VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration
Between:

MARQUETTE COUNTY,

Employer,

-and-

Log No: A24584-2914-11

MI AFSCME COUNCIL 25, AFL-CIO,
LOCAL 2914,

Union.

Gr: Linda Beauchaine/Termination

APPEARANCES

On Behalf of the Employer:

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On Behalf of the Union:

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Marquette, MI 49855

Arbitrator:

JOHN A. LYONS

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OPINION AND AWARD

BACKGROUND/FACTS

The Grievant, Linda Beauchaine, had been transferred pursuant to a Letter of Understanding (Joint Ex. 6) from her position as Deputy County Treasurer II to a new position as "Records Technicians-Sheriff" at the Marquette County Sheriff's Office. The Letter of Understanding is dated February 25, 2011 with a start date of February 28.

The Grievant was terminated on March 14, 2011 allegedly because she called in sick and requested time off when she did not have accumulated sick time. Apparently, she was able to use accumulated personal, vacation or other time in her past position to cover sick time. This practice was not maintained in the Sheriff's Department however. The Union filed a grievance March 17 (Joint Ex. 4). The parties were not able to resolve the grievance and it was appealed through the procedures to Step III. The Step III meeting was held on April 15, 2011 however the written disposition was not given

within ten days of the Step III meeting. The Union requested that the provisions of Article 13, Step 3, paragraph (f) be implemented. That paragraph states in relevant part: "Any grievance not answered within the time limits by the Employer shall be deemed settled on the basis of the Union's last demand. . . . " The lack of answer after the Step III meeting was the basis for the Union's threshold argument that the grievance should be granted.

On the other hand, the Employer argues that there was a past practice, if you will, of granting extensions to comply with the grievance procedure by the parties. Apparently, there was one such extension granted to the Union involving this same Grievant, in 2010. Moreover, the parties did not necessarily strictly comply with the procedure for selecting dates and setting meetings but rather did so often by phone call. This was a variance from the contract.

As suggested by the parties, there are two issues to be resolved. The first, is the threshold issue raised by the Union. If that issue is denied, then the merits of whether there was just cause to terminate the Grievant based upon her calling in sick when she had no medical leave to cover the absence would be addressed.

The hearing in the above case occurred on May 9, 2012. Both parties submitted post-hearing briefs. The following witnesses testified: Anne Giroux, County Treasurer; John Greenberg, former H. R. Director; Michael Lovelace, County Sheriff; Jack Schneider, Undersheriff; and Sherrie Ennett, Deputy Sheriff.

In addition to the above testimony the following exhibits were admitted into evidence.

J-1 Collective Bargaining Agreement
J-2 County Policy Manual
J-3 Notice of Termination

J-4 Grievance Chain
J-5 Seniority List
J-6 Letter of Understanding 2/25/11
J-7 Grievant's receipt of Policy Manual
E-1 Oral Reprimand 2/26/10
E-2 Written Reprimand 4/15/10
E-3 Written Reprimand 12/9/10
E-4 Suspension 2/7/11
E-5 Grievant's time sheet for the last pay period
E-6 A different version of the same time sheet

ISSUES

WHETHER THE GRIEVANCE SHOULD BE GRANTED BASED UPON THE THRESHOLD ISSUE RAISED BY THE UNION UPON THE WRITTEN FAILURE TO OBTAIN AN EXTENSION OF TIME IN THE THIRD STEP OF THE GRIEVANCE PROCEDURE, OR IF NOT HAS THE EMPLOYER ESTABLISHED JUST CAUSE FOR THE TERMINATION OF THE GRIEVANT?

DISCUSSION

The Grievant's seniority is August 8, 1996 or approximately fourteen years seniority. She did not apparently have a disciplinary record prior to Ms. Giroux becoming the new County Treasurer. The discipline in Employer Exhibits 1 through 4 came after.

The Grievant was transferred under the Letter of Understanding (Joint Ex. 6) which has been referred to by the Employer as a Last Chance agreement. It is not described in those terms, rather it is stated in paragraphs 8 and 13 to be an "extraordinary measure" in an "extraordinary situation". The Grievant worked for approximately two weeks at the Sheriff's Department and was terminated. The termination is contained in Joint Ex. 3 and in relevant part states:

> Termination is based upon your calling in sick on March 9, 2011 and March 10, 2011 when you did not have accumulated medical leave available for use. Pursuant to Article 34-Medical Leave, (d) "Medical leave shall not be taken before being accumulated (except as described in Article 25). Medical leave may not be taken during the pay period in which it is

> earned." According to the Accounting/Personnel records, you had 4.5 hours medical leave available to you on March 9, 2011, and March 10, 2011. You missed a total of 16 hours of work. As such, you have violated the contract by taking medical leave before you had any accumulated time to use. This is a direct violation of Article 34 and termination is for cause.

A grievance was filed, Joint Ex. 4, on March 17, 2011. That grievance could not be resolved. It was appealed to the third step in an email sent to then H.R. Director John Greenberg by Joe Benson, President of Local 2914 at the time. He sent the following on May 5, 2011.

> Due to the lack of a written disposition from the Human Resources Manager within the ten days after the Step III meeting, which was held on April 15, 2011, Local 2914 is invoking Article 13, Step III, Paragraph F; which states, "any grievance not answered within the time limits by the Employee shall be considered settled on the basis of the Union's last demand.
>
> The last demand is that of relief sought on the original grievance dated March 17, 2011. The grievant should be reinstated as soon as possible.

On May 5, Mr. Greenberg sent the following to the Business Agent, John Thomas:

> As you may recall, almost one year ago, on May 26, 2010, you called me to state that Judy Phare, a union steward, had unintentionally missed a response deadline for a grievance filed by Linda Beauchaine and you requested we waive that deadline and grant an extension for her response. I agreed to the extension and the grievance was allowed to proceed. Today the shoe is on the other foot. I unintentionally missed the deadline of May 2nd for responding to our step three meeting held on April 15th. At this time I am asking that you grant me an extension of six business days for supplying a written response to that step three meeting.

Mr. Thomas responded on May 9 in a letter written to Mr. Greenberg:

> This letter is in follow up to the notice that Local 2914 President Joseph Benson sent you on May 5, 2011. As stated in Mr. Benson's letter, you failed to respond with a written disposition within ten (10) days following the Step III grievance meeting held on April 15, 2011. This is a violation of the current Collective Bargaining Agreement according to Article 13, Step III, Paragraph F. By failing to respond within the given time line, the

grievance shall be considered settled in accordance with the Union's last demand.

. . .

Also, in response to the letter I received from you on May 5, 2011, I admit that the Employer has granted extension on time lines at the Union's request, and that the Union has also granted extensions upon the Employer's request. However, the grievant Linda Beauchaine is fully aware of her rights within the Collective Bargaining Agreement and does not give permission to the Union to grant a six (6) day extension per the Employer's request. The Union shall honor Ms. Beauchaine's wishes and expect her reinstatement to be without further delay. Please notify the Union of her reinstatement date, along with calculations of making her whole from her termination date by May 18, 2011. Failure to provide us with a reinstatement date by May 18, 2011 will leave the Union no other choice but to assume that the Employer is refusing to return Ms. Beauchaine back to work. If this is the case, the Union will then proceed forward to Arbitration and will reserve the right to use the time line argument during the Arbitration hearing.

. . .

The thrust of the Employer's argument is that the parties had a history of cooperation and lax observance regarding grievance response deadlines to wit, a past practice. Accordingly, despite the untimely response at Step III, the grievance should be decided on its merits. It urges the parties have a practice of accommodating one another if a deadline was inadvertently missed. The County did waive a deadline in 2010. It is the only example of waiving deadlines for the grievance procedure that has been presented as evidence of a practice between the parties. Apparently, with regard to establishing and setting meetings the parties did have an informal regular practice of a "few years" establishing meetings over the phone. It urged that this is also evidence of lax observance and should be considered a part of a custom between the parties and deny the Union's sudden insistence on the ten day written response deadline placed in Article 13, Step III.

On the other hand, the Union urges that contract language is clear and sets forth in subparagraph (f) that "any grievance not answered within the time limits by the Employer shall be deemed settled on the basis of the Union's last demand . . . " Interestingly, subparagraph (g) "Any grievance not appealed by the Union within the time limits shall be deemed settled on the basis of the Employer's last answer." These provisions are unequivocal. Unless a valid past practice is established that modifies or abrogates these clear contract directives, the Arbitrator would have no choice but to honor the Union's argument. The Employer urges cases cited in Elkouri, 2010 supplement for the proposition that arbitrators hesitate to enforce time lines where there is lax observance. In the cases cited, however, cases are clearly distinguishable. There were long histories of mutual extensions. It is not true in this case. There has been one example of extension. A strong proof of a practice can modify clear language, but clear evidence is required.

As we know, past practice in order to be binding on both parties must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonably long period of time as a fixed, and established practice accepted by both parties. Sporadic occurrences do not rise to the level of a past practice. The argument presented in this case by the Employer suggests that the practice can modify or override clear contract language to the contrary. There are arbitrators that hold that a long standing and well accepted practice may prevail even over clear and express provisions in an agreement. *Burrow of Plum and Police Officers of Plum*, 123 LA 641, 644. But, in that case there was mutual agreement. The better holding is that past practice cannot trump unambiguous contract terms. *Jefferson Co. Sheriff's Office*, 119 LA 124, 127-128 (deputy assignments).

Lastly, arbitrators have consistently held even if a party has not policed or requested enforcement of its contract in the past it has the right to do so at any point. See cases cited in note 5, Elkouri, How Arbitration Works, 2010 cumulative supplement, p. 242.

A claimed practice, in order to modify clear and unequivocal language, such as Article 13, Step III(F) must be supported by strong evidence of a clear, consistently followed custom, over a reasonably long period of time, that mutually establishes a way of doing business between the parties. Common Law of the Workplace, §2.20(a), St. Antoine, Ed., citing, 59 Mich Law Rev. 1017 Mittenthal (1961).

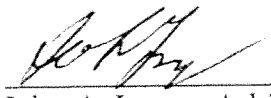
Here, the evidence did not meet the muster. It did not establish a clear practice that modifies the meaning of Article 13, Step III(f).

AWARD

After reviewing the evidence as submitted it is the finding of the writer that the evidence is not sufficient to establish a practice that would override the clear language of the contract. Therefore, the grievance should be granted and according to the terms of Article 13, Step III (f), this grievance should be considered settled based on the terms of the Union's last demand. That demand was stated in Joint Ex. 4 is for the Grievant "to become whole in every way including back pay, seniority, and accumulated leaves as of March 15, 2011. The days of March 9 and 10, 2011 will be time off without pay for not having enough medical leave."

The grievance request that the contract provisions of Article 13, Step III(f) should be applied is granted. Therefore, it is not necessary to discuss the merits of the case or the just cause basis for termination.

Respectfully submitted,



John A. Lyons, Arbitrator

Dated: September 14, 2012