

IN RE ARBITRATION BETWEEN:

MINNESOTA ASSOCIATION OF PROFESSIONAL EMPLOYEES, MAPE

and

STATE OF MINNESOTA

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

June 2, 2008

IN RE ARBITRATION BETWEEN:

MAPE,

and

DECISION AND AWARD OF ARBITRATOR
Ken Genz grievance matter

State of Minnesota

APPEARANCES:

FOR THE UNION:

Rick Nelson, Business Representative
Ken Genz, grievant
Jamie Fitzpatrick, Union Steward
Gary Johnson, Chief Steward
Mike Kellerman, Union Steward
Mark Hinterberg

FOR THE STATE

Carolyn Trevis, DOER Labor Relations Principal
Mary Oman, Human Resources Director, DEED
Cindy Storelee, DOER Disability Management Unit
Kathy Nelson, DEED Unemployment Insurance Div. Dir.

PRELIMINARY STATEMENT

The hearing in the above matter was held on May 7, 2008 at the MAPE Offices at 3460 Lexington Ave. North, Shoreview, Minnesota. The parties presented oral and documentary evidence and further held a telephone conference for the testimony of Mr. Hinterberg on Tuesday May 13, 2008 at which point the hearing record was closed. The parties waived post-hearing Briefs.

ISSUE PRESENTED

The Parties did not agree on the issue to be determined. The Union contended that the issue was as follows: Did the Employer violate the collective bargaining agreement when it discharged the grievant? If so, what shall the remedy be?

The State on the other hand asserted that the issue be stated as follows: Did the Employer violate the parties' agreement when it denied the Grievant an extension of his unpaid one-year medical leave? If the Employer violated the agreement, what is the appropriate remedy?

The issue as determined by the arbitrator is whether the State violated the parties' agreement when it denied the Grievant an extension of his unpaid one-year medical leave? If the Employer violated the agreement, what is the appropriate remedy?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2007 through June 30, 2009. Article 9 provides for submission of disputes to binding arbitration. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

UNION'S POSITION

The Union's position was that the State violated the contract when it terminated the grievant without just cause and refused to extend the leave of absence for the grievant beyond May 24, 2007. In support of this position the Union made the following contentions:

1. The Union asserted that the grievant, a 38 year employee of the Department, suffered a work related injury which severely disabled him in September 2005. He returned to work for a short period but was unable to continue working due to the effects of that work related accident.

2. In May 2006 his doctor disabled him and he was granted a medical leave of absence for one year following that. The State did not allow him to extend the leave past July 2007 however even though it was not clear whether or not the grievant would be able to work. In fact his doctor indicated that he would be out "6 to 12" months but never indicated that he would be permanently unable to return to his former position.

3. The Union also asserted that the refusal to grant the extension was a subterfuge to terminate the grievant without just cause and pointed to several disciplinary warnings and statements that it argued showed a personal animus by the grievant's supervisor to "get rid of" the grievant. The Union argued that these actions when viewed in context constituted a constructive discharge

4. The Union also pointed to other employees whose leaves were extended well beyond the one-year limit. The Union argued that there is in fact a well-established policy to grant extensions for other similarly situated employees who wish to return to work but whose medical condition does not yet allow them to do so.

5. The Union asserted that there was also a hidden agenda here to eliminate the unit on which the grievant had been working and that refusing to grant the extension was a way to facilitate this action. The Union asserted that the unit on which the grievant worked was eliminated during the grievant's medical leave in order to get rid of the grievant.

6. The Union pointed to Article 8, section 1 that provides as follows: Disciplinary action may be imposed on employees only for just cause and shall be corrective where appropriate."

7. The Union also relied upon Article 14, which provides in relevant part as follows: "No leave of absence request shall be unreasonably denied and the reasons for a denial shall be given to the employee upon request." The Union also cited a prior arbitration award between the State of Minnesota and AFSCME Council #6, involving the same contractual language. See *State of Minnesota, State Academy for the Deaf and AFSCME Council #6*, BMS case # 02-PA-1224 (Remington 2002). There the issue was whether the grievant was an "employee" for purposes of continuing health insurance benefits after his leave of absence was ended in November 2001. The arbitrator ruled in that case, interpreting the identical language found at Article 20, Section 3, of these parties' agreement. That language provides in relevant part as follows: 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 an Employer Contribution as long as such an employee receives workers compensation payments. If such employee ceases to receive workers compensation payments for the injury and is granted a medical leave under Article 10, he/she shall be eligible for an Employer Contribution during that leave."

8. Arbitrator Remington in the case cited above ruled that the grievant in that case was still an "employee" for purposes of receiving Employer Contributions to health insurance pursuant to the identical language found in the AFSCME contract. The Union asserted that the same rationale should apply here to render the grievant eligible for an extension of the leave.

9. The Union argued that what happened here was either a not so cleverly disguised termination in violation of Article 8 or an unreasonable denial of the request for an extension of the leave of absence in violation of Article 14.

10. The grievant listed a series of failed attempts to discipline, terminate and discredit him going back decades as evidence of the intent to use the leave of absence as a way to terminate his employment. The grievant asserted that the State first tried to discredit his performance but that his performance was so exemplary and unequalled in the history of the department that his supervisors were not able to do that.

11. The grievant asserted that the State next attempted to discipline him on what he claimed were all trumped up charges. The grievant then pointed to a multitude of instances where the discipline was overturned or simply withdrawn when he showed them the evidence and demonstrated that he was the victim of a witch-hunt.

12. The grievant then claimed that when those first two attempts to terminate him did not work the department then eliminated the position he held as a way of getting around the clear requirements of the labor agreement. He asserted that these vain attempts to fire him are laughable and pathetic and that the arbitrator should see through them as the thinly veiled discrimination they are. He asserted in the most strident way possible that the discretion used to deny the medical leave all tied into the plot to “get him” that has been boiling within the minds of his supervisors for years. He further pointed out that others have been allowed leave well over one year and that he should have been allowed that same benefit.

The Union seeks an award of the arbitrator reinstating the grievant to his status on unpaid medical leave of absence until such time as his doctors release him to return to work.

STATE'S POSITION:

The State's position was that there was no contract violation here at all and that the case is simply one involving the exercise of discretion not to extend a medical leave in the face of a medical opinion giving no clear indication that the grievant might ever return to work. In support of this position the State made the following contentions:

1. The State pointed to the provisions of Article 14, section 3 (F) as follows: "Medical. Upon the request of a permanent employee who has exhausted all accrued sick leave, a leave of absence without pay shall be granted by the Appointing Authority for up to one (1) year because of sickness or injury to the employee. At the request of the employee, this leave may be extended at the discretion of the Appointing Authority. An employee requesting a medical leave of absence shall be required to furnish evidence of disability to the Appointing Authority ..."

2. The State asserted that this provision is clear and unambiguous. There is no requirement that a leave of absence be extended beyond a year and that it is entirely discretionary.

3. The State further noted that there is no dispute about the operative facts in the matter. The grievant was injured in a worker related motor vehicle accident and was disabled from work as of May 2006. The grievant's last day of work was May 9, 2006 and his FMLA qualifying leave started on May 24, 2006. State Exhibit 4.

4. The leave was extended through January 1, 2007, see Union exhibit 5, letter dated December 8, 2006. This was eventually extended through May 23, 2007. See State exhibit 4, letter dated January 3, 2007 to the grievant, which provides in part: "The MAPE contract states 'a leave of absence without pay shall be granted for up to one (1) year because of sickness or injury to the employee.' Your one year medical leave of absence continues through May 23, 2007. Therefore we have extended your unpaid leave of absence thru May 23, 2007." The letter also requested that the grievant was to provide updated information prior to May 23, 2007 regarding the grievant's ability to return to work. He never did that prior to May 23, 2007.

5. In fact, the grievant's supervisor sent the grievant a letter dated May 24, 2007 requesting the updated information. See State Exhibit 4. The grievant's attorney responded by letter dated June 5, 2007 and attached a work ability form signed by the grievant's doctor. The doctor indicated that a return to work date was "unknown" and that it would be "6 to 12 months" before the grievant could return to work. The grievant indicated at the hearing, held almost one year after that letter, that he still was unable to return to work and that it was still not clear when that might occur.

6. The State asserted in the strongest possible terms that it cannot and does not have the obligation to hold a job open forever waiting for someone to be medically cleared to return to work. Accordingly, the grievant's medical leave was ended July 11, 2007 after it was apparent that the grievant was not going to return to work any time soon or even within a reasonable time frame. See State exhibit 1, letter dated July 11, 2007

7. Here the State went the extra mile and waited until July 2007 to end his medical leave. The State acknowledged that if the grievant's doctor had given a firmer date, perhaps 2 or 3 months, for a return to work date, the result might well have been different. Here however no firm date was ever given for a return and there was nothing more they were obligated to do under the contract.

8. The State further acknowledged that others have been granted leaves beyond one year but that these were nothing more than examples of the exercise of discretion where a more definite date of return was provided or perhaps for other reasons. The essential feature of the State's argument though was that these cases are not binding in any sense and that the exercise of discretion does not dictate that it be exercised in any particular fashion in the future.

9. The State argued that there was no requirement of just cause as found in Article 8 of the agreement. The grievant is not being terminated for poor performance but rather for a medical inability to return to work. The State pointed out that the grievant's supervisor in fact had nothing to do with the decision to end the medical leave. That decision was made by people who had never met the grievant and had no knowledge of the history between him and the supervisors in the department.

10. The State asserted that even if a just cause analysis were to be used, there would still be just cause for the termination since the grievant simply cannot return to work due to a medical disability. That he has such a disability is both clear and even undisputed. The grievant himself acknowledged at the hearing that he was unable to return to work now and that he could not provide a date certain or even a general time frame for when he might be able to do so.

11. The essence of the State's argument is thus that while the grievant has a long and storied career, his medical leave ended and there was no obligation to extend it and no evidence he could, or even can today, return to his former position.

Accordingly the State seeks an award of the arbitrator denying the grievance in its entirety and upholding the discharge.

DISCUSSION

The essential facts of the case are undisputed although the grievant brought up a multitude of peripheral issues pertaining to his performance and his history with the department that, while interesting, did not impact the outcome of the matter. The grievant has been with the department for some 38 years. In his words, his career has been unequalled and unprecedented in terms of his ability to ferret out waste and fraud. He has apparently never lost a case and is justifiably proud of that fact. He was understandably frustrated by some of the actions of the department in trying to discipline him in the past and raised a number of instances where he has disciplined, even discharged, in the past and that discipline was either overturned or rescinded upon further review.

The facts leading to the instant dispute however were quite clear. The grievant was injured in a work related motor vehicle accident in 2005. He was apparently quite severely injured as the result of this accident. He attempted to return to work and was able to do so until May 2006 when his doctors disabled him from further work. He has not returned to work at his position at the State since. He was granted a one-year leave of absence pursuant to the provisions of Article 14.

The leave was granted starting May 24, 2006. It was extended through January 1, 2007 and eventually until May 24, 2007. That latter date corresponded to the one-year period set forth in the labor agreement at Article 14, cited above for the mandatory one year medical leave period.

There was some allegation at the hearing that the grievant was not made aware of the end of his leave. The evidence did not support this assertion however. The evidence showed that it was clearly communicated to the grievant that the leave was for a one-year period. In a memo date January 3, 2007, extending the original leave to May, 24, 2007, the State made it quite clear that the leave was extended to May 24, 2007. As noted above, the memo stated that “The MAPE contract states ‘a leave of absence without pay shall be granted for up to one (1) year because of sickness or injury to the employee.’ Your one year medical leave of absence continues through May 23, 2007. Therefore we have extended your unpaid leave of absence thru May 23, 2007.”

That memo further advised the grievant to submit updated information prior to May 23, 2007 regarding his ability to return to work. He did not do so and there was further no evidence that he requested an extension of the leave beyond May 23, 2007 until the grievant’s attorney sent a letter date June 5, 2007 advising the State that the grievant was still unable to return to work and that he was not expected to return to work for 6 to 12 months due to his disability. The attorney further asserted that “Mr. Genz’ position is that his position remain open to him until he is fully capable of returning to work as diagnosed by Mr. Genz’ physician.” See letter dated June 5, 2007 from Philip Villaume to Thomas Romens. There was no formal request for an extension of the leave but a statement by the grievant’s attorney that the State should essentially hold the job open indefinitely.

Attached to this letter was a work ability form signed by the grievant’s doctor, Dr. Mark Steinhauser, indicating that the grievant was unable to return to work and further advising that it was “unknown” when he would. The form asked for an estimate and the doctor indicated “6 to 12 months.” Thus, it was abundantly clear that as of the end of the one year the grievant was not able to return to work.

Instead of ending the leave at that moment, the State actually continued the leave for a few more weeks, thus continuing to pay the grievant's health insurance premiums, until July 11, 2007 when the leave was ended thus terminating the grievant's employment. It was not clear why the time was extended. The State showed that if there is some evidence that an employee will be able to return to work within a short time after the expiration of the one-year leave the State has exercised its discretion to grant a brief extension to allow the employee to recover sufficiently to return to work. Here though there was no such evidence and in fact all indications were that the grievant would not be able to return to work for at least 6 to 12 months. There was further no definite time frame set even after that.

As noted above, the grievant and the Union argued that this is in effect a cleverly disguised termination in the guise of an unreasonable refusal to grant an extension of the medical leave of absence. The Union did a very forceful job of arguing this point. The grievant was given a full and fair opportunity to state his case in this regard and asserted that there would have been many witnesses who could have testified that his termination was really the result of a longstanding, ongoing, surreptitious effort to get him fired.

Frankly, even if all those witnesses had been called and had testified that the department was really out to fire the grievant, it would have mattered little on these facts. One need look no further than the provisions of Article 14 for the answer to the grievance here. This case is about whether there exists a contractual obligation to extend the grievant's leave in these circumstances. There is not. The ultimate question was whether the State violated the contract when it refused to extend the grievant's medical leave. On these facts no contractual violation was shown.

The language of the contract could not be clearer: it reserves to the State the discretion to decide whether to extend a medical leave beyond one year. There is no question that this discretion was exercised here and that there was no evidence whatsoever of anything arbitrary or capricious or nefarious, as the grievant claimed, afoot here. There is no question that at the end of the year his medical condition did not allow him to return to work.

In fact, after almost a year after the expiration of the one-year leave and the grievant is still unable to return to work. There is simply nothing in the contract that requires the State to keep a job open indefinitely or seemingly forever as the grievant asserts.

The Union pointed to a prior arbitration involving similar language in the State of Minnesota and AFSCME labor agreement, see *State of Minnesota, State Academy for the Deaf and AFSCME Council #6*, BMS case # 02-PA-1224 (Remington 2002). There the arbitrator found the employee was entitled to ongoing health benefits as long as the grievant's workers compensation benefits continued.

That case involved a different issue and did not squarely deal with the provisions of Article 14 or anything similar. In fact Arbitrator Remington specifically held that "there can be no question but that the Employer has the discretionary right to extend or not extend leaves of absence." Arbitrator Remington held though that the grievant was still an "employee" for purposes of receipt of health insurance benefits. That issue is not strictly involved here and no such issue was raised by either party in this matter. The question here is whether the State violated the contract when it denied the grievant an extension of his medical leave. The issue as posited by the Union was whether the State violated the contract when it "discharged" the grievant. The issue is thus whether the state's actions constituted a constructive discharge of some sort or whether it was simply the exercise of discretion in not extending the leave.

The State however pointed to an arbitration decided by arbitrator Jack Flagler. See, *State of Minnesota and AFSCME Council 5*, BMS case # 06-PA-1911 (Flagler 2006). Arbitrator Flagler differed with Arbitrator Remington and concluded that once the employment relationship ends, the individual ceases to be an "employee" and becomes a "former employee." At that point the individual is no longer entitled to the rights guaranteed in the labor agreement to employees. It should be noted that one of the issues involved in that matter was virtually identical to that presented here; i.e. "whether the Employer violated [the parties' labor agreement] when they denied the extension of the grievant's one year medical leave."

On balance Arbitrator Flagler's analysis is more persuasive and based on a more rational reading of the labor agreement. Doing otherwise would at times create an almost absurd result. Under State law an employee could be on workers compensation benefits for many years, even with the caps imposed in the 1992 and 1995 legislation to Minn. Stat. 176.101 on various wage benefits. If for example, an employee were to leave the employment at the State due to the effects of the injury and take another job elsewhere, that employee might well be entitled to certain workers compensation wage loss benefits. To require payment of ongoing benefits beyond one year even though the State had exercised its contractually guaranteed discretion to end the leave and therefore end the employment relationship would be patently contrary to the intent of the language and the clear requirement that a person entitled to contractual benefits be an "employee." As Arbitrator Flagler held, "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."

In the Flagler decision there was also a requirement in the contract that the leave requiring that no extension of a medical leave "shall be unreasonably denied." This provision also appears in these parties' contract at Article 14, section 1 but to the extent the Union is claiming that the request for the extension was unreasonably denied, that argument fails as well. It is a well-founded and longstanding rule of contract interpretation that specific language will take precedence over more general language. That is the case here. The language of Article 14, section 3 (F) pertains specifically to requests for *extensions* of medical leaves of absence. Simply stated, the State has full discretion to decide that.

As noted above, the grievant asserted most strenuously that this was essentially the break his supervisors had been looking for and they jumped at the chance to terminate him when it became clear he could not return to work after the expiration of the one-year leave. The grievant and the Union pointed to a volume of documents and the testimony of Mr. Hinterberg to show that the denial of the extension of the leave was done in a disparate way and for the express purpose of discriminating against the grievant.

These documents as well as the testimony regarding the allegation of discrimination against the grievant were reviewed in some detail. The essence of the grievant's assertions here is that he was the victim of a longstanding effort by his supervisors to terminate him. The Union introduced multiple documents to support this allegation. Frankly there appears to be some truth to the grievant's claims that his supervisors really did want him gone. Those facts and conclusions, even if completely true, do not control this situation. The contract language that does control this scenario grants plenary discretion to the State to grant or deny a medical leave of absence after one year. The other problem with the grievant's argument is that he in fact could not return to work upon the expiration of the one-year leave of absence and is apparently not even able to do so now.

Whether the grievant's supervisors liked him or not or even whether they wanted to be rid of him for reasons unrelated to the medical leave is immaterial. What is material is that the State is granted the full discretion under the contract to grant extensions to a medical leave of absence after one year has passed.

Accordingly, despite the Union's quite well argued position here, the language of Article 14 section 3 (F) simply provides no avenue for relief to grant the grievant's claim on the facts presented here and the grievance must be denied.

AWARD

The grievance is DENIED.

Dated: June 2, 2008

MAPE and State of Minnesota, Genz.doc

Jeffrey W. Jacobs, arbitrator