

In Re the Arbitration of:

WASHINGTON FEDERATION OF)
STATE EMPLOYEES,)
Union,)
) AAA No. 75 390 00510 06 LYMC
and)
) James Lawrence Grievance
)
STATE OF WASHINGTON,)
COMMUNITY COLLEGES)
OF SPOKANE,)
Employer.)
_____)

OPINION AND AWARD

Date of Award: July 11, 2007

Arbitrator
Carol J. Teather
Attorney at Law
5278 N.E. See Forever Lane
Poulsbo, Washington 98370
Tel: (360) 598-2621

OPINION OF THE ARBITRATOR

Proceedings

On July 11, 2006, James Lawrence (“Grievant”) filed a grievance on the termination of his employment as an Information Technology Systems Specialist II at Spokane Community College alleging the action was improper and a violation of Article 11, Section 11.2, Article 17, and Article 27.1 of the 2005-2007 Collective Bargaining Agreement By and Between The State of Washington and Washington Federation of State Employees Higher Education (“CBA”). Exhibits (“Exs.”) 14, 15. The parties were unable to resolve their dispute in the initial steps of the grievance procedure, and the grievance was brought to arbitration pursuant to Article 28, Section 28.3, Step 4 of the CBA. The arbitrator was selected through the American Arbitration Association.

A hearing was held on April 10, 2007, in a conference room at the Washington Attorney General’s Office in Spokane, Washington. The Washington Federation of State Employees (“WFSE” or “Union”) was represented by attorney Christopher J. Coker of Younglove Lyman & Coker, and the State of Washington, Community Colleges of Spokane (“CCS”) was represented by Donna Stambaugh, Assistant Attorney General. At the hearing, the parties stipulated that the grievance was arbitrable and there were no timeliness issues. The parties’ representatives presented their cases well and provided excellent arguments in support of their positions. The testimony of witnesses was taken under oath and the parties presented documentary evidence. No formal record was made of the hearing and the arbitrator has relied on her notes.

The parties filed post-hearing briefs which were received by the arbitrator on June 4, 2007, and the hearing was declared closed on that date. The parties agreed to an extension to July 11, 2007, for the arbitrator’s decision.

List of Exhibits¹

Exhibit 1 - Notice of Termination from Steve Hanson to Grievant dated 7/6/06

¹ All of the exhibits were admitted into evidence.

- Exhibit 2 - Pre-discipline letter from Steve Hanson to Grievant dated 6/9/06
- Exhibit 3 - Response to pre-discipline letter dated 6/13/06
- Exhibit 4 - Letter from Steve Hanson to Grievant dated 4/7/06
- Exhibit 5 - Letter from Grievant to Steve Hanson w/ attachments dated 3/17/06
- Exhibit 6 - Memo from Reggie Eans to Grievant w/ attachments dated 2/21/06
- Exhibit 7 - Leave Authorization Forms
- Exhibit 8 - Letter from Deborah Fertakis ARNP to Jolynne Sherman dated 2/2/06
- Exhibit 9 - Various emails
- Exhibit 10 - Letter from Desiree Desselle to Norm Sievert dated 4/24/06
- Exhibit 11 - Application for Family or Personal Medical Leave dated 4/10/06
- Exhibit 12 - Requests for Grievant to attend negotiations and Responses
- Exhibit 13 - Administrative Procedures-Family Medical Leave and Return to Work
- Exhibit 14 - Grievance filed 7/11/06
- Exhibit 15 - 2005-2007 Collective Bargaining Agreement
- Exhibit 16 - Letter from Steve Hanson to Grievant dated 3/13/06
- Exhibit 17 - Email from Desiree Desselle to Norm Sievert dated 4/18/06
- Exhibit 18 - Administrative Policy, Washington State Department of Labor and Industries Employment Standards, ES.C.10

List of Witnesses

Jolynne Sherman, Reginald Eans, Norman Sievert, Grievant, Steve Hanson.

Issues

Did Spokane Community College have just cause to terminate Grievant's employment? If not, what is the appropriate remedy?

Relevant Provisions of the CBA

ARTICLE 10 – VACATION LEAVE

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10.7 Family Care

Employees may use vacation leave for care for family members as required by the Family Care Act, WAC 296-130.

ARTICLE 11 – SICK LEAVE

...

11.2 Sick Leave Use

Sick leave may be used for:

...
 B. Care of family members as required by the Family Care Act, WAC 296-130.

....

...
 11.5 Sick Leave Reporting and Verification

An employee must promptly notify his or her supervisor on his or her first day of sick leave and each day after, unless there is a mutual agreement to do otherwise. If an employee is in a position where a relief replacement is necessary if they are absent, he or she will notify his or her supervisor at least two (2) hours prior to his or her scheduled time to report to work. If the Employer suspects abuse, the Employer may require a written medical certificate for any sick leave absence. An employee returning to work after any sick leave absence may be required to provide written certification from his or her health care provider that the employee is able to return to work and perform the essential functions of the job with or without reasonable accommodation.

ARTICLE 17 – LEAVE WITHOUT PAY

- 17.1 Leave without pay will be granted for the following reasons:
- A. Family and Medical Leave (Article 13)
 - B. Compensable work-related injury or illness leave (Article 14)
 - C. Military Leave
 - D. Cyclic employment

- 17.2 Leave without pay may be granted for the following reasons:
- A. Educational leave
 - B. Child or elder care emergencies
 - C. Governmental service leave
 - D. Citizen volunteer or community service leave
 - E. Conditions applicable for leave with pay
 - F. Union Activities (Article 38)
 - G. Formal collective bargaining leave
 - H. As otherwise provided for in this Agreement

...
 17.11 Formal Collective Bargaining Leave

Leave without pay may be granted to participate in formal collective Bargaining sessions authorized by RCW 41.80.

- 17.12 Requests for leave without pay will be submitted in writing. The Employer will approve or deny leave without pay requests, in writing, within fourteen (14) calendar days when practicable and will include the reason for the

denial.

ARTICLE 27 – DISCIPLINE

- 27.1 The Employer will not discipline any permanent employee without just cause.
- 27.2 Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges. Oral reprimands will be identified as such.
- ...
- 27.7 Prior to imposing discipline, except oral or written reprimands, the Employer will inform the employee in writing of the reasons for the contemplated discipline and an explanation of the evidence. The Employer will provide the Union with a copy. The employee will be provided an opportunity to respond either at a meeting scheduled by the Employer, or in writing if the employee prefers. A pre-disciplinary meeting with the Employer will be considered time worked.
- ...
- 27.9 The Employer has the authority to impose discipline, which is then subject to the grievance procedure set forth in Article 28. Oral reprimands, however, may be processed only through the institution or college's top step of the grievance procedure.

ARTICLE 28 – GRIEVANCE PROCEDURE

28.3 Filing and Processing

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C. Processing

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Step 4

If the grievance is not resolved at Step 3, the Union may file a demand for arbitration (with a copy of the grievance and all responses attached). It will be filed with the director of the OFM Labor Relations Office (OFM/LRO) and the institution's Human Relations Office within twenty-one (21) days of receipt of the Step 3 decision. Within fifteen (15) days of the receipt of the arbitration demand, the OFM/LRO will either:

1. Schedule a pre-arbitration review meeting with the OFM/LRO director or designee, the institution's Human Resources Office representative, and the Union's staff representative to review and attempt

to settle the dispute. If the matter is not resolved in this pre-arbitration review, within fifteen (15) days of the meeting, the Union may file a demand to arbitrate the dispute with the American Arbitration Association (AAA), with copies to OFM/LRO and the institution's Human Resources Office.

OR

2. Notify the Union in writing that no-pre-arbitration review meeting will be scheduled. Within fifteen (15) days of receipt of this notice, the Union may file a demand to arbitrate the dispute with the AAA, with copies to OFM/LRO and the institution's Human Relations Office.

...

E. Authority of the Arbitrator

1. The arbitrator will:

- a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;
- b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;
- c. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement;
- d. Not have the authority to order an employer to modify his or her staffing levels or to direct staff to work overtime.

...

3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

Article 38 – Union Activities

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38.6 Time Off for Union Activities

A. Union-designated employees may be allowed time off without pay to attend union-sponsored meetings, training sessions, conferences, and conventions. The employees' time off will not interfere with the operating

needs of the institution as determined by management. If the absence is approved, the employees may use accumulated compensatory time, personal holiday, or vacation leave instead of leave without pay. However, employees must use compensatory time prior to their use of vacation leave, unless the use would result in the loss of their vacation leave.

B. The Union will give the Employer a written list of the names of the employees it is requesting attend the above-listed activities, at least fourteen (14) calendar days prior to the activity.

Background Facts

Grievant was employed by the Community Colleges of Spokane (“CCS”) as an Information Technology Systems Specialist 2. Exhibit (“Ex.”) 1. His immediate supervisor was Jo Lynne Sherman, Information Technology Consultant 5. Testimony (“Test.”) Sherman. In mid-November 2005, Grievant spoke to his supervisor and asked to work an alternate schedule in order to be home during the day to care for his mother-in-law, who was recuperating from heart surgery and needed his care. Test. Grievant, Sherman. Grievant wished to change his schedule to work from 4:00 p.m. to 8:00 p.m. each day, and to use four hours per day of his accumulated sick leave in order to remain in a full pay status. Ms. Sherman contacted the CCS Human Resource Office (“HRO) and asked if she could approve a temporary schedule change. She did not, however, advise HRO of the specific details of Grievant’s request or that it was for a medical reason.² Sherman test. She was advised that she could approve a temporary schedule change if she could manage it from an operational standpoint. Ms. Sherman granted Grievant’s request, saying that they would try it and see how it worked out. Test. Sherman, Grievant; Ex. 1. Grievant began his new part-time schedule on November 17, 2005. Ex. 7.

Grievant submitted leave slips to his supervisor reflecting his use of sick leave on a part-time basis each day from November 17, 2005, through February

² The CCS Human Resources Director, Norman Sievert, testified that he first became aware of Grievant’s alternate schedule and leave in early February 2006.

14, 2006. Ex. 7. Ms. Sherman signed each leave slip acknowledging Grievant's absence, and then forwarded it to payroll. She did not approve the leave as she had no authority to do so, and she did not know what payroll did with the leave slips after receiving them. Ex. 7; Sherman test. Grievant did not submit any leave slips after February 2006.

While Grievant was working part-time in the evenings and taking sick leave part-time, he would send his supervisor daily email reports so that she would know what he was doing. On her part, Ms. Sherman would periodically ask him when he would be coming back to work full time, and how much longer he expected to need the alternate schedule. Grievant usually replied that he had no idea. Sherman test.

In February 2006, Ms. Sherman determined that Grievant's alternate schedule was not working out. Communication was difficult, Grievant was not attending staff meetings, and Ms. Sherman believed Grievant's alternate work schedule was beginning to have an adverse effect on the delivery of services to students. She, therefore, sought the advice of HRO as to what she could do under the circumstances. Sherman test. She was told that she had the right to require Grievant to be at work during his normal schedule unless he takes leave. Test. Norman Sievert.

On February 14, 2006, Ms. Sherman spoke to Grievant about the problems his alternate schedule was creating and that she needed him to work his regular schedule or take full-time leave. The result of this conversation was that Grievant was going to take full-time sick leave to care for his mother-in-law. Ms. Sherman directed Grievant to contact HRO for this type of leave. Test. Sherman. At that time, Ms. Sherman also requested medical verification of his need for leave. *Id.*

On February 2, 2006, Grievant had obtained a note regarding his mother-in-law's medical condition from Deborah L. Fertakis, ARNP, who Grievant identified as the family care giver. Ex. 8; Grievant test. Grievant indicated that he obtained the note because he believed it was required for leave under the Family

Care Act. Grievant test. The note was typewritten on Hillyard Medical Clinic, P.S., letterhead paper, dated February 2, 2006, and stated:

Jim has been caring for his mother-in-law since her extensive surgery in October of last year. Though she is improving her recovery has been slow as she has several medical conditions. It is fortunate that he has been able to assist her during her recovery.

Ex. 8. Grievant gave this medical note to his supervisor on February 14, 2006, in the envelope in which it was placed at the doctor's office, and his supervisor forwarded it on to HRO., Test. Grievant, Sherman; Ex. 8. Subsequently, on February 21, 2006, Grievant also gave his supervisor a leave slip requesting full-time sick leave for the period February 15, 2006, through February 28, 2006, to care for his mother-in-law. Ex. 7. According to Grievant, he felt he would get his full-time leave approved by supplying the leave slip and doctor's note.

Grievant did not contact HRO as instructed by his supervisor. He did, however, indicate to Ms. Sherman that he would be attending the staff meeting scheduled for February 22, 2006. Ex. 9, page ("p.") 1. Therefore, on February 21, 2006, HRO gathered the information and forms to be filled out for family care leave and forwarded them by email to Ms. Sherman to give to Grievant at the staff meeting. Exs. 6, 9, pp. 2, 3; test. Sherman and Reggie Eans. The February 21, 2006, email from the CCS District Director Human Resources, Norman Sievert, containing the leave information and forms that was sent to Ms. Sherman was also sent to Grievant, and in it Mr. Sievert stated:

Per the WFSE contract Article 10.7 and the applicable WAC referenced (WAC 296-130) "family care" leave can be granted under certain circumstances with verification of the medical condition and need for the employee to be off work to care for a family member (which includes parent-in-laws). This is different than FMLA, although the certification requirements are similar. Once we receive the required information back from Jim we will assess. For now, however, the leave has not been granted—it is subject to HRO approval and we have not received sufficient information to review, so it is incumbent on Jim to get the info back to us asap.

Ex. 9, p. 3.

Grievant did not attend the staff meeting on February 22, 2006, but left a message with “Sheila” at the help desk saying that his mother-in-law was not doing well. Ex. 9, p. 5. Ms. Sherman telephoned Grievant at home the same day, and informed him that she had the forms he needed to fill out in order to get the leave he was requesting, that these forms were also sent to him by email, and that he should access his email and download the forms. Sherman test. Ms. Sherman also directed Grievant to complete the forms and take them to HRO. Sherman test.; Ex. 9, p. 5.

Ms. Sherman did not hear from Grievant for several days and then he called to say that he had taken his mother-in-law to Kalispell for her brother’s funeral. He also informed Ms. Sherman that he did not know when he would be back to work, but it definitely would not be before March 6, 2006. Ms. Sherman told Grievant that she thought he was going to get his leave paper work in to HRO, and he responded by saying that Rick Nesbitt, a union representative, was going to do that for him.

On March 6, 2006, Grievant left Ms. Sherman a voice mail saying he was not coming in as his mother-in-law had taken a turn for the worse over the weekend, and he would be taking her to a doctor’s appointment on March 15, 2006. In the voice mail, Grievant also stated that he would not be at work until at least after March 15th. Sherman test.; Ex. 9, p. 7. Subsequently, on March 17, 2006, Grievant left Ms. Sherman another voice mail saying his mother-in-law was still in need of care, that he had taken her to the doctor on March 15th, and that he is working with the doctor, but his mother-in-law was in a lot of pain and could not move or get out of bed. Ex. 9, p. 12; Sherman test.

Based on Grievant’s representation to Ms. Sherman that Rick Nesbitt of WFSE would be submitting the leave paperwork on his behalf, Mr. Sievert communicated with Mr. Nesbitt in an effort to obtain the requisite leave request forms and medical certification to cover Grievant’s absences. Ex. 9, pp. 6-10. By

email on March 2, 2006, Mr. Sievert informed Mr. Nesbitt that Grievant had failed to supply the required leave request documentation that his supervisor had told him he needed to complete and submit, and Grievant had also failed to follow up with his supervisor about his absences. Mr. Sievert reminded Mr. Nesbitt that Grievant had an obligation to report his status to his supervisor and to complete the required paperwork that was forwarded to him by email. Mr. Sievert stated that at this point Grievant's leave had not been approved under the Family Care Act provisions of the Washington Administrative Code or the Collective Bargaining Agreement. He also stated that CCS expected Grievant to provide the required documentation for his leave request as soon as possible, and to contact his supervisor daily, unless and until she informed him otherwise. Ex. 9, p. 6. Mr. Nesbitt responded the same day stating that he would call Grievant and relay the information. *Id.*

Mr. Sievert sent Mr. Nesbitt another email on March 9, 2006, with a copy to the Chief Steward for Office Clerical, informing him that Grievant had failed to communicate with CCS as required, and had not provided information to substantiate his request for sick leave. Mr. Sievert asked Mr. Nesbitt to follow up with Grievant and to impress upon him that he was obliged to follow the rules and procedures for leave under the Family Care Act. Ex. 9, p. 8. Mr. Sievert also informed Mr. Nesbitt that Grievant's lack of cooperation/responsiveness was unacceptable, and that any leave request also needed to substantiate Grievant's previous absences dating back to December, given that the only documentation he had submitted from the health care provider simply indicated it was helpful that Grievant could stay home with his mother-in-law and did not substantiate the need for him to provide constant care. *Id.*

On March 13, 2006, Mr. Sievert sent Mr. Nesbitt an email containing the information and leave request and medical certification forms for requesting Family Care leave that were originally sent to Grievant on February 21, 1006. Exs. 6 and 9, pp. 2, 3, 10. The same day, Mr. Nesbitt sent Mr. Sievert an email

asking for the relative policies or procedures that required Grievant to provide more medical documentation than he had already supplied. Ex. 9, p. 9.

On March 14, 2006, Mr. Nesbitt contacted the Leave Administrator, Reggie Eans, and asked him to identify the specific information Grievant needed to obtain from the physician in order to be able to use his leave time for his mother-in-law's care. Ex. 9, p.11. Mr. Eans informed him that the "letter/note" that was with the leave documents sent to him by Mr. Sievert on March 13th spelled out what was needed. Exs. 6 and 9, pp. 2, 3, 10, 11; test. Eans.

On March 22 and 23, 2006, a series of emails between Mr. Sievert and union representative Desiree Desselle referenced the fact that Grievant did not believe the forms he was being asked to complete were appropriate. Ex. 9, p. 13. The final email from Ms. Desselle on March 23, 2006, indicated that she would be meeting with Grievant the following week and would ask him about his concerns with the forms at that time. *Id.*

CCS officials were mystified as to why Grievant had not contacted HRO in accordance with the instructions he had received. Test. Steve Hanson. In an attempt to get his attention, Grievant was sent a letter dated March 13, 2006, from Steve Hanson, President, Spokane Community College, notifying him that based on his continued absence from work without authorized leave, per Article 25 Presumption of Resignation of the CBA, CCS was presuming that he had resigned from his position. Hanson test.; Ex. 16. The letter informed Grievant that his resignation was effective that day, March 13, 2006, and that he may petition for reinstatement within seven (7) calendar days of the notice being deposited in the mail. Grievant was told that any petition must provide proof that his absence was involuntary or unavoidable. Ex. 16.

Grievant responded very quickly to the notice of presumption of resignation in a letter dated March 17, 2006, which was delivered to Mr. Hanson by Mr. Nesbitt, along with a medical note from Deborah L. Fertakis, A.R.N.P, dated March 17, 2006, stating:

Jim is the caregiver for his mom Betty, she was seen and her condition has improved but she still needs constant care from Jim. She will be re-evaluated next month and at that time we should be able to determine how much care will be needed for her.

Ex. 5; Hanson test. Also attached to Grievant's response was a copy of the February 2, 2006, medical note from Ms. Fertakis. Ex. 5.

In his March 17th letter, Grievant denied ever communicating or intending to abandon his position, and apologized for any miscommunication that led to this situation. He explained that his absence from work was due to the need for him to care for his mother-in-law, and that he had notified his supervisor of his request for leave and the reason for the leave. Ex. 5. He also stated that the Family Care Act allowed for such leave and that approval was mandatory. He further stated that he had communicated with his supervisor as circumstances changed regarding the amount and duration of leave, and he had provided her with a letter from the physician attending his mother-in-law dated February 2, 2002. According to Grievant, his actions met the conditions of the Family Care Act. Ex. 5.

Grievant acknowledged that he was asked to complete additional paperwork, but claimed the documents were for Family Medical leave and did not relate to the Family Care Act. He also indicated that Family Care Act leave was approved in the past with only a letter from the employee making the request. Grievant pointed out that he had sufficient leave to cover his absences and was asking President Hanson to approve the use of his sick leave for this purpose. Ex. 5. Grievant also stated his understanding that all of the leave requests he had made to that date were approved, and he was unaware of any leave issues, as evidenced by his receipt of his regular compensation on the March 10th paycheck. Ex. 5.

On April 4, 2006, President Hanson and Norm Sievert met with Grievant and union representatives Desiree Desselle and Rick Nesbitt regarding Grievant's petition for reinstatement. Test. Hanson, Sievert; Exs. 4 and 9, p. 15. During this meeting, Grievant disclosed that his mother-in-law had serious health issues, that

she was being treated by a doctor, and that she is incapable of dressing herself and making her own meals etc. *Id.* He also acknowledged receipt of the leave request and medical certification forms. Ex. 4; test. Hanson.

In a letter to Grievant dated April 7, 2006, President Hanson responded to his petition for reinstatement. He informed Grievant that he had still not complied with CCS leave policies and procedures as directed, and that his non-compliance was without justification. President Hanson directed Grievant to provide HRO with the required leave forms no later than the end of business on Friday, April 14, 2006, so that he could consider Grievant's petition for reinstatement. President Hanson also informed Grievant that his objections to the forms and CCS leave administration was misplaced, and that the Family Care Act does not restrict an employer from requesting verification of a medical condition or from having leave requests processed by the Human Resources Office. The letter also pointed out that the situation Grievant found himself in could have been avoided if he had complied with his supervisor's directive to contact HRO. The letter clearly notified Grievant that he had not provided sufficient information to verify the necessity of his having to stay home full-time during the day to care for his mother-in-law. It also informed him that under these circumstances, his paid sick leave would cease on Monday, April 10, 2006, until such time as the leave forms were completed and the need for leave was verified. President Hanson advised Grievant that if the leave forms were not completed, or leave was not warranted, his petition for reinstatement would be denied. He further advised Grievant that if leave was authorized, he would consider appropriate discipline for his past refusal to comply with CCS policies and procedures. Ex. 4.

Grievant dropped off his Application for Family or Personal Medical Leave along with a Medical Certification at the front counter in HRO on April 11, 2006. Exs. 9, p. 16; and 11. He did not tell either Mr Eans or Mr. Sievert that he was there or ask to speak to either of them. Test. Eans, Sievert. When Mr. Sievert received the completed forms, he examined them and noted a number of problems

with the forms which he described to Ms. Desselle in an email dated April 12, 2006. The Medical Certificate Grievant provided indicated that intermittent leave was needed for an unknown duration but the leave application he submitted requested full-time leave, rather than intermittent leave, through June 2006. There were also a number of answers to questions on the Medical Certificate that were either incomplete or non-responsive. In an email to Ms. Desselle on April 12, 2006, Mr. Sievert advised her of the deficiencies in the leave documentation Grievant had submitted and told her the deficiencies needed to be corrected. Ex. 16; test. Sievert. The deficiencies noted by Mr. Sievert were never corrected and no additional medical information was ever provided. In responding to Mr. Sievert's email, Ms. Desselle focused primarily on the termination of Grievant's employment by presumption of resignation and whether or not he was reinstated. She indicated that once Grievant was reinstated she hoped the leave issues would fall into place. Ex. 9, p. 16.

By letters dated March 28, April 13, May 2, May 9, May 17, and June 16, 2006, the Chief Negotiator for the Union, Evelyn F. Gershen, requested that Grievant, among others, be released to attend meetings of the WFSE bargaining team to be held on April 14 and 26, May 12, 24, and 26, June 7, 9, 13, and 15, July 26, 27, and 28, and August 1, 3, 21 and 23 of 2006. Ex. 12. All of the requests for the release of Grievant were denied on the bases that he was currently on unapproved leave without pay pending final determination of his employment status by President Hanson. Grievant's attendance at such meetings during the work week were found to be in direct conflict with his request for Family Care Act leave to care for his mother-in-law. Ex. 12. Also, by letter dated April 24, 2006, Desiree Desselle, Senior Field Representative for the Union, requested annual leave for Grievant for April 26 and 27, 2006. Ex. 10. The request was denied for the same reason the requests made by Ms. Gershen were denied. Ex. 9, p. 18. In his email to Ms. Desselle denying the leave, Mr. Sievert pointed out the continuing difficulties CCS was having in getting Grievant to provide sufficient information

for HRO to consider his Family Care Act request for leave, and stated that the difficulties were in large part due to Grievant's non-communication with CCS, in particular with Mr. Eans and Mr. Sievert. Ex. 9, p. 18.

By email dated April 26, 2006, Mr. Sievert reminded Ms. Desselle that "leave requests are supposed to come from the employee, who signs the appropriate leave request form and submits (it) to their supervisor" He also reiterated his concern over Grievant's lack of communication with HRO and his supervisor. Ex. 9, p. 18.

By means of a pre-discipline letter dated June 9, 2006, Mr. Hanson advised Grievant that CCS was considering taking disciplinary action against him, up to and including dismissal from his position as an Information Technology Systems Specialist 2, for the following reasons:

You have been absent without approved leave since February 16, 2006; you have attended negotiating sessions regarding the CBA between Washington State and WFSE after being denied leave to do so and after representing that your leave was needed to care for your mother-in-law; and you have refused to follow directives given to you to contact your supervisor and to provide sufficient medical information for your leave request.

Ex. 2. The letter also advised Grievant that President Hanson had decided not to proceed with the presumption of resignation, inasmuch as in his reply Grievant had indicated that he did not intend to resign. The letter further advised Grievant that his response to the presumption of resignation was insufficient to warrant granting approved Family Care Act leave and gave a detailed explanation of the reasons. Grievant was given an opportunity to respond to the allegations against him. Ex. 2.

Grievant responded through his union representative, Desiree Desselle, by letter dated June 13, 2006. Ex. 3. In this response, Grievant indicated that his request for full-time sick leave to care for his mother-in-law was to accommodate the desires of his supervisor, and that at no time had he indicated that the medical condition of his mother-in-law required the change from part-time to full-time sick

leave. He stated that once on full-time leave, reporting is no longer a daily requirement, and that since he continued to receive his full pay check, he believed his leave was approved. Grievant further stated that he never indicated in words or in deeds that he had abandoned his position, and that he had contacted his supervisor on March 6th and informed her he would have new information on March 15th concerning the necessity for him to continue his leave to care for his mother-in-law. Grievant also indicated that he had provided medical verification of his mother-in-law's condition and CCS had never notified him that the information he provided was unacceptable. Grievant maintained CCS did not have just cause to discipline him. Ex. 3.

By letter dated July 6, 2006, President Hanson notified Grievant that he was terminated from his position effective immediately for 1) excessive absenteeism, 2) unauthorized leave, 3) misuse of leave/dishonesty, 4) insubordination and 5) willful violation of a management directive or published institutional policy/procedure. Ex. 1. Grievant filed a grievance concerning his termination on July 11, 2006, alleging a violation of Article 11.2, Article 17, and Article 27.1 of the CBA. Ex. 14.

Positions of the Parties

The Union points out that from November 2005 to the middle of February 2006, with the approval of his supervisor and no requirement that he provide medical certification, Grievant worked an alternative schedule and used four hours of sick leave each day to allow him to care for his mother-in-law. It also points out that Ms. Sherman first requested verification from a medical provider regarding Grievant's use of leave in mid-February 2006, and that Grievant timely provided a note from his mother-in-law's nurse practitioner dated February 2, 2006. The Union further points out that the forms relating to extended leave for a family member were first provided to Grievant on or about February 21, 2006, and that Grievant returned the completed forms to CCS on or about April 10, 2006. The Union maintains that between the completed forms and the medical notes

from the nurse practitioner, Grievant had supplied enough information to qualify for leave under the Family Care Act. The Union also maintains that such leave has been approved in the past for other employees without the official form being completed. The Union further contends that at no time was Grievant ever ordered back to work, and it remains unclear exactly what additional information CCS was seeking and for what purpose. Additionally, the Union contends that any delay by Grievant in returning the required forms is excusable based upon past practice and the strange circumstances of this case. According to the Union, Grievant complied with all requirements under the policy related to the Family Care Act and should not have been terminated.

The State contends that there was just cause to terminate Grievant's employment due to his continued failure to provide proper justification for his lengthy unauthorized absence, and that termination was the only appropriate sanction. The State maintains Grievant was absent from his work site without authorization from mid-February 2006 until his termination in early July 2006. It further maintains that Grievant refused to report to work or to provide proper documentation supporting his need for extended leave. The State points out that in his testimony, Grievant indicated that his mother-in-law suffered from numerous medical conditions, therefore, obtaining a completed medical certification to support his need for leave should have been a simple matter. It contends that rather than following the instructions of his supervisor and HRO officials by obtaining and submitting the necessary complete medical certification, Grievant chose to stall, delay and shift the blame for his situation onto CCS and their use of forms that did not meet his approval. The State maintains that CCS did not order Grievant to return to work, but instead believed that his union representatives were actively working on his behalf and he would ultimately cooperate and provide the required information. The State also maintains that Grievant was notified of the rules to be followed, and that CCS officials only communicated with union representatives because Grievant had indicated early on that they were

corresponding on his behalf. The State contends that CCS provided Grievant with all of the necessary procedural safeguards and under the circumstances of this case dismissal is the only appropriate sanction. According to the State, Grievant had the capacity to rescue his job from the beginning, but failed to believe that he needed to cooperate.

Burden of Proof

The parties' CBA requires "just cause" for discipline and the employer has imposed the extreme penalty of discharge. Thus, CCS has the burden of establishing that the Grievant is guilty of the wrongdoing of which he is accused by clear and convincing evidence.

Discussion

Excessive Absenteeism and Unauthorized Leave

It is undisputed Grievant was absent from work for four hours per day from November 17, 2005, through February 14, 2006, and was absent from work full-time from November 16, 2006, until his termination on July 6, 2007. It also is undisputed that from November 17, 2005 through February 15, 2006, Grievant was working an alternative schedule and using four hours of sick leave per day with the approval of his supervisor. It is also clear from the evidence presented that no one questioned his use of leave during this period, or requested greater verification of his need for leave than the information he had provided his supervisor on his leave slips. Thus, I find that Grievant was working an alternative schedule and effectively on approved leave through February 15, 2006. The issue is Grievant's leave status beginning February 15, 2006.

Grievant's stated reason for being absent from work and in need of leave was to care for his mother-in-law. The federal Family Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601, et seq., allows eligible employees to take up to 12 weeks of leave for certain qualifying reasons. The FMLA does not cover leave needed by an employee to care for a mother-in-law. 29 U.S.C. 2612(a)(1) Thus, Grievant is not entitled to FMLA leave.

The Family Care Act, Laws of Washington, 2002 c 243 § 1, amending RCW 49.12.270. et al., (FCA) became effective January 1, 2003. The FCA requires that “If under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer shall allow an employee to use any or all of the employee’s choice of sick leave or other paid time off to care for ... (b) a spouse, parent, parent-in-law, or grandparent of the employee who has a serious health condition or an emergency condition.” ... “The employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employee policy applicable to the leave, except for any terms relating to the choice of leave.” RCW 49.12.270(1).

It is undisputed Grievant had an abundance of leave at his disposal, i.e., over 400 hours of sick leave plus accrued annual leave. Test. Sievert. Under the FCA, Grievant would be entitled to use any or all of this paid leave to care for a mother-in-law with a “serious health condition or an emergency condition.” Exs. 13, 18. Due to the length of time Grievant was absent from work, it is unlikely that his absence was due an “emergency condition” suffered by his mother-in-law, and there is no evidence establishing such a fact. Thus, the information Grievant gave to CCS to support his request for leave must show that his mother-in-law suffered from a “serious health condition” during the relevant period.

CCS has Administrative Procedures governing Family Medical Leave, i.e. Administrative Procedure 2.40.01 (“AP”). Ex. 13. Under these procedures, the “Chief Human Resources Officer is responsible for ensuring leave is administered in good faith and consistent with the rights and responsibilities provided by statute,” which in this case was the FCA or WAC 296-130. AP 1.2; Ex. 13. “Employees are responsible for reporting leaves and providing the notice and information necessary for CCS to effectively administer this procedure and direct its work force.” AP 1.4; Ex. 13. Thus, Grievant had the responsibility for requesting FCA leave and for providing sufficient information to HRO to establish

his eligibility for the leave he requested. To be eligible for FCA leave, Grievant needed to provide information showing his mother-in-law had a “serious health condition” which required his care. A “serious health condition” for purposes of the FCA is defined in CCS Administrative Procedure 2.40.01 at AP 2.7. Ex. 13.

Grievant notified his supervisor of the need for full-time leave to care for his mother-in-law on or about February 14, 2006, when she informed him that he could no longer work evenings on an alternate schedule. Under CCS Administrative Procedures, a request for FCA leave is accomplished by an employee submitting official notification paperwork consisting of a Request for Family or Personal Medical Leave completed and signed by the employee and his supervisor, and a Medical Certification completed and signed by a health care provider. AP 6.1 and 6.5, Ex. 13.

The problem that ultimately led to Grievant’s discharge was that Grievant did not contact HRO as he was directed to do by his supervisor. In fact, he never spoke directly to any official in HRO. If he had, it is likely that he would have been able to make the proper request for the leave he needed, and provide the medical information necessary to support it. It is unclear to me why he did not do this. Instead of going through HRO, Grievant gave his supervisor the February 2, 2006, note from nurse practitioner Fertakis on February 14, 2006, and on February 21, 2006, he gave her a Leave Authorization Form requesting full-time sick leave for the period February 15, 2006, through February 28, 2006. The Leave Authorization Form simply gave the reason for the leave as “Care for Mother in law.” Ex. 7. The medical note and the Leave Authorization Form did not comply with the requirements for FCA leave or the CCS Administrative Procedures. The leave request was not on the requisite form and the medical note did not show that Grievant’s mother-in-law had a “serious health condition” and required full-time care.

Although Grievant never contacted HRO, he was sent the official notification paperwork by Mr. Sievert on February 21, 2006, by means of a copy

of an email sent to Ms. Sherman. At this time, Grievant was also notified that his leave was not approved until such time as HRO had received the required information and assessed it. Ex. 9, p. 3. Additionally, on February 21, 2006, Ms. Sherman telephoned Grievant and told him that he needed to complete the forms he was sent by email and take them to HRO. Thus, on February 21, 2006, Grievant was aware that his leave was unauthorized and that there were certain forms he needed to complete and turn in to HRO before leave to care for his mother-in-law would be approved. Yet, despite this knowledge and the instructions he received from his supervisor and from Mr. Sievert, through his union representatives, Grievant failed to provide the necessary forms and medical information, taking the position that the forms were inappropriate. Grievant felt that he had notified his supervisor of his need for leave to care for his mother-in-law, supported his request with a medical notes from the nurse practitioner who was caring for his mother-in-law, and that approval of the leave under FCA was mandatory. Ex. 5. It was not until President Hanson informed Grievant that his paid sick leave would cease on April 10, 2006,³ until the leave forms were completed and his need for leave verified, that Grievant finally provided the completed forms to HRO on April 11, 2006.

Mr. Sievert examined the forms submitted by Grievant and found the medical certification deficient for the following reasons: 1) It did not show whether the mother-in-law was incapacitated or having some difficulty and/or intermittent problems; 2) question 6 was left completely blank and, therefore, there was no way to tell if Grievant's mother-in-law was having additional medical treatment or not; 3) the signature of the health care provider is unreadable and there is no indication of his/her qualification; and 4) the certification's late date does not address whether Grievant's mother-in-law was incapacitated since October 2005. Ex. 9, pp. 16-17. Mr. Sievert neither approved nor denied

³ As a courtesy, and on the assumption that Grievant would complete the necessary forms and justify his need for FCA leave, CCS had continued to pay Grievant through April 10, 2006. Sievert test.

Grievant's leave request. Rather, he notified Grievant, through union representative Desiree Desselle, of the deficiencies in the Medical Certification and the need for more detail and clarity regarding the condition of Grievant's mother-in-law. *Id.* As previously indicated, Grievant did not supply any additional information.

The Medical Certification Grievant submitted to HRO on April 11, 2006, showed that Betty Stubbs, presumably Grievant's mother-in-law, suffers from a chronic condition(s) which:

- a. Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
- b. Continues over an extended period of time (including recurring episodes of a single underlying condition);
- c. May cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, etc.).

Answer to question 3 on Medical Certification, Ex. 11, and Ex. 6, Medical Certification, page 5 (Definitions for a 'Serious Health Condition'). It also showed that Grievant's mother-in-law had undergone heart surgery, has multiple medical problems, and has difficulty managing personal needs. Her condition commenced in October 2005 and was of unknown duration. Furthermore, Grievant may work only intermittently or on less than a full schedule as the patient (his mother-in-law) requires assistance for basic medical or personal needs or safety. Although the Medical Certification identified the mother-in-law's condition as a "chronic condition", it did not clearly state whether she was incapacitated at that time or the likely duration and frequency of episodes of incapacity. The answer to this question was simply "slowly improving unclear duration." Ex. 11. Other than the heart surgery, the mother-in-law's medical conditions and/or symptoms are not identified and there is no explanation of the type or extent of care she requires.

In addition to the Medical Certification discussed above, Grievant had submitted the medical note dated February 2, 2005, described above and a medical note from D. L. Fertakis, A.R.N.P. dated March 17, 2006, stating:

Jim is the caregiver for his Mom Betty. She was seen and her condition has improved but she still needs constant care from Jim. She will be re-evaluated next month and at that time we should be able to determine how much care will be needed for her.

Ex. 5.

Reginald Eans is the leave administrator for CCS. Eans test. He testified that the head of Human Resources is Greg Stevens. Mr. Eans further testified that Mr. Stevens is the person responsible for granting or denying employee leave, but that this function was delegated to him in consultation with his supervisor, Norman Sievert. Mr. Eans also testified that in a typical situation he is the one who approves leave but that his supervisor, Mr. Sievert, has taken an active role in questioning forms. Mr. Eans did not review Grievant's FCA leave forms; they were reviewed by Mr. Sievert.

Mr. Sievert testified that his concern over the lack of detailed information regarding the mother-in-law's condition came from the fact that at one point Grievant had told his supervisor that he might only need Tuesday and Thursday off and his request was for full-time leave. As a result, Mr. Sievert was uncertain as to whether the mother-in-law was completely incapacitated or only needed intermittent or periodic assistance.

I agree with CCS that the medical information concerning his mother-in-law's condition submitted by Grievant was sketchy. I also find that Mr. Sievert gave a legitimate reason for his concern over the lack of specific medical information provided in response to questions 5.c and 6 on the Medical Certification, as the information sought by these questions would have a bearing on whether Grievant was entitled to the full-time FCA leave he had requested or some lesser amount of leave. I do not find, however, that he has shown a legitimate concern regarding the signature of the health care provider or the fact

that the Medical Certification did not address whether Grievant's mother-in-law was incapacitated since October 2005.

The signature on the Medical Certification is not completely unreadable, and appears to be similar, although not exactly the same, to the signature of nurse practitioner D. L. Fertakis on the medical notes dated March 17, 2006, and February 2, 2006. Under these circumstances, and in the absence of any evidence to the contrary, I must assume that the Medical Certification was signed by D. L. Fertakis, who, as evidenced by the medical notes, is a nurse practitioner and meets the definition of health care provider under the CCS Administrative Procedures (AP 2.8).⁴ Additionally, the certification showed that Grievant's mother-in-law's serious health condition commenced October 2005 and was of unknown duration. As Grievant's leave was approved through February 15, 2006, and only became unauthorized after that date, the extent of incapacitation of Grievant's mother-in-law prior to February 15, 2006, is not relevant to the issue of whether or not Grievant is entitled to FCA leave to cover his absences after February 15, 2006.

Mr. Sievert had the right to request additional medical information in answer to questions 5c and 6 on the Medical Certification if he felt he lacked sufficient information to determine whether Grievant's mother-in-law needed full-time care or only intermittent care. AP 6.2. Ex. 13. Yet, it is unclear whether Grievant was made aware of what he must do to correct the deficiencies in the information he had submitted. Mr. Sievert did not advise Grievant of his concerns. Rather, they were set forth in an email he sent to union representative Desiree Desselle with copies to Reggie Eans and Steve Hanson. Ex. 9, pp. 16-17. Furthermore, Ms. Desselle's responses do not indicate that she provided Grievant with a copy of the deficiencies listed by Mr. Sievert in his email dated April 13, 2006. Ex. 9, p. 16. Rather, she states that: "It appears there are (sic) additional information that you are requesting and I am certain that once communicated to

⁴ There is no evidence of a forgery. Mr. Eans testified that he had no reason to question the identity of Ms. Fertakis.

Jim he will attempt to resolve them.” Ex. 9, p. 16. By such a statement Ms. Desselle could well have meant that Mr. Sievert should deal directly with Grievant concerning his list of deficiencies.

Grievant testified that he was told there were deficiencies in his Medical Certification form by the Union, but that he was also told they had instructed Mr. Sievert to contact him directly. Grievant further testified that the Union had decided they were not going to intervene on his behalf anymore because of the explicit medical information that was needed. Grievant also testified that he was waiting for Mr. Sievert to contact him regarding the deficiencies in his Medical Certification. Grievant additionally testified, however, that the Union had told him the form his doctor filled out was not sufficient and that they had gone over the information given the Union regarding the deficiencies. Under these circumstances, it appears Grievant was made aware that Mr. Sievert had found deficiencies in his Medical Certification and was advised of the specifics. Even if he was not aware of the specific deficiencies found by Mr. Sievert, the fact Grievant knew there were deficiencies is sufficient to require him to contact HRO to determine what he needed to do to provide the necessary information. It was Grievant’s obligation to provide the information necessary for CCS to effectively administrate its procedures and direct its workforce. AP 1.4; Ex. 13.

Grievant did not contact HRO and did not submit any additional medical information to correct the deficiencies in his Medical Certification. Furthermore, his explanation that he was waiting for Mr. Sievert to contact him directly does not justify his failure to provide additional medical information. Yet, the record reflects that Grievant had provided Mr. Sievert with relevant information on the issue of his mother-in-law’s incapacity at an earlier date.

During a meeting with President Hanson and Mr. Sievert on April 4, 2006, prior to submitting his official FCA leave documentation, Grievant had informed them that his mother-in-law was being treated by a doctor and was in recovery, but that she still could not dress herself, make her own meals, etc. Ex. 9, p. 15.

Furthermore, his statements in this regard are consistent with the Medical Certification dated April 10, 2006, which, when considered as a whole, states that due to a “serious health condition,” Grievant’s mother-in-law has difficulty managing personal needs and requires assistance for her personal needs, as well as her basic medical needs and for safety. Ex. 11. Additionally, inasmuch as Grievant is the one who has been providing assistance to his mother-in-law on an almost daily basis, and the health care provider only saw her periodically, and then only to assess her medical condition and/or provide treatment, he was well qualified to describe his mother-in-law’s abilities and needs for assistance. “Incapacity” for purposes of the FCA is defined to mean, inter alia, “inability to ... perform ... regular daily activities.” Grievant provided information to HRO showing his mother-in-law was unable to perform regular daily activities due to a “serious health condition.”

At the hearing, under oath, Grievant provided additional information regarding his mother-in-law’s condition which further evidences the fact that she was incapacitated due to a serious health condition and needed full-time care. Grievant testified that she suffers from diabetes, joint problems, rheumatoid arthritis, gout, and kidney problems. He also testified that through April 2006, his mother-in-law was pretty much in bed or in a wheel chair. He described helping her out of bed, helping her to the bathroom, helping her dress, making sure she got the correct medicine and making all of her meals. According to Grievant, his mother-in-law’s heart condition was improving but many of her other conditions were going backwards. Grievant stated that he needed full-time leave after February 14, 2006, because he could no longer work part-time in the evenings when his wife was home. Someone had to be with his mother-in-law at all times and when he needed to be away, he made sure that someone came in to take care of her. Grievant test.

Based on the medical information Grievant provided to HRO, and his description of his mother-in-law’s condition and needs when he met with Mr.

Sievert and President Hanson on April 4, 2006, I find Grievant established his eligibility for FCA leave to care for his mother-in-law. I also find that the Medical Certification he provided supported his request for full-time leave.

The answer to question 5.b on the Medical Certification does seem to indicate that Grievant might be able to work intermittently or on a less than full schedule. Furthermore, the evidence shows that this is true, inasmuch as he was able to work four hours per day, as long as he could work in the evenings on an alternate schedule when his wife was at home to care for her mother. It was only when, for operational reasons, Grievant's supervisor took him off the alternate schedule and placed him back on his regular daytime schedule that Grievant needed full-time leave. In filling out the Medical Certification, the nurse practitioner answered question 8.a but left 8.c blank indicating that Grievant's mother-in-law required assistance for her basic medical or personal needs or safety on a full-time basis due to a "serious health condition."

I find that Grievant submitted the official notification paperwork to HRO and provided medical and other information establishing his eligibility for full-time FCA leave to care for his mother-in-law. Furthermore, it is undisputed Grievant had sufficient sick leave and other paid time off to cover the leave he requested. Under these circumstances, the FCA required SCC to allow Grievant to use his sick leave or other paid time off to care for his mother-in-law. CCS has not established that it properly denied Grievant FCA leave for the period of his absence from February 15, 2006, through June 30, 2006, with the exception of days Grievant spent attending out-of-town negotiating sessions.

President Hanson stated in his pre-discipline letter dated June 9, 2006, that Grievant participated in negotiating sessions at Tacoma Community College on April 27-28, May 24-25, and June 7-8 regarding the collective bargaining agreement between Washington State and WFSE. Ex. 2. Furthermore, this fact was not denied by Grievant in his response to the pre-discipline letter, and at hearing he admitted attending negotiating sessions. Grievant testified that when

he attended negotiating sessions and union meetings, he made sure that his mother-in-law was taken care of by his sister-in-law, his stepdaughter or his wife. As Grievant's mother-in-law was being taken care of by someone else, Grievant was not eligible for FCA leave for the time he spent meeting with the union and attending negotiating sessions. Furthermore, Grievant admitted and the record reflects that the Union's requests that he be released to attend these sessions were denied by CCS. Ex. 12; Grievant test. Thus, I find Grievant was absent without leave on the days he spent meeting with the union and attending negotiating sessions.

Grievant did not request leave for any period after June 30, 2006. He testified that as of June 30, 2006, his mother-in-law no longer needed his full-time care and that now she is being taken care of by her son and his wife. Therefore, Grievant was not eligible for FCA leave subsequent to June 30, 2006. As Grievant neither requested leave nor was eligible for FCA leave after June 30, 2006, I find he was absent without leave from July 1, 2006, to his termination on July 6, 2006.

CCS has established Grievant was absent without approved leave on the six days he spent meeting with the union and attending negotiating sessions, and for the period July 1, 2006, through July 6, 2006. The charge of unauthorized leave is sustained.

CCS charged Grievant with being excessively absent from work for five months on unauthorized leave. Yet, as discussed above, the evidence only established that Grievant's absence from work for approximately twelve days was properly found to be unauthorized. There is no evidence establishing or even suggesting that approximately twelve days of unauthorized absence constitutes excessive absenteeism. Accordingly, this charge is not sustained.

Misuse of leave/Dishonesty

As discussed above, Grievant participated in several negotiating sessions regarding the collective bargaining agreement between Washington State and WFSE at Tacoma Community College on April 27-28, May 24-25, and June 7-8.

Ex. 2. It is undisputed, and established by the evidence, that Grievant told his supervisor that he needed leave in order to stay home and care for his mother-in-law during the day, and that on April 11, 2006, he submitted a formal request for such leave along with a Medical Certification supporting his request. Furthermore, at the hearing, Grievant testified, without rebuttal, that he was with his mother-in-law all the time except when he needed to be away, and at these times he made sure someone was with his mother-in-law. He also testified that he arranged for someone to take care of his mother-in-law during the time he was away at negotiating sessions and that the union had requested annual leave on his behalf to cover his employment situation. Thus, according to his testimony, when Grievant was attending out of town negotiating sessions in Tacoma, Washington, someone else was caring for his mother-in-law and he would not need or be entitled to the FCA leave he had requested for this time. There is no evidence, however, that Grievant modified his request for FCA leave to reflect this fact.

I do not find, however, that Grievant's failure to modify his request for FCA leave for the dates he attended negotiating sessions rose to the level of dishonesty. Grievant did not conceal the fact that he had made other arrangements and did not need to take care of his mother-in-law on the dates of the negotiating sessions. Rather, by implication, CCS was advised of this fact by reason of the union's requests that he be released from duty on the negotiating dates. Furthermore, CCS acknowledged its awareness in its responses to the union's requests by stating that Grievant's "attendance at an out-of-town meeting during the work week would be in direct conflict with his request for Family Care Act leave to provide for his mother-in-law." Ex. 12. CCS has not established its charge of dishonesty. The charge is not sustained.

After April 10, 2006, Grievant was in an unapproved, unpaid leave status. Test. Grievant, Sievert; Ex. 12. The negotiating sessions attended by Grievant while employed by CCS were all after April 10, 2006. As Grievant was not in a

paid or approved leave status at the time he attended the negotiating sessions, he cannot be found to have misused leave. This charge is not sustained.

Insubordination

CCS alleged Grievant did not follow his supervisor's directives to contact HRO regarding his need for full-time leave to care for his mother-in-law, and to complete and submit to HRO the official notification paperwork for such leave. Ex. 2. It is a well-established principle that employees must obey the orders and directives of management. Furthermore, Grievant testified that he was familiar with the notion of obey and then grieve.

On February 14, 2006, Grievant's supervisor, Ms. Sherman, directed him to contact HRO regarding his need for leave to care for his mother-in-law. Sherman test. Grievant testified that Ms. Sherman did not tell him to contact HRO, at least he did not remember such a directive. Yet, I find Ms. Sherman's testimony in this regard more credible than that of Grievant.

Ms. Sherman testified that she does not approve sick leave and that requests for sick leave go through HRO. Her testimony in this regard is supported by that of CCS leave administrator, Reginald Eans, who works in HRO. Mr. Eans testified that he has delegated authority to approve or disapprove requests for FCA leave. Just prior to meeting with Grievant on February 14, 2006, Ms. Sherman had contacted HRO to inquire as to what she could do with Grievant's alternative schedule and was told she could require him to work his regular schedule.⁵ Test. Sherman. At this time, Ms. Sherman was also told that she should not have granted Grievant the four hours of medical leave per day that he received prior to February 14, 2006, but should have had him fill out the requisite forms and contact HRO. Test. Sievert. In view of the advice she had just received from HRO, when Ms. Sherman spoke to Grievant on February 14, 2006, about ending his alternate schedule, it is more likely than not that she would have directed Grievant to contact HRO regarding his continuing need for leave to care for his mother-in-law.

⁵ Grievant appears to have worked days on his regular schedule.

On the other hand, Grievant's testimony regarding the directions he was given by Ms. Sherman was ambiguous. At one point, he testified that he had received a direction from Ms. Sherman to contact HRO. At a later point, he testified that Ms. Sherman did not tell him to contact HRO, and then qualified his testimony by stating that he did not remember such a directive.

On February 22, 2006, Ms. Sherman telephoned Grievant and told him that he needed to complete certain forms and that he could obtain the forms either from her or by accessing his email and downloading them. She also told him to take the completed forms to HRO to get the leave he was requesting to care for his mother-in-law. Sherman test.

Grievant testified that he did not contact HRO and he did not talk to anyone at HRO. He also testified that he did not complete the forms he received from his supervisors through email, because he believed they were wrong and he would get his leave approved by providing doctors' notes. He additionally testified that he was not given a direction by HRO, and it was President Hanson who directed him to fill out the forms and get them to HRO by a certain date. Upon receiving the direction from President Hanson, Grievant completed and submitted the requisite forms for FCA leave.

Based on the credible testimony of Ms. Sherman that she had directed Grievant to contact HRO regarding his need for FCA leave, and Grievant's testimony that he did not contact HRO and did not speak to anyone at HRO, I find CCS has established that Grievant was insubordinate in this regard.

The evidence does not show that either Ms. Sherman or anyone from HRO specifically ordered Grievant to complete and return the FCA leave forms to HRO in order to obtain approved leave and justify his absence from work. Ms. Sherman advised Grievant that he needed to submit the requisite forms in order to obtain the leave he was requesting, but did not direct him to do so. Mr. Eans also only advised Grievant as to what he needed to do with the forms he received by email, and then thanked him in advance for his cooperation, patience, and understanding.

Ex. 6. Mr. Sievert did not communicate with Grievant directly, but worked through union representatives in an effort to get Grievant to submit the paperwork he was required to submit under CCS Administrative Procedures for FCA leave. The first clear direction Grievant was given to provide HRO with the required leave forms by a specific date was from President Hanson in a letter dated April 7, 2006. Ex. 4. Grievant complied with this direction and submitted the requisite completed forms to HRO on April 11, 2006. Exs. 9, p. 16, and 11. The fact that Mr. Sievert considered the forms to be inconsistent and incomplete does not establish that Grievant failed to comply with the direction he was given.

CCS has not established that Grievant was insubordinate when he refused to heed the advice he was given, and failed to complete and submit the forms and information necessary to obtain to obtain FCA leave and justify his absence from work.

Willful violation of a management directive or published institutional policy/procedure

CCS charged Grievant with failing to stay in regular communication with his supervisor as required by Article 11.5 of the CBA. Ex. 2. It also charged Grievant with deliberately failing to follow CCS leave policies and procedures regarding requesting FCA leave without justification. Ex. 4.

Article 11.5 of the CBA requires an employee to notify his supervisor on his first day of sick leave and each day after, unless there is a mutual agreement to do otherwise. Ex. 15. From November 17, 2005, through February 15, 2006, Grievant complied with this requirement. Ms. Sherman testified that he sent her email reports every day. Beginning February 16, 2006, when he took full-time leave, Grievant did not do this. Sherman test.; Ex. 9, p. 3. The only contacts Grievant had with his supervisor during the relevant period after February 15, 2006, were on February 21 and 22, 2006, on or about March 2, 2006, March 6, 2006, and March 17, 2006.

On February 21, Grievant telephoned Ms. Sherman with concerns about his office being cleaned up in his absence. During this call, Grievant told Ms. Sherman that he would be attending the office staff meeting on February 22, 2006. He also indicated that he was taking the rest of February off, and that starting in March he would not work Tuesday and Thursday, as he would need a couple of days for doctors' appointments. Sherman test.; Ex. 9, pp. 1, 3, 9. Grievant did not attend the February 22, 2006, staff meeting so Ms. Sherman telephoned him at his home to let him know that Mr. Sievert had sent him an email regarding his leave request, that the requisite forms for his leave were attached to the email, and that he needed to complete the forms and take them to HRO. Sherman, Grievant test.; Ex. 9, p. 5. On or about March 2, 2006, Grievant called Ms. Sherman to tell her that he did not know when he would be back to work but that it definitely would not be before March 6, 2006. During this call, Ms. Sherman inquired as to why he had not gotten the leave paperwork in to HRO, and Grievant said that he had not contacted HRO because he thought union representative Rick Nesbitt was doing this on his behalf. Ex. 9, pp. 6, 9; Sherman test. On March 6th, Grievant left Ms. Sherman a voice mail message saying he would not be coming in to work because his mother-in-law had a bad weekend, and he would be out until at least March 15th, when his mother-in-law had an appointment with the doctor. Sherman, Grievant test.; Ex. 9, pp. 7, 9. The next communication Ms. Sherman received from Grievant was a voice mail message he left for her on March 17, 2006, in which he said that his mother-in-law was still in need of care, that she was in a lot of pain and cannot move, and that he is working with her and her doctor. Sherman, Grievant test.; Ex. 9, p. 12. This was the last communication Ms. Sherman had from Grievant.

Grievant testified that reporting to his supervisor was not a daily requirement, although he admitted that he was familiar with the contract language about reporting daily unless other arrangements have been made. He testified that he had telephoned Ms. Sherman twice, and when he called her they had agreed he

would keep her informed and let her know if anything changed. Ms. Sherman testified that she had never made an agreement with Grievant that he did not have to call her every day as required by the CBA. The fact that she may have agreed to his keeping her informed and letting her know if anything changed does not mean that Ms. Sherman released Grievant from the obligation of contacting her every day as required by Article 11, Section 11.5 of the CBA. Rather, such a remark is consistent with Grievant's obligation to communicate with Ms. Sherman every day.

In responding to President Hanson's Pre-Discipline Letter dated June 9, 2002, on Grievant's behalf, union representative Desiree Desselle indicated that once on full-time leave reporting to his supervisor was no longer a daily requirement for Grievant. Ex. 3. This may be true if an employee is on full-time approved leave, as the approval may constitute an agreement that daily reporting to a supervisor is no longer necessary. The problem here is that Grievant was not on approved leave because he did not properly request the leave he needed until April 11, 2006, and then he did not respond to requests for additional information and clarification.

CCS has established that Grievant failed to contact his supervisor each day of his absence after February 15, 2006, as required by Article 11. 5 of the CBA, and that Grievant was never released from this requirement by mutual agreement.

It is undisputed, and clearly established by the evidence, that Grievant was seeking to use his sick leave, and possibly other paid leave, to care for his mother-in-law, who was ill and in need of full-time care. The type of leave to cover such a situation is FCA leave. CCS's Administrative Procedures provide that the official notification paperwork to request FCA leave consists of the Request for Family or Personal Medical Leave and Medical Certification forms which are located in HRO. AP 6.1; Ex. 13. Yet, as discussed above, Grievant deliberately refused to submit this documentation until forced to do so by the explicit direction of President Hanson and the cessation of his pay.

Grievant's actions in refusing to submit the paperwork he was sent for the purpose of requesting FCA leave and justifying his absence from work were willful and unjustified. He had no good reason for his refusal. The language on the forms does indicate that they are for FMLA, but that is not a sufficient reason for Grievant to refuse to fill them out and submit them. The forms were sent to him by HRO for the purpose of his obtaining FCA leave to care for his mother-in-law. Furthermore, if he had any questions or concerns, he could have contacted HRO as his supervisor had directed him to do. Yet, he did not do so.

Grievant's union representative, Mr. Nesbitt, contacted the leave administrator, Mr. Eans, and inquired as to the specific medical information Grievant needed to obtain in order to be able to use his leave time to care for his mother-in-law. Ex. 9, p.11. Mr. Eans informed Mr. Nesbitt that the information he received from Mr. Sievert (i.e., the Medical Certification form) spelled out what information was needed. Eans test.; Ex. 9, p. 11. This answer should have reinforced the instructions Grievant had received previously regarding the need for him to complete and submit the official paperwork.

Grievant also had no basis for believing the February 2, 2006, medical note from nurse practitioner Fertakis established his eligibility for FCA leave. This note simply said that Grievant's mother-in-law was slowly recovering from extensive surgery, that she had several medical conditions, and that it was fortunate Grievant was able to assist her during her recovery. It did not establish that his mother-in-law had a "serious health condition" which caused her to be incapacitated and/or require full-time treatment. Although the March 17, 2006, note from nurse practitioner Fertakis indicates Grievant's mother-in-law needs constant care, it does not say what care is needed or how the care relates to her medical condition(s). A reasonable person would not find this meager information sufficient to establish that Grievant needed to be off work full-time to care for his mother-in-law because of a health condition qualifying as a "serious health condition."

Grievant was not expected to be an expert on the FCA or to know all of the requirements of FCA leave. All he was expected to do was to provide the information requested by the forms he received and to submit this information to HRO. Eans test. If he had any questions, he could have and should have spoken to someone from HRO. He deliberately failed to do so.

CCS has established Grievant willfully violated its Administrative Procedures governing FCA leave during the period February 1, 2006, to April 11, 2006, by refusing to submit a completed Application for Family or Personal Medical Leave signed by himself and his supervisor, and a completed Medical Certificate signed by his mother-in-law's health care provider.

Just Cause for Discipline

As pointed out by both parties, the following elements are commonly considered when examining whether just cause exists for discipline: 1) Notice to the grievant of the rules to be followed and the consequences of non-compliance; 2) Proof that the grievant engaged in the alleged misconduct; 3) Procedural regularity in the investigation of the misconduct; and 4) Reasonable and evenhanded application of discipline, including progressive discipline where appropriate.

In this case, Grievant was clearly put on notice that he was required to fill out and to submit to HRO the leave documents he received from HRO before his leave would be approved. He was also told that until such time as he did this his leave was unauthorized. Furthermore, he knew or should have known that his unauthorized absence could result in his termination. Absence without authorized leave, along with a failure to contact the Employer for a period of three (3) consecutive days, subjects an employee to being presumed to have resigned from his position and possible separation. Article 25, Sections 25.1 and 25.2 of the CBA; Ex. 15. Grievant knew he had not contacted a CCS official for periods longer than three days during his full-time absence and that his leave would not be approved until he submitted the requisite documentation for FCA leave and it was

verified by HRO. Accordingly, he knew or should have known that his continued refusal to comply with the instructions he received regarding requesting leave and his unauthorized leave status could result in the termination of his employment.

As discussed above, CCS established by clear and convincing evidence that Grievant engaged in misconduct.

There was evidence of a minor procedural irregularity. Mr. Eans testified that as the leave administrator he deals with issues of sick leave, shared leave, extended leave, the FCA, and the FMLA. He further testified that CCS uses the same leave forms for both FMLA and FCA, as the information needed to administer both programs is essentially the same. He also testified that if an employee comes in to HRO with a leave issue, he gives the employee the appropriate forms, explains how to fill them out, and answers any questions the employee might have. He additionally testified that if the employee does not come in, he will email the forms and instructions to the individual and also send a hard copy to the mailing address. In the case of Grievant, he did not do this. Instead the forms and instructions were given to Mr. Sievert who provided them by email to Ms. Sherman with a copy to Grievant. According to Mr. Eans, this was done because Grievant had not come in to HRO and Ms. Sherman had indicated that Grievant told her he would attend a staff meeting on February 22, 2006. Grievant admitted to receiving the requisite forms, and indicated he understood that he was supposed to complete and submit them to HRO. Therefore, the irregularity in the normal procedure was of no consequence.

CCS followed the process for disciplining employees outlined in the CBA at Article 27, Section 27.7. As discussed above, Grievant was informed in writing of the reasons for the contemplated discipline, an explanation of the evidence, and was given an opportunity to respond either at a meeting or in writing. Exs. 2, 4, 16. Furthermore, the Union was provided with copies of these notices. Grievant had a union representative at an investigatory interview held on April 4, 2006, and, when Grievant elected to respond to the pre-disciplinary letter proposing his

removal in writing, a union representative prepared the response and Grievant affirmed its contents. Exs. 3, 9, p.15. Grievant was provided with all of the procedural safeguards to which he was entitled.

Grievant was absent without authorized leave for a number of days. His actions in connection with the leave to care for his mother-in-law subjected his employer to a great deal of unnecessary concern, time and effort. His failure to keep in touch with his supervisor on a daily basis made it difficult for her to complete his evaluation. Ex. 9, p.1. His failure to submit, in a timely manner, a formal request for leave with detailed information on his mother's medical condition(s) and care caused CCS officials to question whether he was actually entitled to FCA leave. This situation was further exacerbated by the requests for leave for Grievant to attend negotiating sessions. Also, Grievant's refusal to contact HRO regarding his need for leave, as he was directed to do by his supervisor, led to his confusion regarding the applicability of the forms he received and the requirements of the FCA and the CCS Administrative Procedures governing the FCA. Additionally, Grievant's continuing refusal to complete and to submit the paperwork necessary for him to have his leave approved caused both CCS officials and union officials to expend a considerable amount of time and effort on this issue. Furthermore, Grievant lacked a valid reason for his actions in this regard.

Grievant had the obligation to justify his absence and to obtain approved leave. He also was obliged to request leave in accordance with the procedures established by his employer. To meet these obligations, Grievant was instructed by his supervisor to contact HRO and to obtain the necessary forms for obtaining the appropriate leave. If he had done so, any questions he had concerning the application process and the requirements for FCA leave would have been answered. He did not do so. Nevertheless, HRO officials sent Grievant the appropriate forms and told him to fill them out and to submit them. If Grievant had questions concerning the information sought by the forms he received, he

should have contacted Mr. Eans, as he was told to do in the letter from Mr. Eans that accompanied the forms. Ex. 6. Grievant did not have the right to ignore the instructions he received and simply not submit any completed forms without consequences.

CCS had just cause for discipline

The penalty assessed was too severe

President Hanson testified that when he issued the Pre-disciplinary Letter on July 9, 2006, he understood that Grievant's absence was still unauthorized due to lack of sufficient documentation to justify his need for leave. He further testified that the key factors which led to his decision to terminate Grievant were that he was absent without approved leave for a long period of time, he had not done what he needed to do to get his leave authorized, and he was told what he needed to do to get his leave approved and he did not do it. President Hanson also stated that if Grievant had showed him approved leave forms at any time before July 6, 2006, he would likely have imposed a penalty less than termination for Grievant's misconduct. The major factor in his decision to terminate Grievant's employment was Mr. Sievert's determination that the medical information Grievant had supplied was insufficient.

As discussed above, I found Mr. Sievert failed to consider Grievant's description of his mother's condition and the care she required, and that this information taken together with the information supplied by the health care giver, nurse practitioner Fertakis, met the requirements for use of paid leave to care for a parent-in-law under the FCA. Therefore, Grievant was entitled to use paid leave for all of the days that he actually took care of his mother-in-law and his leave for these days should have been approved.

Grievant has 27 years of service with the employer and there is no evidence of prior discipline. Furthermore, as correctly pointed out by the Union, the confusion and miscommunication in this case is not wholly attributable to Grievant. Management's actions also had some part. Although Grievant certainly

did not meet his obligation to contact HRO, neither Mr. Eans nor Mr. Sievert made any attempt to contact Grievant directly in connection with his failure to submit the requisite forms to obtain FCA leave or to provide sufficient information to justify his need for leave. Mr. Sievert only communicated with Grievant's union representatives and there is no evidence establishing exactly what information these union officials passed on to Grievant. Furthermore, the record reflects that the union representatives, at least Ms. Gesselle, appeared to support Grievant's position regarding the applicability of the forms. Also, Grievant continued to receive his pay up until April 10, 2006. This fact somewhat reduces the urgency of Grievant's providing the necessary information to get his leave approved. Additionally, Mr. Nesbitt, on Grievant's behalf, requested copies of policies and procedures relating to Grievant's use of sick leave to care for his mother-in-law. Yet, there is no evidence that a copy of the CCS Administrative Procedures governing Family Medical Leave and Return to Work was provided to either Mr. Nesbitt or Grievant in response to this request.

For the reasons set forth above, I find CCS has not established that termination was a reasonable penalty.

President Hanson indicated that he might have reduced Grievant's pay rather than terminate his employment if at any time he had provided HRO with information sufficient to approve leave. A reduction in pay is one of the disciplines described in the CBA at Article 27, Section 27.2. Accordingly, I find an appropriate penalty for Grievant's misconduct is a reduction in pay.

President Hanson did not specify how much Grievant's pay might be reduced or how a reduction in pay would be administered. Furthermore, it is not my place to make this determination. It is up to President Hanson, as the deciding official, to determine an appropriate reduction in Grievant's pay for the sustained misconduct.

AWARD

The Grievance is SUSTAINED.

Grievant's employment was unjustly terminated. CCS is ORDERED to reinstate Grievant effective July 6, 2006, with back pay, seniority, and other benefits as if he had not been terminated but with an appropriate reduction in pay. The back-pay award will be reduced by any amounts earned by Grievant in other employment during the period between July 6, 2006, and the date he is ordered to return to actual duty. CCS is further ORDERED to approve Grievant's requests to use his paid leave to care for his mother-in-law during the relevant period, with the exception of those days he was not actually taking care of his mother-in-law.

I am reserving jurisdiction in this case until such time as my award is carried out in case there is a problem with administration of the award.

Date: July 11, 2007

Carol J. Teather
Arbitrator