

IN THE MATTER OF THE ARBITRATION BETWEEN

THE OFFICE AND PROFESSIONAL)	FEDERAL MEDIATION AND
EMPLOYEES INTERNATIONAL)	CONCILIATION SERVICE
UNION, LOCAL 12,)	CASE NO. 14-52876
)	
)	
Union,)	
)	
and)	
)	
GROUP HEALTH, INC.,)	
AN AFFILIATE OF)	
HEALTH PARTNERS, INC.,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

For the Union:

Joseph J. LeBlanc
LeBlanc Law & Mediation, LLC
Attorneys at Law
Suite 1600
222 South Ninth Street
Minneapolis, MN 55402

For the Employer:

Penelope J. Phillips
and Meggen E. Lindsay
Felhaber Larson
Attorneys at Law
Suite 2200
220 South Sixth Street
Minneapolis, MN 55402-4504

On June 17, 2014, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance states that it is a "class-action" grievance and does not identify a particular grievant for whose benefit it was initiated. The focus of the Union's evidence, however, relates to the Employer's action toward

Brenda J. Westlind. Accordingly, I refer to her as the grievant, and I refer by name to several other employees about whom the Union alleges similar treatment.

The grievance alleges that the Employer violated the labor agreement between the parties by requiring the grievant and others to use two kinds of leave concurrently rather than separately. Post-hearing written argument was received by the arbitrator on August 2, 2014, and, by request, was supplemented on October 27, 2014.

FACTS

The Employer is Group Health, Inc., an affiliate of HealthPartners, Inc. Together, they operate clinics and hospitals throughout the United States and employ over 22,500 employees. The Union is the collective bargaining representative of employees of the Employer who work in many classifications, such as Accounts Payable Clerk, Medical Office Assistant and Pharmacy Technician. The grievant is employed by the Employer as a Pharmacy Technician II at the Employer's Wabasha Clinic in St. Paul, Minnesota.

Relevant parts of Sections 10.05 and 10.06 of the parties' labor agreement are set out below:

Section 10.05. Parenting Leave.

A. Eligibility. To be eligible for parenting leave, an Employee must have completed his/her probationary period prior to the commencement of the leave.

B. Granting. Upon written request, a leave of absence shall be granted to an Employee in connection with either the birth of a child or child adoption. Such leave shall be granted for the requested time up to four (4) months, including the medical portion of the leave for a newborn.

C. Use of Paid Time. The Employee may use accrued sick leave for that portion of the leave for the birth of a newborn that is considered a disability. (Typically six (6) weeks for a normal delivery or eight (8) weeks for a Caesarean delivery.) If the period of disability is longer than six (6)/eight (8) weeks because of health complications, additional accumulated sick leave may be used upon receipt of a physician's statement. The Employee may choose to use accumulated personal holiday and vacation time during the leave.

On-call employees shall be eligible

The number of vacation and personal holiday hours selected will be paid out at the rate of 37.5 hours per work week for consecutive pay periods until exhausted. Employees must designate the number of hours to be paid at the beginning of their parenting leave.

D. Return to Work. Employees on an approved parenting leave

E. Partial Leave. Subject to the approval of the Employer,

F. Failure to Return From Leave. Employees who do not return to work

Section 10.06. Family Medical Leave. The Employer agrees to comply with the Family Medical Leave Act and the Employer's FMLA Policy. Eligible Employees are entitled to up to twelve (12) weeks of FMLA in a twelve (12) month period, as defined from January 1 through December 31. All compensated hours shall be used in calculating the one thousand two hundred fifty (1,250) hours for eligibility. An Employee's Workers Compensation hours shall not count toward his/her FMLA entitlement.

Article 10 of the labor agreement also establishes several other kinds of leave -- unpaid Medical Leave for extended medical disability (Section 10.03), unpaid Personal Leave, with approval of the Employer (Section 10.04), unpaid Military Leave (Section 10.07), unpaid Union Business Leave (Section 10.08), unpaid School Conference Leave (Section 10.10), and Voting Time Leave (paid) (Section 10.11). While on most of the leaves listed as unpaid, the employee may elect to be paid by using accrued paid time off such as vacation days and personal holidays or, when

appropriate, by using paid Sick Leave (established in Article 8 of the labor agreement) for absences caused by illness or injury.

In November of 2012, the grievant gave her supervisor the following handwritten note:

This is my written request per the union, for maternity leave. My due date is 6/3/13, but plan to work till the baby comes. Also letting you know I will be taking the full amount granted, which is 4 months, (16 weeks). I would be back Monday 9/23/2013. Sooner depending on when I go into labor.

On November 13, 2012, Dorie Thomas, Leave Management Supervisor in the Employer's Worksite Health Department, sent a letter to the grievant, apparently in response to the grievant's note. Excerpts from that letter are set out below:

You notified Worksite Health or your leader of your need to take FMLA due to the birth of your child. It is assumed that you may need intermittent FMLA for routine pre-natal visits prior to the birth. . .

This is to inform you that your request for FMLA is approved. You have the right to up to 12 weeks of unpaid FMLA leave in a 12 month period calculated as January through December. Any FMLA time taken for this condition will be counted against your annual FMLA entitlement. . . .

During the first months of 2013, before the birth of her child in late May, the grievant used FMLA Leave for several purposes -- some related to her pre-natal care, some related to her request for a reduced work schedule during late pregnancy and some related to other serious health conditions, including disability caused by migraine headaches. Several times during these months, Thomas of Worksite Health sent the grievant notices informing her of the approval of these uses of FMLA Leave. Some of these notices informed the grievant of her

remaining balance of FMLA Leave, and some of them informed her that "you will be required to use sick leave or Doctor Time, if applicable, for FMLA absences" and that "when sick leave is exhausted, you may choose to use accrued vacation and personal holiday or unpaid time for your FMLA absences pursuant to the Collective Bargaining Agreement." The grievant gave birth on May 27, 2013. On that date, she had used 217 hours of her 480 hour FMLA Leave entitlement for calendar year 2013.

On July 16, 2013, Thomas sent the grievant the following letter:

As of July 11, 2013, you exhausted the 12 weeks of FMLA protection that was available to you for the current calendar year. At this time, you should contact your leader to discuss your options for returning to work or staying out on a non-FMLA protected leave. If you have any questions about this notice, please contact your leader.

The grievant returned to work on September 9, 2013. The Employer treated her absence from the time just before her May delivery until her return to work on September 9 as covered by Parenting Leave. The Employer also treated that time as FMLA Leave, until July 11, 2013, when, by the Employer's calculation, her twelve weeks of FMLA Leave for 2013 had been exhausted.

On November 12, 2013, the grievant was absent because of a serious health condition and requested FMLA Leave. On November 13, 2013, Thomas sent her a letter denying her request, stating that she was ineligible because "you exhausted the 12 weeks of FMLA protection that was available to you for the current 2013 calendar year in July 2013." The grievant was not disciplined for being absent on November 12, 2013.

On October 23, 2013, the Union initiated this class-action grievance. Because the written grievance is dated before the denial of the grievant's request for FMLA Leave covering her absence on November 12, 2013, I assume that a similar denial of FMLA Leave either to the grievant or another employee preceded the date of the grievance and caused the Union to grieve.

The primary allegation made by the grievance is that Parenting Leave and FMLA Leave are separate benefits and should not be treated as running concurrently, thereby diminishing the total leave time available to the grievant. The Union's position is that, during the months the grievant was on Parenting Leave, the Employer should not have charged her with the simultaneous use of FMLA Leave, a separate benefit.

The following letter from Jerry Jones, Human Resources Compliance Consultant for the Employer, to Lance Lindeman, then a Business Representative for the Union, summarizes the arguments made by both parties during grievance processing at a second step meeting held on December 2, 2013:

The Union contended that Management's practice of having FMLA and Parenting leave run concurrently is in violation of the Collective Bargaining Agreement as well as the FMLA regulations. Specifically, the Union argued the following:

- FMLA and Parenting Leave are separate benefits under the Collective Bargaining Agreement; therefore, they should not run concurrently.
- The Parenting Leave language was part of the Collective Bargaining Agreement when the FMLA Leave language was added. Therefore, at that time, Management should have bargained with the Union that they would run concurrently.
- By having the FMLA and Parenting Leave run jointly less senior employees are receiving more of a benefit than more senior employees.

- The FMLA regulations state that the rights established under the act may not diminish any rights established under a Collective Bargaining Agreement. Having the FMLA and Parenting Leave run concurrently is in violation of the regulations because it diminishes the employees' right under the Collective Bargaining Agreement.

Management is not in agreement with the Union's position that FMLA and Parenting Leave should not be run concurrently. It is Management's position that the FMLA regulations allow them to have an employee's FMLA time and other leave benefits run concurrently.

Management agrees that the Parenting Leave language and the FMLA language are separate sections within the Leave of Absence Article in the Collective Bargaining Agreement. However, they do not agree that it means that the Parenting Leave and FMLA cannot run concurrently. In addition, Management does not agree with the Union's position that the parties should have bargained having the Parenting Leave and FMLA run concurrently.

Management would also agree that there are times when a less senior employee may appear to get more time off than a more senior employee. However, it is Management's position that the language in the Collective Bargaining Agreement is being followed.

It is Management's position that the FMLA regulations state an employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. The Parenting Leave allows for an employee to take up to 16 weeks of leave while FMLA gives the employee 12 weeks of leave. An employee is eligible for the Parenting Leave after completing their probationary period, but the FMLA requires the employee to work for 12 months before they are eligible. Therefore, the employees' rights are not being diminished by having the Parenting Leave and FMLA run concurrently.

The evidence shows that for many years the Employer has treated absences that qualify for health related leaves established by the labor agreement (Parenting Leave, Disability Leaves, Workers Compensation Leave and sometimes Military Leave) as also qualifying for FMLA Leave if the cause of the absence meets the qualifying standard for FMLA Leave -- that the employee

(or a related individual) has a "serious health condition." When the reason for an absence qualifies it for FMLA Leave as well as another kind of leave, the Employer has considered the two kinds of leave as running concurrently and has treated such an absence as reducing both kinds of leave. The evidence shows that the Family Medical Leave Act (hereafter, "the Act," when I am referring to the statute itself), defines absences related to pre-natal care, to birth, to post-natal infant care and to adoption, as absences caused by a "serious health condition," thus qualifying such absences for FMLA Leave.

Thomas testified as follows. She searched the Employer's computer records, which for this search begin on January 1, 2009, and found that between January 1, 2009, and April 22, 2014, 107 members of the Union who took Parenting Leave were also eligible for FMLA Leave. All of them were charged with concurrent use of both kinds of leave. The Employer presented a computer generated list of those employees (Exhibit 19). Other evidence shows that the Employer has followed this practice for many years before January 1, 2009.

Jones testified that the concurrent charge for the use of both kinds of leave conforms to the Employer's FMLA Policy (sometimes hereafter, the "Policy") and that all employees, whether members of the Union or not, are treated the same. Jones also testified that upon his review of Exhibit 19 he found the names of two or three Union Stewards who had been charged with concurrent use of Parenting Leave and FMLA Leave. Until the present grievance, the Union has not grieved that practice.

Lindeman, now the Union's Business Manager, testified that women make up eighty percent of the Union's membership and that the concurrent running of Parenting Leave with FMLA Leave can, as in the grievant's case, make FMLA Leave unavailable to an employee returning from Parenting Leave. He testified that, although the grievant was not disciplined for her absence on November 12, 2013, the Employer might have decided to discipline her and might decide to discipline others who, after returning from Parenting Leave, are considered as having exhausted FMLA Leave because the Employer charges them with the concurrent use of FMLA Leave. Lindeman also testified that, when Section 10.06 of the labor agreement was first adopted, the parties did not discuss whether FMLA Leave should run concurrently with Parenting Leave or other health related leaves.

DECISION

The primary issue presented -- one that I may sometimes refer to as the "Concurrent Use Issue" -- is an issue of contract interpretation:

Whether Sections 10.05 and 10.06 or other provisions of the labor agreement prohibit the Employer from charging an employee who takes Parenting Leave with the concurrent use of FMLA Leave.

The Union argues that Parenting Leave and FMLA Leave are separate benefits, indicated as such by their placement in separate sections of the labor agreement. The Union urges that, because the two leaves are separately provided for, the Employer should treat them as running separately and not concurrently. In addition, the Union argues that, without language in the

agreement, expressly stating that the two leaves are to run concurrently, they should be administered to allow an employee to take them separately.

The Employer concedes that the labor agreement does not have express language stating that the two leaves are to run concurrently, but it points out also that there is no express language stating that the leaves are to run separately. The Employer rejects the Union's argument that the separate reference to the two leaves in different sections of the labor agreement shows an intention that they run separately. The Employer argues that Section 10.06 does not create a newly negotiated benefit and that, rather, the section is merely a recitation that the Employer will comply with the Act. The Employer argues that it has complied with the Act when it has charged the grievant and other employees who are on Parenting Leave with the concurrent use of FMLA Leave.

I make the following rulings. The parties' bargain about FMLA Leave must be found from the relevant language of the contract, primarily Sections 10.05 and Section 10.06. To receive Parenting Leave, Section 10.05(A) requires the employee's completion of probation, and Section 10.05(B) requires the employee to make a written request for the leave "in connection with either the birth of a child or child adoption."

Section 10.06 does not expressly define eligibility for FMLA Leave in its text (except to state one minimum requirement -- having worked for 1,250 hours). Instead, Section 10.06 refers to two other sources to state the parties' bargain -- that the

Employer will "comply with the Family Medical Leave Act and the Employer's FMLA Policy." I agree with the Employer that Section 10.06 does not create FMLA Leave, as a negotiated benefit. The Employer's obligation to provide FMLA Leave exists by force of the Act itself, an obligation that would exist even if Section 10.06 did not appear in the labor agreement.

The Employer's FMLA Policy (the "Policy"), first adopted in 2000, was last amended in 2010. It does not state expressly that FMLA Leave is to run concurrent with or separate from Parenting Leave or other health related leaves. The Policy does state, however, that the Employer's administration of FMLA Leave will conform to the Act.

Because Section 10.06 and the Policy state the parties' agreement that the Employer will "comply with" the Act, thus recognizing that statutory obligation, I look to the Act and its regulations to determine the Concurrent Use Issue, and, because Section 10.06 is merely a recitation that the Employer will comply with the Act, I give no weight to a possible inference derived only from the placement of references to the two leaves in separate contract sections.

The Employer makes the following arguments about what the Act requires. An employer is obligated by the Act to provide up to twelve weeks of FMLA Leave per year to an eligible employee who is absent because of a "serious health condition" of the employee or a related individual, defined in the Act. When such an absence occurs, the Act also requires an employer to give the employee written notice that the absence qualifies for FMLA

Leave and has been counted as such. When an absence meets the qualifying standards for FMLA Leave, the Act requires the employer to provide the employee with FMLA Leave, even if the employee requests otherwise. The Employer argues that, in the present case, when the grievant asked for Parenting Leave, that request itself informed the Employer that her absence would be caused by a "serious health condition," thus triggering its obligation to provide her with FMLA Leave and to give her written notice that it was doing so.

The Employer notes that it has always been its practice to treat FMLA Leave as running concurrently with Parenting Leave and with other leaves that are based on a serious health condition, and the Employer presented testimony that it is standard practice for government and non-government employers also to do so.

In its post-hearing brief, the Employer cites authorities in support of its position. The Employer cites the following passage from federal FMLA regulations, 29 CFR 825.300(d):

The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee. . . . When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification) the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. [My underlining.]

This provision can be read in two ways. The underlined passage -- that the employer "must notify the employee whether the leave will be designated and will be counted as FMLA leave" may refer to the possibility that the information gathered is

either sufficient or insufficient to conclude that the absence is FMLA-qualifying. Alternatively, the passage can be read to indicate that an employer has a statutory right to count all FMLA-qualifying leave as FMLA Leave, but need not do so.

Even if this regulation is not given the interpretation the Employer has proposed (that an employer is required to treat all absences based on FMLA-qualifying causes as FMLA Leave), the other available reading (that an employer has the right to do so, but need not do so) is consistent with the Employer's action in the grievant's case and with its previous practice of charging concurrent use of the two kinds of leave. Indeed, the Employer cites the following passage from a 1997 letter issued by the Wage and Hour Division of the Department of Labor (<http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-91.htm>), (hereafter, the "WAH 1997 Letter") as confirmation that, under the Act, an employer can charge concurrent use of FMLA Leave with another leave taken for a "serious health condition":

Leave granted under circumstances that qualify as FMLA leave can be counted against the 12-week entitlement so long as the employee is FMLA-eligible and is notified in writing that the leave is designated as FMLA leave. (See 29 CFR 825.208.) Employers are permitted to designate paid sick leave as FMLA leave and offset the maximum entitlements under the employer's more generous policies to the extent that the leave qualifies as FMLA leave. (See 29 CFR 825.700 and 825.207.) Leave granted for reasons not covered by FMLA, however, cannot be counted against FMLA's 12-week entitlement.

Thus, the regulation quoted above and the WAH 1997 Letter show that the Act allows an employer to charge FMLA Leave concurrently with the use of another kind of leave taken for a "serious health condition."

The Union argues as follows. Notwithstanding this reading of the Act, the parties' labor agreement should be interpreted not to permit the Employer the option of charging concurrent use of FMLA Leave with a leave taken for a "serious health condition." The Union urges that a provision of the Policy, which I refer to as the "No Loss of Benefits" provision, states that "use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave" and that this provision of the Policy states a requirement of the Act itself. The Union argues that charging concurrent use of FMLA Leave and Parenting leave violates the "No Loss of Benefits" requirement of the Policy and the Act -- by reducing the total leave time that would be available to an employee if FMLA Leave (12 weeks) and Parenting Leave (4 months) were counted separately.

The Employer concedes that Parenting Leave is an "employment benefit" that accrued prior to the start of FMLA Leave, but the Employer argues that, as in the grievant's case, a concurrent charge of FMLA Leave with Parenting Leave still allows those using Parenting Leave the full 4 months of Parenting Leave and thus does not result in the loss of that previously accrued employment benefit.

As I interpret the No Loss of Benefits provision of the Policy (and its corresponding prohibition in the Act), it protects against reduction of a leave taken for a "serious health condition" (Parenting Leave in the present example), requiring that such a leave not be reduced because of the existence of FMLA Leave. Here, because the grievant was allowed four

months of Parenting Leave (as does the Employer's practice with respect to others taking Parenting Leave), the No Loss of Benefits provision does not apply.

The Union also makes the following argument. Even if, arguendo, the Employer is entitled by the Act to charge use of FMLA Leave concurrently with Parenting leave, the Employer had discretion not to do so under the Act. In its post-hearing brief, the Union cites the following quotation from "The FMLA Handbook," a Minnesota Continuing Legal Education publication:

The National Labor Relations Act requires employers and the employee representative of a unionized workforce to bargain in good faith over certain mandatory subjects, including subjects related to family and medical leave. Any aspect of the FMLA that allows the employer any discretion is a mandatory bargaining subject and must be specifically negotiated with the union. See Murphy Oil, 286 N.L.R.B. 1039 (1987).

The Union argues that the Employer had discretion not to charge the grievant with the concurrent use of FMLA Leave when she took Parenting Leave and that, because the Employer could have declined to do so, it had a duty to bargain about the subject.

I rule as follows. As shown by the regulation cited above and by the WAH 1997 letter, the Act provides that an employer, even if not required to treat FMLA Leave as running concurrently with other leaves caused by a serious health condition, at least has a statutory right to do so. Because that right is established by the Act itself, an employer has no affirmative duty to raise the subject in bargaining. Though it is possible that an employer may agree in bargaining to waive

any statutory right, that possibility does not impose a duty to bargain about such a waiver, nor does that possibility create a duty to refrain from implementing the right unless the employer has proposed bargaining on the subject.

The Union presented evidence relating to three other employees who had taken Parenting Leave. Jamie Nelson requested and received Parenting Leave to begin on June 14, 2014. Because she had not worked for the Employer for 1,250 hours, she was not eligible for FMLA Leave and was not charged with the concurrent use of FMLA Leave as she took her Parenting Leave. The Union argues that more senior employees who take Parenting Leave -- those who have worked for the Employer for 1,250 hours and are thus eligible for FMLA Leave and are charged with its concurrent use -- receive a lesser benefit than junior employees such as Nelson. I rule that, because all employees are subject to the same FMLA eligibility requirement, any difference in the benefit received by a new employee is not discriminatory, but is one caused by the time the employee conceives or adopts and thus becomes entitled to Parenting Leave.

The Union also argues that the Employer should have honored express requests made by two other employees, Jennifer Dahlberg and Naomi Valli, that their FMLA Leave not run concurrently with their Parenting Leave. I rule that, notwithstanding an employee's express request that FMLA Leave, run separately from Parenting Leave, the Employer, by running them concurrently, is in compliance with the Act and did not violate the labor agreement.

AWARD

The grievance is denied.

November 3, 2014



Thomas P. Gallagher, Arbitrator