

**FMCS MIDWEST ARBITRATORS' SYMPOSIUM**  
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**Conduct of the Hearing: The Limits of Arbitral Discretion**  
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The Problem

More and more often arbitrators are being called upon to interpret and decide contractual claims based upon external laws.

Examples:

Americans with Disabilities Act (ADA)

**1. School District X, Wisconsin:**

Applicable Contract Language:

4.1 Statutory/Constitutional Rights

The teachers and Association shall have and enjoy all of the rights and privileges granted to them by the Wisconsin Statutes and the Constitution of the United States.

4.2 Religious/Political Rights

Teachers shall be entitled to full rights of citizenship and no religious or political activities of any teacher or lack thereof shall be grounds for any discipline or discrimination with respect to the professional employment of such a teacher.

4.3 No Discrimination

The provisions of this Agreement shall be applied without regard to race, creed, religion, color, national origin, age, sex, or marital status.

8.1 Board Responsibility and Authority

The Association recognizes that the Board has the responsibility and authority to manage and direct, on behalf of the public, all the operations and activities of the District to the full extent authorized by law; therefore, it is understood the Board retains without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and constitution of the State of Wisconsin, and/or United States, including but without limiting the generality of the foregoing: The management and control of school properties, school organization, facilities and instructional programs.

8.2 Limitation of Board Rights

The exercise of these powers, rights, authority, duties and responsibilities by the Board and the adoption of such rules, regulations and policies as it may deem necessary shall be limited only by the specific and express terms of this Agreement.

## 9.1 Grievance Claim

A grievance is a claim which alleges that one or more provisions of this Agreement or established District policy has been incorrectly interpreted and applied. Such claim must be based on an event or condition which affects wages, hours and/or conditions of employment of one or more teachers.

## 9.2 Purpose of Grievance Procedure

The purpose of this procedure is to secure equitable solutions to the problems which from time to time arise, affecting the welfare of working conditions of teachers.

### 9.3.3.5 Arbitrator Interpretation of Agreement

The arbitrator may consider or decide only the particular issue or issues presented to him/her by the Board and the Association, and his/her decision must be based solely upon an interpretation of the provisions of the Agreement.

## Applicable Federal Law and CFR – Appendix A and B

### ISSUE:

#### *Posed by Association*

Is the grievance arbitrable? If so, did the District violated sec. 4 or 8 of the collective bargaining agreement in dealing with requests for accommodations?

#### *Posed by Board*

Is grievance arbitration the proper forum for enforcement and resolution of ADA matters properly before the EEOC? Did the District violate Section 4 or 8 of the collective bargaining agreement in dealing with requests for accommodation? If so, what is the appropriate remedy?

### FACTS

Several instances of District dealing with requests from teachers with physical disabilities, e.g., (1) a blind teacher requesting voice-to-text software and a larger computer monitor and OTT Lite. Monitor secured but not size teacher could use, refusal on software and substituted with a magnifying lamp. (2) teacher with scleroderma, fibromyalgia and Raynaud's disease hampering ability to walk requesting a classroom on first floor, that staff meetings be held in gym on first floor and a phone in classroom and parking in fire aisle close to building. Board assigned first floor classroom and denied all other requests.

## **2. City Y, Wisconsin**

### Applicable Contract Language:

#### Preamble

4. This Agreement is an implementation of the provision of Section 111.70, Wisconsin Statutes, consistent with that legislative authority which is delegated to the Common Council of the City of Y, the statutes, and insofar as applicable, the rules and regulations relating to or promulgated by the City Service Commission, and uniformity of compensation provided for under the Municipal Budget Law.
5. It is intended by the provisions of this Agreement that there be no abrogation of the duties, obligations, or responsibilities of any agency or department of City Government which is now expressly provided for respectively by: state statutes; charter ordinances; and ordinances by the City of Y except as expressly limited here.

#### Article 3 Ordinance and Resolutions References

This Agreement contains benefits and the terms and conditions under which they are provided employees. The City may establish ordinances, resolutions and procedures to implement and administer these benefits; however, these ordinances, resolutions and procedures, as well as any other City ordinances or resolutions providing benefits to employees, shall not be deemed a part of this Agreement, nor shall they add to, modify, diminish or otherwise vary any of the benefits or obligations provided in this Agreement, unless the parties shall mutually consent in writing thereto. Other City ordinances and/or resolutions or parts thereof in effect on the execution date of this Agreement, as well as those adopted thereafter, that do not conflict with the specific provision of this Agreement, shall remain in force and effect.

#### Article 15 Grievance Procedure

1. Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provision set forth below and shall be handled as expeditiously as possible.

#### Article 16 Arbitration Procedure

11. The arbitrator shall neither add to, detract from, nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for arbitration within the limitations expressed herein.
12. The arbitrator shall expressly be confined to the precise issue submitted for arbitration and shall not submit declarations of opinion which are not essential in reaching the determination of the question submitted unless request to do so by the parties.

#### Article 44 Transitional Employment Program.

1. A transitional Employment Program shall be established in accordance with the Sanitation Division guidelines dated August 1, 1989.
2. Employees may be placed in accordance with this Program only once per calendar year.

#### Article 47 Americans with Disabilities Act (ADA)

2. The parties recognize their obligation to comply with the Americans with Disabilities Act (ADA). Before the City takes any steps, including reasonable accommodation that may conflict with this Agreement, it will meet with the Union to discuss those steps that may be taken in that individual case. In those discussions the parties will respect the confidentiality of the disabled person as required by the Act. Nothing in this provision shall preclude an employee from meeting with the City and Union regarding a request for a reasonable accommodation. This provision does not modify, change or delete any rights of either party contained within this Agreement.

Applicable Federal Law and Regulations (Appendix A and B)

Applicable Case Law – Appendix C (Dalton)

ISSUE:

*Posed by City*

Is the City under an obligation to provide available transitional duty assignments to employees represent by Local Y who are injured away from work and are recuperating from a temporary restriction and are otherwise qualified to participate in the existing transitional duty program?

*Posed by Union*

Is the City under an obligation to provide available transitional duty assignments to employees on sick leave who are recuperating from a temporary restriction and are otherwise qualified to participate in the existing transitional duty program?

FACTS

Both the Municipal Ordinance and the Sanitation Department Guidelines provide that the transitional duty program is only for employees injured on the job and eligible for worker's compensation benefits. There is a dispute about whether one of the grievant's was injured on the job and the other has a non-work-related temporary injury and wants to participate in the Transitional Duty Program. Union wants to extend transitional duty program to all employees not just those who incurred a duty related injury under ADA.

## Fair Labor Standards Act (FLSA)

### County Z, Ohio

#### Applicable Contract Language:

##### Article 2 Hours of Work

##### Section 2.3 – Overtime

- (A) It shall be the policy of the County to keep to minimum, work in excess of established work schedules and to permit such excess work only when it is necessary to meet urgent City operating requirements.
- (B) Hours worked in excess of 40 hours per week shall be compensated at time and one half except that an employee, at his option, may elect to accrue compensatory time at the rate of one and one-half (1 ½) hours off for each such hour of work, and place such time in a comp-time bank. Once the employee has placed such time in the bank, he must give a twenty-four hour advance notice to the Sheriff for comp time leave, except that such comp time would be permissible with a one (1) hour notice if the supervisor so granting such leave is of the opinion that doing so would not unduly disrupt the operations of the department. The Employer shall have the sole discretion for granting such leave, but such denial shall be for just cause and not mere inconvenience, meeting the requirements of the Fair Standards Act. For purposes of this section, "hours worked" is defined as hours actually worked plus injury leave, vacation leave, and compensatory time as counting towards overtime. Sick leave shall not count towards hours worked for computing overtime hours except that employees called in outside their regular shift under emergency or unforeseen circumstances shall not suffer loss of overtime pay due to sick leave taken in the same week. The maximum accrual of compensatory time shall be determined according to the following schedule.

Date of Hire	Maximum Hours
0-18 years	80
19+	320

##### Section 13.3 –Specified Management Rights

Management retains the right to:

- (g) to determine the methods, means, and personnel by which operations are to be carried on subject to the provisions as expressly provided herein.

##### Section 23.11- Management Prerogatives Excluded from the Grievance Procedure

No management prerogative reserved solely to the discretion of the City shall be made the subject of a grievance.

##### Article 24 Arbitration

##### Section 24.1-Limits on Arbitrability

- (a) Only disputes involving the interpretation, application or enforcement of the terms of this Agreement or of the work rules may be arbitrated.

#### Section 24.2-Limits on Arbitrator's Authority

- (e) ...The arbitrator shall not have the authority to add to, delete from, or modify any provision of this Agreement.
- (g) The arbitrator shall expressly confine himself to the precise issues submitted for arbitration and shall have no authority or privilege to determine any other issue not so submitted to him. Nor shall the arbitrator have the authority or privilege to submit observations or declarations of opinion which are not directly essential in reaching a decision on the precise subject matter.
- (h) The arbitrator may not make an award which in effect grants either party that which it was unable clearly to secure during past collective bargaining negotiations.

### The FLSA Applicable Statute

#### Chapter 8 Fair Labor Standards

##### Section 207 Maximum hours

##### (o) Compensatory Time

(5) An Employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

- (A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
- (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

"Reasonable period" is defined in the Department of labor Regulations:

Reasonable period. (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on experience, (c) emergency requirements for staff and service, and (d) availability of qualified substitute staff.

(2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work...To the extent that the conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in Subsection 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period." 29 C.F.R. Subsection 553.25

### APPLICABLE CASE LAW – Appendix D (Aiken)

#### ISSUE:

**STIPULATED**

Did the County violate the parties' collective bargaining agreement? If so, remedy?

**FACTS:**

The parties have been quarreling for some time about minimum manning standards. Under the statutory scheme in that particular state, this is not a mandatory subject of bargaining. The grievant asked to use comp time for a certain day. Her supervisor denied her request citing the minimum manning standards, stating to the effect: The supervisors' contract (with a different union) allows supervisors 14 days off when another supervisor is also off. This requires a senior deputy to be in charge because to ask the other supervisors to cover would place an undue burden on them. Offering overtime to supervisors to allow you to take the comp time would create a situation where time off was not granted evenly. In reviewing the time book, it would seem that most of the time officers are able to take time off when they so desire.

The grievant was forced to switch shifts with a co-worker because her request to use comp time was denied.

**Family Medical Leave Act (FMLA)****State A****Applicable Contract Provisions:**

Article IX Discipline

Section 1. Definition

A. The Employer agrees with the tenets of progressive and corrective discipline. Disciplinary action or measures shall include only the following:

- a) Oral reprimand
- b) Written reprimand
- c) Suspension (notice to be given in writing)
- d) Discharge (notice to be given in writing)

Disciplinary action may be imposed upon an employee only for just cause. An employee shall not be demoted for disciplinary reasons...

Article XXIII Leaves of Absence

Section 15 Sick Leave

A. ...The Employer will not discipline an employee for legitimate use of sick days if taken within procedural guidelines. The Employer may request evidence, which may be in the form of a written medical certification of use of sick leave if reasonable grounds exist to suspect abuse. If

the Employer demands an additional form of proff, different than that which was furnished by the employee, and involves cost to the employee, the Employer shall pay the cost of such professional services when such verifies that the employee was not abusing sick leave.

B. Guidelines on Proof Status. At the time an employee is placed on proof status, the Employer will submit to the employee, in writing, the reasons for placing the employee on proof status.

## APPLICABLE STATE AND FEDERAL STATUTES

### STATE A COMPILED STATUTES-State A School Student Records Act

Sec. 6 (a) No school student records or information contained therein may be released, transferred, disclosed or otherwise disseminated, except as follows:

(9) To a governmental agency, or social service agency contracted by a governmental agency, in furtherance of an investigation of a student's school attendance, pursuant to the compulsory student attendance laws of this State, provided that the records are released to the employee or agent designated by the agency; or....

TITLE 29 Chapter 28 Sec. 2611.(2), 2612(a)(b)(c) - Appendix E

### ISSUES:

#### STIPULATED

May the State use evidence obtained from school authorities to prove its case?

Did the State have just cause to suspend, and ultimately discharge the grievant for abuse of Family Medical Leave? If not, what is the appropriate remedy?

### FACTS

The grievant applied for and was approved for periodic Family Medical Leave based upon her child's mental and emotional impairments. The State employer began to suspect that the grievant was abusing her leave based upon the pattern of her absences over a three-month period. The collective bargaining agreement contains no provisions about Family Medical Leave, but the sick leave language permits the employer to place an employee on "proof status" if it suspects sick leave abuse. The grievant was placed on "proof status" when she was to take her periodic FMLA leave, failed to comply with supplying proof and was suspended and ultimately discharged. As a part of the investigation prior to the discharge, the State Employer, a Division of the Child Support Enforcement arm of this state, subpoenaed grievant's child's attendance records to prove that she was in fact abusing FMLA leave.

## MISCELLANEOUS STATE LAWS

### County B

## Applicable Statutory Language

### Article 26 HOSPITALIZATION

Section 1. The Employer shall make available to all bargaining unit employees, hospitalization health care insurance and life insurance, in effect as of the effective date of this Agreement. If it becomes necessary to change carriers and/or benefits, the Employer agrees to meet and negotiate with the Union no later than sixty (60) days prior to the date of such proposed change. Should the parties be unable to reach agreement on any proposed changes, they will have recourse to the dispute resolution procedure of state statute x.

Section 2. For the term of this Agreement, the Employer shall pay the full premiums of the health insurance coverage listed in Section 1 above.

### Applicable Statutory Provisions:

#### State X Revised Code – 3901.38

(B)(1) Except as provided in division (B)(2) of this section and in section 3901.381 of the Revised Code, within twenty-four days of the receipt of a completed claim from a provider or a beneficiary for reimbursement for health care services rendered by the provider to a beneficiary, a third-party payer shall, in accordance with division (D) of this section, make payment of any amount due on such claim.

(2) A third-party payer and a provider may, in negotiating a reimbursement contract, agree to any time period by which a third-party payer shall, subject to division (D) of this section, make payment of any amount due on a completed claim. Nothing in this division shall be construed as limiting in any manner the application of the requirements of this section to any benefits or reimbursement contract.

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(C) No third-party payer shall refuse to process or pay within the time period required under division (B)(1) or (2) of this section a completed claim submitted by a provider on the ground the beneficiary has not been discharged from the hospital or the treatment has not been completed, if the submitted claim covers services actually rendered and charges actually incurred over at least a thirty-day period.

(D)(1) Notwithstanding section 1751.13 or division (2) of section 3923.04 of the Revised Code, a reimbursement contract entered into or renewed on or after June 29, 1988, between a third-party payer and a hospital shall provide that reimbursement for any service provided by a hospital pursuant to a reimbursement contract and covered under a benefits contract shall be made directly to the hospital.

(2) If the third-party payer and the hospital have not entered into a contract regarding the provision and reimbursement for covered services, the third-party payer shall accept and honor a completed and validly executed assignment of benefits with a hospital by a beneficiary, except when the third-party payer has notified the hospital in writing of the conditions under which the third-party payer will not accept and honor an assignment.

(E) A series of violations which taken together, constitute a consistent pattern or a practice of violation of any of the provisions of this section in an unfair and deceptive act pursuant to sections 3901.19 and 3901.23 of the Revised Code and is subject to proceeding pursuant to those sections.

## FACTS

The parties stipulated that the County is the proverbial slow payer for all of its claims. The third party administrator approves the claims in a timely fashion but the County Commissioners have repeatedly failed to transfer adequate funds to the administrator. Some of the claims from eleven months previous have been approved but not yet paid. This has caused health care providers to deny services, to require payment upfront from employees and employee credit ratings to be effected.

## **TRENDS**

1. Since 1974, *Alexander v. Gardner-Denver Co*, 415 U.S. 36, arbitrators have appeared to be more willing to rely on external law, especially in discharge and discipline cases.
2. Some, especially, where it is conditions of employment that are at issue, such as accommodating a disability, find that the determination of reasonable accommodation and undue hardship is a matter of law for the appropriate judicial forum and not for the arbitrator who takes his authority solely from the parties' collective bargaining agreement.
3. Others, while not, applying the external law and refusing to consider the particular law in the analysis, seek to make their decisions consistent with the law.
4. More recently, especially where an anti-discrimination clause exists in the contract, some arbitrators have concluded that the parties have bargained for consideration and application of the statutory criteria in the appropriate resolution of the contractual dispute.
5. One other factor which may also result in the arbitrator's willingness to consider the external law, is federal and state court willingness to vacate awards that conflict or appear to conflict with the law and the general pervasiveness of statutory regulations in all aspects of labor relations, especially in the public sector.