

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCIL 5**

and

STATE OF MINNESOTA – BOARD OF PSYCHOLOGY

DECISION AND AWARD OF ARBITRATOR

BMS 13-PA-0232

JEFFREY W. JACOBS

ARBITRATOR

October 10, 2013

IN RE ARBITRATION BETWEEN:

AFSCME Council 5,
and

DECISION AND AWARD OF ARBITRATOR
BMS Case #'s 13-PA-0232

State of Minnesota – Board of Psychology

APPEARANCES:

FOR THE UNION:

Linda Jackson, Union Field Representative

FOR THE STATE:

Laura Davis, Labor Relations Specialist DOER
Angelina Barnes, Executive Director, Board of Psych.
Leo Camparo, Ass't Executive Director

PRELIMINARY STATEMENT

The hearing in the above matter was held on August 27, 2013 at the BMS offices in St. Paul, Minnesota. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted post hearing briefs on September 28, 2013.

ISSUES PRESENTED

The parties stipulated to the issues as follows: Did the Board of Psychology have just cause to terminate the grievant? If not, what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2011 through June 30, 2013. Article 17 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the BMS. The parties stipulated there were no procedural arbitrability issues and the matter was properly before the arbitrator.

RELEVANT CONTRACTUAL PROVISIONS

Article 9 Section 4 – Sick Leave

Whenever possible, employees shall submit written requests for sick leave on forms prescribed by the Appointing Authority, in advance of the period absence. **When advance notice is not possible, employees shall notify their supervisor by telephone or other means at the earliest opportunity.** Supervisors shall respond promptly and shall answer all requests in writing. Written requests for sick leave shall only state which category of leave specified in Section 3A and B is to be used. However, the supervisor may orally inquire into the specific reason for request. (Emphasis added)

Article 10 Section 4 – Unpaid Leaves of Absence

C. Medical leave: Leaves of absence up to one (1) year shall be granted to any permanent employee who as a result of an extended illness or injury, has exhausted his/her accumulation of sick leave. Upon the request of the employee, such leaves may be extended. An employee who becomes disabled while on layoff or other leave of absence shall have the right to apply for and receive medical leave status so the employee becomes eligible for disability pension.

F. Personal Leave: Leave may be granted to any employee upon request, for personal reasons. No such leave may granted for the purpose of securing other employment, except as provided in this article. Employee may be required to exhaust vacation leave accruals prior to personal leaves of absence of less than ten (10) working days

No leave of absence request shall be unreasonably denied and an employee shall not be required to exhaust vacation accruals prior to leave of absence except as required under Section 4F personal leave.¹

Article 16 Section 1 Discipline and Discharge:

Disciplinary action may be imposed on an employee only for just cause.

RELEVANT PROVISIONS OF THE EMPLOYER’S POLICY

(Relevant policy sections were found at State’s Exhibit 2 and are cited here only in part due to their length)

Attendance and punctuality

It is understood that things will sometimes happen that will prevent you from showing up to work on time. For example, you may be delayed by weather, a sick child or car trouble. We value your safety, the health of you and your family and recognize life’s obstacles. If you are going to be late, please call or text your supervisor. If you cannot reach this person, contact the Management Analyst. **Please give this notice as far in advance as possible.** (Emphasis added)

Sick leave – Requests for Use

Use of sick leave is governed by each respective contract as well as PERSL #1337 and the policies established therein. **Requests for sick leave should be received before the start of the regularly scheduled starting time.** You must call or text our supervisor prior to the start of your shift to notify of your intended use of sick leave. Following notification to your direct supervisor, you should ensure that administrative staff are aware of your absence by call: 612-617-2230 and requesting that an administrative team member enter your absence on the Board’s Outlook shared calendar entitled, “psychology vacation and leave calendar.” (Emphasis added)

¹ It was not clear where this provision resides in the CBA between the parties because neither party provided a complete copy of it to the arbitrator. Instead this provision was cited in the Union’s brief and may well be in Article 10 somewhere but it was clear where. Having a complete copy of the contract, especially for those provisions relied upon by the parties for their respective positions would have been helpful.

STATE'S POSITION:

The State's position was that there was just cause for the disciplinary suspensions and discharge of the grievant. In support of this position the State made the following contentions:

1. The State asserted that the grievant has had multiple problems with attendance and tardiness in the past and that despite multiple warnings, counseling sessions and contacts with her supervisors she failed to properly notify her supervisors when she was out sick. The state asserted that the grievant's history shows a cavalier and even disrespectful attitude toward the legitimate interests of management in showing up for work, showing up for work on time and for notifying them when she is unable to come to work. The State asserted quite bluntly that the grievant plays by her own rules and disregards those management requires of everyone else.

2. The State further asserted that her duties as an Office and Administrative Specialist, OAS, at the Board of Psychology requires that she appear for work regularly. Further that the rule and policy is clear and requires that if an employee is ill and cannot come to work they must call in prior to the beginning of their shift to report the absence and of their intended use of sick leave. The State pointed to several warnings given to the grievant over the years that it asserted clearly notified her of the need to either be at work on time as scheduled or to notify her supervisors of the absence.

3. She received a formal letter of expectation in 2009 regarding her excessive use of sick leave and required her to provide documentation of any absences for a period of three months. When her current supervisor, Mr. Campero, became her supervisor in 2011 he immediately noted her problems with attendance and noted in her evaluation that she needed to be "more consistent" in attendance. The State asserted that there is no question that the grievant's attendance has been a problem for several years and that the State has "bent over backwards" to accommodate her illnesses as well as her inconsistent practices in notifying her supervisors of absences.

4. Specifically, the State asserted that in 2011 the grievant began missing work and failing to notify her supervisors of her intended absence. She would call in well after her 8:00 start time and either leave a message or speak to her supervisor. The State asserted that she was to call in before the start time yet she repeatedly failed to do that. She was also frequently late for work and failed to comply with the clear policy to call in before her shift set forth above.

5. Instead of issuing discipline, her supervisors issued only a Letter of Expectation, which again set forth in some detail the requirements of the policy and of the expectations of her supervisors. She was also clearly informed that “upon depletion of [her FMLA time], any absence could be considered an unauthorized absence and may result in disciplinary action” State exhibit 17.

6. The grievant undertook other more nefarious actions by sneaking into her supervisor’s office in October 2011 even though she clearly was not permitted to be there. It remains unknown what she was doing there or why she felt the need to go into her supervisor’s office and apparently rummage around in his desk.

7. The State pointed to the events of mid-December 2011 and noted that the grievant missed work on 4 successive days. She was terminated at that time for failing to provide adequate support for her claimed FMLA leave at that time. She claimed that she was sick but had posted a message on Twitter that there was a “beautiful sunset from Welch ski hill tonight,” leading her managers to believe that she had fraudulently claimed that she was sick.

8. Despite this clear evidence, she was allowed to return to work, despite what the Sate called a clear cut case warranting termination, since she eventually did provid a medical leave slip for the absences. She was given the “benefit of the doubt” but told that she would need to comply with the legitimate expectations of managers to be at work or call in before her shift and to provide adequate documentation and support for any leave in the future or face discipline up to and including discharge again. See State exhibit 21.

9. The State asserted that this should have been enough to send the message to the grievant to shore up her behavior but that it was not. Rather than accepting the rescission of the termination with the grace and gratitude that action warranted, the grievant celebrated it by a post on Twitter saying in part “love it!” Within a few months she was back at it again by missing work and failing to call in as required, using up her leave and taking unauthorized leaves.

10. The State asserted that there was ample warning and notice to the grievant of the problems she was having with attendance. Her evaluation reflected the warning that her attendance needed to improve, see State exhibit 2. Likewise, her managers testified that they told her repeatedly of the requirement to call before her shift if she were going to be absent or late due to illness.

11. The events leading to her termination occurred in late June 2012, only days before she would have been allotted another 12 weeks of FMLA leave, since the fiscal year begins July 1st of each year. The grievant was on an approved leave to attend a union conference but was schedule to return to work on June 25, 2012. She did not appear and failed to call in until after 10:30 that day. She failed to call before her shift and again failed to show up for work.

12. When she asked the next day about her balance of FMLA leave she as told that she could look it up herself. Her managers were out of town and were unable to access the grievant’s account as they were getting off an airplane at the time she contacted them. The State asserted that there is no question that the grievant was out of FMLA leave and that her absence on June 27th was unauthorized. She also inquired as to her balance and was told it had expired as of 4:00 p.m. the prior day. She requested unpaid leave and her supervisor forwarded her the necessary forms to complete to do that. The grievant indicated that she would be meeting with her doctor but told him she would be in to work on June 28th. She in fact appeared for work on the 28th but was terminated for repeatedly using unauthorized leave – as her FMLA leave had expired on the 27th and due to her failure to report for work on June 26 and 27, 2012.

13. The State further asserted that the grievant's cavalier attitude toward her employment was demonstrated when at the Loudermill hearing on July 3, 2012 she produced a doctors slip that purported to show that she was unable to work at all, See Union exhibit 36, yet she was at work on June 28, 2012. These two things cannot be consistent. By this time the State noted that her managers had seen and heard enough and determined that termination was more than warranted given her long history and clear evidence that despite warnings, coaching and other efforts to get her to comply, she could not and would not comply.

14. The State asserted that it met all of the necessary elements of just cause. There was ample notice, See State exhibits 14, 20 and 32 (all of which advised the employees as to the proper procedure for calling in and all advised the grievant to follow the correct procedure for reporting an illness), the rule was both reasonable and reasonably enforced, there was no question that the grievant was not at work and no question that she failed to comply with the policy regarding calling in, there was a fair investigation (indeed the union did not seriously assail any of these prior three elements) and that discharge given her sordid history of compliance with the reasonable directives of management was appropriate.

15. The State acknowledged that the grievant is qualified for Family and Medical Leave, FMLA, leave and that she was approved for intermittent FMLA for various depression and anxiety related issues. The State further asserted though that there has been no violation of the FMLA.

16. The essence of the State's case is that the grievant failed to appear for work on June 26 and 27, 2012 and ran out of leave on the 26th, thus rendering the absence on the 27th an unauthorized absence. The medical information submitted indicating that she was unable to work in any capacity was inconsistent with her appearance at work on the 28th and should be discounted.

The State seeks an award sustaining the dismissal and denying the grievance.

UNION'S POSITION

The union's position was that there was not just cause for the discipline. In support of this position the union made the following contentions:

1. The union noted that the grievant is well regarded and that her work performance has never been an issue. She is by all accounts very good at what she does. The union noted that she has a serious medical condition within the meaning of the FMLA that requires her to be out of work on an intermittent basis. Indeed, the union argued that the State has never disputed that and acknowledges that the grievant is entitled to FMLA leave.

2. The union cited the provisions of the contract cited above, especially the language emphasized, that allows an employee to call in "at the earliest opportunity" if they will not be at work on time. The union further asserted that the contract governs employee conduct, not just the policy, and that where the two are inconsistent the contract governs. Here the contract allows the employee to call in as early as they can but does not in all cases require that the person call in before their scheduled shift. While calling in prior to the start of the shift may be desirable it is not required under the contract.

3. Further, the union pointed to inconsistencies in the employer's policy itself. The union noted that while one section provides for a call prior to the shift, another in the same policy provides as follows: "If you are going to be late, please call or text your supervisor. If you cannot reach this person, contact the Management Analyst. Please give this notice as far in advance as possible."

4. The union and the grievant indicated that due to her medical condition it is not always possible to call in prior to the shift and that she did in fact try to give as much notice as possible whenever she felt her symptoms coming on.

5. Further, the union asserted that the 2011 incidents were all subsumed in the discharge action taken in December 2011 and may not be used again to discipline her. Otherwise it would constitute double jeopardy and an unlawful attempt to discipline her twice for the same offense.

6. Turning to the events of June 2012, the union noted that the grievant was on an approved leave until June 22, 2012 to attend a union conference out of town. Upon her return she suffered symptoms related to her FMLA approved leave and knew she was unable to come to work on June 25th as scheduled. The union argued that these symptom were brought on by her supervisor's vehement anti-union sentiments and recent messages on his Twitter account and that these caused her to become too stressed to return to work knowing how he felt about unions in general.

7. She in fact did contact her supervisor on June 25 and advised him that she would not be at work that day. She had FMLA hours to cover that absence.

8. On June 26th her symptoms had not subsided and she again advised her supervisors as soon as she could to let them know she would not be in. The union asserted that her actions were thus consistent with the policy and with the governing language of the labor agreement. She also had FMLA hours to cover the absence for the 26th and should not have been disciplined for that at all.

9. The union acknowledged that the grievant did not have hours to cover the absence on the 27th but that she has requested medial leave pursuant to the language of Article 10. Moreover, her supervisor had led her to believe that the paperwork for this was on its way to her and that she should see her doctor to get the necessary approvals. While her hours under FMLA were expired, the labor agreement requires the granting of a medical leave.

10. She returned to work on the 28th on the advice of her union because her FMLA hours had expired, because she was "doing a little better" with some new medications and because she wanted to avoid being absent without leave for that day. The union asserted most adamantly that she should not be punished for coming to work on the 28th even though her doctor later indicated that she was medically unable to work as of the 27th.

11. The union asserted that the employer seems to switch back and forth between the labor agreement and policy whenever it suits them but must in fact apply the contract where there is conflict. Here that allows a call-in later than the start of the shift where appropriate. It further requires a medical leave and the granting of leave where appropriate under FMLA. Further, under FMLA, whenever there is a claimed medical absence the supervisor is required to inquire whether it will be covered under FMLA – here her supervisor failed to do that. See State exhibit 2 Appendix N at page 161 question 9, see also, page 160 question 14(a). These provisions require the employer to inquire as to the nature of the absence and whether FMLA will be claimed.

12. As noted above, the supervisor led the grievant to believe that her request for medical leave, made on June 26th in order to protect her job, would be granted (as it is required to be under Article 10 section 4C. That clause provides that “leaves of absence up to one (1) year shall be granted to any permanent employee who as a result of an extended illness or injury, has exhausted his/her accumulation of sick leave.” Thus there is no question that the grievant was entitled to a medical leave and the employer completely violated the contract by first seemingly granting her request, as it was required to, and then punishing with termination for showing up to work when she was simply trying to protect her job, having been told that her FMLA hours had expired.

13. The union argued that at worst, the absence on June 27th was unauthorized but then should have been covered as a medical leave. There is simply no just cause for terminating her under these circumstances.

14. The union countered the arguments made by the State and asserted that contrary to the assertion that she did not try to contact her employer, she was in virtually constant contact with the employer on June 25, 26 and 27, 2012 advising him of her condition, her efforts to get to a doctor and to provide the necessary documentation for a medical leave. She in fact contacted him before 8:00 a.m. on June 26th, i.e. 7:42 to advise that she would not be in and asked about her FMLA balance so she could pass that information on to her doctor.

15. The union asserted that the grievant contacted Mr. Campero again at 8:17 a.m. that day to advise him that she would be in as soon as she could see her doctor. The union asserted that in fact she informed her supervisor each day she was gone that she would not be in and that she did so consistent with the requirements of the labor agreement.

16. Further, the grievant advised her supervisor why she would not be at work, see union exhibit 3 at page 6, and was available for any questions. Instead of advising her otherwise, the supervisor told her that the documents to get the medical leave were “on the way.” She appeared at work on advice of her union to protect her job and to carry her until July 1, 2012 when she would have received another 12 weeks of available FMLA leave.

17. The essence of the unions’ case is that the grievant despite her illness has tried to come to work when she is able and that she has followed all the applicable rules regarding reporting absences, providing medical documentation of absences and to inform her supervisors as soon as she could when she was unable to come to work due to her illness. The union asserted that it is the employer who is not following the rules as provided for in the labor agreement and is attempting to punish the grievant for her illness. Finally, that when she did not come to work on June 25, 26 and 27, 2012 the first two days were covered by FMLA hours (and the State has acknowledged that) and that her absence on the 27th was, she believed, to be covered by an approved medical leave.

The Union seeks an award sustaining the grievance, overturning the dismissal and making the grievant whole in every way.

DISCUSSION

FACTUAL BACKGROUND – 2011 DISCHARGE

The grievant is an OAS at the Minnesota Board of Psychology. By all accounts the evidence showed that she is a capable employee who performs her work competently and ably. The issue in this case and which has been one on an ongoing basis is her attendance and absences from work.

The evidence showed however that she suffers from a variety of medical conditions that cause her to be unable to work on an intermittent basis. The evidence also showed that she has been approved for an intermittent FMLA leave and that the State acknowledged that. There is no evidence of a violation of the FMLA on this record. The question here is whether there was just cause for her termination based on the events of June 2012 and her history.

Initially it should be noted that the grievant was terminated in December 2011 for taking unauthorized absences. The State introduced considerable evidence regarding the grievant's absences prior to that action as well as evidence regarding the grievant's action in going into her supervisor's office. These actions frankly took place well before December 2011 and were subsumed in the employer's action to discharge her then – and the subsequent decision to reinstate her following that action. While it was clear that these actions were clear notice to the grievant of the need to notify her supervisors of absences reliance on them for anything other than that is misplaced. These prior offenses can certainly be used to provide notice of the requirement to notify her managers of absences but alone cannot be used to justify termination unless there is an adequate showing of a subsequent rule violation.²

Significant too was the lack of a clear last chance agreement between the parties regarding the grievant's return. See State exhibit 21. The parties agreed to simply reinstate the grievant per the e-mail of December 19, 2011. There was no other agreement apparent on this record regarding an agreement to terminate the grievant if she violated any employer rule.

² This is not to say that the evidence of the grievant's actions prior to the termination of December 2011 is not relevant or not important, the point here is that the relevance of this evidence was to show notice of the rule and to perhaps support the claim for termination as opposed to some other lesser form of discipline. The issue here is that this evidence cannot be used to support the claim of guilt or innocence of a subsequent charge. That must rest on the strength of the evidence of those events themselves. For example, the fact that she was late in May 2011 or failed to show up for work on several times in December 2011 does not necessarily show that she was guilty of such transgressions later. The employer seemed too to base much of the claim for the grievant's discharge on her actions in 2011 prior to her discharge in December 2011. Suffice to say that while that evidence can be considered as part of the determination of the appropriate level of discipline once a subsequent violation has been established, it cannot be used to establish that subsequent violation.

There was a letter of expectation regarding attendance as well as comments made in the grievant's evaluation regarding attendance. These are certainly on the grievant's record but there is the other significant fact that she has an approved intermittent FMLA that allows her to take her allotted FMLA leave as appropriate. There was no evidence on this record that after her reinstatement the grievant's absences were not related to her FMLA illness.

There was little question that her managers were frustrated by the frequency of the grievant's absences and that they very much wanted to see improvement of attendance. The issue here though is whether the grievant violated the contractually mandated procedure to report absences and whether her absences in late June 2012 were sufficient on this record to warrant her discharge. It is thus against that factual backdrop that the events of June 2012 occurred.

EVENTS IN JUNE 2012

The evidence showed that the grievant was on an approved leave from June 18 through June 22, 2013 to attend a union conference out of town. She was scheduled to return to work on June 25, 2013. Upon her return however the evidence showed that her symptoms recurred and that she contacted her supervisor to inform them she would not be in on June 25th.

Contrary to the assertions by the state that the grievant did not inform her supervisor until after the shift, the evidence showed that she indeed did send an e-mail at 7:53 a.m. on June 25th informing her supervisor that she would not be in that day. There was some confusion about this but it was apparent that he did not receive that message. See Union tab 3 at page 7, e-mail from Mr. Campero to Ms. Barnes indicating that the grievant was a "no show." The grievant had apparently typed an incorrect e-mail address for Mr. Campero and the message may have ended up in his spam box. There were other e-mails with that same address on them though that did apparently go through so it was not clear on this record why the original message sent before the start of the shift did not go through. It was also apparent from the evidence that the grievant was not aware that her first message did not go through until well after 8:00 a.m.

Thus while it is the employee's responsibility to notify the supervisors as soon as possible, on this record the grievant's actions were reasonable. Further there was insufficient evidence to warrant the conclusion proffered by the State, that the grievant had intentionally modified her message to hide the fact that she had not sent it. In fact, the evidence was clear that the first message was sent prior to 8:00 a.m. so there would have been no reason to modify the message in the first place.

The grievant sent another message at 10:30 that same day indicating that she "would be in after her FMLA symptoms subside." At 10:36 the grievant sent a message to Ms. Barnes that she just realized the original message did not go through and asked she forward the message to Mr. Campero. There was also ample evidence that e-mail notification was acceptable. On this record, there was insufficient evidence that the grievant intentionally failed to notify her supervisors. Certainly her absence was puzzling to her supervisors but the question is whether she failed to follow the rules or ignored them. There was insufficient evidence to show that. Further it was clear on this record that her absence was related to her FMLA symptoms and that she had FMLA leave to cover that day.

The evidence showed that her second message that day was not received until 10:36 a.m. that morning. While the contract does not require that the employee contact the employer prior to the beginning of the shift, it does reference that and says that this should be done "as soon as possible." She did not appear for work on June 25, 2012 but did have FMLA time to cover the absence. There was also evidence that the reason for her absence that day was due to the illness giving rise to the FMLA leave. There was also evidence to support the grievant's claim that her symptoms occur on an intermittent basis and sometimes with little warning such that it was not unreasonable that she may well have intended to go to work as planned the night before but experienced her FMLA related symptoms early in the morning of June 25th rendering her unable to work that day.³

³ Much was made of the Twitter messages from Mr. Campero regarding unions and events in Wisconsin at about the same time these events were happening. The grievant claimed that these messages gave rise to her symptoms. On this record the reasons why she experienced symptoms were not material to the discussion. Further, there was insufficient evidence to show any anti-union animus toward the grievant based on her position with the union in this matter. This case was decided on the facts surrounding her absences on June 25, 26 and 27, 2012 and the contractual language at play in this case.

The termination letter at State exhibit 28 states that the reasons for her discharge were the absences on June 26 and 27, 2012. No mention is made in that letter of the absence on the June 25th. Clearly however the employer knew that the grievant was suffering from FMLA related symptoms and that she would be using FMLA approved leave for that day.

Contrary to the State's assertions that the grievant did not call in on the 26th, the evidence showed that the grievant did contact the employer on the 26th at approximately 7:42 a.m. to report her absence.⁴ She sent another e-mail message at approximately 8:17 a.m., indicating that she needed to know her FMLA balance and further indicating that she would be in "as soon as she I can see my doctor today." There was evidence that she could have done this even if her password was not at home since the website has a place to either look up a forgotten password or to get a new one. The grievant thus could have found this out. However, this information clearly put the employer on notice that the grievant was seeking FMLA absences for that day.

She again did not appear for work on June 26th but as noted, she did have FMLA time to cover this absence. On this record there was insufficient evidence to show that the grievant's absence that day violated any of the contractual language regarding notifying the employer of an absence or of the use of FMLA. She was advised that her FMLA hours expired at 4:00 p.m. on June 26th. See State exhibit 28.

The grievant asked immediately about a medical leave of absence after being informed that her FMLA balance has expired. She sent a message to the employer seeking the necessary paperwork to commence a request for medical leave. Significantly, Mr. Campero then sent her those forms. See union exhibit Tab 3.

⁴ There was again some problem getting this message to go through but the grievant clearly sent it with the intention that she was notifying her supervisor of the absence for that day. See union tab 3 at page 8. The issue was that the grievant was sending the e-mail to "Leonardo.campero@state.mn.us" but Mr. Campero's e-mail address is "leo.campero@state.mn.us." Oddly enough however, the e-mail chain reflected at Union tab 3 page 8-10 shows that the grievant's message sent to "Leonardo.campero@state.mn.us" did get through to him since he responded to the question regarding the grievant FMLA balances. The grievant had sent a message to "Leonard" address at 8:17:49 and Mr. Campero responded to this at 9:34 telling her to look up the balances herself and giving her the information to do so. On this record, all that can be said from this is that somehow, he must have gotten this message despite the URL issue.

He did not at that point indicate to her that the absence of June 27th would be anything other than a medical leave. Further, the grievant was in the process of making an appointment with her doctor to get the paperwork for the medical leave filled out and submitted in a timely fashion.

Frankly, at this point it was difficult to see what the grievant was doing wrong here. She had been advised that her FMLA hours for that year had expired and in order to save her job she made an appropriate request for a medical leave. The contractual language at Article 10 provides simply that “Leaves of absence up to one (1) year shall be granted to any permanent employee who as a result of an extended illness or injury, has exhausted his/her accumulation of sick leave.” Moreover, those forms were sent out and certainly led her to believe that the medical leave required to be granted would be once she saw her doctor and submitted the necessary paperwork. Thus while she did not appear for work on the 27th, the employer’s actions led her to believe that she would be granted a medical leave and that she had not done anything incorrectly. While it was clear that the employer was frustrated by the grievant’s spotty attendance and sometimes last minute notifications of her absences, the question is not the wisdom of the Family and Medical Leave Act but rather whether there was a violation of the policies and contractual requirements here by the grievant that warranted her discharge based on her actions on June 26 and 27, 2012. There was not on this record.

Finally, on the advice of her union representative, she appeared for work on June 28th. The employer terminated her on that date for her absences on the preceding two days. The employer also questioned why she appeared for work when her doctor signed the medical leave form indicating that she was unable to work in any capacity as of June 26, 2012 without any firm end date.

The employer is thus effectively punishing the grievant for coming to work – a curious position indeed. Further, there was no countervailing evidence to suggest that the doctor’s note was incorrect or that there was some other medical opinion to the contrary.

On this record it must thus be assumed that the grievant was indeed medically unable to work but appeared anyway in order to save her job. This is not unlike a person who comes to work in pain following an injury or illness but feels they have to in order to protect their job. There was no violation of any contractual language by her appearing for work under these unique circumstances. The question now is the appropriate result based on that determination.

APPROPRIATE REMEDY

Several options were considered. A reinstatement with full back pay and benefits was rejected due to the clear evidence from her doctor that the grievant was “unable to work in any capacity” as of June 26, 2012. There was no evidence as to when that was ever changed by her doctor and on this record at least; no such end date can be simply assumed. Thus it would be manifestly unfair to require back pay when it was not at all certain when if ever the grievant was cleared to return to work.

On this record, it was clear that the medical leave was required per the language of Article 10 set forth above and that this would have gone for a year. Since that date has now passed,⁵ the other language of Article 10 requiring that “Upon the request of the employee, such leaves may be extended” and that such requests would not be unreasonably denied.”

The parties granted to the arbitrator the discretion to fashion a remedy based on the facts and evidence in this case. While arbitrators must be careful not to impose a remedy that creates more trouble than it resolves or to speculate on what “might have happened or what would have happened,” here the evidence showed that the most appropriate remedy is to treat the time between the grievant’s discharge and the date of this award as a medical leave and to treat her as having that status. The grievant is to be reinstated immediately to her former position upon a showing that she is medically able to return to work in that capacity.

⁵ Had the grievant been approved for a medical leave the evidence showed that it would have commenced on June 26, 2012 and that the one-year for the mandatory leave would have expired on June 25, 2013.

AWARD

The grievance is **SUSTAINED IN PART AND DENIED IN PART** as set forth above.

Dated: October 10, 2013

Jeffrey W. Jacobs, arbitrator

AFSCME and State of Minnesota PL – Board of Psychology award.doc