

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

.....
DEPARTMENT OF VETERANS AFFAIRS, .
VETERANS ADMINISTRATION MEDICAL .
CENTER, MEMPHIS, TENNESSEE .

Respondent .

and .

Case No. 4-CA-00371

NATIONAL ASSOCIATION OF .
GOVERNMENT EMPLOYEES, .
LOCAL R5-66 .

Charging Party .

.....
Austin G. Moody, Esq.
For the Respondent

Sherrod G. Patterson, Esq.
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on May 15, 1990, by the Regional Director for Region IV, Federal Labor Relations Authority, a hearing was held before the undersigned on June 7, 1990 at Memphis, Tennessee.

This case arises under the Federal Service Labor-Management Relations Statute, 5 U.S.C. section 7101, et seq., (herein called the Statute). It is based on a first amended charge filed on April 23, 1990 by National Association of Government Employees, Local R5-66 (herein called the Union) against Department of Veterans Affairs, Veterans Administration Medical Center, Memphis, Tennessee (herein called the Respondent).

The Complaint alleged, in substance, that in December 1989 Respondent changed its procedure for approving sick leave by requiring additional medical information to support requests by employees for sick leave approval. Further, that such change was implemented without notifying the Union and bargaining with it concerning the substance or impact and implementation thereof - all in violation of section 7116(a)(1) and (5) of the Statute.

Respondent's Answer,^{1/} dated June 1, 1990, denies that the alleged change in the procedure for approving sick leave, as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter briefs were filed which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the National Association of Government Employees (NAGE) has been, and still is, the exclusive bargaining representative of a nationwide unit of employees for collective bargaining including employees at Respondent's Medical Center.

2. The Union herein has been, at all times material herein, the delegated agent of NAGE and has acted as its representative for the purposes of collective bargaining on behalf of Respondent's employees.

3. At all times material herein both NAGE and Respondent have been parties to a collective bargaining agreement which covers the unit employees of Respondent's Medical Center.

^{1/} This Answer, filed after the Formal Papers of General Counsel were prepared, was not included therein but is included in General Counsel's exhibits. Along with its brief General Counsel filed a Motion to designate Respondent's Answer as G.C. Exhibit 1(g). No opposition having been made thereto, the Motion is granted.

4. The said collective bargaining agreement^{2/} provides, under Article 28 - LEAVE, Section 2 D 1, that generally, SF-71 (Application for Leave) and a medical certificate or equivalent should not be required for a sick leave period of three consecutive work days or less. Further, that when a supervisor believes an employee is abusing the entitlement to sick leave, a medical certificate may be required for any period of absence.^{3/}

5. The following provisions regarding sick leave is set forth in 5 CFR Section 630.403 entitled "Supporting evidence."--

An agency may grant sick leave only when supported by evidence administratively acceptable. Regardless of the duration of the absence, an agency may consider an employee's certification as to the reason for his absence as evidence administratively acceptable. However, for an absence in excess of 3 workdays, or for a lesser period when determined necessary by an agency, the agency may also require a medical certificate, or other administratively acceptable evidence as to the reason for the absence.

6. A Policy Memorandum issued by Respondent on June 14, 1989 is entitled "LEAVE FOR MEDICAL CENTER EMPLOYEES" (G.C. Exhibit 17). It provides under 3(b) thereof, inter alia, that supervisors are responsible for determining necessity for, or acceptability of, sick leave medical certificates. Further, under 3(c) thereof, inter alia, that employees are responsible for submitting accurate statements about absences, application for, and use of sick leave; and furnishing medical certificates when required.

7. In support of its contention that in December 1989 Respondent changed its past practice of accepting merely a doctor's certificate (form SF-71) from employees in the Respiratory Therapy Unit for approval of sick leave, General

^{2/} G.C. Exhibit 2.

^{3/} Section 2C of this Article also provides, inter alia, that a supervisor will not routinely request the nature of illness as a condition for approval of sick leave.

Counsel adduced testimony from three witnesses. The events in which they were involved, as well as their testimonies in that regard, are as follows:

(a) Renee Curtis is employed by Respondent as a Respiratory Technician in the Respiratory Therapy Unit which is composed of 21 employees. In October 1989, and during the preceding months, she was absent due to illnesses and placed on sick leave. The usual procedure called for an employee, who is ill and absent from work for over three days, to fill out a form SF-71. On this form the employee sets forth the reason for being incapacitated for duty, whether medical examination would be required, and a space is provided for the doctor to certify that he treated the employee who was advised not to report to work.

Under date of October 26, 1989, Patricia A. Hyatt, Technical Director of the Respiratory Care Unit, wrote Curtis listing her absences due to illness during January, March, May, July, August and October of that year. Further, that in view of this record of absences for illness, Curtis must present a medical certificate to substantiate any requests for sick leave. The employee was absent from work thereafter for illness from November 16-22, 1989. She submitted a SF-71 signed by her physician to Hyatt on November 23, 1989 upon her return to work. On December 1, 1989 Hyatt wrote Curtis again and referred to the employee's sick leave from November 16 through November 22, 1989. The supervisor stated that in order to support approval of such past sick leave, Curtis should provide additional information by December 12, 1989 re her medical condition for review by the Personnel Health Physician. Attached thereto was a document, which was entitled "Medical Documentation Requirements," to be used as a guide by her doctor to the kinds of information that would be useful.^{4/} No new medical evaluation was required, and Curtis was advised that a copy of medical or hospital records, or a narrative medical summary might be sufficient.

Curtis took Hyatt's letter to her doctor's office which required a release in order to furnish the additional

^{4/} This document, which is part of G.C. Exhibit 5, is annexed as part of the decision and marked Appendix. It is set forth in 5 CFR 339.104 which sets forth what should be included in an acceptable diagnosis made by a physician.

information required. The data was not sent as requested,^{5/} and on January 17, 1990 Dr. Carlo L. Mainardi, Chief of the Medical Service, wrote Curtis in regard thereto. He stated that since she failed to provide the additional data re her medical condition for review by the Employee Health physician to support approval of sick leave, Curtis would be charged AWOL for the period November 16-22, 1989 (40 hours). Further, this letter of reprimand would remain in Curtis' official personnel folder for two years unless extended for additional offenses within such period.

Hyatt wrote Curtis on April 26, 1990 that the employee will remain on medical certification in which she had been placed on October 26, 1989, because of his failure to submit the information which had been requested; that she must provide a medical certificate to support requests for sick leave regardless of the length of the illness; that her sick leave record would be reviewed at the end of a six month period.

Curtis, who testified that additional medical information had never been required previously, filed a grievance which was carried through successive steps but denied by Respondent.

(b) Employee Beverly Watkins is a Respiratory Technician who also works in Respiratory Therapy. She testified that prior to December 1989 the policy in her unit required that an employee who is ill and absent over three days, and had to take sick leave, must bring a doctor/medical certificate which attested to the illness. If a supervisor felt that an employee abused sick leave, he could put the individual on "medical certification," which called for submitting a medical certificate on all absences. Watkins stated that the policy changed in December 1989 so that an employee who has been out on sick leave for more than three days was required to bring more than a doctor's certificate

^{5/} The failure arose from a misunderstanding as to whom should follow through and accept responsibility for getting the data to Respondent's Employee Health office. Respondent deemed it to be the employee's responsibility, but Curtis' doctor would not provide the additional information without a release for it. Curtis testified she felt it was a matter to be handled between her doctor's office and Employee Health office.

or statement in order to obtain approval for such sick leave. Additional medical information was required, including such items as lab reports and other medical records.

Watkins was ill and absent from work on February 6 and 7, 1990. She submitted a doctor's statement to Hyatt upon her return to work. In a letter^{6/} dated March 7, 1990 Hyatt wrote Watkins that the employee must submit additional information concerning her medical diagnosis in order to obtain approval of sick leave for the two days of her absence. Watkins obtained the additional information in the form of a letter from another physician (G.C. Exhibit 15) which she gave to Hyatt. She was under a medical certification requirement which obliged her to furnish a medical certificate within five days of her return to work.^{7/}

Record facts show that on February 16, 1989 Hyatt wrote Beverly Watkins re "Leave Usage" (Resp. Exhibit 6).^{8/} The supervisor referred to the absences by Watkins for 32 hours on sick leave (December 23-24, 1988 and January 10 and 21, 1989); that there was a need to determine if the employee was well enough to fulfill her duties as a respiratory therapist. Hyatt stated that to support continued approval of sick leave, Watkins must provide additional information about her medical condition for review by the Personnel Health Physician. Further, that a failure to submit the information would result in denial of leave.

Watkins was concerned about the requirement that additional information must be obtained during an absence for illness. On March 13, 1990 Dr. William J. Bickers, Chief of Ambulatory Care, wrote her and stated that Medical Center

^{6/} Except for the dates involved, it contained the same language as set forth in Hyatt's letter to Curtis of December 1, 1989.

^{7/} Under date of January 2, 1990 Hyatt placed Watkins in this status due to absences for several days during November and December 1989.

^{8/} Attached thereto was the same document, "Medical Documentation Requirements," which accompanied the memo sent to Curtis on December 1, 1989 requesting additional medical information for approval of her sick leave.

Memorandum 05-27, "Leave for Medical Center Employees," of June 14, 1989, details the medical center policy on leave requests for Respiratory Therapy Unit employees.

(c) The President of the Union, James A. Confer, Jr., testified that in the fall of 1989 the policy in Respiratory Therapy for approval of sick leave was changed so as to require additional medical evidence to justify absences for sick leave. He stated that prior thereto only a doctor's statement was needed to support incapacity of an employee to work.

8. Hyatt testified that the procedure for approving sick leave has not been changed nor was it altered in December 1989. She avers that if a pattern of sick leave abuse is seen, a sick leave warning is sent out to the employee. If the abuse continues, the employee is placed on medical certification, and a physician's statement is then needed regarding any illness to show the person is incapacitated for duty and the time or duration is specified. Whatever documentation is submitted by the employee, Hyatt turns it over to the Employee Health physician for his analysis. However, it is Hyatt's responsibility to approve or disapprove the sick leave. In the event that the sick leave is not approved, the time spent on such leave is converted to AWOL.

9. Record facts show that on April 19, 1989 Hyatt wrote Winifred Reese, another Respiratory Therapy Unit employee re her leave usage. The supervisor noted that Reese had been absent for 128 hours (November 13-15, 1988, January 14-17, 1989, February 3-5 and 9-12, 1989, March 11 and 28, 1989). Hyatt informed Reese that to support continued approval of sick leave the employee must provide additional information re her medical condition for review by the Personnel Health Physician. Enclosed was the standard for Medical Documentation as a guide to the information which would be useful, and Hyatt concluded by stating that failure to submit the information would result in denial of leave.

10. Ben Jackson, Jr., Chief of Labor Relations, testified that Hyatt did not change the procedure for approving sick leave in December 1989. Further, that the procedure has been to require additional medical information when an employee is under medical certification and when a supervisor cannot determine whether a person is incapacitated

and unable to work.^{9/} He advised Hyatt of her right to ask for such data. That policy has existed since late 1985 or early 1986. Jackson also testified that there were a number of instances where employees, who had been on sick leave, were asked to obtain additional medical information to support past sick leave and obtain approval therefor.^{10/}

Conclusions

The issue for determination is whether Respondent changed its past practice in the Respiratory Therapy Unit regarding the approval of sick leave theretofore taken by the employees. If so, whether its failure to notify the Union, and bargain with the latter re the change, was violative of section 7116(a)(1) and (5) of the Statute.

General Counsel contends that, prior to December 1, 1989, an employee who returns to work after being absent due to illness was merely required to bring in a doctor's certificate attesting to the dates and the illness. It is maintained that on and after the said date employees in the Respiratory Therapy Unit were required to obtain additional medical information to obtain approval for their past sick leave. This requirement, it is urged, was a change from the past practice, and since the Union was not notified thereof, nor given an opportunity to bargain thereon, Respondent violated the Statute.

Respondent insists that the procedure for approving sick leave was not changed in December 1989 or at any other time. It is contended that for years the practice has been that, in cases of sick leave abuse, additional medical information was required to support employees' requests for approval of sick leave. In conformity with the Code of Federal Regulation, 5 CFR 630.403, it has asked for other evidence when necessary to support a reason for an employee's absence before approving sick leave. Respondent maintains that General Counsel has not established, by a

^{9/} Jackson affirmed that the nature of the additional information requested by Hyatt is the same as sought by the Chief of the Dietetic Service. Hyatt may not have included all the suggested documentation in the attachment she enclosed to the employees in her unit.

^{10/} None of these in Respiratory Therapy was routed through Jackson.

preponderance of the evidence, that the procedure in this regard was changed in the Respiratory Therapy Unit.

While the parties do not agree as to whether the practice alluded to was changed in December 1989, there is no dispute re the continued existence of certain procedures involving sick leave usage. Thus, if an absence for illness does not exceed three days, a doctor's certificate is not generally needed to support sick leave approval. Should such absence exceed three days, a medical certificate must be submitted by the employee along with a form SF-71 seeking approval for the particular dates of absence. In the event that a supervisor feels that sick leave has been abused, the employee is given a sick leave warning. The warning lists the dates of the employee's absences, suggests there is an abuse, and notifies the individual he may be placed on "medical certification." An employee who is thereafter placed in this status must submit a physician's statement upon being absent due to illness regardless of the length or nature of the illness. This is required for approval of the individual's sick leave. The foregoing is standard procedure.

It is recognized, of course, that an agency may not make changes in conditions of employment without first notifying the bargaining agent and affording it an opportunity to bargain concerning the changes, whether it be concerning the subsistence or the impact and implementation thereof. Social Security Administration, et al., 36 FLRA 655. Further, matters dealing with sick leave usage do involve conditions of employment, although certain proposals concerning such usage may violate the right to direct employees, assign work and discipline employees, Fort Bragg Schools, 30 FLRA 508. Apart from whether the Respondent did change its past practice re the information required to approve past leave, I agree with General Counsel that (a) sick leave usage and its approval is a condition of employment and (b) to the extent that it has discretion over a matter, as sick leave usage, Respondent may exercise its discretion through negotiations.^{11/}

^{11/} The requirement to provide additional reasons for sick leave is discretionary with the agency when sick leave abuse is suspected. Thus, a proposal to dispense with this request for medical diagnosis itself has been declared negotiable. See American Federation of Government Employees, AFL-CIO, Local 2052, and Department of Justice, Bureau of Prisons, et al., 30 FLRA 837, 840-841.

After a careful review of the entire record I am convinced, however, that General Counsel has not established a prima facie case herein. I am not persuaded it has been shown that supervisor Hyatt changed the practice with respect to past sick leave when she required additional medical information in support of requested approval for such leave. Thus it would follow, and I so conclude, that Respondent was under no obligation to notify the Union of any demand made to employees in the Respiratory Therapy Unit for additional medical information, nor to bargain with it concerning such demand.

In support of its position General Counsel places particular stress upon the testimonies of two employees in the Respiratory Therapy Unit who were supervised by Hyatt. These employees, Renee Curtis and Beverly Watkins, both testified that on or after December 1, 1989 the supervisor implemented a new requirement in order for employees to gain approval for past sick leave.

With respect to Curtis, this individual was informed on December 1, 1989 that additional medical information (aside from her doctor's statement) would be needed to support approval for 40 hours of sick leave taken by her on November 16-20, 1989. Since this was not forthcoming, she was placed on AWOL for that period and given a reprimand for the failure to provide that information. In April 1990 Curtis was also notified she would remain on medical certification, in which she was placed on October 26, 1989 based on her sick leave absences during the previous four months.

In regard to Beverly Watkins, she had been absent on sick leave on February 6 and 7, 1990, at which time she was also on medical certification based on prior sick leave usage. A doctor's certificate for the two days, which was therefore required, was submitted by her to obtain approval for that sick leave usage. Watkins was notified on March 7, 1990 by Hyatt that additional medical information was required for review by the Employee Health Physician to determine her incapacitation. She submitted the additional information as requested.

General Counsel's remaining witness, James A. Confer, Jr., who is the Union president, testified that in the fall of 1989 the practice was changed to require more than a doctor's certificate after an employee returned from sick leave; that additional medical information was required to obtain approval for such leave.

While these witnesses are in accord that previously employees were not obliged to provide such additional medical information attesting to past sick leave, such evidence standing alone does not suffice to establish that such requirement was a change in past practice. Both Technical Director of Respiratory Therapy, Patricia A. Hyatt, and Chief of Labor-Relations, Ben Jackson, testified that such a requirement was not a change; that the Respondent followed 5 CFR 630.403 which regulates the granting of sick leave, and which permits an agency to "require a medical certificate or other administratively acceptable evidence as to the reason for the absence." Jackson testified that the procedure has existed since 1985-1986 for a supervisor, who cannot determine whether a person, who is under medical certification, is incapacitated and unable to work, to require additional medical information. Further, that there were a number of instances when employees were asked to submit additional information to support past sick leave, although none in Respiratory Therapy was executed through him.

The fact that the record reveals two occasions after December 1, 1989 when additional medical information was demanded does not establish, without more, that a change in procedure was made by Respondent. It may well be that other employees were not asked to submit such information because there was no evidence that they abused sick leave, or that they had such excessive leave usage which would require additional medical information. We are left to speculate concerning the precise instances when, or whether, such additional data was required in the Respiratory Therapy Unit. It is noted that both Curtis and Watkins were on medical certification when the additional information was sought by Hyatt, and a demand under those circumstances may not be a change at all from past practice since there are no cited instances involving employees in that status for whom approval was sought for past leave usage. However, in order to establish a violation herein it is incumbent upon General Counsel to overcome speculation in this regard.^{12/} This

^{12/} The two instances where Respondent required additional medical information, which involved Winifred Reese and Beverly Watkins in February 1989, do not shed much light on the issue herein. As General Counsel maintains, they bespeak of continued approval for sick leave and do not refer specifically to approval for past sick leave usage.

(footnote continued)

might have been accomplished via the records of the employees in the Respiratory Therapy Unit for the several years prior to 1989, or through the testimonies of other unit employees as to their past leave usage in those years and the practice concerning the required submission of medical information. In any event, the burden is upon General Counsel to adduce such data where the evidence is conflicting with respect to the practice so as to support a prima facie case of a unilateral change. I am persuaded that it has not been established by a preponderance of the evidence that Respondent changed the past practice in the Respiratory Therapy Unit concerning the approval of past sick leave. The record arguably supports the conclusion that Respondent continued to call for additional medical information in said Unit when it determined that sick leave had been abused, or when it needed such data to decide if an employee was able to perform the required duties.

In view of the foregoing, I conclude that Respondent has not violated section 7116(a)(1) and (5) of the Statute as alleged. Accordingly, it is recommended that the Authority adopt the following Order:

ORDER

The Complaint in Case No. 4-CA-00371 is dismissed.

Issued, Washington, D.C., September 19, 1990


WILLIAM NAIMARK
Administrative Law Judge

(footnote 12 continued)

However, it might be surmised that, although not alleged as a violation, the requirement to submit additional medical data for future sick leave constituted a change in past practice. Nevertheless, one cannot make such a conclusion without showing what occurred with respect to specific employees prior to 1989.

APPENDIX

MEDICAL DOCUMENTATION REQUIREMENTS

1. THE HISTORY OF THE MEDICAL CONDITIONS, INCLUDING REFERENCES TO FINDINGS FROM PREVIOUS EXAMINATIONS, TREATMENTS AND RESPONSES TO TREATMENT;
2. CLINICAL FINDINGS FROM THE MOST RECENT MEDICAL EVALUATION, INCLUDING ANY OF THE FOLLOWING WHICH HAVE BEEN OBTAINED: FINDINGS OF PHYSICAL EXAMINATION; RESULTS OF LABORATORY TESTS; X-RAYS; EKG'S AND OTHER SPECIAL EVALUATIONS OR DIAGNOSTIC PROCEDURES; AND, IN THE CASE OF PSYCHIATRIC EVALUATION OF PSYCHOLOGICAL ASSESSMENT, THE FINDINGS OF A MENTAL STATUS EXAMINATION AND THE RESULTS OF PSYCHOLOGICAL TESTS, IF APPROPRIATE;
3. DIAGNOSIS, INCLUDING THE CURRENT CLINICAL STATUS;
4. PROGNOSIS, INCLUDING PLANS FOR FUTURE TREATMENT AND AN ESTIMATE OF THE EXPECTED DATE OF FULL OR PARTIAL RECOVERY;
5. AN EXPLANATION OF THE IMPACT OF THE MEDICAL CONDITION ON OVERALL HEALTH AND ACTIVITIES, INCLUDING THE BASIS FOR ANY CONCLUSION THAT RESTRICTIONS OR ACCOMMODATIONS ARE OR ARE NOT WARRANTED, AND WHERE THEY ARE WARRANTED, AN EXPLANATION OF THEIR THERAPEUTIC RISK AVOIDING VALUE;
6. AN EXPLANATION OF THE MEDICAL BASIS FOR ANY CONCLUSION WHICH INDICATES THE LIKELIHOOD THAT THE INDIVIDUAL IS OR IS NOT EXPECTED TO SUFFER SUDDEN OR SUBTLE INCAPACITATION BY CARRYING OUT, WITH OR WITHOUT ACCOMMODATION, THE TASKS OR DUTIES OF A SPECIFIC POSITION;
7. NARRATIVE EXPLANATION OF THE MEDICAL BASIS FOR ANY CONCLUSION THAT THE MEDICAL CONDITION HAS OR HAS NOT BECOME A STATIC OR WELL STABILIZED AND THE LIKELIHOOD THAT THE INDIVIDUAL MAY EXPERIENCE SUDDEN OR SUBTLE INCAPACITATION AS A RESULT OF THE MEDICAL CONDITION.