

sometimes referred to as "the grievant" or "Welde"), for poor attendance. Post-hearing briefs were received by the arbitrator on April 25, 2010.

FACTS

The Employer is the University of Minnesota. It operates its primary campuses in Minneapolis and St. Paul, Minnesota (the "Twin Cities campuses"). The Union is the collective bargaining representative of the non-supervisory employees of the Employer who work in about sixty classifications, including employees who work as Telecom Engineering Technicians, also referred to as "Installation Technicians," the classification's working title.

The grievant was hired by the Employer on February 9, 2004, to work as an Installation Technician ("Technician") in facilities on the Employer's Twin Cities campuses. At all times relevant to this proceeding, he worked in that classification. Technicians install, service and repair the telephone and computer systems in new and existing campus buildings. They work in the Networking and Telecommunications Services group ("NTS"), of the Employer's Office of Information Technology ("OIT").

On April 14, 2008, Mark R. Zierdt, Manager of Field Operations for NTS and, as such, the grievant's supervisor, sent the grievant the following written warning:

This letter is a written warning to address your abuse of sick leave. As defined in Article 17 - Sick Leave, Section 5D: "Abuse shall be defined as use of paid sick leave for reasons other than those listed in this Article. Use of paid sick leave in a pattern such as Mondays, Fridays, or the day after payday is an example of a use of sick leave that may constitute abuse."

The patterns I have identified:

- Excessive use of unplanned time away from work especially on paydays.
- Your immediate use of sick leave when accumulated.

You received a Letter of Expectations of attendance on February 14, 2008, and a Letter of Expectations for requesting/vacation/sick/comp leave on March 17, 2008.

I expect immediate and continued satisfactory improvement in all major aspects of your job. Failure to meet performance expectations may result in further disciplinary actions up to and including termination.

Enc: Documentation of absences from 10/9/2007 to 3/10/2008.

On May 5, 2008, Jason Iverson, a Union Steward, grieved the issuance of the written warning of April 14, 2008, alleging that the warning violated Article 22 of the labor agreement, which requires that the Employer have just cause for discipline.

On May 22, 2008, the grievant was discharged from his employment, and the Union grieved the discharge. In addition, the Employer imposed several other disciplines on the grievant in the year preceding his discharge, and the Union has grieved those disciplines -- though some of those grievances have since been withdrawn by the Union. The grievance before me is a challenge only to the written warning of April 14, 2008. Nevertheless, insofar as they may be relevant, I will describe some of the other disciplines imposed on the grievant.

DECISION

The arguments of the parties raise two primary issues -- 1) whether the Union complied with the grievance procedure established by Article 21 of the labor agreement (the "Procedural Issue") and 2) whether the Employer had just cause to issue the written warning of April 14, 2008 (the "Substantive Issue").

Timeliness - The Procedural Issue.

The Employer argues that the Union failed to meet the time limits for notifying the Employer of its intent to arbitrate and for requesting arbitration, as established by Article 21, Section 3, of the labor agreement, and that, for that reason, in accord with Article 21, Section 6, the grievance should be "considered settled on the basis of the Employer's last answer [a denial of the grievance] and "all further proceedings" should be dropped.

The following provisions from Article 21, Section 3, of the labor agreement, which establishes a grievance procedure, and from Article 21, Section 6, which relates to the time limits established in Article 21, Section 3, are relevant to the parties' arguments about timeliness:

Section 3. Grievance Processing.

. . .

Step Three. The grievance shall be submitted to the Dean or equivalent administrative officer at the next management level within fourteen (14) calendar days from the time the Step Two answer was due . . . A representative of the appropriate Human Resources Department shall hold a meeting [among the grievant and representatives of the parties].

Within fourteen (14) calendar days of the meeting, the hearing officer shall provide a decision to the grievant and the Union representative . . .

Step Four. If the matter is not resolved, or if no decision is rendered within fourteen (14) calendar days of the meeting, the Union may file a letter of intent to arbitrate within sixty (60) calendar days of when the Step Three response was due. This letter shall be sent to the Office of Human Resources. The Union shall request arbitration within ninety (90) calendar days of the filing of the letter of intent to arbitrate. . .

Within ten (10) calendar days from the Union's request for arbitration the Union and the University shall select

an arbitrator . . . If the parties are unable to agree on a list of arbitrators, then the parties shall select, within ten (10) calendar days of the Union's request for arbitration, an arbitrator from a panel provided by the Bureau of Mediation Services

Section 6. Time Limits.

Should the Union fail to institute a grievance within the time limits specified, the grievance will not be processed and will be considered "waived." Should the Union fail to appeal a decision within the time limits specified, it shall be considered settled on the basis of the Employer's last answer and all further proceedings shall be dropped.

Processing of the grievance occurred as follows. On June 30, 2008, Zierdt sent a Step One response to Iverson, denying the grievance. On July 10, 2008, Iverson sent Zierdt a Step Two grievance. On September 13, 2008, after a Step Two hearing, a hearing officer, Alyssa Peterson, sent Iverson a Step Two denial of the grievance. On October 10, 2008, Iverson sent the Employer a Step Three grievance. On November 24, 2008, after a Step Three hearing, a hearing officer, John Miller, sent Joyce Carlson, a Union Representative, a Step Three denial of the grievance.

On March 31, 2009, Carlson Sent a letter to the Employer in which she wrote, "in accordance with the provisions of the Agreement between the parties, this is to notify the Employer of the Union's intent to submit the following grievances to arbitration." She listed four grievances, including the grievance now before me.

On August 12, 2009, Jill Kielblock, a Union representative, sent a letter to the Minnesota Bureau of Mediation Services ("BMS") requesting that BMS send to the Union and to the Employer a list of arbitrators for each of four grievances,

including the one now before me. She sent a copy of that letter to the Employer.

On September 10, 2009, Brent P. Benrud, Associate General Counsel for the Employer, sent Carlson a letter in which he asserted that the Union had not met the time limits established by several provisions of Article 21 of the parties' labor agreement in the processing of three grievances. All of those grievances were brought in behalf of David Welde -- one relating to a three-day suspension, another relating to allegations concerning "Union Activity," and the third relating to his discharge. The timeliness objections raised by Benrud with respect to these three grievances included an assertion that the Union had not met the requirement that it request arbitration within ninety calendar days after it notified the Employer of its intent to arbitrate. Benrud's letter of September 10, 2009, however, did not raise a similar objection to the timely processing of the written-warning grievance now before me, nor did it make any reference to that grievance.

On September 22, 2009, Carlson responded to Benrud's letter of September 10, 2009. Carlson wrote that the Union was withdrawing two of the grievances referred to in Benrud's letter, but that, with respect to the grievance of Welde's discharge, the Union "is prepared to strike to select an arbitrator" and "we do not agree that this grievance is untimely, and we are prepared to argue timeliness and merit before the selected arbitrator." In her letter of September 22, 2009, Carlson also made reference to two other grievances

brought in behalf of Welde, one of which was the grievance challenging the written warning that is now before me. With respect to that grievance, Carlson wrote only that "the Union is prepared to strike to select an arbitrator in this case."

The Employer argues that the Union sent the notice of its intent to arbitrate on March 31, 2009, more than two months later than the time limit established in Article 21 -- sixty calendar days after the Employer's Step Three response of November 24, 2008. Further, the Employer argues that the Union sent its request to arbitrate on August 12, 2009, more than six weeks later than the time limit established in Article 21 -- ninety calendar days after the Union's notice of intent to arbitrate of March 31, 2009. The Employer argues that, because the Union failed to meet the time limits established by the grievance procedure, the grievance should be considered settled on the basis of the Employer's denial.

The Union argues that the Employer raised no objection to the timeliness of the Union's processing of the grievance now before me until February 19, 2010 -- about a month before the hearing on March 24, 2010. The Union argues that, by failing to make its objection to timeliness until just before the hearing, the Employer has implied by its conduct that it waived any such objection.

I accept the Union's argument that the Employer has waived its objection to the timeliness of the Union's grievance processing by failing to notify the Union that it had such an objection until February 19, 2010 -- about six months after the

August 12, 2009, request to arbitrate. By then, the parties had gone through the process of arbitrator selection, of notice to me on November 17, 2009, of my selection, of setting the hearing for March 24, 2010, and presumably, at least some effort toward preparation for the hearing. Failure to make the objection earlier implied that no such objection would be made and induced the Union to proceed with its preparations. I rule that the Employer has waived its objection to timeliness and is estopped to assert it now.

The Substantive Issue.

The following provisions from Article 17 of the parties' labor agreement, which is entitled, "Sick Leave," are relevant:

Section 4. Utilization.

Approved sick leave may be used by an employee who is unable to perform duties because of illness, injury or pregnancy; or who would expose others to contagious or infectious diseases; or who must keep medical or dental care appointments.

Accumulated sick leave may be used to supplement Workers' Compensation benefits during periods of lost work time due to compensable on-the-job illness or injury.

Approved sick leave may be used to care for or arrange care for an employee's child, and up to five (5) days per incident may be used by an employee to care for or make arrangements for the care of an ill member of the employee's immediate family. A department may approve an additional five (5) days of sick leave to care for or make arrangements for the care of an ill member of the employee's immediate family provided this illness is covered by the FMLA. . . .

Section 5. Requesting Sick Leave.

- A. Employees must request and receive approval for use of sick leave from the designated or appropriate administrator in the Department as soon as possible after the onset of illness.

- B. While supervisors must be informed of the general nature of the illness, such information shall be treated by the supervisor with appropriate confidentiality.
- C. In the case of extended or chronic illness, the designated or appropriate administrator in the Department may require statements from a physician or dentist which includes the anticipated date of return. Upon request of the Employer, when the Employer has reasonable cause to believe that an employee has abused or is abusing sick leave, employees utilizing leave under this Article may be required to furnish a statement from a medical practitioner as defined in the Family Medical Leave Act stating that the practitioner finds the employee unable to work due to illness. Requests to furnish a statement from a medical practitioner may be oral or written. Oral requests shall be reduced to writing as soon as practicable. The written requests shall state the reason(s) for the request as well as the period of time that the employee will be required to furnish the statement. If an employee does not bring a medical practitioner's statement of illness when requested, the supervisor may deny the use of sick leave.
- D. Abuse of sick leave shall be one form of just cause for disciplinary action. Abuse shall be defined as use of paid sick leave for reasons other than those listed in this Article. Use of paid sick leave in a pattern such as Mondays, Fridays, or the day after payday is an example of a use of sick leave that may constitute abuse.

The grievant testified that he had back surgery on May 20, 2006, and that he was on Family Medical Leave Act ("FMLA") leave until he exhausted that and returned to work, though he was not completely well. On February 13, 2007, he had surgery for a hernia and took a week off, using sick leave and vacation to cover his absence. In April of 2007, he had gall bladder surgery and returned to work on June 11, 2007.

Because of a recurring strain to his back, the grievant, who was now under a twenty-pound lifting restriction, took FMLA leave from July 10, 2007, till September 27, 2007, when he returned to work without any lifting restriction. The grievant

testified that he provided medical documentation to the Employer for absences resulting from these occurrences.

The following is a summary of the testimony of Zierdt, who was the author of the written warning of April 14, 2008, and the grievant's supervisor. On June 15, 2007, Zierdt sent the grievant a "Letter of Expectations," which, though it did not relate to attendance at work, did enclose a copy of an email Zierdt sent to all Technicians on May 15, 2007, in which Zierdt summarized matters to be discussed at a staff meeting the next day with all Technicians. The grievant did not attend the staff meeting because he was absent from work that day. Relevant parts of the email of May 15, 2007, are set out below:

. . . I am also including a brief summary of the policies we discussed in our last Wednesday meeting. . . Here is a summary of the key points.

1. Assigned work hours for all staff are 7 a.m. to 3:30 p.m. . .
2. All exceptions to assigned work hours must be pre-approved by me. In the event of a late arrival or early departure, [stop by my office or email me with an explanation].
3. All overtime must be pre-approved by me.
4. All vacation must be pre-approved by me.

. . . .

On February 12, 2008, Zierdt issued a written warning to the grievant, which, after the Union grieved it, became the subject of an arbitration hearing held on February 19, 2010. The arbitrator in that proceeding, Roy A. McCoy, issued an award denying the grievance on April 13, 2010. I set out below Zierdt's written warning of February 12, 2008:

This letter is a written warning to address the issue of your failure to follow the call in sick procedures on February 1, 2008. As you know, I met with you on February 5, 2008, to conduct an investigatory meeting regarding your failure to call your supervisor when sick. Also attending were Ken Holm and Lucy Newman.

You acknowledged that on February 1, 2008, you called and informed a peer that you were sick and would not be reporting to work. You stated that you had forgotten your supervisor's phone number. [Article 17, Section 5 of the labor agreement] states that employees must request and receive approval for use of sick leave from the designated or appropriate administrator in the Department as soon as possible after the onset of illness.

In an email sent to you from Mark Zierdt on May 15, 2007, you were notified that "All exceptions to assigned work hours must be pre-approved by me." . .

On October 2, 2007, you were given an Oral Warning which stated, "You have been instructed that you must notify me (your supervisor) when you leave work due to an illness."

Failure to meet your performance expectations may result in further disciplinary actions up to and including termination.

On February 8, 2008, Kevin M. Hinze, an NTS Engineer, was assigned to supervise another Engineer and six Technicians, one of them the grievant. During the next few days, Hinze met with the seven people newly under his supervision. His meeting with the grievant occurred at 7:15 a.m. on February 13, 2008, with Zierdt also in attendance. At the end of that meeting, Zierdt instructed the grievant to appear at two meetings the following day, February 14, 2008 -- one a "problem solving" meeting and the other an investigatory meeting to discuss the grievant's behavior toward co-workers. Zierdt testified that, when the grievant was told to attend the two meetings set for the following day, he said, "I might not make those meetings," and walked out of Zierdt's office. He walked down the hall and told a supervisor, "I'm going home sick." The next day, February 14,

2008, the grievant called in sick, and, for that reason neither of the planned meetings was held.

On February 14, 2008, Zierdt sent the grievant the following "Letter of Expectations":

Reliability is a quality that OIT requires for all its employees. It is especially important for one in your position as a [Technician].

You have exhausted all of your sick leave and have been in without pay status for 136.85 hours in the last four months. I spoke to you on December 5, 2007, and informed you that your absenteeism has become a serious performance issue. Your attendance improved for the month of December 2007, but has again become unacceptable beginning in January of 2008.

Scheduling work orders is time sensitive because we agreed to meet our customer's requests. When you are not at work, it is an inconvenience to our customers, an imposition on your colleagues and other staff who have to work overtime to cover your hours and it increases our operating expenses because we need to hire contractors.

We will no longer grant you unpaid time off as leave. Failure to be at work will result in further disciplinary action up to and including suspension or termination.

On March 17, 2008, Zierdt sent the grievant the following memorandum:

Subject: Expectations for requesting vacation/sick/comp leave

The pattern of your use of sick/vacation time continues to create problems for assigning work and fulfilling our commitments to our customers. Over the past months I have maintained a process that is in compliance with the agreement between [the Employer and the Union]. You are required to follow this process.

The expectations are as follows:

1. All future vacation/sick/comp requests must be made directly to your supervisor.
2. Leaving a voice message for vacation/sick/comp requests or for leaving work for any reason will not be accepted. This must be discussed with the supervisor in person or over the phone.

3. You will not be granted any unpaid time off as leave.
4. All requests for sick time for you, or to care for any family members, will require a signed medical practitioner's statement before you can return to work.
5. All time off work must be submitted on FormsNirvana [a software system for tracking attendance] immediately on your return to work.

The next action taken by the Employer was an investigatory meeting held on April 1, 2008, which eventually led to the issuance of the written warning that is the subject of the grievance now before me.

The only performance evaluation of the grievant that was presented in evidence is authored by Zierdt and covers the fiscal year ending on June 30, 2006. It rates the grievant as "Successful," the highest rating available.

The evidence shows the following absences of the grievant for the months of October, 2007, through March, 2008, the period that was used by Zierdt as the basis for his written warning of April 14, 2008:

<u>Month</u>	<u>Available Work Hours</u>	<u>Hours Absent</u>	<u>Leave Status</u>
October	184	8.95 12.30 38.75	Sick Vacation Without Pay
November	160	8.35 13.25 40.00 8.00	Sick Vacation Without Pay Personal Holiday
December	144	None	
January	168	18.00 4.00 2.00	Sick Vacation Without Pay
February	152	3.64 28.86	Sick Without Pay
March	168	4.18 1.32	Sick Vacation

Pay days fall on Wednesday, every two weeks. During the period from October of 2007 through March of 2008, there were thirteen pay days. The grievant was absent on six of them, and he was absent for a full or part day on five days after a pay day. The Union points out that only one of the six absences on a pay day was isolated, i.e., that it occurred without being adjacent to another day of absence on the day before or the day after the pay day.

The evidence shows that the grievant has had a history of using his sick leave soon after it is earned. It also shows that he has used leave without pay for a substantial number of hours, though his record during the six months at issue showed some improvement. According to the Employer, any such improvement is explained by the attention Zierdt paid to the grievant's poor attendance -- a coaching on December 5, 2007, the written warning of February 12, 2008, as well as the letters of expectation dated February 14, 2008, and March 17, 2008.

The written warning of April 14, 2008, which is here at issue, states that it has been issued for "your abuse of sick leave" and states that the "patterns I have identified" are "excessive use of unplanned time away from work especially on paydays" and "your immediate use of sick leave when accumulated." The written warning of April 14, 2008, also states that the grievant received letters of expectation on February 14, 2008, and on March 17, 2008. The Union argues that in the period after February 14, 2008, and before March 17, 2008, the grievant

was on sick leave for two hours on February 27, 2008, which was a pay day, and for 5.5 hours on March 10, 2008, which was a Monday, and that the grievant had no absences between March 17, 2008, and April 1, 2008, the end date of the period for which the grievant was warned in the written warning of April 14, 2008.

The Union presented evidence showing the total time absent for each Technician during the year preceding April of 2008. This record shows that the grievant had a total of about 977 hours of absence for sick leave, vacation, FMLA leave, leave without pay and compensatory time. This amount was far greater than that of the others, except for one employee who had been seriously injured and was off for 1,530 hours, covered by the same kinds of leave and by 302 hours of sick leave donated by other employees during his recovery.

For the following reasons, I conclude that the evidence shows some justification for the issuance of the written warning of April 14, 2008. First, I do not consider the basis for the written warning of February 12, 2008, as evidence supporting the later written warning of April 14, 2008. By a separate grievance proceeding, the parties have disposed of all issues concerning the cause for the earlier warning, and that matter is not before me.

Second. The grievant's absences on pay days or on the days after a pay day, though frequent, do not necessarily show the kind of pattern that Article 17, Section 5D, lists as an example "of a use of sick leave that may constitute abuse." As the Union argues, because most of those absences fell within

longer periods of absence, they do not imply that the grievant was using sick leave merely because the sick day was proximate to a pay day. This is not to say that the absences in the periods that included pay days were legitimate. Rather, I find that those absences do not necessarily imply sick leave abuse of the pay-day sort given as an example in Article 17, Section 5D.

Third. The evidence does show that the grievant tended to use sick leave as soon as it was accumulated -- as is alleged in the written warning of April 14, 2008. I understand the Employer's argument to mean that such a pattern indicates sick leave abuse, i.e., the use of sick leave "for reasons other than those listed" in Article 17, Section 4. The Union argues that immediate use of sick leave does not necessarily show that the sick leave was taken for "reasons other than those listed" because an employee may have need to use sick leave as it is earned for legitimate reasons. I agree that, without a showing that at least some of the instances of immediate use have not been legitimate, such a pattern does not necessarily indicate abuse.

Fourth. I interpret the written warning of April 14, 2008, as more than a warning about the use of sick leave in the two patterns it describes -- use on pay days and use immediately as accumulated. I interpret it also as a warning against any use of sick leave "for reasons other than those listed" in Article 17, Section 4. The evidence supports a finding that the grievant's claim of illness on February 13, and 14, 2008, was

not for illness, though he claimed that he was ill on those days. As I have described above, the grievant left a meeting with Hinze and Zierdt that started at 7:15 a.m. after he was told that he was to appear at two meetings the following day to discuss discipline and "problem solving." When the grievant was told to attend the two meetings, he said, "I might not make those meetings," and walked out of Zierdt's office. He then walked down the hall and told a supervisor, "I'm going home sick." The next day, he did not come to work, claiming that he was sick.

The grievant testified that he felt stressed when Zierdt told him to attend the two meetings. He also testified that he saw a doctor on February 14, 2008, but there is no written note from a doctor covering February 13 and 14, 2008, among the medical notes presented in evidence. The Union argues that, at that time, the grievant had not been ordered to provide a medical note for each sick day claimed.

I make the following ruling. Even if there were a medical note covering the absences of February 13 and 14, 2008, I would find implied in the circumstances that the grievant did not have an illness from stress so severe that it prevented him from starting his work day after the morning meeting on February 13, 2008, or from attending the corrective meetings on February 14, 2008. I find that the grievant's allegations of illness on February 13 and 14, 2008, were not made in good faith.

Though the evidence is unclear about the balance of sick leave that the grievant had on February 13 and 14, 2008, the

fact that those days were marked "leave without pay" in the Employer's records indicates that he did not have sick leave to use at that time. Thus, it appears that, because he had no sick leave, his absences on those days cannot fit the literal definition of "abuse of sick leave" as given in Article 17, Section 5D, of the labor agreement. It also appears, however, that the Employer has allowed employees leave without pay to cover a bona fide illness when they have no sick leave to cover the absence.

I rule that, insofar as the evidence shows such an expansion of "sick leave" in practice -- to include leave without pay when an employee claiming sickness has exhausted sick leave -- the grievant's absences on February 13 and 14, 2008, were abuses of "sick leave" in the expanded sense of that term.

I conclude that there was just cause to issue the written warning of April 14, 2008, for abuse of sick leave -- insofar as I have described above with respect to the grievant's absences on February 13, and 14, 2008.

I also conclude that the evidence shows a patterned use of sick leave on pay days or on the day after pay days during the period covered by the warning, and that the evidence shows a patterned immediate use of sick leave as accumulated during that period. The evidence does not, however, show in addition that at least some of these uses of sick leave were for illegitimate reasons, and, for that reason, I conclude that the patterns alone do not show an abuse of sick leave.

AWARD

The grievance is sustained in part and denied in part, in accord with the reasons stated in the Decision, above.

June 18, 2010


Thomas P. Gallagher, Arbitrator