In the Matter of Arbitration
Between:

COUNTY OF KENT
STATE OF MICHIGAN

and

KENT COUNTY EMPLOYEE'S ASSOCIATION

OPINION AND AWARD
Samuel S. Shaw, Arbitrator

Hearing Held
Grand Rapids, Michigan
October 19, 1981

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Appearances

For the County:
Robert Stone, Attorney

For the Union:
Craig Avery, Attorney

Witnesses

Randall Mack
Helen Brent

Ernest Figgures
Linda Figgures
Linda L. Ritz
The Grievance

Grievance No. 80-42  Date: 11/14/80

Section of Contract of Personnel Policy Manual Violated:
3.1, 16.1, 8.4(B) of the KCEA Contract. 900.1, 900.12 of the Personnel Policy Manual.

Nature of Grievance:
"I had received no registered certified mail to concur with my employer about disability extension, when there in fact was medical certification in regards to my disability. I had been in contact with my supervisor in regards to the status of my disability. The letter of termination was dated the same day I brought doctors statement for returning to employment, when after contacting my immediate supervisor, it was related to me to bring a doctors statement and I would be reinstated to my position. I feel I was unjustly terminated."

Suggested Adjustment or Solution:
"That I be reinstated to my former position as Mental Health Worker II at Kent Oaks Hospital and be reimbursed all lost wages effective from 11/17/80."

This grievance, having been denied by the Employer at all steps of the grievance procedure, was referred to arbitration.

The Hearing was held in the Grand Rapids offices of the Michigan Employment Relations Commission on October 19, 1981
before Samuel S. Shaw, Arbitrator, selected under the procedures of the Federal Mediation and Conciliation Service.

Both Parties were represented by counsel who were given full and ample opportunity to submit all pertinent documentary evidence, introduce and cross-examine witnesses and present arguments in support of their respective positions. The Parties mutually stipulated there were no issues of arbitrability, and the matter was properly before the Arbitrator. All witnesses were duly sworn and the proceedings tape recorded by the Arbitrator.

At the close of the oral Hearing, both Parties elected to file post-hearing briefs and agreed to mail them to the Arbitrator postmarked no later than November 6, 1981. Both briefs were received postmarked as agreed, and the Hearing was closed as of November 7, 1981.

Pertinent Contract Provisions

The following provisions, deemed pertinent by the Arbitrator, appear in the collective bargaining Agreement effective January 1, 1978 to December 31, 1980.
RIGHTS OF COUNTY

Section 3.1 Rights.

"It is understood and hereby agreed that the County reserves and retains, solely and exclusively, all of its inherent and customary rights, powers, functions and authority of management to manage the County's operations, and its judgment in these respects shall not be subject to challenge. These rights vested in the County include, but are not limited to, . . . . . . discharge for just cause; . . . . . ."

Section 5.11 Arbitrator's Jurisdiction.

"The arbitrator's powers shall be limited to the application and interpretation of this Agreement as written. He shall be at all times wholly governed by the terms of this Agreement and shall have no power or authority to amend, alter or modify this Agreement in any respect. . . . . . . . . . . . . . .

The arbitrator's decision shall be final and binding on the Association, the County and its employees, provided, however, either party retains all legal rights to challenge arbitration and decisions thereof where the award was procured by fraud or undue means, or where the arbitrator was guilty of misconduct or exceeded his powers or jurisdiction. . . . . . . . . . ."

SENIORITY

Section 8.4 Loss of Seniority.

"Seniority shall be lost and the employment relationship shall end under the following conditions:

(b) Absence from work for three (3) working days unless otherwise excused"

MISCELLANEOUS

Section 16.1 Discharge and Suspension.

"(a) The parties agree that the standards of just cause for imposition of discharge or disciplinary suspension are not the same as the standards required by law arising out of the alleged commission of crimes.
Therefore, any discharge or disciplinary suspension shall be based upon the standards of just causes, independent of the issuance of or the lack thereof of a criminal complaint.

Background

Kent County, Michigan operates the Kent Community Hospital Complex which includes Kent Oaks, a 50-bed psychiatric unit. Ernest Figures, the Grievant in this case, was hired by Kent Oaks as a Mental Health Worker I on September 28, 1978.

On March 28, 1980 the Grievant sustained a neck injury while on duty, and requested and received a medical leave of absence effective as of that date. The Leave of Absence stated, in pertinent part: "* * * * his physician has deemed him unable to work -- indefinitely."

According to the Grievant, he was admitted to the Grand Rapids Osteopathic Hospital on April 4th where "I had traction." He was discharged on April 12th.

On April 25th, at the request of the Employer, the Grievant reported to J.R. Williams, M.D., a neuro-surgeon, for an examination. The Grievant's problem was diagnosed as a
"herniated disc", and the Employer so notified by letter dated May 5, 1980. The Grievant was examined by Doctor Williams again on May 2nd and on May 16th, and the Employer advised of the results of each visit by letter.

On July 24, 1980 the Employer notified the Grievant by certified mail that he must supply medical certification of his illness by August 7th or "your leave of absence and employment status will be terminated". This letter was returned, unclaimed, on August 10th.

On August 14th the Employer sent a second letter to the Grievant, again by certified mail, stated that medical certification must be supplied by August 29th. The first letter, having been sent to the Grievant's address on file and returned, the second letter was sent to a second address where the Employer was understood the Grievant sometimes resided. The second letter was returned, unclaimed, on August 30th.

In early September, 1980 the Grievant went to Kent Oaks regarding his vacation pay. At that time he had a brief conversation with the Assistant Director of Nursing who advised him of the Facility's unsuccessful attempt to contact him by mail. The Grievant confirmed his current address was as recorded in his personal file. According to the Assistant Director, she
also advised the Grievant he must provide medical certification.

On October 22, 1980, no certification having been received, the Employer sent a third certified letter to the Grievant's address on record, advising that medical certification must be submitted no later than November 5th. This letter was returned, unclaimed, on November 9th.

In a certified letter dated November 17th, the Employer notified the Grievant that "**without medical certification, we regret to inform you that your employment at Kent County is terminated effective November 14, 1980. According to the Postal Service record, this letter was received on November 19, 1980. However, the Grievant claimed that prior to November 17th he had heard he was being terminated. Therefore, he obtained a release to return to work from a chiropractor who had been treating him, and reported to Kent Oaks on November 18th. At that time he was advised of his termination, whereupon he filed the instant Grievance.

Briefly, it was the basic position of the Employer it had been a long standing practice of the Facility to require a medical certification approximately every three months when an employee was on an extended medical leave of absence. In this
case, three attempts had been made to so inform the Grievant; all three by certified mail sent to the Grievant's last address of record. Moreover, although these letters were returned marked "unclaimed", it did not change the fact that every reasonable effort had been made to notify the Grievant that medical confirmation was required. Therefore, as the Grievant continued to ignore this requirement the Employer was left with no alternative but termination.

It was the position of the Union that the Grievant was never informed that any medical confirmation was required during a leave of absence. Furthermore, he never received the certified letters in question, despite the fact he had been living and receiving other mail at his recorded address. Therefore, there was no just cause for his termination.

Discussion

The Arbitrator recognizes that in the operation of a business, management has the responsibility to provide proper job coverage, and in so doing must be able to anticipate changes in employment levels. Therefore, it is not unusual for management to require periodic medical confirmation from an employee
who is on an extended medical leave of absence. In this case, the Employer's requirement that such confirmation be submitted at three month intervals is not only within the prerogatives of Management, but is understandable and reasonable.

However, although Management's right to establish such a requirement is without question, conjunctive with this right is the obligation to fully inform all affected employees of the requirement. After reviewing the submitted evidence, it is the conclusion of the Arbitrator that none of the employees had been informed, at least officially, of the subject requirement.

According to the testimony, it had never been posted, and although two employee handbooks had been issued, one in 1976 and a revised edition in 1980, neither makes any mention that an employee, on an extended medical leave of absence, must substantiate his or her medical status at any time during the leave period. Also, there is some question as to whether the employees were verbally informed of such requirement. Therefore, the Grievant cannot be faulted for failing to initiate a medical certification. Furthermore, had Management properly promulgated its requirement there would have been no need to resort to a mail notification procedure after the Grievant was

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already on a leave of absence.

With respect to the Employer's repeated attempts to contact the Grievant by certified mail, the Arbitrator has some reservations as to the validity of the Grievant's claim he never received any notification of the Postal Service's delivery attempts.

The Arbitrator acknowledges that in the past few years the Postal Service has been the subject of criticism with respect to its mail delivery. However, this criticism is rarely directed to its handling of certified or registered mail. Under the Postal Service's procedures, if a piece of certified mail is undeliverable, the carrier leaves a pink slip. Five days later, a second delivery attempt is made, and if still unclaimed, a second pink slip is left. From the date of the first delivery attempt, a certified letter can be claimedit at the local Post Office for a period of fifteen days before it is returned to the sender.

Although the above procedure is firmly established and well policed, the Arbitrator can accept the possibility that Postal Service might have bungled a certified letter delivery; however, it is difficult to believe it could have happened.
on three successive occasions, all within a matter of a few months, and all to the same addressee. Also, as the Grievant claimed he slept at his given address almost every night, it is difficult to understand how he missed finding any of the six notification slips that were probably left by his letter carrier. Admittedly, it is possible they were not left; however, it is highly unlikely a carrier would have "forgotten" to leave the required slips on six separate occasions.

Nevertheless, assuming, arguendo, that the Grievant did not receive notification of the certified letters, it is apparent that in early September he was so advised in person. By his own admission, when he went to the Hospital to inquire about vacation pay, the Assistant Director of Nursing told him of the unsuccessful attempts made to contact him by mail, and further, that he should submit medical certification to support his leave. Although the Grievant claimed he gave the Assistant Director the names of the doctors that had been treating him, such verbal information does not constitute medical certification. In short, it is difficult to understand why the Grievant would not have made an effort to find out why the letters had been sent, and what they contained. Also, why he ignored the request for medical certification until November, approximately two months after he was informed it was required. In the
Arbitrator's opinion, this apparent cavalier attitude belies the Grievant's claim he was always very concerned about his job.

The final argument presented by the Employer, and considered by the Arbitrator, was that by the Grievant's failure to respond to the certified letters, his continued absence "became an unauthorized leave"; therefore, he was in violation of Section 8.4 (b) and (d). This Section provides for loss of seniority under the following situations:

"(b) Absence from work for three (3) working days unless otherwise excused.

(d) Failure to return to work at the expiration of a leave of absence, unless otherwise excused ***."

The Arbitrator would agree that under many situations this argument might well be considered conclusive. However, in this case the subject leave was originally issued for an "indefinite" period, with no conditions attached. Therefore, it would not expire until he returned to work with a work release statement, or it was otherwise canceled. For the leave to have been canceled, the Grievant would have had to have been so notified. With exception of the matter of the certified letters, no evidence was presented that established the Grievant was notified his leave was canceled. No one, with the exception of
the Assistant Director of Nursing, ever talked to him, and at that time the conversation was limited to the question of the certified letters, and the need for medical certification. Under these circumstances, therefore, it is the conclusion of the Arbitrator that neither (b) or (d) of Section 8.4 would apply.

In summary, the Employer has the right to require any employees on a medical leave of absence to reconfirm their medical status at periodic intervals. However, in the exercise of such right the Employer is obligated to notify all affected employees of the requirement at the time it is established. This notification should be clear and fully comprehensive, and should set forth all procedural requirements.

In this case, no such notification was provided, either prior to, or at the time the Grievant was issued his leave of absence. In fact, the leave stated it was for an "indefinite" period, with no conditions indicated.

The evidence indicates the Grievant was verbally informed of the medical certification requirement early in September; however, whether he received any notification prior to that time is a matter of debate. Although the Arbitrator has some
very strong reservations with respect to the Grievant's testimony that he did not receive any of the certified mail notifications, it is acknowledged that there is a possibility that such could have happened.

Therefore, after considering the evidence as a whole, particularly that involving the receipt of the certified letters, it is the Arbitrator's opinion that under the circumstances, termination was unwarranted.

However, the Arbitrator is satisfied that in early September the Grievant was verbally informed he must submit some documentation of his medical status. Also, that repeated efforts had been made to contact him at his last known address. Nevertheless, he made no effort to find out why the Employer was trying to reach him, and of even more significance, failed to comply with the request for medication confirmation. Therefore, it is the Arbitrator's opinion this completely disregard of the Employer's request justified disciplinary action.

     AWARD

For the reasons discussed herein, it is the finding of the Arbitrator there was no just cause for termination. Therefore, the Grievant is to be reinstated to his former position, seniority permitting, or if not, to a position of equal level for which he is qualified.
However, for the reasons stated, some disciplinary action was justified. Therefore, the Grievant is suspended for a period of six months to be calculated from the date of his discharge, or to May 14, 1981.

He is to be reimbursed for money lost from May 14, 1981 to the date of his reinstatement. In calculating this reimbursement, the Employer may deduct any monies received by the Grievant during the period from May 14th to his reinstatement.

Samuel S. Shaw, Arbitrator
Grand Rapids, Michigan
December 15, 1981