#1917

ARBITRATION DECISION

January 8, 2007

In the Matter of:

State of Ohio	)	
	)	
and	)	Eligibility for Holiday Pay
	)	
Ohio Civil Service Employees Association, AFSCME Local 11	)	

APPEARANCES

For the State:

Michael Duco, Advocate
Kristen Rankin, Second Chair
Steve Loeffler, Office of Collective Bargaining
Georgia Brokaw, Witness
Teri Decker, Witness
Gary Johnson, Witness

For the Union:

Thomas Cochrane, Advocate
John Porter, Second Chair
Jessica Parker, Observer
Andy Douglas, Witness

Arbitrator:

Nels E. Nelson

BACKGROUND

One of the issues in the negotiations between the State of Ohio and OCSEA, AFSCME Local 11, for the 2006-2009 collective bargaining agreement was eligibility for holiday pay. Section 26.03 of Article 26 of the 2003-2006 contract stated:

> An employee whose scheduled work day off falls on a holiday will receive holiday pay for the day. An employee on vacation or scheduled sick leave during a holiday will not be charged vacation or sick leave. Employees who are scheduled to work and call off sick the day of a holiday shall forfeit their right to holiday pay for that day.

The state's initial proposal, dated November 29, 2005, sought to add the following sentence:

> Employees must work their last scheduled shift prior to the holiday and their first scheduled shift immediately following the holiday to be eligible for holiday pay.

The union proposed no change in Section 26.03.

As the negotiations progressed, the issue of eligibility for holiday pay was referred to a subcommittee. The subcommittee was chaired by Georgia Brokaw, the Labor Relations Administrator for the Department of Mental Health, and Terri Decker, the Labor Relations Administrator for the Department of Rehabilitation and Correction, and Bob Goheen, the union's Operations Director. On January 25, 2006, the subcommittee produced a "supposal" which renumbered 26.03 to 26.04 and stated:

> An employee on vacation or scheduled sick leave during a holiday will not be charged vacation or sick leave for the holiday. Employees who are scheduled to work and call off sick the day before, the day of, or the day after a holiday shall forfeit their right to holiday pay for that day, unless there is documented, extenuating circumstances which prohibit the employee from reporting for duty.

On January 26, 2006, the state prepared a tentative agreement for Article 26 incorporating the new Section 26.04 from the previous day's supposal. It was signed without modification by Andy Douglas, the union's chief spokesman, and Gary Johnson, the state's chief spokesperson.

The tentative agreement was subsequently ratified by the union membership as part of the 2006-2009 agreement.

After the approval of the contract, a number of disputes arose over the interpretation and application of Section 26.04. Rather than submitting each case to arbitration, the parties agreed to submit two questions to an Arbitrator and to use his answers to the two questions as a guide in resolving the pending grievances. While the parties anticipated that the Arbitrator's answers to the questions would allow them to settle the pending grievances, the parties agreed that any unresolved cases would be submitted to the Arbitrator.

The Arbitrator was notified of his selection on September 21, 2006. The hearing was held on November 1, 2006. Post-hearing briefs were received on December 13, 2006.

ISSUES

The issues as agreed to by the parties are:

1) In §26.04 of the CBA, do the terms "the day before ... or the day after a holiday" mean the calendar day before and the calendar day after the holiday, or the employee's last scheduled work day before and first scheduled work day after the holiday?

2) For purposes of §26.04 of the CBA, what constitutes a documented, extenuating circumstance which prohibits an employee from reporting for duty?

i. Employee calls in sick, and provides no doctor's slip confirming the sickness, nor an explanation of how the sickness prevented him from working.

ii. Employee calls in because his/her minor, dependent child is sick, and employee provides no doctor's slip confirming the sickness, nor an explanation of how the child's sickness prevented the employee from working.

iii. Employee calls in sick, provides a doctor's slip confirming the sickness, which does not explain how the sickness prevented him/her from working.

iv. Employee calls in because his/her minor, dependent child is sick and

employee provides a doctor's slip confirming the sickness, which does not explain how the child's sickness prevented the employee from working.

v. Employee calls in sick and provides a doctor's slip confirming the sickness and explaining how the sickness prevented the employee from working.

vi. Employee calls in because his/her minor, dependent child is sick and provides a doctor's slip confirming the sickness and explaining how the sickness prevented the employee from working.

vii. Employee has an FMLA certification on file and relies solely on that certification to establish documented, extenuating circumstances which prohibit the employee from reporting for duty.

viii. Employee has an FMLA certification on file, provides additional documentation explaining how the sickness prevented him/her from working, and relies on both to establish documented, extenuating circumstances which prohibit the employee from reporting for duty.

ix. Employee schedules sick leave for the day before, day of, or the day after a holiday, and does not subsequently provide a doctor's slip confirming treatment was received on the scheduled leave day.

x. Employee schedules sick leave for the day before, the day of, or the day after a holiday, and subsequently provides a doctor's slip confirming the treatment was received on the scheduled leave day.

RELEVANT CONTRACT LANGUAGE

Article 26
Holidays

* * *

Section 26.04 - Eligibility for Holiday Pay

An employee on vacation or scheduled sick leave during a holiday will not be charged vacation or sick leave for the holiday. Employees who are scheduled to work and call off sick the day before, the day of, or the day after a holiday shall forfeit their right to holiday pay for that day, unless there is documented, extenuating circumstances which prohibit the employee from reporting for duty.

DEFINITION OF DAY

Union Position - The union argues that the "day before" and the "day after" in Section 26.04 of the contract refer to "calendar days." It points out that the "plain language rule" indicates that when contract language is clear and unambiguous, the straightforward meaning of language must be enforced. The union claims that this is a "rock-solid" principle of contract interpretation.

The union contends that the "rule of holistic construction" also applies in the instant case. It states that this principle means that the contract must be read as a whole to determine the meaning of a questioned word. The union claims that "if a given provision is clear and unambiguous when read within the context of the whole contract, the plain language rule must be followed, and parol evidence cannot be relied upon to defeat the obvious intent." (Union Brief, page 3)

The union maintains that these principles of contract interpretation are part of the collective bargaining agreement by virtue of having been applied in previous arbitration decisions. It cites Arbitrator Mollie Bowers, who relied on the plain meaning rule in OCSEA and Ohio Department of Rehabilitation and Correction, Case No. 27-05-(91-03-29)-0138-01-06, November 19, 1992. The union also offers OCSEA, Local 11, AFSCME, AFL-CIO and State of Ohio, June 24, 1992, where Arbitrator Rhonda Rivera stated that if contract language is clear, "its meaning must be determined from the four corners of the Agreement without resort to the evidence external to it."

The union argues that whenever the parties used the word "day" in the contract, they meant "calendar day," unless they specifically indicated otherwise. It indicates that "day"

appears 449 times in the contract. The union claims that in 79 instances it is used in conjunction with a modifier, such as "calendar," "work," "consecutive," "business," or "duty"; in 42 instances it refers to neither a "calendar day" nor a "work day"; and in 30 instances the context makes it clear that "day" means "work day." It stresses that in the remaining instances "day" means "calendar day."

The union contends that its position regarding the meaning of "day" is also supported by the fact that the parties named three exceptions to the rule that employees must work the "calendar day" before and after the holiday. It reports that the agency-specific provisions, shown in Appendix Q of the contract, state that employees in the summer work program of the Ohio School for the Deaf and Blind must be in active pay status their "last scheduled work-day prior to the holiday" to qualify for holiday pay; that certain employees in the Department of Job and Family Services must work "the scheduled day before and the scheduled day following the holiday" to get holiday pay; and that some employees in the Department of Mental Health must work "the scheduled day before and after the holiday" to be eligible for holiday pay. The union emphasizes that "there would be no need for these three exceptions if Section 26.04 disqualified employees from receiving holiday pay for calling off sick the last scheduled work day before or the first scheduled work day after a holiday." (Union Brief, page 5)

The union maintains that evidence extrinsic to the contract is not relevant. It points out that Section 43.01 of the contract states that "all the rights and duties of both parties are specifically expressed in the Agreement [and that] no verbal statements shall supersede any provisions of this Agreement." The union further notes that item #19 of the ground rules for the main table negotiations and item #3 of the ground rules for the agency-specific negotiations

provide:

> The fact that items are proposed, modified or withdrawn will not imply intent or meaning to existing contract provisions and will not hold any evidentiary value in future bargaining, meetings, mediation, arbitration, or ULP hearings.

The union asserts that in the instant case, the state put "all its eggs into one basket, the wrong basket." It claims that the state's entire argument turns on evidence of the parties' discussions during negotiations. The union stresses that the parties have agreed that such evidence cannot be considered in arbitration.

The union argues that even if extrinsic evidence is considered, it still wins. It observes that the state's initial proposal relating to what was to become Section 26.04 stated that "employees must work their last scheduled shift prior to the holiday and their first scheduled shift immediately following the holiday to be eligible for holiday pay." The union indicates that "in their penultimate negotiations exchange dated January 25, 2006, the parties contemplated not shifts or work days before and after the holiday, but the day before and the day after." (Union Brief, page 7) It states that this compromise, which was reached through negotiations, was memorialized in the tentative agreement.

The union charges that the state is trying to gain through arbitration something it could not obtain at the bargaining table. It notes that employers frequently complain that unions engage in this conduct. The union stresses, however, that the rule, "pacta sunt servenda," is the same for an employer as for a union.

The union concludes that "day," as used in Section 26.04, refers to a "calendar day."

State Position - The state argues that in Section 26.04 "day" refers to a "scheduled work day." It states that the parties tried to incorporate the concepts articulated by Johnson at the onset

of bargaining into the language of the supposal. The state claims that "the unrefuted testimony of Ms. Decker and Ms. Brokaw establish that [in the subcommittee's deliberations] neither the Union nor the Employer discussed the language at the beginning of the sentence [and] all of the discussion and concern raised by the Union centered on the new language at the end of the sentence." (State Brief, page 4-5)

The state contends that the language at the beginning of the sentence is ambiguous. It indicates that when the sentence is read as a whole, the language is "in artful and clumsy". The state asserts that "where the language is ambiguous ... the arbitrator must include the language of the contract, the bargaining history and past practice." (State Brief, page 5)

The state relies on the dictionary definition of "day" in support of its position. It points out that the New World Dictionary, Second College Edition, lists nine separate meanings for "day," including "a particular or specific day" and "the time one works each day." The state indicates that "when one examines the word as a living thought at the time it was used in negotiations, one is left to but one conclusion the parties meant it as 'the time one works each day.'" (State Brief, page 5-6)

The state claims that the intent of the language is clear. It points out that its initial proposal stated that employees must work their "last scheduled shift prior to the holiday and their first scheduled shift immediately following the holiday" to receive holiday pay. The state observes that Johnson explained that the intent of the proposal was to get employees to show up for work on their last scheduled day before and their first scheduled day after a holiday. The state claims that "the subcommittee had little discussion about this concept and adopted the language of a 'supposal' which is the product of that joint committee in which they attempted to

incorporate that thought into the existing language of the CBA." (State Brief, page 6)

The state argues that the Arbitrator must draw a negative inference from the fact that the union did not call any of its subcommittee members to challenge the testimony offered by Brokaw and Decker. It claims that the union did not do so because its committee members understood the intent of the language. The state asserts that Douglas, the union's sole witness, had no direct knowledge of the subcommittee's discussions.

The state contends that the union's interpretation of the contract should be rejected because it does not provide "reason and equity." It states that the union's position creates two classes of employees. The state observes that those who are scheduled to work Monday through Friday and call in sick on a Friday before a Monday holiday, would not lose holiday pay but those scheduled to work on Sunday would forfeit holiday pay if they called in sick on Sunday. It reports that "this interpretation of the language would result in two employees who are working side by side in the same facility to be disproportionately impacted by this provision." (State Brief, page 7)

The state maintains that the custom and practice of the parties support its interpretation of Secction 26.04. It states that since the pending grievances involve the first application of the language in question, the custom and practice must be derived by looking at the contract as a whole. The state notes that in Section 30.03, which begins, "three (3) consecutive days of bereavement leave," "day" has been interpreted to mean "work day" so that employees on Monday through Friday schedules who begin their leave on Friday get leave on the following Monday and Tuesday. It claims that the same interpretation should apply to Section 26.04.

The state rejects the union's reliance on two agency-specific agreements contained in

Appendix Q of the contract. It acknowledges that both provisions indicate that the parties know how to write language specifically using "scheduled day." The state insists, however, that these sections are not very probative with respect to the instant dispute because they apply only to specific agencies and operations.

The state argues that the parties know how to limit the scope of the language to certain agencies and to use the term "calendar days." It points out that Section 27.04 requires employees in certain institutional agencies to provide at least seven "calendar days" notice to use personal leave the day before or after certain holidays. The state claims that Section 25.01(c) is also indicative of the parties' ability to define a "day" as a "calendar day."

The state contends that the industry practice supports it position. It observes that Johnson testified that he has negotiated provisions similar to Section 26.04 in many public sector collective bargaining agreements to insure that employees work on their last scheduled day prior to a holiday and their first scheduled work day after a holiday. It asserts that Section 26.04 should be interpreted in light of the industry practice.

The state maintains that the rule that an ambiguity should be construed against the drafter is not helpful in the instant case. It reports that the language at issue was not its proposal or a union proposal but was the product of a joint committee. The state stresses that this means that both parties are the drafters of the language.

The state asserts that even if it could be construed as the drafter of the language, the record indicates that it met the purpose of the rule. It states that the rationale of construing an ambiguity against the drafter is "to promote the careful drafting of language and careful disclosure of what the drafter intends." (State Brief, page 10) The state claims that it was clear

about its intent both at the main table and in the subcommittee.

The state concludes that "day" in Section 26.04 means "scheduled work day."

Analysis - The issue is the meaning of "day" in Section 26.04 of the collective bargaining agreement. Section 26.04 states that "employees who are scheduled to work and call off sick the day before ... or the day after a holiday shall forfeit their right to holiday pay." The union claims that "day" means "calendar day" so that an employee who works Monday through Friday and takes sick leave on Friday is still eligible for holiday pay for a Monday holiday. The state claims that "day" refers to a "scheduled work day" so an employee on a Monday through Friday schedule who takes sick leave on Friday does not get holiday pay.

While the meaning of "day" might appear clear, its ambiguity should be apparent to any labor relations professional. Consequently, the parties should be careful to define the term. In fact, in Article 25, which sets forth the grievance procedure, the parties indicate in Section 25.01(C) that for purposes of Article 25, "day" means "calendar day." Unfortunately, the parties did not adopt this approach in Article 26.

In other circumstances, employers and unions agree to add a modifier to "day" to eliminate any doubt regarding the meaning of the word "day." The union indicated that the word "day" appears in the contract in 79 times with a modifier such as "calendar," "work," "business," "or "duty." However, in Section 26.04 the word "day" appears all alone.

In many instances the meaning of "day" can be established by reference to past practice. This is the case for Section 30.03 where the parties have agreed that the "three (3) consecutive days" of bereavement leave means three "work days" so that an employee who is off on bereavement leave on Friday is also entitled to leave on the following Monday and Tuesday.

Unfortunately, there is no past practice to guide in the interpretation of the language at issue because it is new to the contract.

One of the frequently relied upon methods for interpreting ambiguous contract language is bargaining history. The Arbitrator believes that in the instant case, bargaining history strongly supports the conclusion that "day" in Section 26.04 refers to "scheduled work day." The state's initial proposal required employees to work "their last scheduled shift prior to the holiday and their first scheduled shift immediately following the holiday" to be eligible for holiday pay, leaving no doubt about the intent of its proposal. In addition, Johnson testified that he made it clear at the initial main table bargaining session that the intent of the proposal was to prevent employees from using sick leave to extend their time off around holidays.

The Arbitrator rejects the union's argument that bargaining history cannot be considered under the main table and agency-specific ground rules. The rules state:

> The fact that items are proposed, modified or withdrawn will not imply intent or meaning to existing contract provisions and will not hold any evidentiary value in future bargaining, meetings, mediation, arbitration, or ULP hearings.

However, the prohibition against the use of proposals to imply intent or establish meaning applies to "existing" contract provisions. In the instant case, the dispute is over the meaning of new contract language. It is not the usual case where one side tries to use a proposal made during negotiations to change the meaning of an existing contract provision.

The fact that the language adopted by the subcommittee was ambiguous does not indicate that the intent of the language changed. Brokaw and Decker testified that there was no discussion regarding the work requirement to qualify for holiday pay. They stated that the union's concern was what would constitute "documented, extenuating circumstances" which

would allow employees to use sick leave without losing their eligibility for holiday pay. The union did not call any of its members of the subcommittee to rebut the testimony offered by Brokaw and Decker.

The Arbitrator understands the reason for the language that emerged from the subcommittee. The 2003-2006 contract stated that "employees who are scheduled to work and call off sick the day of a holiday shall forfeit their right to holiday pay." Rather than altering the entire sentence to correspond to the state's initial proposal, the subcommittee, without any discussion, simply added a few words to the existing contract language indicating that employees would also lose holiday pay if they took sick leave "the day before, ... , or the day after a holiday." There is nothing in the record to suggest that there was any change in the intent or meaning of the new language from what was presented at the main table.

The Arbitrator's conclusion about the meaning of "day" is also strongly supported by the industry practice. Many employers have difficulty with employees who extend their holiday weekends by taking sick leave the day before or the day after a holiday. They have responded by negotiating provisions that require employees to work their last scheduled shift before the holiday and their first scheduled shift after the holiday. It is clear that the negotiators in the instant case were aware of the problem and agreed to a provision to deal with it.

The interpretation of Section 26.04 sought by the union creates a significant inequality. The majority of the members of the bargaining unit, who work Monday through Friday schedules, would not be able to extend their holiday weekend by taking sick leave on Friday without sacrificing holiday pay. However, a relatively small number of employees, who are on different schedules, would not be penalized by using sick leave to extend their holiday.

Based on the above analysis, the Arbitrator must conclude that "day" in Section 26.04 refers to a "scheduled work day."

DOCUMENTED, EXTENUATING CIRCUMSTATNCES

Union Position - The union argues that the meaning of the end of the second sentence of Section 26.04 can be determined solely from the contract language. It indicates that this can be accomplished by parsing out the phrase word-by-word. The union offers the following:

unless there is	The parties use of the passive verb form indicates that the employee does not necessarily have to take an affirmative step for his absence to be excused. If such was required, it would say "unless the employee gives to the employer … "
documented	The employee must present the employer with documentation of the extenuating circumstances, either a paper or writing, or an electronic record. An oral representation to the employer, without more, would not constitute documentation.
extenuating	The circumstances must excuse in whole or in part, the employee's absence. An incapacitating sickness, or the need to stay home and care for a minor child with an incapacitating sickness, renders the employee nonculpable for the absence. Staying home because an employee does not feel like working that day does not.
prohibit	The circumstances must wholly bar the employee from working. Circumstances that simply make it less convenient to work do not qualify.
reporting	This disqualification language pertains only to an employee who fails to report for duty and subsequently leaves work because of sickness and consequently does not disqualify them from receiving holiday pay. (Union Brief, page 9)

State Position - The state argues that "the objective manifestation of the parties' intent [in the second sentence of Section 26.04] is found in the words they utilized." (State Brief, page

11) It states that the test that the parties set forth is that an absence must be documented; that there must be extenuating circumstances; and that the circumstances must prevent the employee from reporting for duty.

The state claims that the patent ambiguity relating to the phrase "extenuating circumstances" was removed by pre-contract discussions. It points out that Brokaw and Decker explained to the subcommittee that an employee who hits a deer on the way to work, is hospitalized, and submits hospital admission papers and a police report meets the requisite criteria. The state notes that they also stated that a mere illness of an employee or the employee's child is not an extenuating circumstance.

The state maintains that there is a presumption that an employee who calls off sick before or after a holiday forfeits the holiday pay. It states that an employee who calls off bears the responsibility to establish the requisite conditions to be paid for the holiday. The state asserts that it is "the employee's responsibility to connect the 'dots' for the employer." (State Brief, page 12) It indicates that "employees who value their privacy over the holiday pay may choose not to provide documentation and forgo the pay." (State Brief, page 17)

Analysis - The state and the union agree to a large extent on the meaning of "documented, extenuating circumstances which prohibit the employee from reporting for duty." They concur that an employee who calls off sick must present documentation of the extenuating circumstances; that the reason for the absence must be an incapacitating sickness of the employee or a minor child; and that the circumstances must wholly bar the employee from working.

The parties disagree about the extent of an employee's obligations. The stated argues that an employee who calls off sick the day before or after a holiday forfeits holiday pay unless he

shows that his sickness prevented him from reporting for work, i.e., he has the responsibility for "connecting the dots." The union contends that once an employee provides documentation of a sickness, the employee "is entitled to the presumption that a sickness is work prohibitive unless the State produces evidence to the contrary." (Union Brief, page 10) It maintains that an employee cannot be denied holiday pay for failing to take the affirmative step of showing that his sickness prevented him from working.

The Arbitrator believes that the state has the right under Section 26.04 to require an employee to show that he was unable to report for duty. While in some cases a diagnosis may be sufficient to establish an inability to work, in other cases the ability of an employee to work depends on the severity of the symptoms. For example, one employee suffering from a gastro-intestinal upset may have severe vomiting and diarrhea while another employee may be spared such symptoms. As a matter of practice, an employee requesting a doctor's slip should tell his doctor that the slip must include a statement indicating why he was unable to report to work on the relevant dates. If an employee fails to do so, he risks having to return to the doctor for further documentation regarding his inability to work.

The parties face a significant challenge in the implementation of Section 26.04. As they stated in the joint stipulations, "each situation will be unique and ... what establishes the 'documented, extenuating circumstances which prohibits the employee from reporting for duty' needs to be based upon the totality of facts and circumstances." (Joint Stipulations, pages 2-3) The application of the provision is made even more challenging by the need to protect the privacy rights of employees.

SCENARIOS

The scenarios submitted to the Arbitrator are shown below. They are followed by the rationale each party offered for deciding whether the employee meets the requirements of Section 26.04 and the Arbitrator's comments and decision.

i. Employee calls in sick, and provides no doctor's slip confirming the sickness, nor an explanation of how the sickness prevented him from working.

The union argues that the employee does not meet the requirements of Section 26.04 because documentation is absent.

The state contends that the employee does not meet any portion of the standard, i.e., no documentation was provided, the illness may or may not qualify, and no explanation was provided about why it prevented him from working.

The Arbitrator agrees with the parties that the employee does not meet the requirements of Section 26.04 because he did not provide any documentation. In addition, any documentation would have to identify the illness and, depending on the nature of illness, may have to state that it prevented him from reporting for work.

ii. Employee calls in because his/her minor, dependent child is sick, and employee provides no doctor's slip confirming the sickness, nor an explanation of how the child's sickness prevented the employee from working.

The positions of the parties and the arbitrator's analysis are the same as in scenario i.

iii. Employee calls in sick, provides a doctor's slip confirming the sickness, which does not explain how the sickness prevented him/her from working.

The union argues that the employee meets the requirements of Section 26.04. It claims that because documentation was provided extenuating circumstances were established. It acknowledges that no explanation was provided as to how the sickness prohibited the employee from reporting for duty but claims that "the employee is entitled to the presumption that a sickness is work prohibitive unless the State produces evidence to the contrary." (Union Brief, page 10)

The state argues that the employee does not meet the requirements. It states that

while there is some documentation, it is insufficient because it failed to explain how the sickness prevented him from working.

The Arbitrator believes that the employee may or may not meet the standard. As discussed above, the doctor's diagnosis may or may not be sufficient all by itself to determine that the employee was not able to work. In cases where an employee's ability to report for work is not clear, the state has the right to ask the employee for further documentation.

iv. Employee calls in because his/her minor, dependent child is sick and employee provides a doctor's slip confirming the sickness, which does not explain how the child's sickness prevented the employee from working.

The positions of the parties and the Arbitrator's analysis are the same as in scenario iii.

v. Employee calls in sick and provides a doctor's slip confirming the sickness and explaining how the sickness prevented the employee from working.

The union argues that the employee meets the requirements of Section 26.04. It states that the sickness was documented as well as the fact that it was work prohibitive.

The state argues that the requisite conditions would be met "if the nature of the sickness is more than a minor illness."

The Arbitrator believes that the employee meets the standard. The doctor's slip states that he was sick and explained how he was prevented from working. There is nothing in the scenario to suggest that there was any basis for the state to consider the seriousness of the illness given that the doctor explained why it prevented him from working.

vi. Employee calls in because his/her minor, dependent child is sick and provides a doctor's slip confirming the sickness and explaining how the sickness prevented the employee from working.

The positions of the parties and the Arbitrator's analysis are the same as in scenario v.

vii. Employee has an FMLA certification on file and relies solely on that certification to establish documented extenuating circumstances which prohibit the employee from reporting for duty.

The union argues that the employee meets the requirements of Section 26.04. It maintains that the FMLA certification on file met the documentation requirement because the statute allows employees to use FLMA only for their own serious health condition or to care for a spouse, child, or parent with a serious health condition and that the sickness must result in the person's incapacity. The union adds that the illness was work prohibitive because the employee was either unable to work or had to stay home with someone who was incapacitated by a sickness.

The state argues that the employee does not meet the requirements. It acknowledges that the nature of the illness was not a question but claims that the documentation fell short of meeting the standard. The state indicates that the general medical certification did not indicate that the condition was active on the day(s) in question and did not provide an explanation for how it prevented the employee from reporting for work.

The Arbitrator believes that the employee does not meet the requirements. He had to provide a doctor's slip that indicated that he was sick on the day(s) in question and showed why his condition prevented him from working.

viii. Employee has an FMLA certification on file, provides additional documentation explaining how the sickness prevented him/her from working, and relies on both to establish documented, extenuating circumstances which prohibit the employee from reporting for duty.

The union argues that the employee meets the requirements of Section 26.04 just as in scenario vii.

The state argues that the employee meets all of the requisite conditions. It points out that the illness was well-documented and was not minor and the doctor explained why it prevented the employee from working.

The Arbitrator agrees with the parties that the employee meets the standard.

ix. Employee schedules sick leave for the day before, day of, or the day after a holiday, and does not subsequently provide a doctor's slip confirming treatment was received on the scheduled leave day.

The union argues that the employee meets the requirement of Section 26.04. It states that the employee established documentation of sickness through the process of scheduling sick leave in advance. The union claims that the lack of an explanation for the employee's inability to report for work is not relevant.

The state argues that this scenario is "not a product of the language [of Section

26.04 but is] a product of the basic employer/employee relationship." (State Brief, page 16) It indicates that on that basis, it had the right to request the employee to provide confirmation that treatment was received for the stated purpose. The state claims that "if the Employee refuses then such employee should be treated as if he called off and did not meet the requisite the conditions." (Ibid.)

The Arbitrator believes that the employee does not meet the requirements. The employee's sick leave was pre-approved but the state had the right to confirm that it was used for the agreed upon purpose.

x. Employee schedules sick leave for the day before, the day of, or the day after a holiday, and subsequently provides a doctor's slip confirming the treatment was received on the scheduled leave day.

The union argues that the employee meets the requirements of Section 26.04.

The state argues that this scenario is "not a product of the language [of Section 26.04 but is] a product of the basic employer/employee relationship." (State Brief, page 16) It indicates that on that basis, it had the right to request confirmation that treatment was received for the stated purpose. The state observes that in this scenario the employee documented that the leave was taken for its stated purpose and, therefore, met the standard.

The Arbitrator agrees with the parties that the employee meets the standard.

AWARD

1. "Day" in Section 26.04 of the collective bargaining agreement refers to "scheduled work day."

2. In the ten scenarios submitted by the parties, the Arbitrator holds:

i. The employee does not meet the standard set out in Section 26.04.

ii. The employee does not meet the standard set out in Section 26.04.

iii. The employee may or may not meet the standard set out in Section 26.04 depending on the nature of the sickness.

iv. The employee may or may not meet the standard set out in Section 26.04

depending on the nature of the sickness.

v. The employee meets the standard set out in Section 26.04.

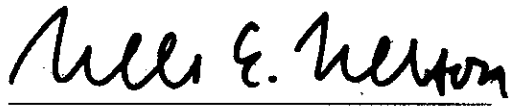
vi. The employee meets the standard set out in Section 26.04.

vii. The employee does not meet the standard set out in Section 26.04.

viii. The employee meets the standard set out in Section 26.04.

xix. The employee meets the standard provided the pre-approved sick leave was used for the agreed upon purpose. The state can require documentation regarding the actual use of the leave.

x. The employee meets the standard set out in Section 26.04.



Nels E. Nelson
Arbitrator

January 8, 2007
Russell Township
Geauga County, Ohio