksic was absent from work for seven consecutive days. Before I review what happened in detail, I'm going to say this: the timing of Jaksic's absences was terrible because they occurred just a month after the LCA was signed.

The absences just referenced started as follows: On September 27, after the school nurse talked to Jaksic about her open sores, Jaksic immediately left the school to seek medical treatment. That was problematic for two reasons. First, the school nurse didn't tell Jaksic that she had to get medical attention right then and there. Jaksic made that decision herself. Second, when teachers decide – for whatever reason – that they have to leave the school in the middle of the day, they are supposed to talk to the building principal and get approval to leave. Jaksic did not do that. While she did tell some people she was leaving, including the secretary in the school office, that was not sufficient. None of those people were empowered to approve Jaksic's leaving the building. Thus, Jaksic left the building without permission.

After Jaksic left the building that day, she went to an urgent care center where she received treatment. At the end of that appointment, she got a return to work letter. That letter – which consisted of a single sentence – said that Jaksic could “return to work per dermatology's recommendation.” It was dated for that same day (i.e. September 27).

While my interpretation of that letter was that Jaksic could have gone back to work that same day, that is not how Jaksic interpreted it. She thought she needed to be away from work until her dermatologist said she could return to work.

Consistent with that view, Jaksic was then absent from work for the next seven school days: September 28 and 29 and October 2, 3, 4, 5, and 6.

During that time period, Jaksic did the following. First, as expected, she called into the school office each morning to report her absence for all those days, except October 5 and 6. Jaksic did not call in on those days to report her absence. Second, as expected, she went online each day to AESOP to get a substitute (for herself). Third, Jaksic sent multiple emails to the principal wherein she attempted to keep the principal abreast of what was happening to her (medically speaking). However, there were no medical verification forms attached to any of those emails.

While Jaksic maintains that her foregoing actions should have been sufficient to qualify her absences as approved, the record reflects that there is one more step that an employee who has been absent for more than three consecutive days has to satisfy. I'm referring, of course, to the requirement noted in the Background section that an employee has to provide medical documentation afterwards which substantiates the absence.

Here, the District referenced this requirement in a letter dated October 9. In that letter, the District said that since Jaksic had been absent since September 28, she was required to submit a medical excuse from a doctor substantiating her absences from September 28 through October 9. She was further informed that, per the Employee Handbook, she was to submit a medical excuse to her supervisor within seven calendar days of her first absence date. Jaksic was further informed that she would be considered to be absent without leave (AWOL) if she failed to submit this required documentation.

When Jaksic got this letter, she knew the drill so to speak, because she had been through this process just a few months earlier. The letter told her in plain terms that she was to submit medical documentation which verified why her absences on those dates were medically necessary.

On October 16, Jaksic submitted two medical documents to the District. One document, dated September 27, 2017 was the one that stated she was seen in Urgent Care and was allowed to "return to work per dermatology's recommendation." The other document, dated October 9, 2017 was the one that stated she "is not contagious and is okay to work." She also submitted a series of emails between herself and her principal.

A District representative subsequently concluded that the two documents Jaksic submitted were insufficient to substantiate her absences. Said another way, the District found that those two documents did not establish that her absences from September 28 through October 6 were medically necessary.

I concur with that finding. Here's why. Since Jaksic was absent from September 28 through October 6, she needed to provide medical documentation that said something to the effect that she was unable to work on those dates (i.e. that she could not work on those dates). However, neither of the medical documents she submitted said anything close to that. The first letter dated September 27 (which was the day before Jaksic's first full absence day) said she "can return to work" (as of that date – September 27). While the sentence went on to say "per dermatology's recommendation," we don't know what that phrase meant. Although Jaksic interpreted it to mean that she was to be off work on sick leave until her dermatologist cleared her to return to work, the letter does not say that either explicitly or implicitly. As for the second medical document (i.e. the one saying Jaksic "is not contagious and is okay to work") we don't know from that statement if Jaksic was contagious prior to that date referenced therein (October 9) and could not work prior to then. Additionally, we can't tell from that document if Jaksic was incapacitated on September 28 and 29 and October 2, 3, 4, 5, and 6. Said another way, we don't know from that statement if all her absences at issue here were medically necessary.

The last point just referenced is the crux of this case. Because of her seven consecutive absences, Jaksic was directed to give the District medical documents that

showed that those absences were all medically necessary. The District concluded that the two documents Jaksic submitted concerning her absences between September 28 and October 6 did not establish that all her absences were medically necessary. Thus, the District found that the medical verification which Jaksic submitted did not substantiate her seven consecutive absences. That's important because when an employee's medical verification does not pass muster with the District, that means that the absence is considered to be an unexcused absence that is designated as an absence without approved leave (AWOL). The Employee Handbook provides that employees who are AWOL in excess of three consecutive workdays shall be deemed to have committed job abandonment. In September and October, 2017, Jaksic was AWOL for seven consecutive workdays.

That particular offense was specifically referenced in the LCA signed just a little over a month before. In Section 4 of the LCA, it said that if the District (subsequently) considered Jaksic to be "absent without approved leave (AWOL) and to have committed job abandonment" – which is what the District concluded here – then the punishment for same would be that Jaksic would be "subjected to summary discharge as a consequence." The LCA went on to provide that in the event she files an appeal, "the sole issue to be determined by the hearing officer is whether there is sufficient evidence to establish that she was AWOL and abandoned her job with the District." I find that there is sufficient evidence to establish that Jaksic was AWOL and abandoned her job with the District. Thus, her grievance is denied.

In light of the above, I issue the following:

### **DECISION**

That there is sufficient evidence to establish that Michelle Jaksic was AWOL and abandoned her job with the District. Thus, her discharge is upheld and her grievance is denied.

Dated at Madison, Wisconsin, this 27th day of June, 2018.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Raleigh Jones, Impartial Hearing Officer