

IN THE MATTER OF ARBITRATION BETWEEN

AFSCME, COUNCIL 5)	ARBITRATION
)	AWARD
)	
)	
and)	KLEVAN PAY
)	GRIEVANCE
)	
STATE OF MINNESOTA)	BMS Case No. 05-PA-387
)	

Arbitrator: Stephen F. Befort

Hearing Dates: July 27, 2007
August 1, 2007

Date of decision: August 28, 2007

APPEARANCES

For the Union: Sandra Curtis

For the Employer: Carolyn Trevis

INTRODUCTION

The American Federation of State, County, and Municipal Employees, Council 5 (Union) brings this grievance as exclusive representative claiming that the State of Minnesota, Minnesota State Operated Community Services (Employer) violated the parties' collective bargaining agreement by placing Margie Klevan on leave for six and one-half months without pay. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of

witnesses and the introduction of exhibits. The parties decided not to submit post-hearing briefs.

ISSUES

1. Did the Employer violate Article 8 or 16 of the Agreement between the parties when Grievant requested and was placed on an unpaid personal leave of absence in June 2004?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 8 – VACATION LEAVE

Section 3. Vacation Period. Every reasonable effort shall be made by the Appointing Authority to schedule employee vacations at a time agreeable insofar as adequate scheduling of the work unit permits.

ARTICLE 16 – DISCIPLINE AND DISCHARGE

Section 1. Purpose. Disciplinary action may be imposed upon an employee only for just cause.

Section 3. Disciplinary Procedure. Disciplinary action or measures shall include only the following:

1. oral reprimand;
2. written reprimand;
3. suspension;
4. demotion; and
5. discharge.

Section 4. Investigatory Leave. The Appointing Authority/designee may place an employee who is the subject of a disciplinary investigation on an investigatory leave with pay provided a reasonable basis exists to warrant such leave.

ARTICLE 24 – MANAGEMENT RIGHTS

It is recognized that except as expressly modified by this Agreement, the Employer retains all inherent managerial rights necessary to operate and direct the affairs of the Employer and its agencies in all its various aspects.

These rights include but are not limited to the right to determine policy, functions, and programs; determine and establish budgets; utilize technology; relieve employees due to lack of work or other legitimate reasons; determine the methods, means, organization, and number of personnel by which such operations and services are to be conducted; and select, and direct personnel.

Any terms of employment not specifically established or modified by this Agreement shall remain exclusively within the discretion of the Employer to modify, establish, or eliminate.

FACTUAL BACKGROUND

The State of Minnesota hired Margie Klevan in 1998 as a Health Services Technician (HST). She was assigned to work in a group home in Alexandria operated by Minnesota State Operated Community Services (MSOCS). Her responsibilities included the provision of personal care services for four adult males with profound developmental disabilities.

The residents of the Alexandria group home are vulnerable adults under Minnesota law. Employees providing care for such individuals are subject to the background check provisions of Minn. Stat. Ch. 245C. That chapter requires that licensing authorities conduct investigations into the criminal and employment history of employees hired to provide care for vulnerable adults. Such checks are required upon initial hire and are subject to annual updates. Additional background checks may be initiated upon reasonable cause to suspect maltreatment. An employee who fails a background check investigation is disqualified from providing direct care services to individuals at licensed facilities.

On December 30, 2003, Arlene Barber, supervisor of the employees at the Alexandria group home, received a report of a possible vulnerable adult violation concerning another HST who worked at the group home. This report triggered an

investigation by MSOCS as well as by Douglas County which has licensing authority over the group home. MSOCS issued an investigative report on February 23, 2004 that found certain acts of maltreatment and suggested that Klevan had joined in some of those acts.

In response to the report, Douglas County and the Minnesota Department of Human Services (DHS) re-initiated background studies of Klevan. Douglas County Social Services Supervisor Noreen Carlson also placed a telephone call to MSOCS Residential Program Manager Dave Campbell seeking assurance that MSOCS would remove Klevan from the group home until the matter was resolved. Campbell agreed to the request, but because Klevan was out on medical leave, no immediate personnel action was taken. Both Carlson and Campbell testified that the County likely would have rescinded the group home's license if Klevan had continued to provide direct care services at the facility.

The Employer, meanwhile, conducted its own investigation into the allegations. On April 1, 2004, the Employer issued a two-day suspension to Klevan for making "inappropriate and non-therapeutic verbal comments that were degrading and derogatory about a consumer." Later that month, when Klevan was eligible to return to work, the Employer temporarily reassigned Klevan to a group home in Battle Lake due to the fact that the background checks had not yet been completed.

A new allegation of misconduct was lodged against Klevan on May 4, 2004, and the Employer placed Klevan on paid investigatory leave. Grant County, the licensing authority for the Battle Lake facility, initiated another background check and also sent a letter ordering MSOCS "to immediately remove this individual from having direct

contact with persons served by the program.” On June 7, 2004, the Employer completed its investigation of the new allegation, issuing Klevan a three-day suspension without pay.

Campbell testified that, at this point, with the background checks still uncompleted, there was no position available in which to place Klevan. On June 14, 2004, Campbell sent a letter to Klevan stating as follows:

This is to inform you that since you are no longer on Investigatory Leave and you are still unable to work until a background study from Grant County is completed.

A satisfactory background study must be received in order for you to be able to work. The ability to successfully pass and maintain a background study is one of the Essential Job Functions.

Since it has been determined that you are not able to work, you must be placed on leave. This will be effective June 16. You may request to use your accumulated vacation leave and comp time, and then be placed on a personal leave. Or you can request a personal leave at this time until this process is complete.

You need to provide a written request to use your Vacation or Comp time and also apply for a personal leave until the study is completed or we will have considered you to have resigned and will process accordingly.

Klevan subsequently submitted a personal leave request along with a request to use banked vacation and other paid leave. Once the banked leave pay was exhausted, the remainder of Klevan’s personal leave was without pay. Klevan began receiving unemployment compensation benefits on September 14, 2004.

DHS Division of Licensing completed its background check study and issued an Investigation Memorandum on December 23, 2004. The memorandum concluded that Klevan had engaged in acts of maltreatment and disqualified her from work in any position having direct contact with vulnerable adult clients. The Employer sent Klevan a discharge letter on January 4, 2005 which stated as follows:

This is to inform you of your discharge from employment with the MSOCS, effective January 8, 2005. The reason for your discharge is that you have failed to successfully meet the requirements of your position. Specifically, you failed to maintain a successful DHS Licensing background study.

A successful background check is a requirement of the job as outlined in Minnesota Statutes, chapter 245C (Department of Human Services Background Studies Act), Minnesota Statutes, section 144.057, and Minnesota Statutes, section 241.021. Since the Department of Human Services licensing division has determined that you are unable to have direct contact with the individuals we support, we have no alternative but to discharge you from your position.

The Union's grievance in this matter does not challenge the Employer's discharge decision. The grievance, instead, claims that the Employer violated the parties' collective bargaining agreement by placing Klevan on unpaid leave pending the outcome of the background check process.

POSITIONS OF THE PARTIES

Union:

The Union contends that the Employer violated two provisions of the parties' collective bargaining agreement by placing the grievant on an unpaid leave of absence from June 16, 2004 until her discharge on January 8, 2005. The Union first claims that the Employer's action violated Article 8 of the agreement which provides that covered employees, rather than the Employer, have the right to select the time period in which to use accrued vacation leave. The Union also asserts a violation of Article 16 which provides that an unrequested investigatory leave for disciplinary purposes is to be with pay.

Employer:

The Employer maintains that both of the Union's claimed violations are without merit. The Employer argues that Klevan's leave did not violate Article 8 in that it did not

compel her to use accrued vacation, but only offered her the option to choose such paid leave on a voluntary basis. The Employer further contends that Klevan's leave was not in the nature of an investigatory leave required by the Employer for possible disciplinary purposes, but instead was required by state and county licensing authorities for the purpose of completing a background check essential for meeting minimum job qualifications. Since paid leave was not compelled by any specific provision of the agreement, the Employer concludes that it had residual authority to require such leave without pay under the terms of the agreement's management rights clause.

DISCUSSION AND OPINION

The Union's complaint in this grievance concerns the fact that the Employer placed Klevan on unpaid leave for a period of six and one-half months even though she was willing and able to work. Because the Employer gave Klevan the options either of applying for leave or losing employment, Klevan's leave status clearly was involuntary in nature.

The Union claims that the Employer's action violated two provisions of the parties' collective bargaining agreement. First, the Union contends that the Employer violated Article 8 of the agreement by compelling Klevan to use her accrued vacation time while on leave. Under Section 3 of Article 8, the Union points out, the right to determine the timing of paid vacation leave belongs not to the Employer, but to the employee who earned the leave.

The Union's argument, however, misconstrues the nature of Klevan's leave status. The Employer did not compel Klevan to take vacation leave; it only offered her the option to use such leave as a means of obtaining some income during the otherwise

unpaid leave period. As such, the vacation leave option was in the nature of a benefit that Klevan was free to use, rather than one that she was compelled to use. The Employer's offer of such an option does not offend Article 8.

The Union alternatively argues that Klevan's leave was the functional equivalent of an investigative leave for disciplinary purposes. Under Article 16, Section 4, if the Employer places "an employee who is the subject of a disciplinary investigation on an investigatory leave," such leave must be with pay.

Although Klevan's leave was related to an investigation, it was not the type of investigatory leave contemplated by Article 16. By its terms, Article 16 paid leave only applies to a leave that is triggered by the Employer's investigation into a potential basis for disciplinary action. In this instance, however, the state and county licensing authorities were conducting the pertinent investigation rather than the Employer. Moreover, by June 16, the Employer already had completed its disciplinary investigation and had imposed discipline in the form of a three-day suspension. Accordingly, the Employer also did not contravene Article 16 by not continuing Klevan's pay during the period of the background check study.

The management rights provision contained in Article 24 of the parties' agreement provides that, "except as expressly modified by this Agreement, the Employer retains all inherent managerial rights necessary to operate and direct the affairs of the Employer and its agencies in all its various aspects." The managerial prerogative described by Article 24 expressly includes the Employer's right to "relieve employees due to lack of work or other legitimate reasons." Here, the Employer acted for a legitimate purpose in relieving Klevan from duty due to the fact that she was ineligible to

provide services to vulnerable adults because of the pending background check study. Since, as discussed above, no provision of the agreement obligates the Employer to provide paid leave under these circumstances, the Employer did not run afoul of the agreement by structuring such leave on an unpaid basis. Accordingly, the Union's grievance in this matter must be denied.

AWARD

The grievance is denied.

Dated: August 28, 2007

Stephen F. Befort
Arbitrator