

IN THE MATTER OF ARBITRATION BETWEEN

STATE OF MINNESOTA	)	
DEPARTMENT OF EMPLOYEE RELATIONS	)	
“Employer”	)	Ken Jezek, Grievant
	)	
AND	)	BMS Case No. 06-PA-1191
	)	
AFSCME COUNCIL 5	)	
“Union”	)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: October 10, 2007; St. Paul, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: November 10, 2007

APPEARANCES

FOR THE EMPLOYER: Carolyn Trevis  
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Joan Blumstein, Human Resources Consultant

FOR THE UNION: Robert L. Buckingham  
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Kenneth Jezek, Retired Executive  
Peter Benner, Director, AFSCME Council 6

## STATEMENT OF THE CASE

This case involves the denial of an extension of a medical leave of absence for Ken Jezek, who was injured on the job. The Employer is ceasing to pay the employer's contribution for his health insurance premiums during the period the Grievant was receiving workers compensation benefits. The Union filed this grievance. The Brainerd Regional Treatment Center (the "Employer") is a state Department of Human Services facility. The arbitration was conducted at AFSCME Council No. 5 located in South St. Paul on October 10, 2007. There are no issues of timeliness or arbitrability in dispute,

## BACKGROUND

The undersigned parties agree to the following stipulation:

1. Grievant was hired on October 6, 2003 to work for the Department of Human Services as a Human Services Technician.
2. Grievant was injured on May 11, 2004 while at work.
3. A first report of injury was filed on May 12, 2004.
4. Grievant received worker's compensation benefits which he supplemented with vacation and sick leave through January 25, 2005.
5. Grievant is not able to perform the essential functions of his job and is placed on a medical leave of absence on January 26, 2005. Workers compensation benefits continue.
6. Grievant is granted two extensions of the medical leave of absence through January 26, 2006.
7. Grievant was informed on January 26, 2006 that his request for an extension of the medical leave of absence would not be granted due to him not being able to perform the essential functions of his job in the near future. He was also informed that his employer contributions, health, dental and basic life insurance would cease at midnight on January 31, 2006.
8. The Grievant elects to continue participation in the Minnesota Group Insurance Program at his own expense.
9. Grievant reached maximum medical improvement on April 8, 2006.
10. Grievant began working part-time at Grandview Lodge in a training position on June 19, 2006. Workers compensation wage replacement payments are reduced to temporary partial disability payments.
11. Grievant loses his job at Grandview Lodge on July 20, 2006. Workers compensation wage replacement payments stop.
12. Grievant began working for Bethany Good Samaritan Village in January of 2007 one and one half hours per day, seven days a week. Workers compensation wage replacement payments at the temporary partial disability rate begin on January 26, 2007.
13. On February 14, 2007, Administrative Law Judge issues a decision that the Grievant is entitled to a period of disability commencing November 23, 2004 and to disability benefits of the Social Security Act.
14. The Grievant discontinues participation with the Minnesota State Group Insurance Program effective July 31, 2007 and begins coverage under Medicare on August 1, 2007.

## ISSUES

Did the Employer violate Article 10, Section 2 when they denied the extension of the Grievant's one year medical leave of absence?

Did the Employer violate Article 19, Section 3, C-3 by ceasing to pay the employers contribution for insurance premiums while the Grievant was still receiving workers compensation benefits?

## POSITION OF THE UNION

The legislative history, bargaining history and grievance/arbitration history are intertwined. The Union's statement of facts is a chronological sequence of events.

1967: Legislation regarding the employer payment of basic health benefits for injured state workers appears to have first been put in statute in 1967. (Peter Benner testimony)

1975-1977: Article X, Leaves of Absence – The “no unreasonable denial” language comes from the 1975 negotiations. The Union proposed this and the Employer accepted the proposal. The Union also proposed the mandatory one year on disability leave, and the Employer accepted the proposal.

There is no language in the contract on workers compensation. There were no related proposals by either party.

1976: Minnesota Statutes 43.44, Subdivision 2 entitles “A state employee who is disabled and off the State payroll as a result of personal injury arising out of and in the course of employment with the state and is otherwise eligible for the basic life insurance and basic health benefits coverage paid for by the state shall be eligible for state paid coverage and shall continue to be eligible therefore during the period such employee is receiving workers compensation payments for temporary total or temporary partial disability pursuant to an award of the workers compensation court of appeals.”

The statute was amended in 1979 – Laws of Minnesota 1979, Chapter 332, Article I, Section 52 to read in part: “...shall continue to be eligible for state paid coverage during the period such employee is receiving workers' compensation payments for temporary total or temporary partial disability pursuant to an award of the workers' compensation court of appeals or is on disability leave pursuant to the rules of the Department of Personnel or a collective bargaining agreement entered into under the provisions of Section 179.61 to 179.76.”

This statute was repealed in 1981 as part of the rewrite of the civil service laws into Chapter 43A. Chapter 43A has no reference to workers comp payments at all. This was because

all the specifics on things like this were to be dealt with either in collective bargaining agreements or by the personnel rules or Commissioners plans.

1977-1979: Article XIX Insurance – includes language under eligibility “Benefits shall continue as long as an eligible employee appears on a state payroll for at least one (1) working day each payroll period or is off state payroll due to a work related injury or disability and is receiving Worker’s Compensation payments.” This came in as part of a very late proposal (well after mediation had begun) by the Employer for a major rewrite of the insurance article. There does not appear to have been a dispute over this proposal.

1979-1981: Article XIX language was amended to read: “Benefits shall continue as long as an employee meets the eligibility requirements described in Minnesota Statutes 43.43 subdivision 2, and 43.47...and is either receiving Workers’ Compensation payments or utilizing disability leave as provided in Article X.” This was the union’s proposal and the Employer agreed to the addition. This appears to have been uncontroversial. The addition of the Article X reference was to pick up employees who had claims pending. Neither party proposed changes in Article X language.

1981-1983: In Article X, the Employer proposed to limit disability leave to a cumulative total of one year per injury or disability. The rationale was to limit employees who come to work only occasionally. The Union did not agree and they dropped the proposal.

In Article XIX, the parties did a technical rewrite to reflect the changes in MS 43A. Section 2 language now read: “Benefits provided under this Article shall continue as long as an employee meets these eligibility requirements and...is off the State payroll due to a work related injury or disability and is either receiving Workers’ Compensation payments or is using disability leave as provided in Article X.”

1985: The Union moves to arbitrate two grievances due to the denial of insurance benefits on behalf of two employees on workers compensation. Joyce Lindquist and Delmar Travis leaves of absence were not extended and the Employer discontinued the Employer’s contribution for health insurance.

1986: The Employer and the Union agreed to a settlement of the Lindquist and Travis grievances. Lindquist was placed back on leave for one year and three months. Travis was placed back on leave for four years. Any request for an extension must be in accordance with the terms of the Master Agreement.

The Union’s statement in closing out the grievances states, “We agreed to non-precedent where employer continues to look at their policy.”

Lance Teachworth, Chief Negotiator and Deputy Commissioner of Employee Relations issued an office memorandum (Teachworth Memo) addressing the contractual interpretations concerning Disability Leaves for work related injuries. The Teachworth Memo states: “absent voluntary resignation, retirement or termination for one of the above-stated reasons, the

employee remains on a leave of absence. The employee on a leave of absence continues to receive State-paid insurance under the noted contractual provisions.”

In Article XIX the Employer proposed to change the “while on disability leave” to “is eligible to receive workers’ compensation payments.” The Union agreed to “...as long as such an employee receives workers’ compensation payments, or while the workers’ compensation claim is pending.”

1991-1993: The Employer proposed to limit participation in the group for people on workers comp to age 65. The issue was a change in federal law which required post 65 to remain in the active group. The Union opposed. The Employer dropped the proposal on June 28, 1991.

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1995-1997: The Employer proposes to limit the insurance eligibility to those on temporary total and permanent total only, delete the “while claim is pending,” cap at age 65, and drop coverage for anyone receiving other payments. The Employer dropped all of their proposals.

1997-1999: The Employer proposed to delete the “while claim is pending,” and to limit eligibility to temporary total and permanent total. The Union opposed and the Employer dropped at their second counter.

1999-2005: No changes were proposed by either party regarding these issues.

2001: The Employer denies Dave Higgins request for an extension of a medical leave of absence and discontinues paying the Employer’s portion of health insurance premiums. The Union filed a grievance on the matter.

2002: Arbitrator John Remington issued an award on the Higgins grievance stating the Employer violated Article 19, Section 3C5 and Article 32 of the parties’ collective agreement when it terminated the Employer contribution to the Grievant’s health care insurance.

Remington reasoned, “The above language clearly and unambiguously provides that such an employee remains eligible for the Employer Contribution as long as he continues to receive workers’ compensation benefits, and the record reflects that the Grievant continues to receive such benefits. This language is reinforced by the provision of Article 32.3. There is no mention of termination of employment as a disqualifier.

Remington goes on to say, “There can be no question but that the Employer has the discretionary right to extend or not extend leaves of absence. However, its exercise of this discretionary power may not be utilized to avoid the clear requirements of the collective agreement to abridge employee rights and benefits provided by that agreement.”

2004: The Grievant is injured on the job and begins to receive Workers Compensation benefits.

2005: He begins a medical leave of absence on January 25, 2005.

2006: The Grievant's request to extend his medical leave of absence is denied and he is terminated effective January 26, 2006. The Employer's contribution to health insurance is discontinued effective January 31, 2006. He elects to participate in the group insurance program at his own expense. The Union files the grievance.

There has been a long history of legislation, collective bargaining, grievance settlements and arbitration awards that grant certain rights of employees with work related injuries. These rights include medical leaves of absence, extensions of a medical leave and employer paid health insurance for the duration of a medical leave.

The Teachworth memo was issued by the Employer as the appropriate interpretation of the applicable contract language. The Union accepted this memo as a clear and unambiguous interpretation of the contract language concerning the granting or extending a leave of absence and insurance coverage for an employee with a work related injury or disability.

The Employer has made numerous unsuccessful attempts to limit the rights of injured employees through collective bargaining proposals.

When the Employer was unsuccessful in bargaining they denied an extension to the leave of absence. The Union arbitrated the matter. The arbitrator in that case stated the Employer violated the agreement and the Employer was required to reimburse the Grievant for medical costs of health insurance premiums.

The Grievant in this case did not resign, retire nor was he terminated. He is entitled to the extension of his leave of absence and the continuation of the Employer contribution to health insurance premiums as stated in the Teachworth memo and the Remington Arbitration award.

The remedy requested is that the Employer be ordered to reinstate the medical leave of absence back to January 26, 2006 and the Employer reimburse the Grievant for insurance premiums paid by the Grievant in the amount of the Employer contribution through July 31, 2007.

#### POSITION OF THE EMPLOYER

DHS denied the extension for legitimate and non-discriminatory reasons. Article 10, Section 4 of the parties' Agreement provides that an extension of a medical leave may be granted. Article 10, Section 2 also provides the only bargained-for contractual limitation on this discretion, that no request "shall be unreasonably denied." The determination of whether DHS

was reasonable requires an analysis of the facts that the agency knew at the time it denied the extension:

The Grievant had not worked in the HST position since November 23, 2004;

According to the Functional Capacities Evaluation (FCE) performed in August, 2005, the Grievant was unable to return to his job as an HST due to his permanent physical limitations, which included a lifting restriction of ten (10) pounds.

DOER's Disability Coordinator, Cindy Storelee, had been working with the QRC and placement vendor on job search for other state jobs within the Brainerd area that fit within the Grievant's physical restrictions;

During this time, DHS was in the midst of closing some of its residential treatment centers and moving residents to community-based group homes, which limited the number of available jobs within the Grievant's abilities;

Despite her best efforts, Cindy Storelee and the QRC were not able to find a job that the Grievant could perform.

Evaluations of whether an employee can return to work are done on a case-by-case basis;

The DHS' standard practice over the last number of years is to extend medical leaves beyond the one year when there is reason to believe that the employee could return to State employment within a few months.

Although Teachworth was issued as general guidance to State agencies in 1986, the Union failed to prove that this guidance did not change from 1986 to the present. To the contrary, over these years, the State's return to work program evolved so that now State agencies routinely end medical leaves at the end of one year when there is no reason to believe that an employee will be able to return to State employment in the near future. Cindy Storelee also testified about this policy which has been applied to several employees over the past five years. Joan Blumstein from DHS testified that DHS will not extend leaves when there is no reason to believe the employee can return to work and that this has been the agency's practice for several years.

Statutory references in the memo are obsolete (e.g., Minn. Stat. Sec. 176.101 was repealed in 1995). The references to a 14-day requirement and administrative conferences are outdated, and are based on repealed legislation. Mandatory retirement mentioned in this memo, no longer applies to State employment.

Ms. Storelee clearly put the Union on notice that the memo was not being strictly followed, as the return to work program evolved and as the laws changed. Further, the State's practice of terminating leaves for reasons other than those listed in the 1986 memo is established by the examples listed, including those of Soraya McCallum, separated on February 4, 2004,

who found employment outside the State in August, 2004; Melissa Whipple separated on June 1, 2006 and accepted other employment on August 1, 2006.

Although the Union argues that the State is eternally bound by the memo, it did not even attempt to prove that it was consistently followed by the State for the twenty-one years since 1986.

For the Union to show a past practice, it must prove three elements: (1) there has been a clear, consistent course of conduct; (2) the conduct must have been repeated over a reasonable period of time; (3) the conduct must have been known and accepted by both parties. Proof of these elements is lacking. Indeed, the only evidence on the practice of the parties shows that there has not been a consistent course of conduct over the years, and in fact the underlying circumstances have changed considerably since 1986.

The Union's reliance on prior settlements is also misplaced: In addition to the memo, the Union relies on two prior settlements of grievances relating to medical leaves, as support for its arguments. These settlements, however, are by their terms non-precedent setting. Further, parties settle grievances for various reasons, and it should not be implied that the State settled because it violated the contract in 1986. These settlements should not be given any weight in this matter, as there was no showing that the facts of those grievances were in any way similar to the instant facts.

Extending medical leaves indefinitely when there is no reasonable prospect of the Employee's return to work as an unreasonable application of the Agreement. Acceptance of the Union's argument that DHS was obligated to extend the Grievant's medical leave in 2006, when the evidence shows that there was no reason to expect that he could return to work with the State, places a great burden on the State and will have serious financial consequences. By extending the leave indefinitely beyond one year, the employee is eligible to receive the Employer contribution to health insurance indefinitely, which is an obvious disincentive for an employee to find other employment. This disincentive is contrary to the concerted efforts made by the State to return injured workers to employment as soon as feasible.

The parties have already bargained for and agreed to a mandatory one-year period of medical leave in Article 10, a reasonable period of time for injured workers to recover from their illness/injury and rehabilitate themselves so that the employees may return to their jobs, obtain retraining, or explore other employment options. During this one-year period, workers injured on the job continue to receive insurance benefits. To extend this one-year period indefinitely goes beyond what the parties bargained in Article 10.

Further, as noted in Article 10, an employee is not eligible for the unpaid medical leave unless and until the employee has exhausted his/her accumulated sick leave balance. Since employees may accumulate sick leave with no cap, long-term employees can potentially have hundreds if not thousands of hours of sick leave available to use prior to requesting the one year medical leave. During the paid sick leave, the injured employee also continues to receive the Employer contribution for health insurance. Thus, an injured employee could potentially be off work for several months, if not a year or more, before the employee has to request a medical

leave under Article 10, thus giving that employee significant additional time to rehabilitate before any attempt to return to work. The State's leave policies are more than generous for injured employees, without adding an additional mandatory requirement to extend the leave.

The issue before this arbitrator is whether the agency unreasonably denied an extension of the Grievant's medical leave. However, the Remington arbitration award that the Union relies on here is not precedential for this issue.

First, Arbitrator Remington states certain issues were deemed immaterial, irrelevant, or side issues to his decision, including "whether or not the decision to terminate the Grievant's leave was reasonable." He did not address this issue. That award finds it significant that the Grievant was an employee at the time. That is not true here. That issue was whether the Employer violated Article 19 and 32; the parties did not ask the arbitrator to rule on Article 10, the Leaves of Absence provision. Arbitrator Remington ruled on specific facts of the subject grievance; he clearly limited his ruling to the facts before him.

If the Union wants to place further limits on the Employer's discretion, then it needs to bargain those limits into the contract. The Union appears to argue at the hearing that the Teachworth memo places limits on the rights of the Employer to extend or not extend medical leaves. The Union did not show that it tried to bargain any of these limitations into the contract. The sole contractual limitation on the Employer's discretion is that it not "unreasonably" deny an extension of a leave. To read any other limitations into the Agreement violates Article 17, Section 5 which provides as follows:

The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. Joint Exhibit No. 1, p. 49.

If the Union wants to further limit the Employer's discretion in this regard, it must come to the table and bargain.

The Union claims further that DHS violated Article 19 by failing to continue the Employer contribution for health insurance following the Grievant's separation from State employment. This position is not supported by the clear language of the agreement, or by the parties' practice. Article 19 provides that:

An employee who receives an Employer Contribution and who is off the State payroll due to a work-related injury or a work-related disability remains eligible for the Employer Contribution as long as such an employee receives workers' compensation payments.

This language applies to "an employee" only. The Grievant was not an employee after his medical leave expired and he was separated from State employment. Thus, when this grievance was filed in early February, 2006, he was not entitled to any continuing Employer contribution. Where the language of the contract is clear and unambiguous, the arbitrator is obliged to follow that language.

The clear intent of this provision is to provide an Employer contribution during the time that an employee is unable to work at his/her state job because of the work-related injury. It allows the employee time to recover from the injury and make attempts to return to work, without the loss of insurance.

The Union's evidence supports this interpretation. Mr. Benner testified that state law in 1976 provided for this benefit for state employees. The statute, in part, reads:

A state employee who is disabled and off the state payroll as a result of personal injury arising out of and in the course of employment with the state is otherwise eligible for the basic...health benefits coverage paid for by the state shall be eligible for state paid for coverage and shall continue to be eligible during the period such employee is receiving workers compensation payments.

The statute clearly limits the benefits to employees. Mr. Benner also testified that in 1977 and 1979, the parties' contract incorporated this statute into the parties' labor agreement.

The 1986 grievance documents further support the State's position that this benefit is to be paid only to employees, not to former employees. The Lindquist Settlement places Ms. Lindquist on a disability leave through June 30, 1986, and then states, "in accordance with Article XIX," the employee is eligible to receive state-paid insurance benefits "for the duration of this leave of absence." If the benefit was intended to apply to non-employees, there was no reason to reinstate Ms. Lindquist to a leave of absence. The Delmar Travis Settlement is identical, placing him on a medical leave, in order to continue payment of the insurance benefits.

The instant grievance and the requested remedy specifically asks the arbitrator to "reinstate" the Grievant and continue the insurance contribution for him. If the language in Article 19 applied to separated or former employees, there is no need to seek reinstatement of the Grievant to State employment.

Although past practice does not come into play here given the clarity of the language, there is also no evidence of a past practice to support any argument that Article 19 applies to former employees. In fact, the evidence demonstrates that the State has consistently limited the continuation of the Employer contribution to employees.

Arbitrator Remington's award was based on facts, unique to that particular grievance. Although AFSCME initially grieved Article 10 in that case, the Union did not pursue its grievance under Article 10. In fact, the Union amended the grievance at Step 3 and deleted the reference to Article 10.

Further, the Union agreed and the arbitrator found that at the time the grievance was filed on November 15, 2001, Higgins was still a State employee and had the right to continuing insurance benefits as of that date.

It should be noted that Higgins was also engaged in a formal retraining program at the time of the grievance. It is apparent that Remington gave this fact import and found that his

“employment” with the State continued during this retraining period. The retraining program was to end in December, 2002. Significantly, the award also limited the period of time during which the Employer was obliged to continue insurance contributions to November 16, 2001-December 31, 2002, the exact length of the retraining program. Here the Grievant was not in any formal retraining program in 2006, and cannot be deemed to be an “employee” after January 26, 2006.

Here the Union asks for a mandate that the State extend medical leaves for employees who have no reasonable prospect of returning to work for it. Such an interpretation runs directly counter to the purpose of a leave of absence, that is, to provide time for an employee to recover from an illness and injury in order to return to work. Further, such an interpretation will require that the State continue insurance contributions for potentially indefinite periods of time, at a significant cost to the agencies and it will create a disincentive for employees to return to work. This produces a harsh result, and one that was not intended when the statutory obligation of Minnesota Statutes Sec. 43.44 was created, and eventually incorporated into the parties’ labor contact.

#### DISCUSSION AND OPINION

The grievance requires arbitral interpretation, under the particular facts presented, of Article X, Section 2 which provides, in relevant part, that no extension of a medical leave request “shall be unreasonably denied.” The operant facts show that the Employer denied the Grievant’s request on the grounds that all medical evidence available indicated that his permanent disabilities it was extremely unlikely that he would ever be able to perform any work available in the Agency.

The record establishes that DOER’s Disability Coordinator, Cindy Storelee worked with the Grievant’s ORC and placement personnel in an intensive but unsuccessful job search to find a job he would perform within the State.

Analysis: There remains no dispute over the fact that the Grievant is no longer able physically to perform any work available to him in state service and that there is no likelihood that his physical capacities will ever be recovered. The sole issue is whether or not the Employer unreasonably denied his request for a further extension of his one year medical leave of absence on such grounds.

Both parties argue that past practice and selected parts of the Remington Arbitration Decision favor their respective positions. The Union, as the moving party also has the burden of showing that the Teachworth Memo of 1986 constitutes the definitive interpretation of how the collective bargaining agreement governs disability leaves for work related injuries which gave rise to a State Policy and practice that continues in effect to the present.

It should be noted that in his decision, relied on by the Union as controlling the outcome of the instant matter, Arbitrator Remington pointedly dismissed the Teachworth memo as relevant, “because the document is over fifteen years old, the author of the document was not

available to testify, there have been changes in the relevant contractual language, and the Union was unable to present specific evidence to show that the policy contained in the document has been consistently followed since it was issued.” (p. 10, Award)

Nothing has changed since Arbitrator Remington’s quoted observations in December of 2002, except that the document has aged yet another five years. Conspicuously, the Union still was unable to present evidence of a consistent practice of granting requests for medical leave extensions except for the limited grounds for denial set forth in the Teachworth memo.

By contrast, the Employer presented the uncontroversial testimony of coordinator Cindy Storelee and DHS representative Joan Blumstein that at least over the past five years DHS has granted extensions of the one year medical leaves only when there was reason to believe that the employee will be able to return to work. Clearly the Employer has prevailed on the past practice contention and also on the issue of any relevance the Teachworth memo might have on the correct interpretation and application of the collective bargaining agreement under the facts of the instant case.

The remaining basis for the Union’s case refers again to its view of the relevance of the Remington Decision to the facts of the instant case. Careful analysis of what Arbitrator Remington wrote requires special attention to the following passage:

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the clear meaning of the parties’ collective bargaining agreement, the evidence is more than sufficient to conclude that the Employer violated Articles 19 and 32 of the parties’ agreement when it terminated the Employer Contribution towards the cost of Grievant’s health insurance.

Two parts of Arbitrator Remington’s findings and conclusions noted above hold particular significance for the Union’s assertion that his 2002 decision controls the issue raised in the present matter. In the first instance, the contractual provisions raised in that earlier case were Articles 19 and 32, while the present grievance asserts violation of Articles 10 and 19.

In regard to the sole common contractual reference, Article 19, Section 3 Arbitrator Remington addressed a different subsection, i.e., Section C.5 while in the instant matter the Union asserts a violation of Section C.3. Specifically, the Union states in its version of the Issue at hand, “Did the employer violate Article 19, Section 3, C-3?” In his Award, Arbitrator Remington found, “THE EMPLOYER VIOLATED ARTICLE 19, SECTION 3.C.5...”

More importantly, the core factual issue before Arbitrator Remington involved the question of whether or not the Grievant met the definition of an “employee” for purposes of eligibility to receive the disputed Article 19 Insurance benefit coverage. That particular issue has not been raised, per se, in the case here for review and disposition. Rather, the issue in the present matter focuses on the meaning of “unreasonably denied” as that language appears in Article 10.

In regard to the subject language in Article 10, Arbitrator Remington expressly stated that among “other issues [which] must be deemed immaterial, irrelevant or side issues [are]...whether or not the decision to terminate the Grievant’s leave was unreasonable...whether or not the Teachworth memo was intended as an incentive to return to work and so forth.” (p. 10).

Aside from Arbitrator’s disclaimers limiting the scope of his review, he pointedly notes that his Award is limited to “the specific facts of the subject grievance.” Among the more distinguishable facts Remington dealt with is that in that case, the Union amended its remedy plea to request only that the Grievant’s insurance contributions be continued as long as he received workers compensation benefits. In the case at hand, the Union seeks the reinstatement of the Grievant’s medical leave of absence back to January 26, 2006 with Employer reimbursement to him for insurance premiums be paid in the amount of the employer contribution.

These several factual and contractual differences clearly distinguish the Remington Decision from those presented in the instant matter. Those distinguishing differences are so varied and significant as to defeat any argument that the Remington Award influences, much less controls the outcome of the case at hand.

At this point in the analysis, the Union’s arguments that the Teachworth memo sparked a continuing practice supporting this grievance and that the Remington Award controlled the resolution of the instant case have been dismissed as lacking in merit. This leaves a clear path to a straightforward contractual interpretation of Articles 10 and 19 on the basis of the language the parties chose to capture and express their negotiated intent and purpose. Turning first to the disputed terms of Article 10, the central question remains as to what the parties meant when they agreed in Section 2 that the only bargained for limitation on the Employer’s discretionary authority to deny a request for an extension of a medical would be that no such request “shall be unreasonably denied.”

The term “unreasonable” is commonly used to limit the abuse of discretionary authority. The term has been described by various courts as synonymous with irrational, senseless, immoderate, exorbitant, capricious, arbitrary, and unlawful. I much prefer the definition of the term commonly employed in arbitration which holds that an action is unreasonable if it lacks some good and useful purpose, i.e., if it is whimsical, lacking in meaningfulness, random, aimless, inconsistent, arbitrary or discriminatory.

Clearly, the denial of the Grievant’s request for an extension of his medical leave as based on a well-defined purpose – as a continuing policy of the DHS to grant such extensions only for relatively short periods with the expectation that the employee will be able to return to work. It matters not in the least whether the Arbitrator or the Union agree with this well thought out and consistently implemented policy – the significant point is that the Employer’s exercise of discretion in denying the medical leave extension request was in accordance with a consciously designed, purposeful goal and objective. Thus, it cannot be said that the denial of the Grievant’s request for an extension of his medical leave lacked reasonableness.

Employer witnesses, including State Negotiator Paul Larson, testified that the policy of limiting medical leave extensions to those who are likely to return to work has several purposes including:

Encouraging full participation and effort in the State's return to work rehabilitation and job search efforts.

Conserving funds needed to replace employees who are unlikely to return to their jobs.

These were the goals also mentioned by Coordinator Storelee in her testimony. There can remain no serious question that these stated goals and purposes for the policy of denying medical leave extensions to employees who are unlikely to return to work fully meets the Article 10 standard that such medical leave extensions not be "unreasonably denied."

In regard to the Grievant's Article 19, Section 3.C.3 claim, it must be noted that following language contains no ambiguity:

...an employee who receives an Employer's contribution and who is off the state payroll due to a work-related injury or work-related disability remains eligible for an Employer Contribution as long as such an employee receives workers compensation payments.

Article 19, Section 3.C.3 contains no qualifiers on the plainly stated provision that "such employee," (as the Grievant who qualifies on all other stated grounds) remains eligible for an Employer Contribution as long as [he] receives workers compensation payments.

The Union relies on the Remington Decision as far as that award continued Employer's contribution to the end of Higgs' workers compensation payments. It should be noted that this period, from November 2001 through December, 2002, exactly coincided with the State continued Higgs' retraining program. The logical inference to be drawn from this fact can only be that Arbitrator Remington considered that Higgs' remained a state employee for the entire period of his retraining.

In general usage both in arbitration and in law, the term employee covers those who work for a wage or salary and perform services for an employer. Where services for an employer are not being actively performed, a continuing relationship of some description defines "employee" such as on leave (for whatever contractual or statutory purpose). When there no longer exists an expectation that the employee will be ready, willing, and able to return to perform services, the status becomes former employee.

Former employee became the Grievant's status upon the ending of his mandatory medical leave of absence – because, as is undisputed, he will not be returning to work for the state. If, indeed, it were the intent of the parties that former employees were to be eligible for certain benefits growing out of their completed employment, such benefits and eligibility standards would need to be clearly set forth in the collective bargaining agreement.

The Grievant, as a former employee, has no such Employer Contribution continuation eligibility under the labor contract.

DECISION

Based on the foregoing discussion and opinion, the grievances are hereby denied.

12/6/2007  
Date

\_\_\_\_\_  
John J. Flagler, Arbitrator