

**BEFORE ARBITRATOR ANITA M. ROWE**

**In the Matter of an  
Arbitration Between**

Chicago Transit Authority,	)	
	)	
Employer,	)	
	)	
and	)	Grievance No. 13-0043
	)	Grievant: Quentin Eskridge
Amalgamated Transit Union,	)	
Local 241,	)	
	)	
Union.	)	

**LABOR ARBITRATION OPINION AND AWARD**

On December 19, 2013, a hearing was held before Arbitrator Anita M. Rowe, having been jointly selected by the parties, the Chicago Transit Authority ("Employer" or "CTA"), and Amalgamated Transit Union, Local 241, ("Union"), to hear and determine the above-captioned matter. Appearing for the Employer was its counsel, Priya Khatkhate, Esq. Testifying for the Employer were Jeni Guzman, Aaron Crockett, and Arnold Hollins. Appearing for the Union was its counsel, Marisel A. Hernandez, Esq. Timely post-hearing briefs were timely filed on January 31, 2014.

**STATEMENT OF THE ISSUES**

The parties stipulated to the following issue:

Did the Chicago Transit Authority have sufficient cause to discharge the Grievant, Quentin Eskridge, on December 26, 2012? If not, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

**Article 2, Section 6 NON-INTERFERENCE**

The Authority shall be at liberty at all times during the existence of the Agreement and subject to provisions hereof, to operate its property according to its best judgment and the orders of competent authority. Local 241 and Local 308 agree that they will not in any way interfere with or limit the right of the Authority to discharge or discipline its employees covered by this Agreement, where sufficient cause can be shown, except for membership in Local 241 or Local 308.

## RELEVANT PORTIONS OF CTA RULES AND PROCEDURES

### A. Relevant General Rules

#### 7. Obedience to rules

- (a) All rules, orders, bulletins, and instructions must be obeyed.
- (b) Ignorance of the rules, orders, bulletins, and instructions will not be accepted as an excuse for failure to comply.
- (c) Violation is cause for disciplinary action.

#### 14. Personal Conduct

- (e) Conduct unbecoming an employee.
- (f) Excessive absenteeism, falsifying sickness or injury.

#### 18. Reporting for Duty

- (a) Employees must not change their scheduled working hours, assignments or duties unless authorized to do so by the appropriate supervisor. Tardiness or unauthorized early departure is not permitted.
- (b) If unable to report for duty, employees must notify their immediate supervisor before reporting time. Fulfillment of this requirement does not automatically constitute an excused absence

#### 24. Use of Best Judgment

Should a situation requiring prompt action arise which is not covered by the rules in the General Rule Book, specialized rule books, executive orders, bulletins or instructions, the employees involved must use their best judgment in selecting the best course of action to follow, then report the action taken to appropriate supervision as soon as possible thereafter.

### B. Relevant Excerpt from Corrective Action Guidelines

#### **Excessive Absenteeism**

The CTA has a right to expect that employees will come to work. Corrective action is

taken even if, through no fault of his or her own, the employee is frequently absent from work.

Entries for excessive absenteeism will include all unapproved or unexcused absences, except AWOL and missed assignments, such as:

- Unexcused absence
- Failure to report
- Late report
- Sick (non-FMLA)
- "SNIPES" or Unapproved early departure
- Other time off (not paid for by contract)

**Absences covered by FMLA protection are not subject to disciplinary action; however, underlying rule violations may still be subject to disciplinary action.**

**All FMLA rules and procedures must be followed.**

C. Excerpts from Administrative Procedure 1013: Family and Medical Leave of Absence (FMLA)

## **2. SUPPORTS THE FOLLOWING POLICY**

It is the policy of the CTA to comply with all provisions set forth in the Family and Medical Leave Act as amended.

### **4.10 Discipline**

Employees shall not be disciplined based upon the fact that they have taken an approved FMLA leave. However, CTA may discipline or terminate an employee for failing to comply with the requirements and/or intent of FMLA or abuse of FMLA leave....

### **4.16 Recertification**

#### **E. Content**

CTA may ask for the same information when obtaining recertification as that permitted for the original certification. The employee has the same obligations to participate and cooperate....in the recertification process as in the initial certification process. As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, CTA may provide the health care provider with a record of the employee's absence pattern, and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

EXCERPTS FROM RELEVANT FMLA REGULATIONS

**29 CFR Section 825.308 Recertifications taken for leave because of an employee's own serious health condition or the serious health condition of a family member.**

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(c) *Less than 30 days.* An employer may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the time of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days...

**29 CFR Section 825.313 Failure to provide certification.**

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(c) *Recertification.* An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave...

**FACTS**

The Grievant was hired by the CTA as a full-time bus operator on June 26, 2005. On November 15, 2011, the Grievant called in sick, his sixth such absence from work in the prior 12 months. He was interviewed regarding this absence and, in accordance with CTA's Corrective Action Guidelines ("Guidelines"), given a Corrective Case Interview, a three-day suspension and a six-month probation. His probation extended from November 15, 2011 to May 15, 2012.

The Grievant accumulated several unexcused absences after his probation expired. These absences, occurring on June 19, 2012; July 23, 2012; August 13, 2012; and August 22, 2012, were not grieved through the Union. This brought the Grievant to five unexcused absences in the 12-month period starting from November 15, 2011. The August 22<sup>nd</sup> absence resulted in a Corrective Case Interview, another three-day suspension, and another six-month probation, which would run until February 21, 2013. Under the terms of his probation, the next attendance infraction was to result in a referral to the General Manager with a recommendation for discharge.

On September 6, 2012, the Grievant applied for intermittent leave through the Family and Medical Leave Act ("FMLA") due to his asthma. Sedgwick, CTA's third-party claims administrator, handles CTA employees' FMLA claims, including approving or denying leave requests, communicating rights and responsibilities, receiving and reviewing medical information, and processing absences. Sedgwick approved the Grievant's intermittent FMLA leave and sent him an approval letter dated September 11, 2012. The letter stated that Grievant's FMLA claim for intermittent leave was approved for the period of September 6, 2012 through April 4, 2013.

The CTA's Administrative Procedure ("AP") #1013 communicates procedures to be followed when requesting permission for a leave of absence pursuant to the FMLA, and is available to all employees online, as well as posted in CTA garages. Section 4.16 of AP #1013 discusses recertification rules and expectations, including the circumstances under which CTA may request recertification of an employee's FMLA leave, pursuant to federal FMLA regulations. Section 4.16E, in particular, indicates that,

CTA may ask for the same information when obtaining recertification as that permitted for the original certification. The employee has the same obligations to participate and cooperate....in the recertification process as in the initial certification process. As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, CTA may provide the health care provider with a record of the employee's absence pattern, and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.<sup>1</sup>

Section 5.E states the employee's responsibilities in case of a recertification request:

Provides the requested recertification to the [third party administrator] within 15 days of the [third party administrator's]

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<sup>1</sup> This section closely tracks 29 CFR 825.308, the federal FMLA regulation dealing with recertifications.

request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

This Section goes on to state that the Third-Party Administrator "decides whether recertification is warranted." However, there is no language in AP 1013 specifically dealing with the failure to provide recertification documentation.<sup>2</sup> In contrast, the relevant federal FMLA regulation states that if an employee fails to provide such documentation "within a reasonable time,...the employer may deny the continuation of the FMLA protections until the employee produces a sufficient recertification." 29 CFR 825.313(c).

Whenever a Sedgwick Leave Specialist takes any action or has any communication regarding an employee's FMLA coverage, the specialist makes a note in Sedgwick's electronic claim system. Sedgwick's FMLA file for the Grievant reflects that he called Sedgwick on November 8, 2012 to utilize 8 hours and 30 minutes of FMLA time. The next day, November 9, 2012, LaSharee Lawrence, a Sedgwick Leave Specialist, entered notes indicating that a "pattern" was identified of absences that extended the Grievant's scheduled days off. Sedgwick's Absence Management Team lead, Jeni Guzman, testified as to what Sedgwick deems a "pattern":

when the employee displays a pattern of using FMLA either in correlation with their off days, particular days of the week, weekends, you know, depending on how they use it...if their condition is random in nature. If they display a habit of using particular - using FMLA on particular days then that is a pattern of use.

Guzman explained that Sedgwick developed its own algorithm and instituted it at the CTA, as well as at its other clients across the country. This algorithm triggers a pattern warning when, out of a minimum of four absences, forty percent of them exhibit a pattern. According to Guzman, Sedgwick also looks at the timing of those absences flagged by the system:

Now if there is a big break....like the first two absences were in January and the last two absence were in May,....we would look is that there's no history of ongoing use. So, no, we would not pattern. But if the absences are every single month, then, yes, by the fourth month we do review.

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<sup>2</sup> According to Section 4.6C, entitled, "Failure to Provide Documentation," if an employee fails to meet submission deadlines for the initial FMLA certification, "approval may be denied or delayed."

In addition, she confirmed that leave specialists have discretion to decide what constitutes a pattern. The system will identify the pattern in accordance with the algorithm, but once a specialist reviews that pattern, he or she is free to ignore the pattern reminder and simply note in the record why they are not "processing" it further at that time.

Sedgwick's notes indicate that as a result of the pattern identified in the Grievant's leave records, his November 8<sup>th</sup> absence was no longer considered approved but was now "pending" FMLA approval. The notes also show that Lawrence called and spoke to the Grievant the same day, November 9<sup>th</sup>, advising him that a pattern had been identified with sixty percent of his absences, and that his November 8<sup>th</sup> absence and the remainder of his FMLA leave were now all in pending status. The notes go on to detail that Lawrence informed the Grievant that two letters were sent to his home address: one to him, explaining the recertification process and what was required of him, and the second addressed to his physician, Laco Mace, with instruction that this should be provided to the doctor for completion. The Grievant was given a November 26, 2012 deadline to submit the requested information.<sup>3</sup>

The November 9, 2012 letters, received into evidence, state that three of the Grievant's last five FMLA-requested absences were taken around scheduled days off, weekends, or holidays, and constituted 60 percent of all his absences. The letter to the Grievant's physician gives the same information, and adds that the physician should specifically address the Grievant's absence on November 8<sup>th</sup> on the attached certification form by the November 26, 2012 deadline. The letter warns the Grievant that "[i]f sufficient information is not provided in a timely manner, your remainder of your leave may be denied."

According to Sedgwick's notes, the Grievant next contacted Sedgwick on November 14, 2012 and requested 8 hours and 30 minutes of FMLA leave time. Under Sedgwick's pattern recertification policy, approval of this absence - which created a 67 percent pattern of FMLA use on days surrounding Grievant's scheduled days off -- was also pending the resolution of the pattern issue triggered on November 8, 2012. There was no further contact between the Grievant and Sedgwick until November 26, 2012 - the date on which Grievant's medical documentation supporting his pattern of absences was due. On that date, according to the Sedgwick notes, the Grievant called Sedgwick and stated he had never received the recertification forms and requested an extension. However, the claims specialist who had been handling the Grievant's claim called the Grievant back and spoke with his wife, who said she was aware of the deadline and had already faxed the forms to the Grievant's doctor. His wife stated that the completed forms would be in by the end of the day. The claims specialist explained that the decision would be made the next day, November 27<sup>th</sup>.

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<sup>3</sup> Lawrence did not testify at this hearing.

Guzman also testified that if a CTA employee provides Sedgwick with a compelling extenuating circumstance that would justify extending the deadline to submit his medical documentation, such as a death in the family or a doctor being out of the office, Sedgwick leave specialists have the discretion to grant extra time. If a request for an extension is denied by a leave specialist, Guzman testified that the matter is then submitted to her for approval or reversal of that decision. Nothing in Sedgwick's notes reflect that the Grievant or his wife mentioned an extenuating circumstance, or requested an extension of the deadline to submit his medical documentation.

Sedgwick sent a letter dated November 27, 2012 to the Grievant stating that Sedgwick did not receive the requested recertification form within the required time frame, and that his November 8<sup>th</sup> leave request had been denied as a result. The letter additionally stated the remainder of his leave, from November 9, 2012 through April 4, 2013, was also denied, including the leave he used for his November 14<sup>th</sup> absence. Sedgwick sent a similar letter to Grievant's CTA work location, stating that the Grievant's pending FMLA absences were denied due to his failure to provide the information. A Sedgwick leave specialist also called the Grievant's home on November 27<sup>th</sup> to inform him that his medical recertification was not received by the November 26<sup>th</sup> deadline, the November 8<sup>th</sup> and November 14<sup>th</sup> absences were denied, and the remainder of the claim closed.<sup>4</sup>

Under cross-examination, Guzman acknowledged that the November 8<sup>th</sup> absence did not contribute to any suspected "pattern," and that Sedgwick had no reason to believe that it was a misuse of FMLA leave. Rather, it was denied only because the Grievant failed to recertify on a timely basis. Guzman explained that the "pattern" should have been picked up and reviewed a month earlier, after the Grievant's absence on October 18<sup>th</sup>, but "the examiner must have missed processing it, so we waited until the next absence to occur." November 8 was that next absence, and because the pattern was then "processed," that date was swept into a "pending approval" category. If not for the pattern investigation, the Grievant's FMLA absence on November 8<sup>th</sup> would have been approved. In fact, Sedgwick's electronic file shows that on November 5 Guzman herself did a "60 day SR review" and concluded a "pattern does not apply at this time, most recent absence does not contribut [sic] to pattern." The Grievant's "most recent absence" as of that date was October 18.<sup>5</sup>

On November 28, 2012, Sedgwick received the requested recertification form via fax from the Grievant's doctor. In it, Dr. Mace explained that his patient has moderate "persistent asthma" and is incapacitated on days when it flares up, despite

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<sup>4</sup> On December 18, 2012, the Grievant's wife spoke to Sedgwick manager Kevin Kaiser and alleged that the claims specialist had given her an extension to December 4<sup>th</sup> in which to submit the form. Kaiser told her that there was no record of such an extension, and Sedgwick's denial decision remained unchanged.

<sup>5</sup> Guzman was never asked about this entry during her testimony.



being compliant "with all prescribed therapy."

Once the Grievant's November 8<sup>th</sup> and November 14<sup>th</sup> absences were no longer FMLA-approved, they were converted into regular sick book entries. Because these constituted the Grievant's sixth and seventh unexcused absences in twelve months, his managers subsequently disciplined him in accordance with the Guidelines. When Transportation Manager Aaron Crockett interviewed the Grievant on December 7<sup>th</sup>, the Grievant's only comment about the absences was that he was waiting for his FMLA leave to be approved. Mr. Crockett referred him to a higher-level manager on December 11<sup>th</sup> for further disposition.

On December 11<sup>th</sup>, Transportation Manager II Elizabeth Watlington interviewed Grievant regarding his sick absences. The "Employee's Comments" section from the Employee Interview Record indicates that the Grievant told Ms. Watlington he had submitted all of his medical paperwork to Sedgwick on time, but was told by Sedgwick on November 27 that his FMLA leave was denied. Ms. Watlington's December 19<sup>th</sup> Recommendation for Discharge states the reason for discharge consideration as excessive absenteeism, specifically excessive sick book entries. Watlington notes that upon review of all the facts of the case, she found no mitigating or extenuating circumstances to warrant a penalty less than discharge. The Grievant was then referred to the general manager of the 77th Street Garage for a discharge hearing on December 26, 2012.

On December 26<sup>th</sup>, the Grievant had a final interview with Acting General Manager Arnold Hollins, who testified at this hearing that he reviewed the Grievant's records, including the number of unexcused absences, and "based on my observation of the operator's record, he was in violation and he needed - it was time for him to be discharged." On cross-examination, when asked if he had the authority to decide whether or not to discharge an employee, Hollins responded that "after employee relations make sure that everything is proper, it's - it's basically a done deal." He recalled that he did not discuss anything having to do with the Grievant's medical condition, which is typically private information kept between the employee and Sedgwick, and did not review Dr. Mace's recertification form.

Hollins stated that he had not presided over many discharge hearings and had not given out many Last Chance Agreements, although he understood that under the Guidelines that he had that option. When asked by the CTA's counsel if he recalled the Grievant giving any information that would "make you question the recommendation for discharge," Hollins replied, "no." The Grievant was presented with a Notice of Discharge on December 26, 2012.

The Union filed a grievance challenging the Grievant's termination on December 26, 2012. Elvira Beltran, the CTA's Manager for Dispute Resolution, denied the grievance on February 21, 2013. The parties were unable to resolve the grievance, which proceeded to arbitration pursuant to the procedures set forth in the Agreement. At the hearing, all parties were afforded full and fair opportunity to

present testimony and evidence, to examine and cross-examine witnesses, to provide oral and written argument, and authority in support of their respective positions. The parties have stipulated that the grievance is properly before me for a final and binding resolution on the merits.

### POSITIONS OF THE PARTIES

According to the CTA, the Grievant's seven unexcused absences in a twelve-month period constituted sufficient cause for his termination. It asserts that his last two FMLA absences were properly considered unexcused absences because the Grievant failed to follow the CTA's FMLA-related procedures and requirements. He was told by telephone and in writing that he would have to submit documentation to support his absence on November 8 by the November 26<sup>th</sup> deadline, but failed to do so. The evidence established that the doctor's recertification did not arrive at Sedgwick until November 28<sup>th</sup> and that there was no extension of that deadline requested or given. The Guidelines provide that, "[a]ll FMLA rules and procedures must be followed." The CTA argues that FMLA approval was properly denied for the Grievant's final two absences, because he failed to adhere to CTA's FMLA rules and procedures and did not submit required medical documentation by the given deadline.

Further, the CTA asserts the Grievant knew the consequences of not submitting the requested documentation to Sedgwick by the deadline, and gave no indication that he did not understand his communications with Sedgwick. According to the CTA, at the time he attempted to use FMLA leave on November 14<sup>th</sup>, in particular, he knew that FMLA approval was pending and required timely action on his part. Nonetheless, he failed to ensure that the recertification document was submitted by November 26<sup>th</sup>. Moreover, he had received progressive discipline on prior occasions, and knew well the rules and the consequences of incurring seven unexcused/unapproved absences in a twelve-month period.

The CTA also maintains that the rules the Grievant violated were reasonable and that when other arbitrators have examined the issue of FMLA leave and an employer's attendance policy, they have determined that timely submission of medical documentation is a valid requirement for taking FMLA leave. Citing *Lau and United Steelworkers of America, Local 8768*, the CTA argues that non-compliance with such requirements has been found to be an appropriate reason to charge an employee with the absence. By not following CTA's procedures regarding FMLA use, the Grievant violated other CTA rules, all of which have been in effect in their current form since October 1, 1989, and serve the reasonable purpose of assisting CTA in managing its employees, equipment and time as effectively as possible in order to meet its goal of providing safe, clean, on-time, courteous and efficient service.

According to the CTA, the Grievant also received due process. Though he had the opportunity to, he failed to provide the documentation by the deadline and

offered no extenuating circumstances that would warrant an extension. He was also interviewed more than once in regards to the November 8<sup>th</sup> and 14<sup>th</sup> absences. The CTA notes that he was afforded the opportunity during these interviews to offer evidence that those absences should not be considered unexcused. According to the interview records, the only arguments he offered were that he was waiting for his FMLA approval and that he had submitted his medical documentation prior to the deadline. At his discharge hearing, the Grievant did not offer any explanation or mitigating circumstance that would prompt CTA to change its view of the evidence.

The CTA further contends that the Grievant's discharge was commensurate with his infractions. The Guidelines note that all FMLA rules and procedures must be followed, and once the Grievant failed to submit the required documentation timely, his final two absences were properly converted into unexcused absences. The CTA followed the Guidelines, administered progressive discipline and properly discharged him for his sixth and seventh unexcused absences.

Finally, the CTA argues that the Grievant was treated fairly, that all mitigating factors were considered, and that leniency is the prerogative of the employer, not the arbitrator. The weight of the evidence, including the credible and consistent testimony of the CTA's witnesses, demonstrate that discharge was appropriate given the Grievant's repeated and excessive absenteeism. The CTA asks that the grievance be denied.

The Union contends that the CTA has failed to meet its burden to prove that the penalty of discharge was appropriate, given all the surrounding circumstances. Specifically, the Union asserts that Sedgwick's pattern algorithm is unreasonable. In the Grievant's case, in order to avoid an alleged "pattern," he could have used his intermittent FMLA leave on only two days of the week: Thursdays and Fridays. According to the Union, this is unrealistic and unreasonable for anyone who suffers from a serious health condition, such as asthma, and also violates the basic tenets of due process. In addition, the Union maintains that Sedgwick's stated consequence for a late certification is in direct conflict with section 825.308 of the FMLA. At most, the FMLA leave should have been denied for November 27<sup>th</sup>, but once Sedgwick received the certification on November 28<sup>th</sup>, it should have reinstated Eskridge's FMLA leave. The Union contends it should not have disqualified November 8<sup>th</sup> and 14<sup>th</sup> as FMLA days.

The Union also argues that the Grievant's discharge was not in accordance with CTA's own policies and guidelines, since §4.6C of AP 1013 provides that the consequence for failing to submit required FMLA supporting documentation in a timely manner is that FMLA "...approval may be denied or delayed." Moreover, the Union asserts that the CTA's policy must be consistent with and not contradict the FMLA. On September 11, 2012, the Grievant was approved for FMLA leave from September 6, 2012 through April 4, 2013. The Grievant was asked to recertify on November 9<sup>th</sup> and to submit the medical recertification by November 26<sup>th</sup>. Under the present circumstances, because he failed to timely return the medical

recertification, the Union maintains that the CTA's recourse was to delay any more FMLA leave as of November 27<sup>th</sup>, until the medical recertification was submitted, which happened on November 28<sup>th</sup>. FMLA leave should not have been retroactively denied as of November 8<sup>th</sup>, because the Grievant had already been approved for FMLA leave through April 4, 2013.

The Union contends that AP 1013 fails to warn an employee that days which would otherwise be approved FMLA days could be taken away retroactively because of a failure to timely submit documentation. In addition, the Union notes that both section 4.10 of AP 1013 and the Guidelines provide that employees cannot be disciplined for taking an approved leave, and thus, the Grievant's approved leave should have been in place at least through November 26, 2012. The Union asserts that the November 8<sup>th</sup> and 14<sup>th</sup> absences should have been entitled to FMLA protection. Sedgwick readily acknowledges that the November 8<sup>th</sup> absence was a legitimate FMLA absence. The only reason why the November absences were retroactively denied was because on November 8<sup>th</sup>, Sedgwick belatedly realized that it had overlooked a possible pattern which it should have detected once the Grievant took his October 18<sup>th</sup> FMLA absence. According to the Union, the CTA cannot deny FMLA protection to FMLA absences that would have otherwise been covered in the course of an approved FMLA period. That period was halted on November 27<sup>th</sup> when Sedgwick determined that the Grievant failed to timely return the medical recertification by 11:59 p.m. on November 26<sup>th</sup>. However, in accordance with AP 1013, the CTA could have simply delayed FMLA leave from November 27<sup>th</sup> until it received the certification. In this case it was received on November 28<sup>th</sup>. As of that date, Sedgwick was under an obligation to reinstate his leave.

Further, the Union asserts that the CTA failed to follow the Guidelines and take into account the mitigating circumstances of this case or consider a Last Chance Agreement. There is no question that the Grievant called to take FMLA days on November 8<sup>th</sup> and 14<sup>th</sup>, and there is no evidence that he took these two days for anything other than his FMLA condition. According to the Union, the only reason why they were denied was because his doctor failed to return the medical certification on a timely basis. Acting General Manager Arnold Hollins testified that he accepted the discharge packet from Employee Relations as is, and basically rubberstamped the discharge. The Union argues that he never bothered to assess the FMLA absences of November 8<sup>th</sup> and 14<sup>th</sup>, or consider that the very first sick entry in the Recommendation for Discharge that occurred on November 15, 2011 would have dropped off on November 15, 2012, just one day after his last sick day, November 14, 2012. The Union asks that the Grievant be reinstated and made whole for all his lost wages and benefits, starting from the date that his legitimate FMLA days were denied.

## DISCUSSION

Very few facts in this case are actually in dispute. Indeed, the Union did not present any of its own witnesses to challenge the testimony of the CTA's witnesses

or establish alternative facts. There is no question that the Grievant was absent from work on November 8<sup>th</sup> and 14<sup>th</sup> and failed to provide the required medical recertification by the November 26<sup>th</sup> deadline. By the time his doctor faxed it to Sedgwick two days later, Sedgwick had already disapproved the FMLA leave used to cover those two absences. The Grievant was still on probation as a result of his prior attendance issues, and the November absences put him in a position to be discharged. Thus, it is easy to see why Acting General Manager Hollins, as he looked over the Grievant's file on December 26<sup>th</sup>, regarded it as "a done deal," especially after the Employee Relations staff had approved a draft Notice of Discharge. On the surface, this appears to be a routine case of an employee with a history of prior discipline for attendance violations. Hollins did not delve into the details of the Grievant's FMLA claim or the reasons for Sedgwick's disapproval of his FMLA leave. So for him, the additional unexcused absences in November made this an appropriate case for discharge.

The details that Hollins failed to review, however, make this case anything but routine in my view. The propriety of the Grievant's discharge turns on whether Sedgwick properly revoked FMLA approval for his November absences retroactively, based on the missed November 26<sup>th</sup> deadline. If Sedgwick acted appropriately, those absences were properly converted into sixth and seventh unexcused absences, making the Grievant eligible for discharge pursuant to the Guidelines. Upon careful consideration of the testimony, documentary evidence, arguments and briefs, however, I have determined that Sedgwick's determinations were not consistent with either AP 1013, or the federal FMLA regulations, and that the Grievant did not have adequate notice of the consequences for missing Sedgwick's deadline. Accordingly, the CTA lacked sufficient cause to discharge the Grievant. My conclusions and reasoning are set forth below.

The Union argues that Sedgwick's pattern algorithm itself is unreasonable, since only two days of the week could be taken as FMLA leave days and not counted toward a "pattern." I do not necessarily agree, given that the leave specialists have discretion to look at the surrounding circumstances and take into account the time frame. In addition, if necessary, an employee's medical provider can confirm that the leave is being appropriately taken. As described below, however, the troubling way Sedgwick administered its pattern procedures in the Grievant's case is another matter entirely.

Guzman testified that the Grievant's "pattern" should have been picked up and reviewed a month earlier, after the Grievant's absence on October 18<sup>th</sup>, but, "the examiner must have missed processing it, so we waited until the next absence to occur." However, Sedgwick's records reveal that Guzman herself reviewed his absences on November 5<sup>th</sup> and found that his most recent absence of October 18 did not support a pattern finding. Thus, it did not trigger the need for recertification. And yet, the Grievant's absence three days later, on November 8<sup>th</sup> – which Guzman testified did not contribute to evidence of a pattern – was reviewed and "processed" by a different leave specialist, who put into motion the recertification procedures

which ultimately led to the Grievant's discharge. As the Union points out, if not for that pattern investigation, the Grievant's absences would have been approved.

Two "pattern reviews" undertaken within five days of each other but resulting in different conclusions, strikes me as arbitrary and unfair, especially when the two most recent FMLA days did not even contribute to any alleged pattern, but it is the retroactive revocation of previously approved leave that requires reversal here. First, Sedgwick's November 9<sup>th</sup> letter to the Grievant, explaining the pattern finding and requiring a recertification form, did not put the Grievant on notice that Sedgwick could retroactively deny leave -- including leave previously approved and already taken -- if he failed to meet their deadline. It warned him only that "your remainder of your leave may be denied" (emphasis added). Although Sedgwick's electronic notes suggest that he was warned via telephone that approval for November 8 would be "pending," the failure to spell it out in the letter is critical. Given that he was told just two months earlier that his leave had been approved through April 4, 2013, I think there is great potential for confusion when the follow up letter does not explain that days already taken, as well as any time take before the November 26<sup>th</sup> deadline, could be retroactively denied.

Second, AP 1013 does not provide for retroactive denial of approved leave, or warn employees anywhere of such consequences for failing to timely submit recertification documentation. Section 4.16, which authorizes recertification requests, requires an employee to comply with Sedgwick's 15-day deadline but is completely silent on the consequences for late submission. Subsection E adds that the employee has the "same obligations" in the recertification process as in the initial certification. However, section 4.6 describes the consequences for untimely certification submissions as, "approval may be denied or delayed." Assuming *arguendo* that this provision applies to recertifications, in my opinion, it does not adequately authorize, or warn of, the retroactive denial of approved leave used in good faith by an employee with a flare up of his FMLA-qualifying health condition. Employees are entitled to know "what will befall them in the event they violate an employment policy or work rule." *The Common Law of the Workplace: the Views of Arbitrators* section 6.17 (BNA 1998). The Grievant may well have understood the attendance rules and the consequences for unexcused absences under the Guidelines, as the CTA argues, but he was not adequately informed of the consequences for failing to timely submit his recertification form.

Third, Sedgwick's practice of denying leave retroactively appears to be in direct conflict with the FMLA regulations, which describe the following consequences for failing to provide recertification documentation by the employer's deadline:

If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a

sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave.

29 CFR Section 825.313(c).<sup>6</sup> Thus, as the Union points out, at most Sedgwick should have denied the Grievant any further leave starting November 27<sup>th</sup>, but then reinstated it on November 28<sup>th</sup>, once it received the recertification form from Dr. Mace.

Furthermore, although Dr. Mace's completed recertification form arrived two days late, nothing in it suggests that the Grievant used leave inappropriately on either November 8<sup>th</sup> or 14<sup>th</sup>. If anything, the form confirms the unpredictable nature of asthma attacks, despite a patient's compliance with "all prescribed therapy." In fact, there is absolutely no evidence in the record that the Grievant used his November absences for anything other than FMLA leave. Thus, the Union's point that the Grievant has essentially been disciplined for taking FMLA leave - contrary to both the Guidelines and section 4.10 of AP 1013 -- is well taken.

In light of the foregoing, I find that the Grievant's November 2012 absences were improperly converted to "unexcused absences" and added to his five existing attendance violations. Accordingly, his discharge was not appropriate under the Guidelines.

Certainly, the CTA has the right to make reasonable rules, but employees must be adequately informed of the consequences of violating those rules. The CTA cites to Arbitrator Krislov's decision in *Lau and United Steelworkers of America, Local 8768*, 108 LA 136 (1996), where non-compliance with a submission deadline was found to be an appropriate reason to charge an employee with an absence. However, the employee in *Lau* had never actually applied for intermittent leave and did not submit her medical certification until six weeks after her discharge. In contrast, the required recertification documentation here was submitted just two days late, and was requested as a result of a "pattern inquiry" just two months after a six-month period of FMLA leave had been approved. Most importantly, though, the disciplinary action taken here is inconsistent with the relevant FMLA policy. Thus, the case before me is distinguishable from *Lau*.

I realize that the Grievant, through his own fault, failed to meet Sedgwick's deadline since he apparently waited until the 15<sup>th</sup> day to submit the form to Dr. Mace. The CTA requires employees to follow its FMLA rules and there should be consequences for missing such a deadline. Under the FMLA regulations, however, the appropriate penalty should be delay of future leave, not retroactive denial. Once the recertification form was signed by his medical provider and faxed in to Sedgwick, the remainder of his FMLA leave should have been reinstated. The Grievant's absences on November 8 and 14 were entitled to FMLA protection

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<sup>6</sup> Section 2 of AP 1013 affirms the CTA's policy "to comply with all provisions set forth in the Family and Medical Leave Act as amended."

regardless.

The CTA argues that the Grievant received all the due process to which he was entitled but failed to provide Watlington or Hollins with any compelling reason to excuse his absences rather than issue discipline. However, it is not reasonable to expect a layperson such as the Grievant to make the type of legal arguments presented by the Union here. In fact, without Sedgwick's records and Guzman's testimony, I doubt the Union would have had a clear enough picture of how Sedgwick administered the Grievant's FMLA claim and processed the purported "pattern." Moreover, the record raises considerable doubt as to whether Hollins would have entertained any such arguments in the final discharge hearing. He was inexperienced and apparently unclear about his authority to evaluate the case and reject the recommendation once Employee Relations had reviewed the file and approved the discharge.

#### AWARD

For all of the foregoing reasons, I have determined that the CTA lacked sufficient cause to discharge the Grievant. Therefore, the grievance is sustained. The Grievant should be reinstated; the discipline is to be removed from his record; and he is to be made whole for his losses. Upon reinstatement, he should continue to serve on probationary status until he has completed the full 6-month period begun in August of 2012. If he requires intermittent FMLA leave, he should file a new claim pursuant to AP 1013. As the parties stipulated, I will retain jurisdiction over this matter in order to address any issues relating to the remedy and the Grievant's mitigation of damages.

April 3, 2014



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Anita M. Rowe