

**THE AMERICAN ARBITRATION ASSOCIATION
BEFORE SANDRA SMITH GANGLE, ARBITRATOR**

In the Matter of the Arbitration)	
between)	
)	
STATE OF WASHINGTON.)	AAA Case No. 75 390 00039 11
DEPARTMENT OF LABOR AND)	
INDUSTRIES,)	
)	
Employer,)	OPINION AND AWARD
and)	
)	(Maria Steffler Termination
WASHINGTON FEDERATION OF)	Grievance)
STATE EMPLOYEES,)	
)	
Union)	
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Hearing Conducted: Thursday, August 4, 2011

Representing the Employer: VALERIE B. PETRIE, WSBA No. 21126
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Representing the Union: SHERRI-ANN BURKE
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Arbitrator: SANDRA SMITH GANGLE, J.D.
Sandra Smith Gangle, P.C.
Arbitrator / Mediator
P.O. Box 904
Salem, OR 97308

Date of Decision: October 21, 2011

BACKGROUND

This matter came before the arbitrator pursuant to a collective bargaining agreement between the State of Washington (“the Employer”) and Washington Federation of State Employees (“the Union”) for the term of July 1, 2009 to June 30, 2011. *Jt. Ex. No. 1.*

A grievance was filed by the Union on May 10, 2010. *Ex. E-5, Ex. U-1.*¹ The parties were unable to resolve the matter through the contractual grievance procedure and agreed to arbitrate the dispute pursuant to the rules of the American Arbitration Association (AAA), as provided in Article 29.2 Step 5 of the agreement. The parties mutually selected Sandra Smith Gangle, J.D., of Salem, Oregon, from a list provided by the AAA, as the impartial labor arbitrator who would conduct a hearing and render a final and binding decision.

The arbitrator conducted the hearing on August 4, 2011 in a conference room of the State of Washington Department of Justice, Olympia, Washington. The parties were thoroughly and competently represented by their respective advocates throughout the hearing. The Employer was represented by Valerie B. Petrie, Asst. Attorney General and Senior Counsel, Washington Department of Labor & Industries. The Union was represented by Sherri-Ann Burke, Labor Advocate, Washington Federation of State Employees.

Neither party objected to procedural or substantive arbitrability of the grievance. The parties were each afforded a full and fair opportunity to present testimony and evidence in

¹ Exhibits submitted by the Employer are identified in the record as “E-#”; those

support of their respective positions. A court reporter, Beverly Lindauer, made a record of the proceeding, which she subsequently reduced to a transcript for the parties and the arbitrator.²

The parties agreed that the Union should go forward with its case-in-chief first, as the grievance matter involves a contract interpretation issue. Although the action taken by the Employer was a termination, it was not a disciplinary matter. Therefore, the parties agreed the Union would bear the burden of proving that the Employer had violated the contract. The Union presented its case-in-chief first, then the Employer presented its case and the Union had the opportunity to rebut the Employer's evidence.

The following witnesses appeared and testified under oath or affirmation and were subject to cross-examination:

(a) For the Union: Maria Steffler, *Grievant*.

(b) For the Employer: Chris Perales, *Supervisor, Moses Lake Service Location, Washington Department of Labor & Industries (L & I)*; Candyce Peppard, *Human Resources Consultant 2 (FMLA/Shared Leave Coordinator), L & I*; Reuel Paradis, *Regional 5 and 6 Administrator, L & I*.

The parties agreed that September 23, 2011 would be the date on which they would present written briefs of final argument to the arbitrator by electronic and postal delivery. Upon timely receipt of the briefs, the arbitrator officially closed the hearing and took the matter under advisement. She has weighed all the testimony and evidence offered by the

submitted by the Union, on behalf of Petitioner, are identified as "U-#".

parties at the hearing and has given careful consideration to the arguments of the parties' advocates, which were thoroughly and cogently presented in their post-hearing briefs, in reaching her decision.

STATEMENT OF THE ISSUE

The parties did not agree upon a precise statement of the issue. The Union sought to include Article 15.1 as a contract provision that had been violated, while the Employer wanted to exclude any reference to Article 15.1. The parties stipulated that the Arbitrator would have the authority to determine the precise statement of the issue.

Article 29.1 Step 5 Arbitration, Section (D)(1)(b), expressly limits the arbitrator to consider "the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it." The Union alleged a violation of Article 15.1 in its original written grievance form. Therefore, the arbitrator hereby frames the issue to include Article 15.1, as follows:

(1) Did the State of Washington, Department of Labor & Industries, violate Article 15.1, 46.1, 46.2, 46.3 and/or 46.4 of the Collective Bargaining Agreement by and between the State of Washington and the Washington Federation of State Employees 2009-2011 by terminating the employment of Maria (Mary) Steffler on 4/8/2010 and declining to reinstate her?

If so, what should the remedy be?

RELEVANT CONTRACT PROVISIONS

² References to the transcript are identified by page number, as "Tr-#".

ARTICLE 15. FAMILY AND MEDICAL LEAVE – PREGNANCY DISABILITY LEAVE

15.1 Consistent with the federal Family and Medical Leave Act of 1993 (FMLA) and any amendments thereto and the state Family Leave Act of 2006 (FLA), an employee who has worked for the state for at least twelve (12) months and for at least one thousand two hundred fifty (1,250) hours during the twelve (12) months prior to the requested leave is entitled to up to twelve (12) workweeks of FMLA leave in a twelve (12) month period for one or more of the following reasons 1 through 4:

.....
2. Personal medical leave due to the employee’s own serious health condition that requires the employee’s absence from work;

.....
15.4 The Employer has the authority to designate absences that meet the criteria of the FMLA. any employee using paid leave for a FMLA qualifying event must follow the notice and certification requirements relating to FMLA usage in addition to any notice and certification requirements relating to paid leave.

15.5 Personal medical leave consistent with the requirements of the FMLA will be granted to an employee for his or her own serious health condition that requires the employee’s absence from work. The Employer may require that such personal medical leave, serious health condition leave, or serious illness or injury leave be supported by certification from the employee’s . . . health care provider.

15.6 Personal medical leave or serious health condition leave or serious injury or illness leave covered by the FMLA may be taken intermittently when certified as medically necessary.

.....
15.8 The employee will provide the Employer with not less than thirty (30) days’ notice before the FMLA leave is to begin. If the need for the leave is unforeseeable thirty (30) days in advance, then the employee will provide such notice as is reasonable and practicable.

ARTICLE 29. GRIEVANCE PROCEDURE.

29.1 The Union and the Employer agree that it is in the best interest of all parties to resolve disputes at the earliest opportunity

STEP 5 - ARBITRATION:

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

ARTICLE 46 – PRESUMPTION OF RESIGNATION

46.1 Unauthorized Absence

When an employee has been absent without authorized leave and has failed to contact the Employer for a period of three (3) consecutive days, the employee is presumed to have resigned from his or her position. The Employer will make reasonable attempts to contact the employee to determine the cause of the absence.

46.2 Notice of Separation

When an employee is presumed to have resigned from his or her position, the Employer will separate the employee by sending a separation notice to the employee by certified mail to the last known address of the employee.

46.3 Petition for Reinstatement

An employee who has received a separation notice may petition the Employer in writing to consider reinstatement. The employee must provide proof that the absence was involuntary or unavoidable. The petition must be received by the Employer or postmarked within seven (7) calendar days after the separation notice was deposited in the United States mail. The Employer must respond in writing to the employee's petition for reinstatement within seven (7) calendar days of receipt of the employee's petition.

46.4 Grievability

Denial of a petition for reinstatement is grievable. The grievance may not be based on information other than that shared with the Employer at the time of the petition for reinstatement.

Ex. No.P-1, Ex. E-5 (Jt. Ex. No. 1)

STATEMENT OF THE FACTS

The facts of this matter are as follows:

The Grievant was initially hired into State service in 1990, as a Benefit Specialist 2 with the Department of Health. *Tr. 24.* Following a hiatus of several years, she was a continuous State employee between 2003 and her termination date of April 8, 2010.

The Grievant worked as a Customer Service Specialist 2 at the Moses Lake location

of the Department of Labor & Industry (“L & I” or “the Agency”), in Region 5, at the time of her termination. Her responsibilities included assisting customers, in the office and by phone, regarding the Agency’s programs, which include Workers’ Compensation, Contractor Registration and Compliance and Manufactured Home permitting. *Tr. 63.* She had been in that position seven years and at the Moses Lake location for five years.

The Grievant’s supervisor was Chris Perales, Moses Lake Office Manager. Ms. Perales’s supervisor was Linda Castellanos, Region 5 Customer Service Manager, located in Yakima. Ms. Castellanos reported to Reuel Paradis, Regional Administrator, Yakima.

Agency records show the Grievant requested applications for FMLA leave on three separate occasions: November 12, 2008, April 13, 2009 and March 17, 2010. *Ex. E-11; Tr. 105.* The November 2008 FMLA application was never returned to the Agency’s FMLA administrator, Candyce Peppard, so no FMLA approval was granted at that time.

The Grievant’s April 2009 FMLA application was approved for FMLA leave, based on a pre-scheduled surgical procedure. The Grievant’s absences between May 20 and July 6, 2009 were covered by it. The FMLA approval request was administratively closed on August 6, 2009, after the Grievant’s medical provider released her to return to work. *See Ex. E-11, p. 6-9, Tr. 91-2, Tr. 107.*

The Grievant’s March 17, 2010 application for FMLA leave was sent to the Grievant’s workplace e-mail address. *Ex. E-11.* The Grievant was absent from work on that day, as she had left the office due to illness on March 15. She never returned to work before her termination was issued. She never filled out and returned the March 17, 2010

FMLA application to the Administrator, so the record of that application was administratively closed after the Grievant's termination.

On or about March 25, 2010, a chiropractor, Allen Fraley DC, signed a statement on his office stationery affirming that the Grievant would not be able to return to work "until 4-6-10". *Ex. E-2*. No diagnosis regarding the cause for the Grievant's absence was included on Dr. Fraley's statement. There was, however, a hand-written note from the Grievant on the form, which stated as follows: "Chris – I won't have a phone for a few days. You can leave messages for me at 765-8430 or 771-1862. Thank you! Mary." *Id.*

The Grievant did not return to work on April 6, 2010 and did not call her supervisor to explain that she would be absent that day. The Grievant did not return to work on April 7, 2010 either and did not call in that day. On April 8, 2010, the Grievant did not call in or appear at work at her regular starting time. The Grievant's supervisor contacted higher management, including Regional Administrator Reuel Paradis, for instructions on how to proceed. *Tr. 95*.

At approximately 11:00 a.m. on the same day, April 8, 2010, the Grievant appeared at her workplace, accompanied by her brother-in-law. She informed Ms. Perales that she was not there to work, but had only come to collect some personal items from her desk. Ms. Perales informed the Grievant that she had been trying to reach her to learn why she was not at work on April 6 and 7 and had not called in on April 8. The Grievant responded that she had "lost track of time." Then, upon gathering some items, including her notary stamp, the Grievant and her brother-in-law left the office.

Also on April 8, Mr. Paradis executed a notice of termination pursuant to Article 46 of the collective bargaining agreement, stating that the Grievant had been absent “without authorized leave for three (3) consecutive days and [had failed] to contact her employer.” *Ex. U-2, Ex. E-1.* Her failure to report for work and to contact her employer had led to the “presumption that [she had] resigned [her] position.” *Id.* The notice was sent by certified mail and the Grievant received it the following day, April 9, 2010.

On April 14, 2010, the Grievant sent a hand-written letter to Mr. Paradis in response to the letter of termination. *Ex. E-3, U-3.* Her letter stated in pertinent part as follows:

“Please accept this as my response to your letter/notification of separation for my position . . . , I was off work due to anxiety and flu-like symptoms. My supervisor, Chris Perales, advised me I would needed (sic) a doctor’s release to return to work. I saw Dr. Hoover at the Moses Lake Walk-In Clinic. After discussing my symptoms with him a Workmen’s Comp claim was filed with date of injury of 3-15-10. My current authorized provider, Dr. Alan Fraley, took me off work through 4/14/10. I was told his office staff would ensure the activity prescription form would be submitted to the department as notification of my work status. . . .”

Id.

During the relevant time frame between mid-March and mid-April 2010, the Grievant spent time outside her home, caring for a friend who was dying of cancer.

POSITIONS OF THE PARTIES

The Union: The Union asserts that the Employer was aware, as of the fall of 2009, that the Grievant suffered from intermittent panic attacks, chronic anxiety and depression. Certification of those mental conditions, to support FMLA leave, had been

filled out on October 30, 2009 by Ben Murrell, PAC. *Ex. U-10.*³ The Grievant contends that she had previously informed Linda Castellanos, Regional L & I program manager, in a telephone conversation from her home, that she was having a panic attack and that Ms. Castellanos had told her at that time to go to a doctor.

The Union next asserts that the Grievant suffered an on-the-job injury on March 15, 2010 and that she was under the care of a chiropractor, Dr. Fraley, as a result of that injury. The Grievant contends that the injury had occurred in the context of a panic attack at her worksite. The Employer should have been aware of her anxiety and panic.

The Union acknowledges that Dr. Fraley, the Grievant's chiropractor, issued a work release showing April 6, 2010 as the Grievant's effective return-to-work date. The Union contends, however, that the chiropractor subsequently extended that work release date to April 14. *Ex. U-11, U-9.*⁴

The Union contends further that the Grievant was unable to notify her supervisor that she would be absent on April 6, 7 and 8, 2010, as she was suffering from panic and anxiety on those days, was "foggy-headed" and lost track of time. The Grievant's family took her to the Emergency Room on April 6 and doctors treated her there for a panic attack and ordered her to seek further medical attention. *Ex. U-15, p. 2*⁵

³ This exhibit was offered in evidence under strong protest by the Employer, as the Employer did not have a copy of it in its records and contends it never received it.

⁴ Exhibits U-11 and U-9 were offered under strong protest by the Employer, as they had not been submitted prior to April 6, 2010, nor were they submitted within seven days of the Grievant's termination, in conjunction with her petition for reinstatement, as required by Article 46.3 of the collective bargaining agreement.

⁵ The ER report was offered in evidence under strong protest by the Employer,

Based on those contentions, the Union asserts the Grievant's absences on April 6, 7 and 8, 2010 should have been excused by the Employer. She was suffering from a mental health condition or a work-related injury condition, or a combination of both, on those days and she believed she was authorized to miss work. The Employer should have engaged in a reasonable accommodation process instead of pursuing a hasty termination process. The Grievant submitted a timely petition for reinstatement with an explanation of the reason for her absence, as required in Article 46.3. The Employer should have honored her petition and reinstated her. Instead, the Employer violated the labor contract when it failed to grant the reinstatement.

The Employer: The Employer denies that the Grievant ever filed an application for FMLA leave based on her alleged condition of intermittent panic attacks, anxiety and depression. The Employer's records do not contain a copy of Ben Murrell's October 30, 2009 FMLA certification (*Ex. U-10*). The Grievant failed to provide the document to her supervisor, Ms. Perales, or the L &I Agency's FMLA Administrator, Ms. Peppard, as required for proper FMLA approval. *See Tr. 37, 38, 44.*

Also, the Grievant made no reference, in her petition for reinstatement following the termination, to her belief that she had obtained FMLA certification for panic attacks, anxiety and depression. Instead, long after the seven-day period established by Article 46.3 had passed for submission of her petition, she presented to her Union the Murrell

because it was not submitted to the Employer in conjunction with the Grievant's petition for reinstatement after her termination, as required by Article 46.3 of the collective bargaining agreement.

document on which she now relies to support her FMLA contention. The Union then provided it to the Employer during the grievance process. The arbitrator should not give the document any weight, in the Employer's view, because it was not timely presented.

The Employer contends further that the Grievant offered no evidence whatsoever to the Employer, in conjunction with her Petition for Reinstatement, that she had been treated at the Emergency Room on April 6. She offered no proof that her chiropractor had extended her work-release date to April 14, 2010. The arbitrator should not give any weight to the documents that the Grievant offered in evidence at the hearing in support of those contentions because of the contractual limitation in Article 46.4.

Also, the Employer points out that there is no evidence whatsoever in the record that shows Dr. Fraley extended the Grievant's work-release date to April 14 until she saw him on April 9, 2010, which was the day after she had been terminated.

The Grievant failed to establish proof, as required by Article 46.3 and 46.4 that her absences on April 6, 7 and 8 had been "involuntary" or "unavoidable". To the contrary, the Grievant's appearance at the L & I Moses Lake office at mid-day on April 8, 2010, with her brother-in-law, demonstrated that she was active that day and could have avoided the absence. Also, the Grievant admits that she was caring for a dying friend during the period of her absences, April 6-8, 2010.

For these reasons the Employer asks the arbitrator to deny the grievance.

DISCUSSION

The arbitrator is bound to apply the collective bargaining agreement in accordance with its express terms. Her duty is to determine and follow the parties' mutual intent as shown by the provisions of their contract. She may not apply her own personal form of industrial justice. The parties have expressly limited the arbitrator's authority by stipulating, in Article 29.3 Arbitration, Section B Step 5 (D)(1), that the arbitrator "may not rule contrary to, add to, subtract from or modify any of the contract's provisions."

Article 46, Presumption of Resignation, especially sub-sections 46.3 and 46.4, regarding the Petition for Reinstatement, are in issue in this case. The Union has raised Article 15, regarding the Family Medical Leave Act, as an additional issue and the arbitrator will consider that provision, to the extent it is related to the Article 46 issues.

A. How is the case different from a typical discharge grievance matter?

The termination that led to this arbitration is not a disciplinary matter. It is a contract interpretation matter, based on a presumption of voluntary resignation due to the Grievant's unexplained absence on three successive days.

In a disciplinary discharge case, the *Employer* bears the burden of proving, by clear and convincing evidence, that there has been *just cause* for the action that was taken. The Employer must demonstrate that the penalty was justly applied. The arbitrator considers a number of principles, including reasonableness of notice, fairness of the investigation leading to the disciplinary decision and appropriateness of the penalty, in deciding the case.

In this case, however, it is the *Union* that must persuade the arbitrator the Employer

violated the collective bargaining agreement when it reached a presumption that the Grievant had voluntarily resigned from her position. The *Union* must also persuade the arbitrator that the Employer violated the agreement when it failed to reinstate the Grievant, who exercised her contractual right to submit a petition for reinstatement within the seven-day time limit provided in Article 46.3.

The arbitrator will now analyze the evidence in this matter in accordance with the contractual requirements. She will decide whether the Employer properly reached the presumption of resignation, then will consider the argument in the Grievant's petition for reinstatement to determine whether the Employer properly denied reinstatement.

B. Did the Employer properly reach the presumption that the Grievant had resigned, as provided in Article 46.1?

Article 46.1 provides that a presumption of resignation must be based upon facts showing: (1) that the Grievant failed to appear for work without prior authorization on three consecutive days; (2) that she failed to advise the Employer of the absences, and (3) that the Employer made reasonable attempts to contact the absent employee.

The evidence shows that the Grievant was absent continuously between March 15 and her termination on April 8. She had reported a sudden illness or injury on the job on March 15 and left the workplace. The Grievant's chiropractor, Dr. Fraley, issued a written release on March 25, 2010 stating that the Grievant would return to work on April 6, 2010. *Ex. U-2, E-8*. Her absences between March 15 and April 5 had therefore been authorized.

The Grievant failed to appear for work at or after 8:00 a.m. on April 6, 7 or 8, 2010. She did appear at the workplace on April 8, at about 11:00 a.m., but she advised her supervisor

that she was not there with the intention of working. She only intended to gather some items from her desk. She gathered the items, then left the office.

There is no dispute that the Grievant failed to contact the Employer prior to the start of her shift on any of the three workdays in issue, to report that she would be absent. The arbitrator is persuaded that she knew she was expected to call in by 7:00 a.m. on those days. She had been advised as recently as September 25, 2009, of the Employer's expectation that she make such calls. She had been provided with four separate memos, entitled "Job Expectations", during 2009, and they all included the following language:

A. COMUNICATION

1. For illnesses or other unexpected absences, **call my voice mail (509) 764-6910 by 7:00 a.m. each** morning stating the reason why you will be out; then, if needed, contact your supervisor directly between **8:00 a.m. – 8:10 a.m.** . . .
Ex. E-9 (a)-(d) (emphasis in originals)

The arbitrator is further persuaded that the Grievant's supervisor, Chris Perales, attempted to contact the Grievant on each of the three relevant mornings, April 6, 7 and 8, after she learned that the Grievant had failed to appear for work by 8:00 a.m. Ms. Perales testified that she called the phone numbers that the Grievant had provided to her as contact numbers, where she could be reached after March 25, 2010. *Ex. U-2, E-8.* The Grievant did not answer any of the calls.

When the Grievant appeared at the workplace at mid-day on April 8, Ms. Perales approached her and inquired as to why she had not contacted the office during the past two days. The Grievant responded that she had "lost track of time". *Tr. 89.* She also testified that she had told Ms. Perales she was "foggy-headed", but Ms. Perales denied that.

The arbitrator concludes that the Employer properly reached a presumption, pursuant to the criteria of Article 46.1, that the Grievant had resigned her position.

C. Did the Employer violate the agreement by failing to reinstate the Grievant after she sent a Petition for Reinstatement to L & I Administrator Paradis?

46.3 Petition for Reinstatement

An employee who has received a separation notice may petition the Employer in writing to consider reinstatement. The employee must provide proof that the absence was involuntary or unavoidable. The petition must be received by the Employer or postmarked within seven (7) calendar days after the separation notice was deposited in the United States mail. The Employer must respond in writing to the employee's petition for reinstatement within seven (7) calendar days of receipt of the employee's petition.

Jt. Ex. No 1

The Grievant submitted a petition for reinstatement by letter addressed to L & I Regional Administrator Paradis. The letter was dated April 14, 2010, within seven days of the transmission of Mr. Paradis's letter of termination by certified mail to the Grievant.

The Grievant's petition provided in pertinent part as follows:

"Please accept this as my response to your letter/notification of separation for my position . . . , I was off work due to anxiety and flu-like symptoms. My supervisor, Chris Perales, advised me I would needed (sic) a doctor's release to return to work. I saw Dr. Hoover at the Moses Lake Walk-In Clinic. After discussing my symptoms with him a Workmen's Comp claim was filed with date of injury of 3-15-10. My current authorized provider, Dr. Alan Fraley, took me off work through 4/14/10. I was told his office staff would ensure the activity prescription form would be submitted to the department as notification of my work status. . . ."

Ex. U-3, E-3.

The Employer declined to reinstate the Grievant. Administrator Paradis responded to the Grievant's petition by letter dated April 19, 2010. In his letter he recited the basic facts that had led the Employer to its presumption that the Grievant had resigned, then provided as

follows, in denying the Grievant's argument in support of her petition for reinstatement:

“ . . . You have not provided me with any information that would tell me otherwise – and you have not provided proof that you were unable to report to work, that your absence was involuntary or unavoidable. Losing track of time, as you indicated, is not reason for abandoning your position. . . ”

Ex. E-4

The parties mutually agreed in Article 46.4 of their contract that “the grievance may not be based on information other than that shared with the Employer at the time of the petition for reinstatement”. *Jt. Ex. 1*. Therefore, the arbitrator, in deciding this matter, may not consider any evidence that was *not* shared with the Employer on or before April 14, 2010. The cut-off date is the contractual equivalent of a statute of limitations.

During the hearing, the Employer objected to several documents that the Union offered in evidence, because they had not been provided to the Employer at or before the filing of the Grievant's petition for reinstatement. The Employer objected to some of the Grievant's testimony as well, because it related to evidence that had not been shared in a timely fashion. The arbitrator overruled the objections and allowed the objectionable documents and testimony to come into the record, but she advised the parties that she would note the objections. She assured the parties that she would only give such evidence the appropriate weight, if any, to which it would be entitled, once the express contractual limitations of Article 46.3 and 46.4 were applied during her deliberations.

According to arbitral tradition, strict observance to legal rules of evidence is usually not required. *See generally, Elkouri and Elkouri, How Arbitration Works, (6th ed.2003), 341 et. seq.* Rather than exclude evidence that parties may wish to offer, arbitrators prefer to give

parties their “day in court”, allowing them to present all their arguments and share all the evidence they believe is relevant, as long as the hearing is not unduly delayed. It is the arbitrator’s responsibility to weed out irrelevant material and give proper weight to each piece of evidence, even if some evidence gets little or no weight. One federal court has expressly approved the tradition, by explaining as follows:

“In an arbitration the parties have submitted the matter to persons whose judgment they trust, and it is for the arbitrators to determine the weight and credibility of evidence presented to them without restrictions as to the rules of admissibility which would apply in a court of law.”

See Instrument Workers local 116 v. Minneapolis-Honeywell Regulator Co., 54 LRRM 2661 (E.D. Pa 1963).

Article 46.3 provides that the terminated employee “must provide proof that the absence [had been] involuntary or unavoidable.” Article 46.4 refers to “information” rather than “proof”. The two words, “information” and “proof”, have essentially the same meaning, however, in the context of the requirements of a petition for reinstatement.

The parties did not specify what *types* of “proof” or “information” would be required. However, the words imply that the terminated employee must submit, not only a personal verbal description of the symptoms that she had been experiencing and had caused her to be absent from work, but supplemental *documentation*, such as medical reports and witness statements from knowledgeable persons, to prove the truthful basis of her statements and offer a specific diagnosis of the medical problem or a specific protocol that required absence from work. The “proof” would have to be sufficient to show the Employer that the employee’s absence had not been intentional and had not resulted from any preventable or avoidable cause, such as over-sleeping.

The Grievant’s petition for reinstatement stated that her absence had been due to

“anxiety and flu-like symptoms”. Under ordinary circumstances, neither of those symptoms would prevent an affected employee from calling in to report that she would not be able to report to work that day. The Grievant did not offer any supplementary evidence showing that she had been to a doctor for those symptoms or that she had suffered from unusually severe problems such as loss of consciousness or paralysis or severely elevated temperature, any of which which might have prevented her from making a phone call or being aware of time.

Also, the Grievant’s petition was shown to be untruthful in certain respects. She did not offer any evidence at the hearing showing that she had seen either Dr. Hoover at the Moses Lake Walk-In Clinic or her chiropractor Dr. Fraley during the dates in issue, April 6, 7 and 8, 2010, as she alleged in the petition. She had seen Dr. Fraley on or about March 25, because he had written her work release for April 6 that day. However, there is no indication that the Grievant saw Dr. Fraley again until April 9, following her termination. It was then that he had extended her work-release date to April 14. *See Ex. U-9, U-11.*

The Union argues that the Employer was aware of the Grievant’s pre-existing anxiety condition at the time of her termination, because it had received a certificate for FMLA approval back in 2009, showing that she suffered from anxiety as an on-going medical condition that could occur intermittently. The Union offered in evidence a form, dated October 30, 2009, signed by Ben Murrell, PA-C, in support of the contention. *Ex. U-10.* The Union contends the Grievant did not need to submit separate documentation with her petition for reinstatement, to prove that she suffered from anxiety on April 6, 7 and 8, 2010.

The arbitrator does not agree that the evidence upon which the Union now relies

supports the contention that the Grievant had advised the Employer about her anxiety condition. First, the Employer's records do not show that the Grievant ever submitted Ben Murrell's October 30, 2009 to the Employer. Secondly, the Grievant admitted that she had never talked to the L & I agency's FMLA specialist, Candyce Peppard, about her anxiety condition. *Tr. 44.* Also, no FMLA application was ever requested in the fall of 2009.

The Grievant's FMLA record shows that an application had been sent to the Grievant's e-mail on March 17, 2010, but that was never returned. The Grievant did not mention that she believed she had FMLA certification for anxiety when she saw Ms. Perales at the office on April 8, nor did she submit a copy of Dr. Morrell's previous certification -- or even mention such certification -- in conjunction with her petition for reinstatement.

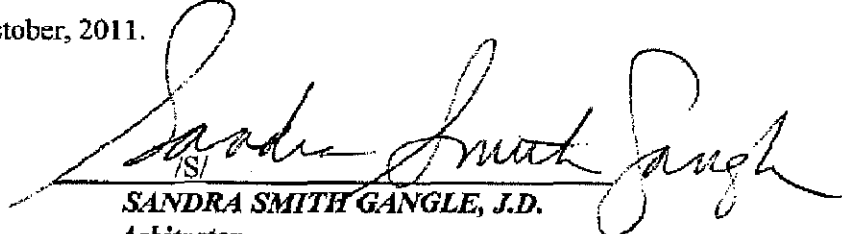
One final point is significant, because it relates to the Grievant's credibility. The Grievant testified that she had been busy taking care of her sick friend on April 6. She stated, "I was still in the home of my dying friend, trying to help care for his needs" *Tr. 31.* She said she had communicated with her friend's family, to explain how they could assist with his care. This evidence showed that the Grievant was acting rationally during her absence from work on April 6. She was capable of caring for a sick person and she could communicate with others, in spite of her anxiety and stated "foggy-headed" condition. Therefore, the arbitrator concludes that she was competent to call her supervisor.

Based on the foregoing reasons, the arbitrator concludes that the Employer did not violate the collective bargaining agreement when it reached the conclusion that the Grievant did not merit reinstatement to her position with the Agency. The grievance is denied.

AWARD

For the reasons set forth in the preceding analysis and decision, the grievance is denied. The parties shall mutually share the responsibility for the arbitrator's fee and expenses.

DATED this 21st day of October, 2011.


/s/
SANDRA SMITH GANGLE, J.D.
Arbitrator