

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between)
Morton School District)
the Employer)
And)
Public School Employees of)
Morton/Washington)
the Union)

**ARBITRATOR'S OPINION
AND AWARD**

(Grievance of
[REDACTED])

Representatives:

For the Employer:

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November 10, 2002

Jane R. Wilkinson, Esq.
Labor Arbitrator
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WITNESS LIST

For the Employer:

Ron Walker, Head of Custodial and Maintenance

██████████, Grievant (adverse)

For the Union:

██████████, Grievant's wife

Russ Davis, Superintendent (adverse)

██████████, Grievant

Beth Byrd, Local PSE Chapter President

EXHIBIT LIST

Joint Exhibits:

1. Collective Bargaining Agreement, September 1, 1999- August 21, 2002
2. Grievance, November 21, 2001
3. Written warning from Ron Walker to Mike Moore, October 15, 2001
4. Memorandum to Ron Walker from Mike Moore, October 19, 2001

District Exhibits:

1. Calendar for September-October 2001
2. Mike Moore's timesheets for September and October 2001

Union Exhibits:

1. Leave Request forms (2), October 8, 2001
2. Policies of Morton School District, 5000 policies series, adopted by Board on February 19, 2002
3. District family leave policy (policy 5323) in effect until February 2002

I. INTRODUCTION

This dispute, between Morton School District (the Employer) and Public School Employees of Morton/Washington (the Union), concerns the grievance of [REDACTED] (the Grievant) that the Union timely submitted to the Employer on September 5, 2001, pursuant to the parties' 1999-2002 Collective Bargaining Agreement. The grievance alleges that the Employer violated the Agreement when it issued a written warning on October 15, 2001, and denied him pay for all or some of the leave he took to care for his critically ill father. The parties were unable to resolve the grievance pursuant to the dispute resolution provisions of their Agreement. Accordingly, they submitted the dispute to arbitration. At an arbitration hearing held on September 5, 2002, in Eatonville, Washington, parties had the opportunity to make opening statements, submit documentary evidence, examine and cross-examine sworn witnesses and argue the issues in dispute. The parties stipulated that the dispute was properly before the undersigned Arbitrator who has the authority to issue a final and binding decision as to the issues submitted herein. The parties also stipulated that the Arbitrator would retain jurisdiction, for 90 days, over the remedial aspect of the dispute should a remedy be awarded in favor of the Union. Upon the receipt of both parties' closing briefs (e-mailed) to the Arbitrator on October 8, 2002, and the District's subsequent Motion to Strike dated October 17, 2002, the hearing closed and the case stood fully submitted for decision.

II. DISTRICT'S MOTION TO STRIKE

After the parties submitted their closing briefs, the District filed a motion to strike that portion of the Union's brief that brought the bereavement leave of the Grievant into issue. The District objected to the Union's claim that the District "retaliated against [REDACTED] ... by refusing to pay him for his full available 5 days for bereavement leave." The District complained that the parties had not presented evidence at hearing concerning that leave because it had not been the subject of

dispute. Furthermore, that leave was not mentioned in the grievance itself nor brought to the District's attention as part of the grievance. The Union did not respond to the District's motion.

The Arbitrator agrees with the District's contentions and therefore will disregard that portion of the Union's argument having to do with bereavement leave.

III. SUMMARY OF THE EVIDENCE

The Grievant began working as a part-time groundskeeper for the District as a temporary employee in 1998 or 1999; the District made his position permanent in May 2001.

The Grievant notified his supervisor, Ron Walker, on Wednesday, September 12, 2001, that his elderly father was seriously ill and that he needed to go to his father's home in Las Vegas to care for him.¹ He stated he would be gone all of the following week. Mr. Walker indicated he understood and gave him a leave slip to fill out. The Grievant did so and submitted it. On Friday, September 14, 2001, the Grievant advised Mr. Walker that he would be leaving immediately to care for his father, and he believed he would be gone one week. Mr. Walker approved the Grievant taking the time off and expressed his sympathy. The Grievant missed work the following workweek, which was from Monday, September 17 through Friday, September 21, 2001.

On Sunday, September 23, 2001, the Grievant telephoned Mr. Walker at home to advise him that his father's condition was poor and that the family was trying to have him placed in a nursing home. According to both the Grievant's and Mr. Walker's testimony, the gist of their conversation was that the Grievant stated he needed to spend more time away from work and indicated he would or might be back at mid-week. The Grievant testified that he asked whether he should telephone the District the next morning and Mr. Walker responded with a "no" and assurances that he (Walker) would take care of it.

¹ According to the Grievant's wife, Teresa Moore, his father suffered from end-stage emphysema, end-stage dementia, had become anorexic and had coronary artery disease.

Mr. Walker, however, interpreted the Grievant's statements as meaning he would be back to work on Wednesday or Thursday and he testified he approved his leave to that extent. He testified that he would have expected the Grievant to call him again if he couldn't make it back. The Grievant testified that he didn't intend to give Mr. Walker that impression, that optimistically he hoped to be back then, but he just did not know for certain when he could return. The Grievant explained that he and his sister had been giving his father 24-hour care, were communicating with doctors and his father's HMO, attempting to procure a supply of oxygen, and trying to find a care facility that would take him. He indicated he was consumed by his father's illness and it was difficult for him to predict when everything could be resolved.

The Grievant did not return that week (the week of September 23, 2001). According to the Grievant's and his wife's testimony, on Sunday, September 30, 2001, the Grievant asked his wife to telephone the District the next morning to let Mr. Walker know that he would not be returning then. He testified that he could have called Mr. Walker directly, but chose not to because, among other things, the family was trying to leave the telephone lines open while they awaited return phone calls. The Grievant apparently gave no indication to his wife as to when he would return and his wife testified that he instructed her to call the District office, not Mr. Walker personally. Mrs. [REDACTED] testified that the situation by then was a "mess" and was "complicated" and explained that her husband and his sister had been providing 24-hour care, seven days a week, including feeding their father and cleaning him. They also were trying to gain information from doctors, find a long-term care facility for placement and deal with related issues. The Grievant added that he was focused on the things he needed to do for his father and that his sister was "wearing down" from the strain of the care she had been providing.

Mrs. [REDACTED], who normally worked night shifts as a hospital nurse, testified that she was very ill with a cold, fever and laryngitis, and did not call the District office until noon the next day. (The Grievant's shift would have started at 1 p.m.). According to her testimony, she spoke with then-District secretary Bonnie Hoffman and ask her to give Mr. Walker the message that her

husband could not return from Las Vegas, that he needed more time to care for his father. She did not state when he would be returning.

According to Mr. Walker, Mrs. [REDACTED] did not leave that message with Ms. Hoffman, but instead left it on his voice mail. He was certain that the message was left on his voice mail because Ms. Hoffman “very seldom” delivers messages to him; instead, she transfers the caller to his voice mail. According to Mr. Walker, the message was vague as to where the Grievant was and when he would be returning. When asked whether he thought Mrs. [REDACTED]’s phone call was a request for more leave time, Mr. Walker responded that he didn’t interpret it that way because “I felt she didn’t know what was going on except that he was in Las Vegas.” Mr. Walker further testified that he had telephoned the Grievant’s home earlier in the morning of October 1, 2001, and left a message inquiring about the Grievant’s whereabouts. Mrs. [REDACTED] did not recall that message.

The Grievant returned to his home the following Sunday, October 7, and returned to work for his 1 p.m. starting time on Monday, October 8, 2001. During the Grievant’s absence, Mr. Walker covered his duties by working overtime, he testified, and had he known it was going to continue through the third week, he would have hired temporary help. Mr. Walker did not ask the Grievant about his absence or otherwise talk about the infrequent contact, but the Grievant stated that from Mr. Walker’s demeanor, he could tell he was “on thin ice.” For that reason, he did not want to make an issue out of how much of his leave would be paid under District policy. He testified he filled in his timesheet as showing only three days of paid leave (using accrued sick leave) because, according to his testimony, Mr. Walker and Superintendent Russ Davis both told him he was not eligible for more. (Superintendent Davis denied talking to the Grievant). Thus, testimony varied as to exactly what was said to the Grievant and by whom, but the upshot was that the Grievant was paid for three days of his absence, and the remainder was unpaid.

Superintendent Russ Davis testified he advised Mr. Walker that the Grievant would need to provide verification for the absence to be paid for more than the three days. He did not provide specifics as to the kind of verification he would accept, but at hearing he testified he would have accepted a note or a call from the Grievant's father's physician or even from the long-term care facility where he was eventually placed. The Grievant testified that he did not receive this information and the District provided no evidence to the contrary.²

On October 15, 2001, Mr. Walker gave the Grievant a written warning for not communicating the specifics regarding his absence. Mr. Walker testified that he carries a cell phone at all times and the employees he supervises have his number.

IV. ISSUES

The parties were unable to agree about a statement of the issues, leaving it for the Arbitrator to decide. The Employer proposed the following:

Whether the written warning issued by the school district on October 15, 2001, was appropriate? If not, what is the appropriate remedy?

The Union proposed to frame the issues in the following manner:

Did the District violate the Collective Bargaining Agreement when it reprimanded and didn't pay the Grievant for family leave in September and October of 2001? If so, what is the appropriate remedy?

Although both parties have fairly appropriately framed the issues, the Arbitrator believes the issues should be more precisely stated as follows:

1. Did the District violate the Collective Bargaining Agreement when it reprimanded the Grievant?
2. Did the District violate the Collective Bargaining Agreement by not allowing the Grievant to use paid sick leave or annual leave for part of the leave he took to care for his father?³

² The Grievant testified that his father passed away on October 22, 2001, and the District allowed him to take bereavement leave after he provided verification in the form of a death certificate.

³ The District initially allowed the Grievant to use about three days of paid sick leave for the period of absence at issue here. In its post-hearing brief, the District stated it was willing to allow the Grievant to take paid sick leave to cover the period from the start of his leave on September 17, 2001, through September 27, 2001. The Union

3. If the answer to either or both questions is affirmative, what is the appropriate remedy?

V. RELEVANT CONTRACT LANGUAGE

The “Declaration of Principles” section that appears at the start of the Collective Bargaining Agreement states, in pertinent part:

2. Effective employee-management cooperation requires a clear statement of the respective rights and obligations of the parties hereto.

Article II of the Agreement states:

RIGHTS OF THE EMPLOYER

Section 2.1. It is agreed that the customary and usual rights, powers, functions, and authority of management are vested in management officials of the District. Included in these rights in accordance with applicable laws and regulations is the right to direct the work force, the right to hire, promote, ... the right to suspend, discharge, demote or take other disciplinary action against employees;

Section 2.2. The right to make reasonable rules and regulations shall be considered acknowledged functions of the District. In making rules and regulations, the District shall give due regard and consideration to the rights of the Association and the employees and to the obligations imposed by this agreement.

Article IX pertains to paid and unpaid leaves, including sick leave, personal leave, bereavement leave and leave sharing. On family leave, this article states:

Section 9.6. Family Leave. Eligible employees shall be granted leave under the Family and Medical Leave Act (FMLA) of 1993. FMLA provisions are posted at each worksite. Additional information may be obtained from the Morton School district office.

Article XII, although entitled “Discharge of Employees,” pertains also to lesser discipline. Its provisions state:

Section 12.1. Following due process, the district may discipline and/or discharge any employee subject to this agreement for justifiable cause. Discipline will be progressive in nature.

Section 12.2. The issue of justifiable cause shall be resolved in accordance with the grievance procedures of this agreement.

indicated that the Grievant had 15 days of sick leave accrued at the time of these events. Thus, the period from September 28 through October 5, 2001 remain at issue.

Article XVI on the arbitration procedure, states in pertinent part:

Section 16.2.4.

The arbitrator's decision will be in writing and will set forth his/her finding of fact, reasoning, and conclusions on the issues submitted to him/her. The decision of the arbitrator shall be final and binding upon the Employer, the Association and the grievant(s).

Jurisdiction of the arbitrator:

The arbitrator shall be without power or authority to add to, subtract from or alter any of the terms of this agreement.

The arbitrator shall be without power or authority to make any decision which requires the commission of an act prohibited by law.

Costs:

The fees and expenses of the arbitrator shall be shared equally by the parties. All other expenses shall be borne by the party incurring them.

VI. RELEVANT DISTRICT POLICY, NO. 5323

Family Emergency Leave

The board recognizes the demands of the workplace and of families need to be balanced to promote family stability and economic security for school district employees. Conditions for the authorized use of accumulated sick leave for family leave are to be fairly construed in a manner consistent with this policy, and other relevant district policies.

In the event the staff member's sick leave has been exhausted, the leave may be granted without pay. Except as otherwise provided, this policy is subject to all of the provision of Police 5320. Unless otherwise provided by an applicable collective bargaining agreement, the following shall apply:

Family Illness

District staff members may use accrued sick leave to care for a child of the employee under the age of eighteen (18) with a health condition that requires treatment or supervision. The district may require a signed statement from a licensed medical practitioner to verify the need for treatment or supervision for any absence which exceeds five (5) consecutive days.

The district shall also allow each full-time staff member 12 days of sick leave per year in the event of a serious illness with the employees immediate family, which shall include the employee's parents or spouse.

Family Leave

Every employee of the district who has worked for the district at least one year and for at least 1,250 hours in the preceding year is entitled to twelve (12) workweeks of family leave during any twelve (12) month period to:

(b) Care for a spouse, parent or child of the employee who has a serious health condition,

The superintendent may require written verification from the employee's health care provider.

Return to work.

Reinstatement of an employee returning from family leave need not occur if: c) the employee fails to provide the required notice of intent to take family leave or fails to return on the established ending date of the leave. ...

VII. POSITIONS OF THE PARTIES

- A. **Position of the District** – The District had just cause under the parties' collective bargaining agreement to issue a written warning to the Grievant. The District is willing to compensate the Grievant for the days it authorized him to be on leave: September 17-27, 2001.
1. The District did not violate the FMLA when it issued the warning.
 1. Under the FMLA, the District can require employees to keep it reasonably informed about plans to return to work. The FMLA specifies "reasonable notice" as two business days. Courts have upheld terminations of employees that failed to follow an employer's notice procedure.
 2. The District requires an employee requesting leave to fill out a leave request form, including what kind of leave is sought and when the employee will return.
 3. The District's standard practice is to require employees to seek extensions. This is permitted under the FMLA.
 4. The Grievant's initial leave request was for the week of September 17-21, 2001.
 5. The Grievant properly requested an extension until "midweek" of the following week, which was equivalent to about September 26 or 27.
 6. The Grievant did not request any additional time off past September 27, yet stayed away until October 8.
 2. Because the Grievant failed to communicate to the District when he would be returning to work, he was properly disciplined.
 - a. The Grievant demonstrated his knowledge of the proper procedure by requesting the first extension over the phone and by testifying that he knew he was on "thin

ice” when he got back, apparently as a result of not having gotten a second extension.

- b. The Grievant’s wife’s voice mail message to the district does not count as proper notice because the Grievant was able to call in himself and request another extension. He admitted that though he was out of town, he had access to a phone.
 - c. The Grievant’s wife left a voice mail message, but it was left only in response to the District calling the Grievant’s home, and the message did not specify a return date for the Grievant. The message merely stated that she did not know when the Grievant would return.
 - d. Had the Grievant given the District proper advance notice, it would have hired temporary help. Instead, the District was short-staffed for three weeks.
 - e. The District did not discipline the Grievant for taking FMLA leave; it disciplined him for failure to provide proper notice.
 - f. If the District is not allowed to warn employees for failing to return by an agreed-upon date and failing to properly request an extension, it would send a message that employees on FMLA leave have a “blank check” to return to work when they want to.
 - g. The District admits that it did not provide the Grievant with written notice that his leave was FMLA-qualifying. However, this means only that the Grievant might still have been entitled to 12 full weeks of FMLA leave. The District was still justified in disciplining the Grievant for failing to provide proper notice.
- B. Position of the Union** – The District violated the parties’ collective bargaining agreement when it failed to compensate the Grievant for FMLA leave taken from September 17 to October 8, 2001. The Grievant must receive pay for the three weeks he was on FMLA leave and for the five days’ bereavement leave he took after his father died. The written reprimand must also be removed from his file.
1. The FMLA recognizes that employees, when caring for sick family members, are in the middle of chaotic circumstances. The FMLA does not require strict compliance.
 2. Under the FMLA, an employer can only place conditions on an employee’s family leave if there is written notification to the employee and if those conditions are consistently enforced.
 3. The District did not have any written policy regarding notice of length of FMLA leave at the time the Grievant took his leave. In fact, it is doubtful whether the District had even posted, as legally required, employees’ rights and remedies under the FMLA.
 4. Absent a written notification policy of the District, the minimum requirements are those specified in the FMLA. The District had a right to ask for compliance with these requirements if possible for the employee to do so.
 5. Such notification requirements must be equally applied.
 6. The Grievant properly notified the District of his intent to continue his leave and even gave more substantial notice than co-workers who took approved leave.
 - a. The Grievant started his leave to care for his ill father with no instructions from the District other than “do what you need to do.”
 - b. The Grievant, through his wife, actually did give the District notice that he needed additional leave starting the week of October 1-5 and lasting for an unspecified length of time.
 - c. If the District did not like the way the Grievant provided notice, it could have let him know that it wanted a more formal notification procedure.

- d. Beth Byrd testified that she and another employee had taken FMLA leave to care for ill spouses. They were placed on leave until they gave notice of their intent to return.
7. The District was not allowed to threaten the Grievant with discipline until it first sought medical certification as to the validity of the Grievant's leave. Because it did not request certification, the District was not allowed to refuse the Grievant up to 12 weeks of leave.
8. The District failed to properly compensate the Grievant for his FMLA leave.
 - a. At the time he left for FMLA leave, the Grievant had accrued at least 15 days of sick leave and 12 days of annual leave entitlement.
 - b. The District has a policy of running FMLA leave concurrently with sick leave, such that any accrued sick leave would go toward compensating an employee for his or her FMLA leave.
 - c. The parties' contract allows employees to share sick leave for absences that qualify for paid leave but when an employee's leave has run out. The District failed to allow the Grievant to seek leave sharing.
 - d. The District treated the Grievant as if he were a non-FMLA eligible employee; it gave him minimal leaves under the contract: personal leave, then unpaid discretionary family leave.
 - e. The District retaliated against the Grievant for taking FMLA by:
 - 1) refusing to pay him for his full available 5 days' bereavement leave and
 - 2) refusing to pay the Grievant for even the five days' leave he initially requested to care for his ill father.

VIII. DISCUSSION AND ANALYSIS

Section 9.6 of the Collective Bargaining Agreement explicitly requires the Employer to grant leave under the Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. §2612 et seq., and it states "FMLA provisions are posted at each worksite. Additional information may be obtained from the Morton School District office." Accordingly, the parties do not dispute the Arbitrator's authority to consider the provisions of that statute in this case. Nevertheless, the Arbitrator recognizes that her authority arises under the Collective Bargaining Agreement and it is the provisions of that Agreement that must be applied. The FMLA⁴ is relevant to the extent necessary to interpret that Agreement or to the extent its provisions are incorporated by reference. The ultimate issues to be determined by the Arbitrator are whether the District

⁴ A provision parallel to the FMLA is found in RCW 49.78, as implemented in WAC 296-134. Although some provisions of RCW 49.78 are more generous to the employee than the FMLA, none of those provisions are implicated in this dispute.

violated the just cause provision of the Collective Bargaining Agreement and whether it violated the Collective Bargaining Agreement or applicable District policy on paid leave. The parties do not dispute that the District policy on using accrued paid leave for FMLA purposes applies to the bargaining unit and is within the Arbitrator's jurisdiction to consider.

A. FMLA Provisions

The FMLA entitles an employee to a total of 12 workweeks of leave during any 12-month period to care for a seriously ill parent. 29 U.S.C. §2612(a). Leave is unpaid under the FMLA unless the employer's plan allows paid leave to be used for that purpose. 29 C.F.R. §825.207(a) & (c). (The District's policy, as set forth above, allows the employee to use sick leave for family leave purposes. The parties do not now dispute that the leave taken by the Grievant was family and sick-leave eligible through September 27, 2001).

The Fifth Circuit, in *Satterfield v. Wal-Mart Stores*, 135 F.3d 973 (5th Cir., 1998), online at <http://laws.findlaw.com/5th/9740135cv0.html>, (hereafter cited as "*Wal-Mart*") observed:

The Family Medical Leave Act of 1993 was enacted because Congress found, *inter alia*, "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods". 29 U.S.C. §2601(a)(4). The purposes of the Act include "balanc[ing] the demands of the workplace with the needs of families" and "entitl[ing] employees to take reasonable leave for medical reasons". 29 U.S.C. §2601(b)(1) & (2). However, the FMLA seeks to accomplish these purposes "in a manner that accommodates the legitimate interests of employers". 29 U.S.C. §2601(b)(3); *see also* 29 C.F.R. §825.101(b) ("The enactment of the FMLA was predicated on two fundamental concerns - the needs of the American workforce, and the development of high-performance organizations.")

1. Employer's Responsibilities to Employees

a) Designating FMLA Leave

The FMLA places significant communication responsibilities on the employer. To start with, the Department of Labor (DOL) regulations do not require the employee to specifically request FMLA leave. Rather, according to 29 CFR §825.303(b):

The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

Stated more simply, "once an employer is given notice that an employee is requesting leave for a FMLA-qualifying reason, the employer bears the obligation to collect any additional information necessary to make the leave comply with the requirements of the FMLA." *Hammon v. DHL Airways*, 165 F.3d 441 (5th Cir. 1998), online at <http://laws.findlaw.com/6th/990010p.html>. Although the regulations state that if an employer fails to properly designate a leave as FMLA leave, the employee's leave may not be counted against his or her 12-week FMLA entitlement, see 29 C.F.R. §§825.208(c) and 825.700(a), the U.S. Supreme Court recently invalidated that regulation because it could effectively give an employee more than 12 weeks' leave, contrary to Congressional intent. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. ___, 122 S.Ct. 1155 (2002).

b) Notice To Employees of Rights and Expectations

The employer's notice obligations to the employee are specific and fairly extensive. The Department of Labor regulations state as follows (underscored emphasis added):

29 CFR Sec. 825.301. What other notices to employees are required of employers under the FMLA?

(a) (1) If an FMLA-covered employer has any eligible employees and has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document. For example, if an employer provides an employee handbook to all employees that describes the employer's policies regarding leave, wages, attendance, and similar matters, the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA. Informational publications describing the Act's provisions are available from local offices of the Wage and Hour Division and may be incorporated in such employer handbooks or written policies.

(2) If such an employer does not have written policies, manuals, or handbooks describing employee benefits and leave provisions, the employer shall provide

written guidance to an employee concerning all the employee's rights and obligations under the FMLA. This notice shall be provided to employees each time notice is given pursuant to paragraph (b), and in accordance with the provisions of that paragraph. Employers may duplicate and provide the employee a copy of the FMLA Fact Sheet available from the nearest office of the Wage and Hour Division to provide such guidance.

(b) (1) The employer shall also provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The written notice must be provided to the employee in a language in which the employee is literate (see Sec. 825.300(c)). Such specific notice must include, as appropriate:

(i) that the leave will be counted against the employee's annual FMLA leave entitlement (see Sec. 825.208);

(ii) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (see Sec. 825.305);

(iii) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(vii) the employee's right to restoration to the same or an equivalent job upon return from leave (see Secs. 825.214 and 825.604); and,

(2) The specific notice may include other information--e.g., whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so. A prototype notice is contained in Appendix D of this part, or may be obtained from local offices of the Department of Labor's Wage and Hour Division, which employers may adapt for their use to meet these specific notice requirements.

(c) Except as provided in this subparagraph, the written notice required by paragraph (b) (and by subparagraph (a)(2) where applicable) must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee--within one or two business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(1) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within one or two business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in subparagraph (b) which has changed. For example, if the initial leave period were paid leave and the subsequent leave period would be unpaid leave, the

employer may need to give notice of the arrangements for making premium payments.

(2)(i) Except as provided in subparagraph (ii), if the employer is requiring medical certification or a “fitness-for-duty” report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(f) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

Nowhere do the regulations mention, much less condone, oral notice or a simple “practice” as being sufficient communication of the employer’s expectations. The last-quoted subsection of 29 CFR §825.301 (subsection f) is awkwardly written: It bars an employer who fails to give the required notice from taking action against an employee who does follow the expectation “set forth in the [nonexistent] notice.” Nevertheless, it is fair to assume, absent any judicial instruction to the contrary (and none could be found) that the DOL meant to prohibit an employer from penalizing an employee who did not comply with expectations that were not communicated properly, *i.e.*, in writing, to that employee (directly or via an employee handbook or similar manual).

In *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001), online at <http://www.ca9.uscourts.gov/ca9/>, the Ninth Circuit addressed, at least indirectly, the meaning of the notice requirements of 29 C.F.R. §825.301. In that case, America West discharged the plaintiff for absenteeism she maintained was FMLA-eligible. *America West* disagreed, based on its method of calculating the one-year period, one of four methods permissible under the Act but which had not been disclosed to its employees. The court found absurd the notion that any information that an employee should have under the FMLA may be kept “secret,” regardless of whether the regulations specifically require disclosure. Citing and discussing 29 C.F.R. §825.301(a)(1) as support, the court observed that the regulations require employee handbooks

or other written employee materials to “incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA.” For employers with no employee handbooks or similar publications, the court noted that 29 CFR §825.301(a)(2) requires employers to give direct to the employee written guidance on the employee’s obligations under the FMLA. The court observed that according to the Department of Labor (emphasis in italics added):

The purpose of this provision is to provide employees the opportunity to learn from their employers of the manner in which that employer intends to implement FMLA and what company policies and procedures are applicable so that employees may make FMLA plans *fully aware of their rights and obligations. It was anticipated that to some large degree these policies would be peculiar to that employer.* 60 Fed. Reg. at 2219.

The court rejected America West’s argument that its posting of the required FMLA notice (see 29 C.F.R. §825.300(a), discussed *infra*) constituted sufficient communication, explaining:

The sample poster that satisfies this requirement does not mention the methods by which employers shall calculate leave eligibility. ... [T]o conclude that complying with the posting rule satisfied all of an employer’s notice obligations under the Act, as America West argues, would render a nullity the subsequent rule, 29 C.F.R. § 825.301, describing the “other notices to employees ... required of employers under the FMLA.” Moreover, the Labor Department explicitly indicated that compliance with the posting rule would not suffice to meet all of the employer's notice requirements. See 60 Fed. Reg. at 2219

The Ninth Circuit panel distinguished cases where an employee fails to give any notice of absence for an FMLA-qualifying reason. The court observed that where an employer is given no reason to believe that the absence might be for an FMLA-qualifying reason, “the absence is not protected by the Act” (citing *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1207 (11th Cir. 2001) *Brungar, v. Bellsouth Telecommunication, Inc.*, 231 F.3d 791, 800 (11th Cir. 2000); *Bailey v. Amsted Indus. Inc.*, 172 F.3d 1041 (8th Cir. 1999)).

Similarly, in *Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7th Cir. 2001), online at <http://laws.findlaw.com/7th/011930.html>, the employee failed to tell the employer that the medical condition might be serious, information needed to make it FMLA-qualifying. The court rejected the employee’s argument that because the rules are silent on what the employee

should tell the employer “when time is short,” she need not ever impart that information. “This is a lot to read into silence, especially when the premise of the argument is so doubtful,” the court observed.

c) Posting of FMLA Rights

A DOL regulation requires employers to post on their premises, in conspicuous places, a notice explaining the provisions of the FMLA. 29 C.F.R. §825.300(a). Regarding the failure to post notice, 29 C.F.R. §825.300(b) states:

[A]n employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave.

The *Wal-Mart* court, however, rejected the plaintiff’s argument that because the employer failed to comply with this provision, it was prohibited from firing her for not giving proper after-the-fact notice of her unforeseeable FMLA leave.

... §825.300(b) by its own terms, applies only in situations where the employee is required to provide “*advance*” notice of a need for FMLA leave. ... [S]uch *advance* notice is required only when the need for FMLA leave is *foreseeable*; it is not required when, as in this case, the need is *unforeseeable*.

Accord, Gay v. Gilman Paper Co., 125 F.3d 1432, 1436, n.6 (11th Cir. 1997) (notice given by employee after a week of absence, along with false information, inadequate for FMLA protection).

d) Retaliation and Interference

The statute makes it “unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under” the Act. 29 U.S.C. §2615(a).

The District correctly cited *Gilliam v. United Parcel Serv., Inc.*, 233 F.3d 969, 971 (7th Cir. 2000), for the proposition that disciplining an employee for the failure to follow the employer’s reasonable notice requirements does not constitute retaliation. *Lewis v. Holsum of Fort Wayne Inc.*, 278 F.3d 706, 710 (7th Cir. 2002) stated:

[T]o establish a prima facie case of retaliatory discharge, [the plaintiff] must show (1) that she engaged in a statutorily protected activity; (2) that she suffered an

adverse action subsequent to this activity; and (3) that there was a causal link between the protected activity and the adverse action. *See Rizzo v. Sheahan*, 266 F.3d 705, 714 (7th Cir. 2001); *Oest v. Ill. Dept. of Corrections*, 240 F.3d 605, 616 (7th Cir. 2001).

2. Employee's Notice and Reporting Responsibilities

a) Employee's Advance Notification Requirements

As is evident from the preceding discussion, the FMLA contemplates that most notification requirements, particularly regarding unforeseeable events or changes in circumstances, will be set by the employer. For example, if the ending date of the family leave cannot be predicted, an employer may require the employee to call in every few days with a prognosis. The law contemplates meeting the employer's needs as well as the employee's and provides the necessary flexibility. Therefore, the FMLA regulations avoid specific requirements on employee-to-employer notice, although in a few areas the regulations define the outer limit of what an employer can require. Thus, when a leave is foreseeable (e.g., planned medical treatment, childbirth, adoption) the FMLA regulations allow a 30-day advance notice requirement. 29 C.F.R. §825.302(a). An employer may, of course, choose to allow shorter notice, but may not require more than 30 days' notice. 29 C.F.R. §825.302(g). If 30 days is not feasible, but the leave is nonetheless foreseeable, then the notice must be given as soon as practicable. *Id.* 29 C.F.R. §825.302(d) addresses the paperwork aspect of foreseeable leave requests:

An employer may also require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. However, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice.

29 CFR §825.303 states, with respect to unforeseeable FMLA leave:

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is

expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally.

...

The *Wal-Mart* court, *supra*, stated that the adequacy of notice (both timing and content) given by the employee to the employer cannot be determined pursuant to categorical rules, but instead depends on the facts and circumstances of each individual case. Quoting from an earlier decision, *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995), the court stated:

The critical question is whether the information imparted to the employer is sufficient to reasonably appraise it of the employee's request to take time off for a serious health condition.

b) Periodic Reporting by Employee

The FMLA regulations specify that an employer may require an employee to report periodically on the employee's status and intent to return to work. 29 C.F.R. §825.309(a). An employer may also require that the employee provide the employer with reasonable notice (i.e., two business days, if practicable) of changed circumstances. 29 C.F.R. §825.309(c). Specifically, 29 §CFR 825.309 states:

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(c) It may be necessary for an employee to take more leave than originally anticipated. ... [T]he employer may require that the employee provide the employer reasonable notice (i.e., within two business days) of the changed

circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

The language of these provisions indicates that requiring periodic reporting or reasonable notice of changed circumstances is optional (“an employer may require”) with the employer. Presumably, whatever the employer requires must be communicated in writing as specified under 29 C.F.R. §825.301, *supra*.

As the District pointed out in its post-hearing brief, courts are not sympathetic to employees who fail to follow their employers’ legitimate notice requirements. *Gilliam v. United Parcel Serv., Inc.*, *supra*, 233 F.3d at 971, stated that FMLA does not “authorize employees on leave to keep their employers in the dark about when they will return.” The court explained, “notice enables an employer to keep its business operating smoothly by bringing in substitutes or hiring temporary help.” *Id.* at 972. In that case, the employer required the employee to let the supervisor know, no later than the third working day of leave, how much more leave the employee needs. Neither the plaintiff nor the employer had identified the leave as FMLA leave and in fact, the plaintiff, whose leave was foreseeable, failed to give the requisite 30 days’ notice. The court held there was no FMLA violation for terminating him. *Id.* at 971. The District correctly noted that employer did not terminate the plaintiff because he took FMLA leave, but because he did not follow its procedures for notification. In the *Wal-Mart case*, *supra*, the employee waited eight days to update the employer on her condition. The court found that this was too long, given that the employee knew her obligations under Wal-Mart’s policies and placing an affirmative obligation on the employer to seek out further information under the facts and circumstances of that case “would be unduly burdensome for employers, to say the least. *See Price v. City of Fort Wayne*, 117 F.3d 1022, 1023 (7th Cir. 1997).” The plaintiff’s notice was “either too little, or too late, or both.” *Accord, Carter v. Ford Motor Co.*, 121 F.3d 1146 (8th Cir. 1997) (employee’s vague communications, contrary to the employer’s instructions, after five, nine and 12 days of absence entitles employer to summary judgment).

c) Medical Documentation

In determining whether an employee's leave request qualifies for FMLA protection, the employer must assess whether the request is based on a "serious health condition", and, for that purpose, may request supporting medical documentation from the employee. 29 U.S.C. §2613; 29 C.F.R. §825.302(c).

B. The District's Notification Rule and the Grievant's Compliance Therewith

A critical factual issue in this case is whether the District had a notification rule or even a common practice that was made known to employees. As discussed above, the Department of Labor regulations contemplate employers establishing written notification and requirements that are communicated to employees. None of the previously cited cases, nor any other case the Arbitrator could find, concerned an employer that did not convey its notification and reporting expectations to the employee in compliance with 29 C.F.R. §825.301. The difficulty with the District's case is compounded by the ignorance of its managerial officials over its own obligations under the FMLA.

The Union presented the District's family leave policy (policy 5323, in effect until February 2002) at hearing, see Exh. U-3, set forth above. The policy does not specify the employee's obligations with respect to notice and reporting, and the District does not otherwise contend that it had a written policy on notice. The District's family leave policy is very brief and comprises the sole evidence of anything the District has in writing at the time of the Grievant's absence regarding family leave. In fact, no evidence was presented showing that the District had even posted the FMLA notice required under 29 C.F.R. §825.300(a).

The District maintains it had a "common practice" or "standard practice," presumably unwritten, about which employees were or should have been familiar. That "common practice" required employees to keep employers apprised of the length their FMLA leave and their anticipated return to work.

Aside from the question of whether an unwritten “common practice” complies with FMLA regulations, the Arbitrator finds the evidence supporting any such practice to be nonexistent. Although the District’s post-hearing brief states, at 4, that the “District has the practice of requiring employees to call in to seek extensions,” not a single witness identified this practice either generally or specifically. In fact, only one instance of an employee taking a family medical leave was identified at hearing, and the testimony conflicted. Employee Beth Byrd testified that when she took FMLA leave after her husband was in a serious accident, she telephoned Russ Davis, who then was a building principal for the District, and told him she didn’t know when she would return to work. She believed she talked to Mr. Davis again not long before returning to work, but would dispute any assertion that she telephoned him every couple of days. She stated that with respect to her time off, Mr. Davis said only “do what you gotta do.” Ms. Byrd testified that she believes she was off about 14 days in total to attend to her husband. Mr. Davis testified that although he agreed with the rest of Ms. Byrd’s testimony, he recalled that he had contact with Ms. Byrd on an “every other day - quite often” basis and he also had contact with other individuals in the community who had visited with her. Suffice it to say that a single instance of disputed communications does not demonstrate a commonly understood practice.

The Grievant’s supervisor, Ron Walker, testified that the District has a leave request form that the employee can pick up just about anyplace. If the leave is foreseeable, then the form is filled out in advance. If not, it is completed once the employee returns to work, Mr. Walker testified. Although the form allows the employee to specify the kind of leave requested (sick, personal, etc.) by checking the appropriate box, it does not request information that would establish the leave as FMLA-qualifying, nor does it contain any information on employee reporting or communication requirements while on leave. Although the FMLA expects the employer to figure out that an employee’s leave is FMLA eligible from the information elicited from the employee, Mr. Walker was unaware of this expectation. Instead, he testified, “it’s up to the employee” to specify the kind of leave he or she wants, “I don’t think I should have to figure

that out.” Mr. Walker testified that he has never received training on the FMLA, and he added, “I don’t see why I’d need training? He added that he was never concerned about whether the Grievant’s leave was FMLA eligible.

Like Mr. Walker, Superintendent Davis also had not had any training on the FMLA, but he does have resources to consult for assistance, he testified. It appears that when Superintendent Davis approved the discipline of the Grievant, he did not know whether or not the Grievant had worked sufficient hours for FMLA eligibility. He said that his office would make this determination after the employee asks for FMLA leave. He admitted that he only learned that the Grievant was eligible “in the past couple of weeks” before hearing.

In its post-hearing brief, the District offered to allow the Grievant paid sick leave through September 27, 2002, but not beyond because of his failure to communicate with his supervisor. However, the District’s position going into these proceedings appeared to be that the Grievant should not be credited for any FMLA leave (paid as sick leave) beyond his first three days of absence. Thus, in this context when examining Superintendent Davis, Union counsel detoured to a statement Mr. Davis had made about District policy requiring medical verification on the fourth consecutive day of absence, which apparently had something to do with the District’s initial position.⁵ In response to counsel’s query, Superintendent Davis responded that it is not a “policy,” but a “procedure.” Counsel asked for the written procedure, and Superintendent Davis responded that it was not with the District’s documents at hearing. Counsel next asked whether it really was a written procedure, and Superintendent Davis responded to the effect that District policies have been formally adopted, but not its procedures. Counsel then asked whether this was a procedure “in people’s heads.” Superintendent Davis responded that it is not “in their heads,” but it is a “practice” of the District for the six years that he has been an administrator. It

⁵ Superintendent Davis, in his testimony, expressed concern that the Grievant had not provided verification of his need for leave, citing the need for the employee to provide verification on the fourth day of leave. There was no evidence that the District requested this verification from the Grievant or otherwise questioned the reason for the leave, and at hearing, Superintendent Davis stated that he was not questioning the legitimacy of the Grievant’s leave.

was an interesting dialogue and it reinforced the Arbitrator's suspicion concerning the ethereal aspect of any relevant District practice or policy.

The above evidence leads to the conclusion that not only was District management ill-informed as to its obligations under the FMLA, it did not have a notification policy or practice, written or unwritten, that was made known to employees generally or to the Grievant in particular regarding the date of one's return from FMLA leave or seeking extensions of that leave. As stated previously, the Arbitrator has found no authority stating that despite the failure of communication on the part of the employer, the employee cannot enjoy FMLA protection for failing to communicate as the employer would have liked. Because of the interplay between the FMLA and the Collective Bargaining Agreement itself, the Arbitrator is inclined to believe that the substantial failure of the District to fulfill its own communication obligations under the law obviates an award in its favor.

The Arbitrator does not go in that direction untroubled by the Grievant's own behavior, however. It is undisputed that the Grievant left his supervisor in the dark about his probable return during at least the last week that he was on leave. Mr. Walker made some effort at communication himself by telephoning the Grievant's home. Mrs. [REDACTED]'s response to Mr. Walker was not very helpful. On the other hand, as to whether the Grievant's conduct was wholly out-of-bounds, there is reason to give him the benefit of the doubt. Surely anyone who has engaged in the round-the-clock care of a critically ill parent over a period of several weeks will be emotionally distraught and physically drained. The Grievant testified to the exhaustion he felt along with the anxiety associated with obtaining placement for his father in a long-term care facility. Although he had access to a telephone, he testified that the family tried to keep the lines open for communication from doctors and care facilities. Clearly, communicating with his supervisor back home was not in the forefront of his thinking.

Still, even under the most trying circumstances, common sense dictates that one's supervisor should be apprised of one's intent or prognosis regarding the duration of an

unanticipated family medical leave. A person who values his or her job will do what is reasonable to preserve that employment. An employee can be reasonably expected to know that the employer has to make adjustments for an absence by reassigning work or hiring temporary coverage. Thus, if a person has told the employer that he or she will return on a particular day, but then learns that this will not be possible, the person could be reasonably expected to promptly communicate this development to the employer.

All things considered, the Arbitrator finds that:

(1) The District was careless in determining its own obligations under the FMLA, including its obligation to advise employees regarding its notification expectations it would have with respect to unforeseeable developments during a family medical leave. As a result, it did not fulfill its obligations to the Grievant under the FMLA regulations. Had it done so, it is likely this dispute would not have arisen.

(2) Nevertheless, even absent specific instruction, the Grievant should have kept Mr. Walker apprised of his need for more leave after the date he told Mr. Walker he would return; an expectation of this sort on the part of the District is reasonable.

(3) The Grievant's failure to properly advise the District is mitigated by the circumstances of his ordeal in caring for his father.

(4) The District's ignorance of FMLA requirements muddied the issuance of the discipline to the Grievant. It failed to ascertain whether he was even FMLA eligible under weeks before the hearing, and withheld sick leave pay based on concerns that it much later abandoned. Beth Byrd's testimony that Mr. Walker stated the reprimand was warranted because of the length of time the Grievant was absent was not refuted or explained by Mr. Walker. If he was concerned about the length of time he was left in the dark, then his concern can't be faulted. But if, as Ms. Byrd's testimony suggested, he was motivated in part by the overall duration of the absence, then discipline is improper. Employees have up to 12 weeks of FMLA leave annually, and the Grievant used only a few weeks of that.

The final determination regarding the appropriateness of a written warning must be made under the just cause clause of the parties' Collective Bargaining Agreement. As has been well established, the burden of proving just cause for discipline is on the employer. See, e.g., *Georgia Pacific Corp.*, 89-1 ARB ¶8194 (Sergent, 1989); *Midwest Telephone Co.*, 66 LA 311 (Witney, 1976); *Whirlpool Corp.*, 58 LA 421 (Daugherty, 1972); *Ingersoll Prod. Div.*, 49 LA 882, 886 (Larkin, 1967); *American Maize Prod. Co.*, 39 LA 1165, 1168 (McGury, 1963); *Southern Bell Tel. & Tel.*, 26 LA 742, 746 (McCoy, 1956).

The question is indeed a close one. Ultimately, after considering all the facts and circumstances of the case, the Arbitrator concludes that the District has failed to persuade her that its cause for disciplining the Grievant was just. The District was far from blameless in the events leading to the grievance, and the questions surrounding its motivation for issuing the discipline and withholding sick pay makes its case less than compelling. It appears that its investigation of the circumstances of the Grievant's absence was inadequate, given that the discipline was issued under a cloud of doubt concerning the legitimacy of his FMLA, doubts that were completely without foundation. Not only did the District fail to fulfill its own obligations under federal law and regulation, it did not even ascertain what those obligations were before meting discipline, nor did it ascertain whether any expectations it had with respect to notification, whether written or unwritten, general or specific to the Grievant, were actually conveyed to him.

For the same reasons, the Arbitrator concludes that the District violated the Collective Bargaining Agreement for refusing to consider the Grievant eligible for FMLA leave, which under the District's policy, allows the use of paid sick leave and personal leave that has been accrued by the employee.

By way of a remedy, the grievance sought the removal of the written reprimand from the Grievant's personnel file, restoration of his sick leave pay for the period for which he was not paid, and a written apology. The Union's post-hearing brief also requested the Arbitrator to assess her fees and expenses against the District.

This award will order the District to remove the written reprimand from the Grievant's personnel file, but will not order a written apology. The Union's request that the Arbitrator assess her fees and expenses to the District is denied because such an order would exceed her authority under Article 16.2.4 of the parties' Agreement, which states that the parties will share equally the arbitrator's fees and expenses. The Arbitrator will order the District to credit the period during which the Grievant did not receive paid leave with the Grievant's accrued sick, personal and vacation leave, in that order, to the extent consistent with District policy.⁶

IX. AWARD

Pursuant to the foregoing discussion and analysis, the grievance herein is SUSTAINED. The Arbitrator has concluded that the District violated the parties' Collective Bargaining Agreement when it reprimanded the Grievant for poor communication during the period of his family medical leave in late September and early October 2001. The District also violated the Collective Bargaining Agreement for partially withholding sick leave and other accrued leave pay from the Grievant during the period of his absence to the extent of his entitlement to such pay under the parties' Agreement.

Accordingly, the Arbitrator orders the District to:

1. Withdraw the written reprimand issued to the Grievant and remove evidence of its issuance from the Grievant's personnel file.
2. Pay the Grievant, to the extent of his accrued sick leave and other leave and consistent with the parties' agreement and practices regarding such matters, for the period between September 17 and October 5, 2001, except for those days for which he was previously credited with accrued paid sick leave.

⁶ It is not altogether clear to the Arbitrator whether the parties' Agreement contemplated crediting personal and then vacation leave to an employee's FMLA-eligible leave, once the employee's sick leave is exhausted, nor is it clear whether the 12-day cap specified in the District's leave policy, 5323, has any relevance here. Neither party mentioned the 12-day cap at hearing or in briefs. If the parties cannot make this determination themselves, then the question may be resubmitted pursuant to the Arbitrator's retained remedial jurisdiction.

Pursuant to the stipulation of the parties, the Arbitrator shall retain jurisdiction in this matter for 90 days from the date of this award in order to resolve any issues pertaining to the remedy herein ordered.

As per Article 16.2.4 of the parties' Agreement, the parties will share equally in the fees and expenses of the Arbitrator.

Date: November 10, 2002



Jane R. Wilkinson
Labor Arbitrator