ARBITRATION DECISION NO.:
22

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Ohio Civil Rights Commission
Toledo Office

DATE OF ARBITRATION:
March 26, 1987

DATE OF DECISION:
May 28, 1987

GRIEVANT:
Ann Feldstein

OCB GRIEVANCE NO.:
G86-0050

ARBITRATOR:
Thomas P. Michael

FOR THE UNION:
Linda Kathryn Fiely

FOR THE EMPLOYER:
N. Eugene Brundige
William T. Johnson

KEY WORDS:
Sick Leave
Physician Statement
Verifying Illness

ARTICLES:
Article 2-Non-Discrimination
    §2.01-Non-Discrimination
    §2.02-Agreement Rights
    §2.03-Affirmative Action
Article 5-Management Rights
Article 29-Sick Leave
    §29.02-Notification

§29.03-Sick Leave Policy
Article 43-Duration
§43.01-First Agreement
§43.02-Preservation of Benefits
§43.03-Work Rules

FACTS:

The Grievant is employed by the Ohio Civil Rights Commission, Toledo Office, as a Civil Rights Representative I (Investigator I). She was absent from work on July 1 and July 2, 1986. On both days she properly notified her immediate supervisor by telephone that she would not be in to work due to illness. She was told by her supervisor to submit a written statement verifying her illness upon her return to work. The Grievant did provide such a statement when she returned to work July 3, 1986. A grievance was filed July 10, 1986, alleging the Employer violated Articles 2, 5 and 29 of the Agreement by requiring the submission of a doctor's excuse under the above described circumstances.

UNION'S POSITION:

The Union's position is that the Employer improperly required the Grievant to provide a physician's statement verifying her illness of two days. There was no written or established policy in effect in July, 1986, which set forth the circumstances under which a doctor's excuse may be required. In the absence of such a written policy, such a requirement must be fair, reasonable, non-arbitrary and non-capricious. Further, it is unreasonable and contrary to the terms of the Agreement to require such a verification of illness for an ailment that would not otherwise require a doctor's attention. As a result, the Employer should be ordered to establish fair written policy guidelines setting forth the circumstances under which a physician's statement verifying an illness will be required.

EMPLOYER'S POSITION:

The Employer's position is that the Union has failed to establish that the Employer has violated any contractual provision by requiring the Grievant to provide a physician's statement verifying an illness. The Grievant was not treated any differently from other Toledo Office employees in the application of the Employer's sick leave policy in that all employees who exhibited an attendance problem were required to provide such a verification. The requirement of a physician's statement is expressly authorized by Article 29 of the Agreement. Finally, the Employer contends that many arbitrators have long recognized an inherent right of Employers to require medical verification of illness before approving use of sick leave for absences. As a result, the requirement in this case is within the terms of the Agreement and the grievance should be denied.

ARBITRATOR'S OPINION:

The Arbitrator agreed with the Employer that the attendance history of the grievant justifies a request for a medical verification of an employee's illness. The Arbitrator considered the date of the incident upon which the Grievant's complaint is based to be critical to the outcome of this proceeding. Section 29.03 of the Agreement explicitly recognizes that a transition period of at least six (6) months would precede drafting and implementation of a written sick leave policy complete with standard forms. During that time period the controlling provision of the Agreement is Section 29.02, which vests discretion in the Employer to request submission of a physician's

statement within a reasonable amount of time in order to verify employee illness.

In addition, the arbitrator held that Section 29.02 does not limit the requirement of a physician's statement to those occasions when the illness is such as to require a doctor's treatment.

AWARD:

Grievance denied. The Arbitrator agreed with the Employer that the attendance history of the Grievant justified a request for such a verification.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO CIVIL RIGHTS COMMISSION

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL NO. 11, AFSCME AFL-CIO

ANN FELDSTEIN, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

Grievance No. G-86-50
Ann Feldstein

Pursuant to notice from the Office of Collective Bargaining, Ohio Department of Administrative Services, Thomas P. Michael agreed to serve as the Arbitrator herein. The parties are the State of Ohio, Ohio Civil Rights Commission, hereinafter referred to as the employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME/AFL-CIO, hereinafter referred to as the Union. The Grievant, Ann Feldstein, is an employee of the Ohio Civil Rights Commission Toledo Office.

The patties stipulate that the grievance is properly before the Arbitrator for determination and have agreed to an extension of the thirty (30) day time limit for the Arbitrator to render a written award. A formal hearing was held on March 26, 1987, in Columbus, Ohio. The parties consented to the taping of the proceedings by the Arbitrator and to the publication of this award provided the name of the Grievant is expunged prior to publication. Witnesses were sworn and sequestered prior to their testimony. The parties have filed post-hearing briefs and this matter has been submitted to the Arbitrator on the basis of those briefs and the testimony and exhibits proffered at the hearing.

APPEARANCES:

For the Employer:
N. Eugene Brundige
William T. Johnson
Bureau of Labor Relations
Ohio Department of Transportation

For the Union:
Linda Kathryn Fiely
Associate General Counsel
OCSEA/AFSCME Local 11

ISSUE

The parties mutually agreed that the issue before the Arbitrator is:

Whether Employer properly requested Grievant to provide doctor's note upon her return to work after her absence on July 1 and July 2, 1986.

If not, what is the appropriate remedy?

FACTUAL BACKGROUND

The parties are in agreement over the operative facts of this dispute. The Grievant, Ann Feldstein, is and has been at all times relevant to this matter employed by the Ohio Civil Rights Commission, Toledo Office, as a Civil Rights Representative I (Investigator I). The Grievant was absent from work on July 1 and July 2, 1986. On both days she properly notified her immediate supervisor, Calvin Banks, by telephone that she was ill. on one of those days she was told by Mr. Banks to submit a physician's statement upon her return to work verifying her illness. Upon her return to work on July 3, 1986, she provided a note from Thomas W. Michaelis, M.D., verifying that she was seen in his office on July 1, 1986 "for severe dysmenorrhea." On July 10, 1986, the grievance at issue herein was filed alleging that the Employer violated Articles 2, 5 and 29 of the Collective Bargaining Agreement by requiring submission of a doctor's excuse under the circumstances hereinabove described. The remedy sought by Grievant is for uniform application of sick leave rules, and reimbursement of the twenty dollar ($20.00) doctor's fee and other expenses incurred by the Grievant in obtaining the doctor's excuse.

It is important to further note that July 1, 1986, was the effective date of the Collective Bargaining Agreement between the parties.

CONTRACT PROVISIONS

The following provisions of the Contract have been cited by the parties as relevant to this proceeding:

ARTICLE 2 - NON-DISCRIMINATION

§2.01 - Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation. Nor shall either party discriminate on the basis of family relationship.

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

§2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement.

§2.03 - Affirmative Action

The Employer and the Union agree to work jointly to implement positive and aggressive affirmative action programs in order to redress the effects of past discrimination, whether intentional or not, to eliminate current discrimination, if any, to prevent further discrimination, and to ensure equal opportunity in the application of this Agreement. Within ninety (90) days of the effective date of this Agreement, the parties will form a statewide Affirmative Action Committee composed of an equal number of Union and Employer representatives and co-chaired by a Union representative and an Employer representative.

The committee shall review affirmative action plans and suggest strategies to improve achievement of affirmative action goals. The Agencies covered by this Agreement will provide the Union with copies of their affirmative action plans and programs upon request. Progress towards affirmative action goals shall also be an appropriate subject for Labor-Management Committees.

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08(A) numbers 1-9.

ARTICLE 29 - SICK LEAVE

§29.02 - Notification

When an employee is sick and unable to report for work, he/she will notify his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances preclude this notification. The Employer may request that a physician's statement be submitted within a reasonable period of time. In institutional agencies or in agencies where staffing requires advance notice, the call must be made at least ninety (90) minutes prior to the start of the shift or in accordance with current practice, whichever period is less.

If sick leave continues past the first day, the employee will notify his/her supervisor or designee every day unless prior notification was given of the number of days off.

§29.03 - Sick Leave Policy

Sick leave policies shall be fair and reasonable; they shall not be arbitrary or capricious.

The Employer recognizes that sick leave policy should be fairly applied throughout the State. Upon the effective date of this Agreement, a Labor-Management Committee will be established to jointly develop a policy which will include, but not be limited to:

A. A standard sick leave form for use throughout the State, with copies provided to the employee after approval for each use;

B. Guidelines on when verification is needed;

C. Systematic standards for defining consistent patterns of sick leave usage.

This policy will be implemented no later than January 1, 1987, unless the date is mutually extended by the parties.

In addition, the Arbitrator will refer to the following contractual provisions:

ARTICLE 43 - DURATION

§43.01 - First Agreement

The parties mutually recognize that this is the first Agreement to exist between the Union and the Employer under ORC Chapter 4117. To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

§43.02 - Preservation of Benefits

To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives.

§43.03 - Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

POSITION OF THE UNION

The Employer improperly required the Grievant to provide a Doctor's verification of illness for her absence of two days. There was no written or established policy in effect in July, 1986, setting forth the circumstances under which a doctor's excuse may be required by the Employer. In the absence of such a written policy, such a requirement must be fair, reasonable, non-arbitrary and non-capricious. The requirement is also subject to pre-existing Ohio statutes and administrative regulations governing the use of sick leave. Ohio law and case law establish that the Employer is not to require a doctor's verification in the circumstances of this case.

The Grievant was not on notice prior to July, 1986, that her attendance history and alleged patterns of absence would require that she produce verification of illness, a requirement different from that applied to other employees similarly situated.

Further, it is unreasonable and contrary to the terms of the Contract to require a doctor's verification of illness for an ailment that would not otherwise require a doctor's attention.

Finally, due to the fact that there were no written standards as to when verification of an illness would be required, the possibility of inconsistent application renders the requirement in this case unreasonable.

The Employer should be ordered to establish fair written policy guidelines setting forth the circumstances under which a doctor's verification of illness will be required. The Grievant should be reimbursed for her expenses in obtaining the doctor's excuse in this case.

POSITION OF THE EMPLOYER

The Union has failed to establish that the Employer has violated any contractual provision by requiring the Grievant to provide a doctor's verification of illness in the circumstances herein.

The testimony and evidence adduced at the arbitration hearing establish that the Grievant was not treated differently from other Toledo Office employees, namely Karen Hubbard and Carlton Jones, in the application of the Employer's sick leave policies. The evidence exhibited shows that those employees, who also exhibited an attendance problem, were required to provide a doctor's verification of illness.

This Grievant had developed a pattern of absenteeism which justified the Employer in requiring a doctor's verification in this instance. A public employer has not only a right, but a duty to the public to assure that its employees do not abuse sick leave. The requirement of a doctor's verification in this case is expressly authorized by Article 29 of the Contract. Grievant's complaint that it was unreasonable to require a doctor's excuse because she would not otherwise have required a doctor's attention is of no moment since she did not explain that circumstance to her supervisor prior to obtaining the verification.

Finally, many arbitrators have long recognized an inherent right of Employers to require medical verification of illness before approving use of sick leave for absences. The requirement in this case is within the terms of the Contract and the grievance should be denied.

OPINION

The Employer has thoroughly rebutted the charges of Grievant that Article 2 of the Contract has been violated. This record is barren of any probative evidence that would support a charge that the Grievant has been unfairly discriminated against as compared to her co-workers.

The Arbitrator considers the date of the incident upon which Grievant's complaint is based to be critical to the outcome of this proceeding. §29.03 of the contract explicitly recognizes that a transition period of at least six (6) months would precede drafting and implementation of a written sick leave policy complete with standard forms. Therefore, during that time period the controlling provision of the Contract is §29.02, which vests discretion in the Employer to request submission of a physician's statement within a reasonable period of time to verify employee illness for purposes of sick leave approval. The contract is explicit and controlling in the absence of any evidence of discrimination or arbitrary application to the Grievant.

The Union's reliance on pre-Contract case law construing Ohio's statutory provisions generally governing use of sick leave is misplaced. As the Union admits in its post-hearing brief, the Contract is not in conflict with Ohio law and rules. The case of CWA v. Rogers, et al., Franklin County Court of Appeals Case Number 36 AP-384, relied upon by the Union, did not involve the applicability of a contractual sick leave provision mutually agreed to in the collective bargaining

process. The parties, including representatives of the Grievant, have mutually agreed that the Employer may require a medical validation of illness. Ann Feldstein was on constructive notice of that contractual provision at the time the Contract took effect on July 1, 1986, and is bound thereby.

Article 43 of the Contract expressly provides that "(t)o the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement . . . this Agreement shall take precedence and supersede all conflicting State laws." (Contract §43.01) Therefore, even if the Contract were in conflict with §124.382(D) Revised Code, which it is not, it would be the duty of this Arbitrator to find that the Contract is controlling and that the Employer legitimately requested a doctor's verification in this case.

Nor does §29.02 of the Contract limit the requirement for a doctor's excuse to those occasions when the illness is such as to require a doctor's treatment. The Arbitrator agrees with the Employer that the attendance history of the Grievant justified a request for a medical verification under the circumstances of this case.

This case does not present, nor has the Arbitrator considered, the issue of the validity of the Employer's enforcement of this rule on and after January 1, 1987. The concerns expressed by Grievant are germane to the development of the Labor-Management Committee's sick leave policy established pursuant to §29.03 of the Contract. If that Committee has not yet implemented a policy, the Arbitrator suggests that the issues advanced by the Union herein be presented to that forum.

AWARD

The grievance is denied.

Thomas P. Michael, Arbitrator

Rendered this Twenty-Eighth day of May, 1987, at Columbus, Franklin County, Ohio

CERTIFICATE OF SERVICE

I hereby certify that the original Opinion and Award was mailed to Edward H. Seidler, Deputy Director, Ohio Department of Administrative Services, 375 S. High Street, 17th Floor, Columbus, Ohio 43266-0585, with copies of the foregoing Opinion being served by United States Mail, postage prepaid, this 28th day of May, 1986, upon: N. Eugene Brundige, Ohio Department of Transportation, 37 West Broad Street, Third Floor, Columbus, Ohio 43215 and Linda Kathryn Fiely, Associate General Counsel, OCSEA/AFSCME Local 11, 995 Goodale Boulevard, Columbus, Ohio 43212.

Thomas P. Michael