

IN THE MATTER OF ARBITRATION BETWEEN

<p>Hennepin County “EMPLOYER” “COUNTY”</p> <p align="center">and</p> <p>Minnesota Public employees Association “MNPEA” or “UNION”</p> <p>In re: Wade Laszlo</p>	<p>BMS Case No. 12-PA-0846</p> <p>Issue: Contract Interpretation, sick leave and attendance policy</p> <p>Hearing site: Hennepin County Government Center</p> <p>Hearing Date: 12-17-2013</p> <p>Brief Submission Date: 01-17-2014</p> <p>Award Date: 03-10 -14</p> <p>Harry S. Crump, Labor Arbitrator</p>
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I. JURISDICTION

Pursuant to the relevant provisions in the parties' 2012 – 2013 Collective Bargaining Agreement ('CBA' or “Contract”) this matter was heard on December 17, 2013 at the Hennepin County Government Center in Minneapolis, Minnesota. (JT EX 1) 1 The parties selected Arbitrator Harry S. Crump to conduct the hearing and issue a binding arbitration award. The parties stipulated that this matter is properly before the Arbitrator. Both parties were afforded a full and fair opportunity to present their case, witness testimony was sworn and cross-examined, and exhibits were introduced into the record. The parties submitted arbitrability documents as Joint Exhibits #4, #5, and #6. However, at the end of the hearing, the parties stipulated to the arbitrability of this matter. The parties waived the 30 day- decision period. The Hearing was closed on January 17, 2013, when Post-hearing Briefs were filed with the Arbitrator.

APPEARANCES

FOR THE EMPLOYER:

Todd Olness	Labor Relations	Representative
William P. Peters	Labor Relations	Director
Chris A. Mathisen	Sheriff's Office	Lieutenant
Craig Riggs	Program Manage	Juv. Det. Center
Jeff Deters	Admin. Manager	Central Services

FOR THE UNION:

Robert J. Fowler	General Counsel	
Joe Ditsch	General Counsel	
Wade Laszlo	Detention Deputy	Grievant
Mike Golen	Business Agent	Executive Director MNPEA

¹ The parties’ joint exhibits are referenced in this document as JT EXs, the Employer's exhibits as ER EXs, and the Union’s exhibits as UN EXs.

II. FACTS AND BACKGROUND

This case involves the Hennepin County Sheriff's Office, an agency of Hennepin County which employs approximately 740 full-time licensed and non-licensed employees. 280 of these employees work in the Jail.

By State Statute, the Sheriff is the Chief Law Enforcement Officer of the County. The Sheriff is responsible for numerous law enforcement operations including the Jail, which is the largest jail in the state of Minnesota with a current capacity of 703 residents. With an average inmate population of 694, the Jail runs at 98.7% of maximum capacity. Each year, there are approximately 40,000 bookings at the Jail. The Sheriff's budget in 2013 was \$86,894,641.

The Minnesota Public employees Association ("MNPEA" or "UNION") is the exclusive representative of all essential, non-licensed employees of Hennepin County Sheriffs Office ("County" or "Employer") within certain designated classifications, excluding supervisory and confidential employees, as defined by the Public Employment Labor Relations Act (PELRA), Minn. Stat. § 179A.

This public employee unit covers Detention Deputies in the Hennepin County Jail and Telecommunicators in the Hennepin County 911 and dispatch center. The unit, previously represented by Teamsters Public & Law Enforcement employees Union, Local #320, was covered by a collective bargaining agreement (CBA). (JT EX #2) MNPEA is the successor exclusive representative to the CBA, and has since entered into an agreement with the County that contains the same language as the CBA in all relevant sections. (JT EX #1)

The case before the Arbitrator involves a grievance filed by Wade Laszlo, a civilian Detention Deputy who works in the Jail. The County issued Detention Deputy Wade Laszlo a Counseling Session on July 29, 2011. (UN EX #3) Laszlo filed a grievance with the County the next day, July 30, 2011. The grievance was filed timely. The grievance was denied at Step 1 that same day. After denial of the grievance at Step 2, Laszlo notified the County he would be moving the grievance to Step 3 – Arbitration, on August 26, 2011, with a voluntary waiver of time lines by both parties.

During this time that followed, the Union elected MNPEA as its new exclusive representative, with the terms of the CBA binding the parties through the contract-in-affect doctrine of PELRA.

On February 01, 2012, the Union requested a list of arbitrators from the Bureau of Mediation Services, and Arbitrator Crump was selected by alternate strikes. The Union notified Arbitrator Crump of his selection.

III. Testimony Summaries

During the hearing, the Arbitrator received six joint exhibits. Two witnesses testified in support of the Employer's case, Hennepin County Sheriff's Lieutenant Chris Mathisen and Labor Relations Director William Peters. Two witnesses (including the Grievant) testified in support of the Union's case, Hennepin County Sheriff's Detention Deputy Wade Laszlo and MNPEA Executive Director Michael Golen. The testimonies of these witnesses are summarized below:

1. The Union called its first witness: Deputy Wade Laszlo testified that he was Chief Steward under the Teamsters, Local #320 during the time when the January 01, 2010 – December 31, 2011, CBA was negotiated, and he was present and participated in the negotiations process. (see JT EX #2) He was one the Stewards under MNPEA when the January 01, 2012 – December 31, 2013, CBA was negotiated, and he was present and participated in the negotiation process. (JT EX #1)
2. He testified further that on July 29, 2011, he was called in and given a counseling session for violating the Sheriff's Office new Sick Leave Policy ("Policy") for being absent from work more than 96 hours in a rolling 12 month period. (UN EX #3) The new Policy took affect June 01, 2011. (JT EX #3) But, what the County did was to run the employees sick leave time back a year to 2010. The County pulled up all Laszlo's sick leave time for the prior year before the policy took affect and place Laszlo on monitored sick leave for violating the Policy that didn't exist in that year.²
3. He testified further that he never had a negative sick leave balance. The County list that Laszlo had used 120 hours sick leave time in that year. He, further, testified that during that year his sick leave time was so high because he had kids in grade school and his wife went back to work full-time days in 2010. During his wife's first year back to work, she could stay at home, but she did not get paid sick leave.
4. He testified further that in prior years, if a kid was sick, his wife was a stay-at-home

² "That year" refers to the time period going backward from July 11, 2011 to July 23, 2010. (UN EX #3)

mom and he did not have to use any of his sick leave time. He further testified that in 2010 if one of his kids was sick, the parent who would stay home from the job would be the parent who got paid by the employer. That was the reason Laszlo had used more sick time than usual in that year.

5. He testified further that some of his time off for sick leave had prior approval. April 05, 2011, his son had a dental appointment that Laszlo had to take care of his son. May 13, 2011, his daughter had a doctor appointment that Laszlo had to take care of his daughter. He further testified that the period between March 4-9, 2011, the County was calling a patterned sick leave time because of those – VAC, SCK, OFF, OFF, SCK. His stepdaughter had been hit by a car a few years earlier. She had a traumatic brain injury and had to spend a week at Northwestern Hospital. The County let Laszlo use some of his vacation time mixed in with sick leave time. He would mix some vacation time in conjunction with sick leave time to avoid burning up too much sick leave time.

6. Laszlo testified further that April 3-5, 2011, -OFF, OFF, SCK- his son had a dental appointment and Laszlo had to take him to the hospital. July 8-11, 2011, - OFF, OFF, OFF, SCK-his son cut his hand and had to have nine (9) stitches in his hand. Laszlo had to take him to the hospital. Laszlo testified that every minute of that sick leave used was “contractual” to take care his family or himself. His sick leave times were approved before hand and then he only took two days of sick leave. He never violated the Policy or the CBA.

7. Laszlo testified further that he has had a bad disk in his back between “L4” and “L5” and the one time he use FMLA to treat his back problem, the treatment ended up costing him 3 days of sick leave time instead of one day.³ He testified that the Policy put a burden on him and other employees, when the CBA was not violated, by requiring employees to see a doctor, spend their money and use sick leave time.

8. Laszlo testified further that he never used three (3) consecutive days of sick leave time, under either the Policy or CBA.

9. He testified further that he was familiar with the CBA, and specifically, ARTICLE 13-SICK LEAVE, Section 5, that the Employer has the right to require that **“sick leave usage shall be subject to approval and verification by the Employer, who may after three (3)**

³ Laszlo testified under cross examination that he wasn't aware that employees can make FMLA requests after the fact and that prior sick leave usage that counts against the employee under the Policy can be corrected.

consecutive days absence require the employee to furnish a report from a recognized physical or mental authority attesting to the necessity of the leave, and other information the Employer deems necessary, as provide in the Article herein titled “Health and Safety,” (JT EX #1, Art. 13, § 5)

10. He testified further that since 1990, he has participated in almost every Union contract negotiations and the Employer had never come to the Union and said “we would like to implement a new sick leave policy.”

11. Laszlo testified further that the new Sick Leave Policy 4-1600 and updated Disciplinary Procedures Policy 4-800 came out June 01, 2011. (UN EXs #1, and #4) He further testified that some years ago, the Employer decided to purchased its policies from Lexipol,LLC, a private company that produced policies for law enforcement agencies. The new Sick Leave Policy came in as part of Lexipol that stated “64 hours in a rolling 12 month period.” The Employer changed the Sick Leave Policy to “96 hours in a rolling 12 month period.” Policy 1014, Sick Leave and Attendance Policy” was the Employer's official Lexipol Policy that came out in October 2011, after the current Sick Leave and Attendance Policy went into affect. (UN EX #2)

12. Laszlo testified further about the differences he saw between the CBA and Sick Leave Policy (the Policy). The CBA stated clearly what was an abuse of sick leave time, what you can and can't use for sick leave. The Policy stated what type of sick leave time could be use “contractual”, but, not how many hours of sick leave can be used. Under the Policy, all sick leave time used by Laszlo were 100% contractual. although Laszlo received a Counseling Session for abusing sick leave time under the Policy, Union Exhibit #3, he had never used three (3) consecutive days of sick leave time required to trigger a contract violation under the CBA. Under the Contract, Laszlo would not be required to see a Doctor for a sick leave note. He felt that the terms of the Policy violated the terms of the negotiated CBA.

13. Laszlo testified further that the Policy “looked retroactively” or backward to the prior year to find what appeared as abuses of sick leave time. Laszlo testified that the Employer should not give him consequences for violations of a Policy that did not exist during the period of the sick leave time.

14. Laszlo testified further that as part of the “retroactive look-back,” the Policy was used to

just (blanket) nail⁴ employees no matter what the reasons were for using the sick leave time exceeding 96 hours in a rolling 12 month period. The phrase “96 hours in a rolling 12 month period” was never negotiated with the Union. However, the phrase “ three (3) consecutive days” had been negotiated with the Union into the CBA.

15. Laszlo testified further that MNPEA, the Union that represents the Grievant, had open-up discussions regarding the “96 hours” grievance with Greg Failor during the first session of the current labor contract negotiations. Further, that MNPEA had raised, as a discussion item, the “96 hours” during both sessions of the labor contract negotiations.

16. Laszlo testified that during the second session, The Employer open-up discussions regarding the 160 hours family leave to use under the Contract. Then the Union open-up the 96 hours grievance.

17. Laszlo testified further that Mr Peters attended only the second session of the labor contract negotiations. Greg Failor was at the first session. That Mr. Olness was not present at those two (2) sessions of the labor contract negotiations.

18. Laszlo testified further that he is not aware of anything in the contract that stated a contract grievance can be trumped by bringing up the grievance at the labor contract negotiations.

19. Laszlo claimed that he burn-up two (2) sick days and incurred two (2) additional co-pays in violation of the contract. He considered these claims as issues for his damages.

20. Laszlo testified further regarding the “Chilling affect” that the new sick leave Policy had on employees. Article 13, § 1, of the Contract specifies “accrual rate,” that earned sick leave hours for employees to used when sick leave hours became available. There are no other restrictions under the Contract on when sick leave time can be used.

21. Laszlo believed, as Steward, by creating a rule that limits the use of sick leave hours (96 hours) within a given 12 month period has a “Chilling affect” on employees ability to use their sick leave time. Since the Policy went into affect, Laszlo had seen two employees with the initials “BW” and “JH” coming to work with fevers, one had a temperature of 102 degrees.

⁴ Other employees nailed by the 96 hours look-back: KC received days off for discipline; KL called in for counseling session but she was on maternity leave. As soon as Employer found out the counseling session was taken away; another employee’s last initial (H) was using fitness for health that push him over the magic number and he got called in. because he was using “fitness for health” he got that pulled by the Employer;

She showed up for work that night because she had the next day “off” and she was afraid if she missed the day before being “off” from work, she would be hit with a patterned sick leave time violation.

22. Laszlo testified further that other employees came to work sick because they were afraid if they missed work, they would be put on monitored sick leave time. He testified if you had the flu or a fever, you should stay home and recover before coming to work. That was the purpose of sick leave time. Don't come to work with the flu or a fever and spread a disease and infect co-workers and inmates, whom worked and lived within close quarters. He testified that The Policy definitely had a Chilling affect on the use of sick leave time because employees were afraid of being put on the radar.

23. Laszlo testified further that the Contract had no ceiling, such as the “96 hours,” on the amount of sick time that can be used.

24. Laszlo testified further that he said to Major Martin that he should not have to burn-up his statutory FMLA sick leave time under the Policy when his back was out. That treatment for his back was covered by his straight sick leave time under the Contract.

25. Laszlo testified further that he did not received any form of discipline for his grievance under Article 34, § 2 of the Contract. Laszlo stated that, under Article 34, § 5 of the Contract, if the Employer used the Policy to look backward one (1) year to determine the amount of sick leave used during period, that under the Contract such disciplinary taken would be given in an untimely manner.⁵

26. He testified further that the implementing of a countywide Policy that failed to look toward the specific conduct of the employee in question did not follow the language of the Policy “appear to be habitually using sick leave or using sick leave for inappropriate purpose” because it's a blanket statement that violated the terms of the Contract. (see last sentence of Article 13, § 5)

27. Laszlo testified further that he is concerned about his counseling session letter, which is maintained in the Division Personnel File, subjecting him to progressive discipline for future violations of the Policy. He considered his counseling session as a discipline because his supervisor(s) placed him on monitored sick leave for one (1) year for violation of the sick

⁵ However, Laszlo was not aware of anyone filing a grievance for being untimely.

leave Policy 4-1600, Sick Leave And Attendance. (JT EX #3 and UN EX #3)

28. The Union called its second witness Michael J. Golen, MNPEA Executive Director, (Golen) Golen described his history as a public employee that was employed by Hennepin County as a Juvenile Detention Corrections Officer from 1979 to 1996, the same job classification as Mr. Laszlo, except Mr. Golen worked with Juveniles at the Detention Center. While employed with Hennepin County, he became Chief Steward from 1981 until he left. After he left in 1996, he became an officer and business agent with the Teamsters, Local #320. He remained business agent with Local #320 up and until 1998, when Laszlo's Unit took over. Local #320 continued to represent Laszlo's Unit until 2011, when MNPEA started. Currently, he is a Board Member of MNPEA, Executive Director and serves as Business Agent for a vast amount of his time to different Units including Laszlo's Unit.

29. Golen testified that he is familiar with both the current and prior Contracts, JT EX #1, and #2, respectively. That the prior Contract was in affect when Laszlo filed his grievance. That both Contracts' language and content are identical and nothing has changed. That prior to MNPEA, Golen was unaware of the Employer ever asking the Union to negotiate for a sick leave policy that changed the sick leave caps and restrictions beyond what's in the Contract. JT EX #1, Article 13, §5.

30. Golen testified that he brought up the "96 hours rule" and the active grievance as a discussion item during the first round of negotiation. That during the second round of negotiation, the Employer brought up for the first time an item for discussion to implement a 160 hours cap for for families covered under the sick leave policies.

31. Golen testified that Employer issuance of a policy that unilaterally placed restrictions on benefits bargained for violated the terms of the Contract. That the existing language in Article 13 of the Contract is sufficiently clear and known to the Employer to have a valid mechanism for dealing with sick leave time.

The Employer called as its first witness Lieutenant Christopher A. Mathisen (Mathisen) with the Hennepin County Sheriff's Office. He currently serves as a Lieutenant in the Personnel and Internal Affairs for the last three years; before that he was a Sergeant for Patrol and Water Patrol; before that he worked as a Crime Lab. Tech; before that he worked as a Licensed Deputy for the Jail, Court Security, Water Patrol and the Civil Units for 14

years; and a Detention Deputy for 2 years.

32. Mathisen testified that what lead to enactment the 2011-Sick Leave and Attendance Policy were two-fold: first, sick leave usage was very high, especially in the jail, and with that goes a premium over-time costs being paid for sick leave usage, and secondly, morale among some employees who were continually being drafted to cover a shift in the jail at a cost of one-and-a half time the salary. Drafting in the Sheriff's Department occurred when someone called in sick and minimum staffing working failed below the "minimum staffing level,"⁶ and no one had volunteered to fill that over-time shift. The Employer, then drafted the next person in line from the drafting list to remain and work a four hour over-time shift. The Employer, also, drafted another person at home to come in and work a four-hour over-time shift, too.

33. Mathisen testified further that ER EX #1 is a graph that depicted the Sheriff's Office-Sick Leave Hours Used from 2010 to 2013. The red line represented the jail and the black line represented the total for all others in the Sheriff's Office. In 2010, there were 22 thousands to 23 thousands sick leave hours used. In 2011, after the Policy was enacted, there were approximately 16 thousands sick hours used. Since the Policy went into affect the staffing level remained even.

34. Mathisen testified further that minimum staffing levels are essential in every Unit of the Sheriff's Office for the management of Officers safety and security and the management of staff and inmates safety and security in the jail. The Patrol Units require a minimum standards of "two car limit" to back-up each other when patrolling in a far western suburban area. The standards for the jail is one deputy for every 25 inmates. The Sheriff's Office follows the Department of Corrections Standards and the Sheriff's Office own minimal Standards. Absenteeism is a problem in a minimum staffing facilities because the Sheriff's Office needs to maintain that deputy presence in order to have a safe and secured facilities.

35. Mathisen testified further that Lexipol is a web-based/data based system that the Employer went to in February 2012. the Employer wrote all of its policies used in the data based system. That each Employee gets a pass-word. In order to see new policies, they

⁶ the Sheriff's Office applies DOC's Standards and adopt some of Sheriff's Office Standards for jail and correction facilities. Since Hennepin County jail and correction facilities are accreditation facilities regulated by the DOC, It's important that the Sheriff's Office maintained it's accreditation and follow DOC Standards do everything possible to maintain that accreditation.

have to log-on to the system and review the new policies. Anytime the Employer put out an update, usually twice a year, the Employees log-on and review the policy, The Employees are responsible for knowing and understanding the contents of the entire new policy. (UN EX #2)

36. Mathisen testified further that Policy 4-1600 and Policy 1014 are essentially the same except when lexipol went live there was a glitch in the system. The 1014.3, Patterned Absenteeism stated 64-hours instead of 96 hours. Major Martin acknowledged the mistake and send out an email to all Employees changing it to 96 hours.

37. Mathisen testified further that Employees were told the Policy became affective June 01, 2011. Section 1 of the Policy talks about purpose and scope of the sick leave and attendance policy. The main purpose of the Policy states that attendance is an essential function of every job in the Sheriff's Offices, absenteeism reduces the efficiency of office's operations, costs the County and it's taxpayers money, and requires co-workers to do the work of absent colleagues.

38. Mathisen testified further that the main exclusion with Federal law is the FMLA Act. When any sick leave is used in conjunction with approved FMLA paper work, the sick leave will not count against the employee's running total of 96 hours in a rolling 12 month period.

39. Mathisen testified further that the Employer began its 12 month review immediately by looking- back at the employee's sick leave for the previous 12 months because it was the first opportunity for the Employer to have a formal talk with the Employee about the Employer's expectations. By giving counseling sessions early on in the process, the Employer could point out the fact that a Special Order regarding the new Policy went out by e-mail and a link to the new Policy went out by e-mail. Although the Employee was responsible for knowing and understanding the new Policy, the Employer wanted to make sure they did. Also, Employee was informed if this pattern of either high number of hours used or pattern of usage continued, discipline could come down the line.

40. Mathisen testified further that FMLA sick leaves are handled by Kathy Smith in the Personnel Office. If an employee or a family member was out sick a few times, employee can call Kathy Smith, apply for FMLA paper work, if it's a qualifying condition, get a doctor's note for the qualifying condition, and the Employer approved the sick leave time. Now Personnel knows you or a family member has been approved. The next time the Employee calls

Personnel and says he or his mother have another doctor's appointment next week, the sick leave time will be approved, no questions asked. The sick leave time will not be counted against the Employee's 96 hours total sick leave time. All others qualifying conditions are handled in exactly the same manner.

41. Mathisen testified further about the counseling session letter given to Laszlo. (UN EX #3) Employee Counseling is a form of coaching used by the Employer to lay-out its expectations of the Employees. to inform them that they are not meeting expectations and why the Employer believes that way. And, also, how the Employees are expected to change going forward

42. Mathisen testified further that Employee counseling is not considered discipline by the Sheriff's Office. Counseling is not a reprimand, oral or otherwise. Counseling letter placed in Employee's file is not considered discipline.

43. Mathisen testified further that the Attendance Policy applied to all 740 full-time Employees worked that morning at the Sheriff's Office and no Employee has filed a grievance for the action taken under the new Policy, except Laszlo. There are a total of five Unions representing all the Employees working at Hennepin County Sheriff's Office and none the other Unions have objected to the establishment of the new Policy.

44. Mathisen testified further that he is familiar with the new Contract and under his review of the Contract there is no language, which precludes the Employer from establishing reasonable policies. (JT EX #1)

45. Mathisen testified further that he prepared a Bar Graph of the Chronological Sessions of the Counseling Session given out in regards to the Attendance and Sick Leave Policy. The Bar Graph started out in July - 11 and went month by month to December – 13. The Bar Graph showed that 80% of the total coaching sessions that were given out occurred within the first six months of the Policy being enacted and 83% of coaching sessions that were given out to MNPEA members occurred within the first six months of the Policy being enacted. (ER EX #2)

46. Mathisen testified further that there were no counseling sessions given out after July 2013 because the Employer did not have any one out of compliance, and because of the new

State law, which was enacted in August of 2013, put the Employer in a holding pattern until the Employer can figure out what affect that the new Law will have on the Policy.

47. Mathisen testified further that he created a Chronological Summary of all Disciplines Administered since the Sick Leave and Attendance Policy was implemented. There were a total of 10 HCSO7 Employees disciplined for attendance under the new Policy. Seven of those Employees discipline resulted in oral reprimands and nothing more. No grievances were filed on any if the above disciplinary actions. (ER EX #3) 8

48. Mathisen testified further why Laszlo was impacted by the Policy because of his total time used for sick leave had exceeded twelve (12) days in a rolling 12 month period, and a patterned absenteeism was observed within that rolling 12 month period because 10 (days) of the 15 days⁹ were all used in conjunction with other days off.

49. Mathisen testified further that Patterned absenteeism was something the Sheriff's Office deal with forever. Back in 1993, when Mathisen started with Sheriff's Office, an employee would call-in every Saturday night sick. The Employer knew he was not sick every Saturday night. Employer recognized back then that the Employee had a patterned sick leave. That Employee was placed on,(if you would call), monitored sick leave. If that employee's called in again on Saturday night sick, he was required to bring in a doctor's note telling the Employer that he was actually sick.

50. Mathisen testified further how Laszlo was actually impacted by the new sick leave Policy in two ways. First, he received a counseling session, and second he had to get a doctor's note. Other options, the Employee has to use, are: (1) FMLA, if the Employee believes there is a qualifying conditions, apply and get it approved. Then the sick leave will not apply against his sick leave; and (2) the Employee's Assistance Program, if something substantial is going on in the Employee's life and the Employee needed some kind of resources, the Employer tried to provide those resources to the Employee.

51. Mathisen testified further that the last two sentences of Article 13, §5, - Sick Leave, in the Contract is essentially the language used to monitor sick leave usage as far back to 1984.

⁷ HCSO referenced the Hennepin County Sheriff's Office

⁸ The ER EX #3 was placed under seal by the Arbitrator and not shall not become a public document.

⁹ Or 66% of his days off were patterned with other forms of days off.

52. Mathisen testified further that after the counseling session with Laszlo, he has adhered to all expectations of the Policy and no further actions have been taken against Laszlo regarding his attendances. He had no further sick leave issues. The Policy worked.¹⁰

53. Mathisen finally testified that nowhere in Article 13, §5 that requires an Employee to fill-out FMLA paper work. That when an Employee use the 13th day of sick leave within a rolling 12 month period that employee will be deemed in violation of the 96 hours sick leave Policy. However, if the Employee had an approved qualifying condition under FMLA that allowed 480 hours of sick leave usage, plus the 96 hours of sick leave usage under the Policy in a rolling 12 month period, none of those sick leave hours-days would count against the total of 96 hours of sick leave usage in a rolling 12 month period under the Contract.

54. The Employer called William P. Peters (Peters), Director of Labor Relations. Peters testified that he has worked 34 years for Hennepin County and 13 years in the current position as Director of Labor Relations. He is personally responsible for negotiating many of the labor contracts they have around the Hennepin County and he supervises the efforts of others that negotiate labor contracts around the Hennepin County.

55 Peters testified further on the subjects regarding Employer Authority,¹¹ Article 6, and Complete Agreement and waiver of Bargaining, Article 24, in the current Contract. He pointed out that the relevance of those two Articles is axiomatic in Labor Relations to understand that Management has nearly unlimited rights to establish the terms and conditions of employment unless those terms and conditions are specifically modified or abridged by the Labor Contract.

56. Peters testified further that the Employer retains all of those rights in the Employer Authority clause to operate ... and perform any inherent managerial functions not specifically limited by the Agreement. Looking at this, the Employer has the right to establish a sick leave policy. The Employer has the right to establish any number of policies. And the Employer is not obligated to negotiate those things with the Union first. Employer's obligation is - to act and the Union reacts - to that situation and may look to limit the Employer's authority in

¹⁰ In his testimony, Laszlo alluded to a policy manual that contained over 200 policies that the Employer had implemented over the years. Mathisen testified that the Employer currently has over 400 policies. That 200 new policies were implemented in the last two years. Most of those policies are new ones or different ones that were not referenced, prohibited or allowed in this Contract.

¹¹ also referred to as Management Rights.

certain situations and instances. (JT EX #1, Article 6)

57. Peters testified further that in the Complete Agreement and Waiver of Bargaining the parties acknowledge that during the negotiations each had an unlimited right and opportunity to make requests and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that complete understanding and agreement arrived at by the parties after the exercise of that right and opportunity are set forth in this agreement. (JT EX #1, Article 24, § 2)

58. Peters testified further that the parties had a lot of discussion on whether during negotiations did the Employer or the Union raised the whole issue of the sick leave Policy. That the reality is no sick leave language came from those negotiations to this document. The Union position seems to believe that the Employer can't do anything unless the Employer negotiate the language. That the Employer's position is just the opposite and is axiomatic that the Employer retains an entire universe of rights unless abridged by the bargaining Contract.

59. Peters testified further that the Employer had a number of tools to manage sick leave. The authority to manage sick leave comes from the last sentence in Article 13, § 5. This language in Article 13, § 5, was mutually placed in this Agreement by the parties, who were signatories, to this Contract long before Mr. Peters' time. What the parties didn't do was to define the terms "habitually" and "inappropriate" in section 5 of the Contract. This is the monitored sick leave language in the Contract. The reason that Peters testified that nothing in the Contract precluded the Employer from establishing this Policy was because now, the Employer is defining "habitually" as more the 96 hours in a rolling 12 month period. Defining habitually is not an inappropriate thing to do nor is it something the Employer is precluded from doing. That establishing a sick leave policy having specific guidelines and objective standards that are appropriate for all Employees is better than having no guidelines for attendance.

60. Peters testified finally that this sick leave Policy is a benefit to all Employees. That 34 years ago, the original debated sick leave in the Contract was used for a short term disability plan. Sick leave was used when sick, but, also, was accumulated to bridge the gap between being sick and when one was eligible for long term disability. Sick leave was never design to be used like vacations.

IV. STATEMENT OF ISSUES

ISSUE 1. Did the Employer violate the collective bargaining agreement when it established an attendance policy by defining the terms “habitually” and “inappropriate” that are used in the existing language of Article 13, § 5 -Sick Leave and Attendance of the current CBA and held employees accountable to its terms, and if so, what is the appropriate remedy?

ISSUE 2. Did the Employer violate the collective bargaining agreement when it counseled the grievant and placed him on monitored sick leave consistent with the terms of the Sick Leave and Attendance Policy, and if so, what is the appropriate remedy?

V. ARBITRATOR AUTHORITY

The Arbitrator’s authority in this matter is mutually defined by the parties at Article 8, Section 3, Step 3 (page 10 of the CBA) which reads in relevant part:

“...the arbitrator shall not have the right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this agreement...”

More specifically, the Arbitrator is without authority to read into the agreement language which limits the Employer’s right to establish reasonable policies, rules, and procedures when such clear language has not been included in the CBA by the parties.

VI. RELEVANT CONTRACT PROVISIONS

ARTICLE 1—PREAMBLE AND PURPOSE OF AGREEMENT

Section 1. The EMPLOYER and the UNION, through this AGREEMENT, continue their dedication to the highest quality of public service. Both parties recognize this AGREEMENT as a pledge of this dedication. The parties recognize that this AGREEMENT is not intended to modify any of the authority vested in the County of Hennepin by the statutes and laws of the State of Minnesota.

ARTICLE 6—EMPLOYER AUTHORITY

Section 1. The EMPLOYER retains the right to operate and manage all facilities and equipment; to establish functions and programs; to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct and determine the number of personnel; to transfer personnel for just cause; to contract with vendors or others for goods and/or services so long as the act is performed in good faith, it represents a reasonable business decision and it does not subvert the agreement between the parties; and to perform any inherent managerial function not specifically limited by this AGREEMENT.

ARTICLE 13—SICK LEAVE

Section 5. An employee may utilize his/her allowance of sick leave on the basis of application therefor approved by the EMPLOYER for absences necessitated by inability to perform the duties of his/her position by reason of illness or injury, by necessity for acute medical care or dental care, or by exposure to contagious disease under circumstances in which the health of employees with whom he/she is associated or members of the public with whom he/she deals would be endangered by his/her attendance on duty, or by illness in his/her immediate family for such periods as his/her absence shall be necessary subject to certification by medical authority. The term "immediate family", shall be limited to spouse, children, a person residing in the employee's immediate household or parent where the parent has no other person to provide the necessary nursing and care and who is living in the household of the employee. Sick leave usage shall be subject to approval and verification by the EMPLOYER, who may after three (3) consecutive days absence require the employee to furnish a report from a recognized physical or mental authority attesting to the necessity of the leave, and other information the EMPLOYER deems necessary, as provided in the Article herein titled "Health and Safety." Employees who appear to be habitually using sick leave or using sick leave for inappropriate purposes may be required to submit such report for absences of less than three (3) days duration.

ARTICLE 24—COMPLETE AGREEMENT AND WAIVER OF BARGAINING

Section 2. The parties acknowledge that during the negotiations which resulted in this AGREEMENT, each had the unlimited right and opportunity to make request and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the complete understanding and agreements arrived at by the parties after

the exercise of that right and opportunity are set forth in this AGREEMENT.

VII. POSITION OF PARTIES

A. Position of Employer

In support of its position the Employer made the following assertions:

The case before the Arbitrator involves a grievance filed by Wade Laszlo, a civilian Detention Deputy who works in the Jail. The case also involves the Employer's right to establish, administer and hold employees accountable to a reasonable attendance policy. The Employer provided evidence and testimony to establish:

- Excessive absenteeism in the Sheriff's Office is not acceptable. This is especially true in the Jail, which runs at 98.7% of capacity
- Unplanned absences in the Jail are regularly filled by employees working premium overtime, costing the Employer and Hennepin County taxpayers needless expense
- In June 2011, the Sheriff's Office implemented a new Sick Leave and Attendance Policy in an effort to address problems of cost, staffing, and employee morale

The 2011 Policy is reasonable in its design and intent. When implemented, it began to meet the Sheriff's goals of reducing overtime costs and unplanned absences (ER EX 1) ¹, set clear expectations among all employees, created objective standards by which the Sheriff measures attendance, and established corrective actions that apply equally to all personnel. JT EX 3.

The Policy takes into consideration Family Medical Leave Act (FMLA) absences, as all such absences are forgiven. That is, only non-FMLA absences are considered under the Policy. Id.

Comparable attendance policies have been established in other County departments.²

¹The parties' joint exhibits are referenced in this document as JT EXs, the Employer's exhibits as ER EXs, and the Union's exhibits as UN EXs.

²On December 23, the Employer sent an e-mail to the Arbitrator (copying Union counsel), documenting the parties' agreement that Hennepin County could introduce separate Policy language on "sick leave and attendance" in its post-hearing brief. Specifically, we introduce ER EX 4 and ER EX 5 below. ER EX 4 is Policy 04-05 on "Unscheduled Leave" from the Juvenile Detention Center's (JDC), a division of the Department of Community Corrections and Rehabilitation. The Policy language from

The Policy does not violate the collective bargaining agreement (CBA). More specifically, the CBA in no way limits the Employer's right to establish reasonable attendance policies.

The Policy applies to and covers all union employees in the Sheriff's Office – employees represented by AFSCME, the Sheriff's Deputies Association, the Sheriff's Supervisors Association, the Teamsters General Services Unit, the Hennepin County Supervisors Association, and MNPEA. Non-organized employees are covered as well. All employees received notice of the new Policy on June 1, 2011.

MNPEA has raised issues related to the Policy in labor contract negotiations. However, to date, no changes have been agreed upon that would in any way provide employees any additional rights.

The long-established labor relations procedure for establishing or modifying terms and conditions of employment is collective bargaining – not the grievance procedure. MNPEA didn't like the Sheriff's 2011 Policy and was free to raise the issue in the parties' negotiations in the Fall of 2011. They did so, but achieved neither a change to the Policy nor any new employee rights, which bolsters the Employer's position that the CBA contains no limitations on its right to establish policy.

The most recent CBA between the County and MNPEA expired on December 31, 2013. MNPEA is now again free to raise the attendance Policy issue in negotiations. With this grievance, it is obvious that MNPEA seeks to achieve via the grievance/arbitration process what it has not or cannot achieve in collective bargaining. The Union should not be allowed two bites at the apple.

Since the new Policy has been in place, attendance in the Jail and throughout the Sheriff's Office has improved, with use of sick leave dropping by 17% in 2011. (ER EX 1)

The Employer notes that affective August 1, 2013 the State of Minnesota passed new legislation that changes the definition of immediate family members covered under sick leave policies and mandates that employees be allowed to use not less than 160 sick leave hours in the care of certain family members. Accordingly, until such time as the Employer can fully address implications of the new law, the Sheriff's Office is not administering the Policy.

the JDC is substantially similar to the language used at the jail. ER EX 5 accompanies the JDC Policy as its "Guidelines and Definitions."

However, the Policy was in full affect during the period of Mr. Laszlo's relevant absences and counseling.

B. Position of Union

In support of its position the Union made the following assertions:

Detention Deputy Laszlo is the Chief Steward for the Hennepin County Detention Deputies, and he has worked for the County since July of 1990. He was present at and participated in the negotiations of many contracts for this unit, and he participated in the negotiations of the CBA in question.

On June 1, 2011, the County issued Special Order #SO 11-14, advising unit members of the County's new policy 4-1600, Sick Leave and Attendance (the "Policy"). The County did not meet, negotiate, or confer with the Union over this Policy. The Policy refers to, among other things, the use of sick leave, monitoring sick leave usage, and discipline for excessive absenteeism. The County then looked back over the twelve months prior to the implementation of the Policy.

Between July 23, 2010 and July 11, 2011, the County identified that Laszlo had used 120 hours of Sick Leave over 15 dates (eight hours each), in excess of the 96-hours restriction in the Policy. In addition, the County identified that ten of those 15 occurrences were "patterned absenteeism." The County defines patterned absenteeism as, "being absent from work before or after holidays, vacations , or weekends (two or more scheduled days off)." There was no allegation that the Sick Leave requests were made for an improper purpose , nor was there any allegation that the requests were not properly made procedurally. As a result of either the 96-hour rule or the patterned absenteeism rule, the County gave Laszlo a Counseling

Session.⁶ The Counseling Session placed Laszlo on "monitored sick leave" for the following year, through June 30, 2012. Being on monitored sick leave meant that:

When any health condition necessitates your absence from work OR when your absence from work is necessary to care for a qualifying family member, you must return to work with a note signed by a physician or other health care provider and containing the following information: 1) That a health condition necessitated your absence from work.

⁶ Submitted as Union Exhibit #3
footnote (6) was the footnote number used in the Union's brief.

- 2) **The reason the health condition precluded your from reporting to work.**
- 3) **The specific time(s) and date(s) for which the health condition made you unable to work.**
- 4) **The note must be signed by a health care provider.**

Union Exhibit #3.

Within the following year, Laszlo experienced some back pain, and Laszlo called in sick.⁷ The monitored sick leave program required him to provide a doctor 's note, so Laszlo scheduled an appointment with his physician at the first opportunity, which happened to be on the third day after he first experienced the pain. After missing three days of work, he returned to work with his doctor's note.

From July 2011 to November 2013, the County gave 23 similar Counseling Sessions to other Union members.⁸ Each of these employees was also placed on monitored sick leave for their actions during the twelve months prior to the issuance of the Counseling Session. Nineteen of these Counseling Sessions included a look-back period that included some time prior to the issuance of the Policy in June, 2011.

The Union's position is that the CBA adequately covers Sick Leave, including the conditions under which a unit member can utilize this negotiated-for contract benefit. The CBA addresses both use and misuse of Sick Leave, and was negotiated with the previous County policies in mind. It occupies the field on this matter. The independent creation of the Policy by the County was a violation of the CBA as an improper attempt to further restrict use of the Sick Leave benefit. If the County desires to place further restrictions on the use of Sick Leave, it should bargain for them.

VIII. MEMORANDUM AND DISCUSSION

ISSUE 1. Did the Employer violate the collective bargaining agreement when it established an attendance policy, by defining terms “habitually” and “inappropriate”, that are used in existing

⁷Facts taken from Laszlo's

⁸Submitted as Employer Exhibit #2

language of Article 13, § 5 -Sick Leave and Attendance of the current CBA and held employees accountable to its terms, and if so, what is the appropriate remedy?

Creating a new sick leave policy

The Employer argued that at its core, this case highlights the Employer's ability to create and administer reasonable policies so long as they do not run afoul of existing labor contract language, and so long as they are not arbitrary or capricious.⁴

In 2011, the Sheriff's Office amended its Policy manual by creating its *Sick Leave and Attendance Policy*. JT EX 3. In doing so, it began to meet the Sheriff's goals of:

- (1) reducing overtime costs and unplanned absences,
- (2) setting clear expectations among all employees in the Office,
- (3) creating objective standards by which the Sheriff would measure sick leave usage, and
- (4) establishing corrective actions that apply equally to all employees.

Article 1, Section 1 of the CBA reminds us that the "AGREEMENT is not intended to modify any of the authority vested in the County of Hennepin by the statutes and laws of the State of Minnesota." JT EX 1.

Further, Article 24, Section 2 states that the parties "each had the unlimited right and opportunity to make requests and proposals with respect to any subject or matter not removed by law from any area of collective bargaining, and that the complete understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in the AGREEMENT." Id.

By the specific terms of Article 6, Section 1, "The EMPLOYER retains the right to... perform any inherent managerial function not specifically limited by this AGREEMENT." Id. As Hennepin County Labor Relations Director William Peters testified, this language is clear, concise, on point, and in tandem with the County's case. Unless limited by the contract (and so long as it acts in a reasonable manner), the County is at liberty to construct and implement policies that help it efficiently run its operations.

Minnesota's Public Employment Labor Relations Act (PELRA) also illustrates

⁴Louring & Louring. *How Arbitration Works, Seventh Edition*. Arlington, VA: Bloomberg BNA, 2012. Print. P 13-6

management's authority to act appropriately:

"A public employer is not required to meet and negotiate on matters of inherent managerial Policy. Matters of inherent managerial Policy include, but are not limited to, such areas of discretion or Policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, selection of personnel, and direction and the number of personnel."⁵

MNPEA suggests that the Employer's ability to create the 2011 *Sick Leave and Attendance Policy* is invalid; that the Employer is restricted to enforcing only the language in Article 13, Section 5. However, the language cited by the Union ("Sick leave usage shall be subject to approval and verification by the EMPLOYER, who may after three (3) consecutive days absence require the employee to furnish a report from a recognized physical or mental authority attesting to the necessity of the leave"), is neither compelling nor complete. This language merely gives the Employer the ability to require that an employee furnish a doctor's note after three consecutive days. Rather, it is the final sentence of this section (***"Employees who appear to be habitually using sick leave or using sick leave for inappropriate purposes may be required to submit such report for absences of less than three (3) days duration"***) that is germane. More to the point, it is the Policy that clarifies the language in this contract provision and documents the conditions under which it is administered. The Policy defines "habitual" (12 in 12) and "inappropriate" (patterned) so that all employees' absences are measured against a common standard.

Block states that, "The right of management to adopt reasonable rules and regulations not in conflict with the collective bargaining contract is too well settled to require discussion."⁶ In leaning on Block, the Employer is on solid ground.

Elkouri also has long provided authority for the Employer to work outside the bounds of the CBA:⁷

"A. Residual/Reserved Rights

"To illustrate the variations in arbitral statements recognizing the 'residual' or 'reserved' rights doctrine, we may note the following arbitrators comments:

⁵Minnesota Statute 179A.07, Subdivision 1 (2013)

⁶Block, p 95

⁷Elkouri & Elkouri, pp 13-5 through 13-7

“It is a well-recognized arbitral principle that the Collective Bargaining Agreement imposes limitation on the employer’s otherwise unfettered right to manage the enterprise. Except as expressly restricted by the Agreement, the employer retains the right of management. This is known as the Reserved Rights Doctrine; it lies at the foundation of modern arbitration practice.” Arbitrator C. Chester Brisco, in *Vacaville Unified Sch. Distr.*, 71 LA 1026, 1028

“Collective bargaining agreements, generally, are devised to establish and grant certain rights to employees, which rights they would not otherwise have under common law. It is also a normal and well recognized principle in the interpretation of such Agreements that the rights of management are limited and curtailed only to the degree to which it has yielded specified rights. The right of management to operate its business and control the working force may be specifically reserved in a labor agreement. However, even in the absence of such a specific reservations clause, as is the case here, those rights are inherent and are nevertheless reserved and maintained by it and its decisions with respect to the operations of the business and the direction of the working forces may not be denied, rejected, or curtailed unless the same are in clear violation of the terms of the contract, or may be clearly implied, or are so clearly arbitrary or capricious as to reflect an intent to derogate the relationship.” Arbitrator Lewis E. Solomon, in *Fairway Foods*, 44 LA 161”

“B. Inherent Rights

“In a number of cases, arbitrators have concluded that they have the power to identify ‘inherent rights’ of the employer.

“The traditional management view is that management ‘has reserved its right to manage unless it has limited its right by some specific provision of the labor agreement.’ In many cases, arbitrators have in fact spoken in terms of a specific contractual provision (containing either an express or implied limitation) as be contained in some specific provision of the agreement but may exist as ‘implied obligations’ or ‘implied limitations’ under some general provision of the agreement, such as the recognition clause, seniority provisions, or wage provisions.” Id. (Elkouri cites *Fairweather, American and Foreign Grievance Systems; Bethlehem Steel*, 30 LA 678; and *Wiggins, The Arbitration of Industrial Engineering Disputes*)

Its a universally accepted principle that the Employer has retained its inherent right to manage unless it has limited its right by some specific provision of the labor agreement. A review of the Contract did not reveal any language limiting or restricting the Employer's inherent managerial right to to unilaterally establish a Sick Leave and Attendance Policy. Employer has an inherent right to create a reasonable sick leave policy that is not arbitrary and capricious.

The Employer and the Union agree that Article 13, Section 5 grants the County the authority to approve and verify employees' sick leave usage. However, the Union erroneously suggests that only one circumstance (i.e., "after three (3) consecutive days absence") permits the Employer to require a doctor's note or otherwise enforce the provisions of this article. This language does not forever limit the Employer from establishing policies or rules to manage sick leave usage. The Sheriff's Office has administered this language since the inception of the contract but used – before the Policy – dissimilar standards throughout the Office.⁸ By the Union's logic, new policy language that seeks to establish sound criteria for measuring sick leave absences is not allowed. The Union is just wrong.

The Employer and the Union also agree that the relevant language in Article 13, Section 5 ("Employees who appear to be habitually using sick leave or using sick leave for inappropriate purposes...") is neither defined in the CBA nor uniformly well understood by either management or by employees. Without clarification as provided in the new Policy, employees, supervisors, and managers are left to their own devices to interpret these contract terms. As Block suggests, the question of where management should draw the "line of demarcation" between reasonable and excessive absences is frustrating for both parties.⁹ In creating and administering the Policy, the Sheriff's Office clarifies a discretionary provision by defining habitual and patterned. By establishing objective standards for sick leave absences and patterned absenteeism, the Employer outlines how it will specifically interpret otherwise unclear terms and eliminates confusion and bias to the benefit of all employees and management.

The Union wrongly suggests that creating and implementing the Policy has a "chilling affect" on employees' willingness to request sick leave, believing that doing so will lead to discipline. This argument ignores the fact that management approved sick leave and disciplined employees long before the advent of the new Policy. Creating and communicating a clear standard doesn't change management's obligation to approve sick leave or, when

⁸As Lieutenant Mathisen noted in his testimony, the Grievant "might have been" disciplined or counseled under the old policy.

⁹Block, p 84

required, to discipline. Instead of chilling employees' ability to use sick leave, the Employer believes that outlining a Policy that treats all employees equally (and obligates the Employer to explain the new Policy in a counseling session before any discipline) should quell employee anxiety. The Policy defines habitual use as 12 occurrences of sick leave (not counting Family Medical Leave Act absences) in a rolling 12-month period without risk of discipline. The Policy also clarifies patterned absenteeism as "being absent from work before or after holidays, vacations, or weekends." The Policy requires a counseling session (not discipline) be given prior to progressive discipline. It further requires the Employer explain FMLA opportunities under federal law that an employee might use in order to cancel previous sick leave occurrences under the Policy.¹⁰ The Employer also explains the Employee Assistance Program that might be useful to employees as they try and avoid future sick leave usage. Finally, employees have the opportunity to cleanse their attendance record by merely showing up for work as perfect attendance cleanses the rolling 12-month period.

The Employer has the right to establish a reasonable sick leave policy which is not arbitrary or capricious and benefited the affected employees and management. The Employer outlined above how it specifically interpreted otherwise unclear terms and eliminates confusion and bias to the benefit of all employees and management.

In a review of Elkouri's Sixth Edition in regards to management's ability to establish reasonable policy outside of the contract and also a brief review here Arbitrator Jacobs' award in United Brotherhood of Carpenters and goebel fixture Co., FMCS Case No, 060817-58898-7 (Jacobs, 2007) in circumstances similar to the instant case, where the stipulated issue was whether the new attendance Policy in question was reasonable.

Elkouri provided "rules governing attendance policies and how arbitrators have analyzed this very question":

"A number of companies have adopted no-fault attendance policies, which provide for discipline and discharge because of excessive absenteeism regardless of the reasons for the absences. Such policies are considered legitimate when implemented to improve and control the attendance of employees, especially where

¹⁰Mr. Laszlo acknowledged under cross examination that he isn't aware that employees can make FMLA requests after the fact and that prior sick leave usage that counts against the employee under the Policy can be corrected. The fact that the grievant didn't know this doesn't mean this option doesn't exist. All he had to do was ask his supervisor.

there has been excessive absenteeism.

“A no-fault attendance Policy allows the Company to terminate an employee automatically once they have been on leave or absent for a predetermined number of days.”

Arbitrator Jacobs clarifies in United Brotherhood that “there may well be a legitimate question of whether the just cause standard applies to somehow alter the strict provisions of a no-fault Policy to support disciplinary action in a particular case,” but that (as in this case) ‘just cause’ was not at issue.

Arbitrator Jacobs also extensively uses Block to frame four criteria used to determine reasonableness of no-fault policies.

The Sheriff's Office sick leave Policy also meets each of Block's four criteria.

Each of Block's criteria apply to the language in the sick leave Policy: 4-1600, UN EX #3 as follows:

The first criteria: A specific number of absences is allowed before discipline is imposed. The Policy allows (12) days (96 hours) of absences in a rolling 12 month period (habitual) for any reason not listed in exclusions below before discipline is imposed.

Second criteria: Certain types of absence are excused and are not counted against the employee. Those types of exclusions listed in “Policy 4-1605 Exclusions are industrial injury, jury duty, authorized leave, holiday, vacation, funeral, special leave without pay, administrative leave, union leave with prior notice that is approved by the office, workers comp-work related injuries, FMLA, other applicable State or Federal laws that guarantee time off from work, and disciplinary time off.

Third criteria : A full range of progressive discipline is employed for absences beyond a certain number. The penalties become more severe, from warnings to suspensions to discharge, for each successive absence. Article 34, § 2 of the Contract has those penalties that become more severe, from warnings to suspensions to discharge, for each successive absence.

Fourth criteria: The employee can ‘cleanse’ his record periodically by perfect attendance. Finally, employees have the opportunity to cleanse their attendance record by merely showing up for work as perfect attendance cleanses the rolling 12-month period.

The results of applying Block's four criteria to the Sheriff's sick leave Policy resolves the question of whether the Sheriff's Policy can meet the test of reasonableness, the standard used by a majority of arbitrators in analyzing and interpreting the use of no-fault plans.

The test of reasonableness of the Sheriff's sick leave Policy is supported by the Employer's purpose for establishing the sick leave Policy to curb "excessive absenteeism" in the jail. The sick leave Policy was promulgated to regulate or to further the Employer's legitimate interest in curbing excessive absenteeism to reduce overtime costs and unplanned absences, setting clear expectations among all employees in the Office, creating objective standards by which the Sheriff would measure sick leave usage, and establishing corrective actions that apply equally to all employees. The record demonstrated that the Employer had a legitimate interest in curbing excessive absenteeism to further the above goals, and since the sick leave Policy was implemented it actually worked in reaching its goals.

Jacobs continues to cite Block:

"Collective bargaining contracts permit management to establish 'reasonable' rules for employee conduct. Many companies exercise this right and promulgate rules to govern excessive absenteeism. Such rules can withstand union challenge because it cannot be seriously argued that companies do not have a legitimate interest in curbing 'excessive' absenteeism.

"Some companies go further. They introduce a no-fault plan which defines 'excessive' absence and triggers discipline automatically at fixed levels of absenteeism without regard to fault. The Union objects to the plan. The resulting dispute turns on the question of whether the plan can meet the test of reasonableness."¹¹

"They approach the problem from a highly pragmatic point of view. They stress the damage caused by absenteeism, the need for objective attendance standards and the actual experience under the plan. They have given considerable weight to proof by the Company that the plan has been reasonable in operation or to the absence of proof by the Union that the plan has worked a hardship in particular cases. This rationale is perhaps best summarized in the following works by Arbitrator James Duff: 'if a plan is fair on its face and its operation in the concrete cases at hand produces just results, and other common tests of reasonableness are satisfied a plan ought not to be

¹¹Id. at 14 (Jacobs cites Gershenfeld in Block)

declared invalid based on the mere existence of some remote possibility that it could operate perversely in the indefinite future under hypothetical circumstances which have not as yet materialized.”¹²

[Lieutenant Mathisen noted in his testimony that since June 2011 the Sheriff's Office has only 54 instances of coaching (no discipline necessary); and only ten instances of discipline, seven of which required no more than an oral reprimand. ER EX 2 and ER EX 3]

Employer in this case had a legitimate interest in curbing excessive absenteeism and the Policy met the test of reasonableness.

In addition, this sick leave and attendance Policy take into account that unforeseen events and illnesses happen to everyone and provide ample accommodation for such events. See, JT EX #3, Policy 4-1600. this Policy is fair on its face and its operation in the concrete case at hand produces just results, and other common tests of reasonableness are satisfied. Arbitrator James Duff wrote that a Policy ought not to be declared invalid based on the mere existence of some remote possibility that it could operate perversely in the indefinite future under hypothetical circumstances which have not as yet materialized. Id. (Arbitrator James Duff.)

The Employer also presented evidence that the Juvenile Detention Center (JDC), adopted in 2006, its “Unscheduled Leave” Policy (ER EX 4) and “Guidelines” (ER EX 5) which are nearly identical to the 2011 Sheriff's Office Policy. JDC is an institution of the County's Department of Community Corrections and Rehabilitation. This is significant as both the Jail and the JDC are 24x7 secured detention facilities that require minimum staffing levels. Each facility enacted a reasonable attendance policy to deal with overtime costs and staffing morale. The evidence from the actual operation of the Policies showed that their goals for the Policies were met without grievances being filed, except for the current grievance of Laszlo.

ISSUE 2. Did the Employer violate the collective bargaining agreement when It counseled the grievant and placed him on monitored sick leave consistent with the terms of the Sick Leave and Attendance Policy, and if so, what is the appropriate

¹²Id. at 15 (Jacobs cites Robertshaw Controls Co., 69 LA 77)

remedy?

THE GRIEVANCE

The Employer stated that the Grievant's requested remedies are (1) to be removed from "monitored sick leave status" and (2) to have the counseling letter removed from his file. JT EX 4. Neither of the Grievant's requested remedies is available.

First, Mr. Laszlo requests to be removed from 'monitored sick leave status,' to which he was assigned as a result of [1] exceeding 12 days of sick leave within a 12-month time period (habitual use) and [2] using sick leave defined as patterned absenteeism (2/3 of Mr. Laszlo's absences occurred in conjunction with off days). UN EX 3. However, the Grievant himself has rendered this remedy null and void as his use of sick leave since his counseling session is acceptable under the Policy. This part of the grievance is moot. The Employer does not have the ability to address this part of the Grievant's complaint, as Mr. Laszlo is not and has not for some time been on 'monitored sick leave.'

Second, Mr. Laszlo requests that the Employer remove his counseling letter from his file. However, there is no provision in the contract that addresses this request. Article 34 provides an avenue to remove written reprimands from an employee's personnel record but, because Article 34 addresses discipline (not counseling letters), this provision is not relevant. During testimony, both the Employer and the Union agreed that Mr. Laszlo's counseling letter is not discipline, making both the requested remedy and the means of delivering it meaningless.

In response to the Employer's point that only one Sheriff's Office employee has grieved the Policy, the Union suggests that many employees await the result of this case. This may be true, but a group of employees awaiting a decision is not the same as a class of employees named as grievants. Although there are dozens of employees who've been directly impacted by the Policy (many of whom belong to MNPEA), the sole grievant in this case is Mr. Laszlo¹³, whose documented remedial requests have no grounds. **Article 8, Section 3 indicates that:**

"The arbitrator shall consider and decide only the specific issue(s) submitted, in writing, by the EMPLOYER and the employee-UNION, and shall have no authority

¹³JT EX 4

to make a decision on any other issue(s) not so submitted.”¹⁴

The Employer further stated that It is common in arbitration cases involving employee absences that the grieving party makes a claim about excused or unexcused absences. In this case, Mr. Laszlo makes no claim that any of his absences should fall under the protection afforded by the FMLA; or that any of his absences should not count against him under auspices of the Policy. While Mr. Laszlo accurately stated that he “had not one minute of unapproved absences,”¹⁵ this point isn’t relevant. That Mr. Laszlo’s sick leave absences were approved means only that he received pay for such time; that is, the term “approved” means only that the payroll system recognized the hours and paid the Grievant for same. For purposes of the case before us, it is relevant only that Mr. Laszlo’s sick leave absences exceeded the bounds of the Policy, as appropriately determined by the Employer.

The Employer further stated that the Grievant and Union make four further arguments about Mr. Laszlo’s use of sick leave: first, that Mr. Laszlo’s sick leave balance never “dropped to zero;” second, that no sick leave was misused; third, that employees earn a prescribed amount of sick leave according to the CBA; and fourth, that the Policy looked back 12 months. We address each in turn:

Again, while the statement regarding Mr. Laszlo’s sick leave balance is accurate, it is not germane to the question before us. The issue of Mr. Laszlo’s sick leave balance was never in dispute and was not part of the counseling session he received.

While it is also true that Mr. Laszlo misused no sick leave time, he did use sick leave in a habitual and patterned manner that resulted in unnecessary premium overtime costs. Neither the Policy nor the Grievant’s counseling letter nor any discipline meted out to any Sheriff’s Office employee was based on misuse. The Policy doesn’t seek to track misused sick leave but speaks to excessive use of sick leave in a defined time frame or to an employee’s patterned absenteeism.

Neither the Policy itself nor its implementation reduces the amount of sick leave time an employee earns under terms of the contract. The Policy outlines and communicates a rule

¹⁴JT EX 1, p 9

¹⁵Testimony of Detention Deputy Wade Laszlo

the Employer needs to efficiently run its operations by making uniform the standards under which all employees' sick leave use is evaluated.

Finally, the Union objected to the fact that the Employer went back 12 months from June 2011 in issuing counseling letters. As emphasized by Employer witness Lieutenant Mathisen, in looking back 12 months from June 1, 2011, the Employer's aim was to simply counsel – to provide information about the Policy so that employees could immediately compare their usage and address their attendance issues.

IX. FINDING OF FACTS AND CONCLUSION OF LAW

1. Under Article 6 of the Collective Bargaining Agreement (“CBA” or “Contract”), the Employer retained the inherent authority to establish a reasonable a Sick Leave and Attendance Policy that was not specifically limited by the Contract. A review of the Contract did not reveal any language that limited the Employer's right to create a reasonable Sick Leave and Attendance Policy. The Employer did not violate the CBA by unilaterally creating a Sick Leave and Attendance Policy.
2. The Employer has a legitimate interest in establishing a reasonable sick leave Policy to govern excessive absenteeism in the Sheriff's Office and especially in the Jail to reduce overtime costs and unplanned absences, setting clear expectations among all employees in the Office, creating objective standards by which the Sheriff would measure sick leave usage, and establishing corrective actions that apply equally to all employees. This Policy met the test of reasonableness. Establishing the Sick Leave and Attendance Policy did not violate the CBA.
3. The Employer held employees accountable to the terms of the Sick Leave and Attendance Policy did not violate the CBA. The terms of the Policy outlines and communicates a rule the Employer needs to efficiently run its operations by making uniform the standards under which all employees' sick leave use is evaluated.
4. The Counseling Session with Laszlo was used within the bounds of the CBA and the

Law. Laszlo's counseling session was not a discipline list in Article 34 of the CBA.

This Grievance became moot because Laszlo's sick leave time is acceptable under the Policy and the counseling session is not a discipline. the counseling session did not violate the CBA, Policy or Law.

X. AWARD

After study of the testimony and other evidence produced at the hearing, on the arguments of the parties (in post-hearing written briefs), on that evidence in support of their respective positions, and on the basis of the above discussion, summary of the testimony, analysis and conclusions, I make the following award:

1. The Employer established a reasonable attendance policy;
2. The Counseling the Grievant was within the bounds of the CBA and the Law; and
3. The Union Grievance is DENIED in full as set forth herein.

Dated: March 10, 2014

Harry S. Crump

Harry S. Crump, Arbitrator