REVIEW COMMITTEE DECISION

Review Committee File Nos. 1199, 1202, and 1261
Humboldt Division Grievance Nos. D.Gr/C 19-72-3 and D.Gr/C 19-72-7
San Joaquin Division Grievance No. D.Gr/C 25-73-2

Statement of the Cases

The above-subject Review Committee cases are directed at a central question concerning the employees' status before and after termination of pregnancy--first, when the maternity leave must start; secondly, whether the employee is entitled to sick leave pay and for how long while on a "maternity" leave; and thirdly, voluntary wage disability payments thereafter.

The first of the three grievances before the Review Committee involves all three questions. The grievant, a PBX Telephone Operator B, procured a statement from her physician indicating that she was physically capable of remaining at work until the time of her confinement, estimated as May 25, 1972. The doctor's statement was transmitted to her supervisor shortly after March 24, 1972. Nevertheless, although there is nothing in the record before the Review Committee to indicate anything out of the ordinary, the supervisor informed her that she must commence her maternity leave on May 8, 1972. The employee did as she was directed but was later called back to work on May 15, in the interim losing the five days' pay, the basis of her first grievance.

She worked until May 30, 1972, when, at her request, she was granted a leave of absence for the birth of her child and remained on this leave until August 7, 1972. Prior to that time, she had procured a written statement from her doctor that she was capable of returning to work July 14. The record does not indicate the reason for the delay between July 14 and August 7, although the grievance which was filed on her behalf seeks recovery of sick leave or voluntary wage disability for the full period of the leave of absence.

The second grievant was granted a leave of absence for maternity reasons starting January 1, 1972, and remained on the leave until June 30, 1972. Again, there is nothing in the file as to why the employee was off the payroll for that lengthy period of time. The correction sought here, like that involved in the first grievance, requests that the employee be paid sick leave or voluntary wage disability for the period of the leave of absence.

There is no evidence before the Review Committee to indicate that there were any complications before or after termination of the pregnancies. With this in mind, the following discussion and decision as to both grievants is premised on the conclusion that we are dealing here with a normal pregnancy and a normal termination of pregnancy.

Discussion

1. Background

To bring this issue into focus, it is necessary to briefly review some of the history surrounding the Company and Union negotiations with respect

to the question of "maternity leaves of absence."

Prior to 1966, the Clerical Labor Agreement dealt specifically with the employee's status while on a "maternity leave of absence" and the conditions controlling the employee's return to work following the termination of the pregnancy. At that time, the Agreement treated leaves for this purpose differently than other leaves granted for an "urgent and substantial reason." As to the latter, the employee's position could not be filled permanently while the employee was on the leave, but rather was held for the employee provided she returned upon the expiration of the leave.

Maternity leaves, however, were specifically dealt with in a separate section of the Labor Agreement (Section 6.2(b)). In the first place, such leaves were restricted to six months; and upon the granting of the maternity leave, the position was considered vacant and filled on a permanent basis through other provisions of the Labor Agreement (Title 18). Upon her return from maternity leave of absence, the employee was reinstated in her former position if it happened to be vacant. If not, she must seek appointment to a vacancy in a lower classification; or if none were available to her, then she was placed on layoff status.

The section pertaining to maternity leaves of absence was amended in 1966 in such a manner as to provide to her some assurance, but not an absolute guarantee, of getting her former job back. Later, following the 1968 issuance of the Federal Equal Employment Opportunity Commission guidelines, the Union and the Company agreed to strike the special provisions for maternity leaves from the Labor Agreement. From that time on, "maternity leaves of absence" have been granted under the remaining sections of the Agreement for an "urgent and substantial reason," and thus treated as any other leave of absence and were expanded from six months to possibly one year. Additionally, as her position could now only be filled temporarily, reinstatement in her job was assured if it still existed.

2. Sick Leave Policies with Respect to Maternity Leaves of Absence

The Company's policies in this regard have not been codified, as have many of its other policies, but seemingly have been left to local application to meet the particular circumstance of the situation at hand. This flexibility has not made the present task of the Review Committee any easier. While there have been grievances filed over the period of years at the local level, either they have been resolved or disposed of short of the Review Committee.

Despite this, it can be said, with perhaps some reservation, that the following has been the general application:

a. Preconfinement - Commencement of Leave and Payment of Sick Leave

As to the latter question, to be realistic, the Review Committee must assume that sick leave has undoubtedly been paid many times in the past for day-to-day, pregnancy related illnesses or disabilities, ie., morning sickness and the like. This is so because the Company seldom makes an investigation of the employee's reason for short periods of absence unless the employee has a very poor sick leave record. For this reason, undoubtedly, many payments have been made for usual short-time periods of illness prior to the termination of the pregnancy.

As to the requirement of commencing a leave of absence, the Review Committee is also cognizant of a period of time several years ago when employees were required to commence a maternity leave of absence many months before their actual confinement. The practice has stopped; and at least with the exception of the one case at hand, the Review Committee is unaware of any employee being required to commence a maternity leave of absence before her doctor certifies that she should not continue on at her work. An exception to this might occur where the work that the employee performs would be detrimental to her or the unborn child's well-being where, although the Committee knows of no such instance, she might properly be assigned other work or put on leave.

b. Post-Confinement

As a matter of policy, the Company has not paid sick leave to employees during and after confinement for the normal termination of the pregnancy. However, where complications arise or further disability associated with termination of the pregnancy occurs, sick leave has been paid. Generally, the latter are associated with complications for which the employee's hospitalization plan provides benefit payments. Additionally, many employees desire to remain at home for a period of time beyond that necessary following the confinement and recuperation. And in these instances also, of course, sick leave has not been paid.

c. Post 1968

Preliminary to examining the reason for striking the special provisions for granting "maternity leaves of absence" from the Agreement, it is worthwhile to note that the question here actually predated the issuance of the 1968 EEOC Guidelines. Title 7 of the Federal Civil Rights Act of 1964 first contained the triggering language prohibiting disparity of treatment between the sexes. The question involving "maternity leaves of absence" policies, however, received little attention until 1968, although during the 1966 negotiations the Company and the Union amended their Labor Agreement Sections 1.2 to incorporate the antidiscrimination provisions of the Act:

> "It is the policy of Company and Union not to discriminate against any employee because of race, creed, sex, color or national origin."

As it is pertinent to the question of when such an employee may be required to commence a maternity leave of absence and for how long the leave must continue, the Equal Employment Opportunity Commission's Guidelines provide, in part, (Section 1604.10(b)):

> "Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave...shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to the other temporary disabilities." (Underlining added)

It should be noted that most of the court cases decided to date have emphasized that, while not law, the Guidelines are to ge given considerable weight by the court in arriving at their decision of contested

matters concerning the leave and sick policies of a company. Broadly construed, then, the policy as it relates to the first grievance involved here simply means that an employee cannot be forced to commence such a leave of absence without pay unless there is either a bona fide work related reason or a medical one involving the pregnant employee's well-being or that of the unborn child.

Turning now to the specific question of sick pay, the Equal Employment Opportunity Commission Guidelines provide (id.):

> "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment."

Read literally, there would seem to be little room left for doubt as to an employee's qualifying for disability or sick pay at least at the termination of the pregnancy and for some indefinite period of time thereafter to recover from the termination. The legal efficacy, however, of these Guidelines has been a matter of considerable controversy recently before the courts and various administrative agencies dealing with state or company administered unemployment disability compensation plans and, as in the case here, employer-paid sick plans. The Review Committee is also cognizant of cases of a similar nature involving interpretations of Labor Agreements like the one in dispute here which have been heard and decided by Boards of Arbitration. One fact is not in dispute, however, and that is that there is little unanimity of opinion between the courts, administrative agencies, and arbitrators. Because there is this diversity of opinion, the Review Committee can reasonably anticipate that the issue it must decide here will shortly go before the United States Supreme Court for final resolution.

3. PSEA Voluntary Wage Disability Plan

To this point, we have dealt primarily with controverted matters which are unquestionably subject to the grievance procedures of the Agreements between Company and Union. However, inasmuch as the grievances filed in this matter also raise issues concerning payments under the PSEA Voluntary Wage Disability Plan, it is necessary to turn back to a more fundamental issue. In this instance, a threshold question here involves whether or not the Plan itself is subject to the grievance procedures of the Labor Agreement. In short, does the Review Committee have jurisdiction over the Plan so as to reach a final and binding decision?

On that question, there is an unreconcilable difference of opinion between the Company and the Union which, if it were necessary to decide, cannot at this time be answered short of arbitration. On the record before the Committee, however, it can be mutually agreed that side-stepping the issue at this time will not work to the prejudice of either grievant and will permit the Review Committee to dispose of the issues over which it unquestionably has jurisdiction. To make it perfectly clear, then, in proceeding to a decision on the issue of "sick pay" in these grievances, the Committee does so with the understanding that the positions of each of the parties as to whether or not the PSEA Voluntary Wage Benefit Plan is a proper subject to be resolved under

the grievance procedures of the Labor Agreements are preserved and are not prejudiced in any way by this Decision. This understanding is reached on these facts:

One of the grievants, and possibly the other, filed an appropriate cause of action with the California Unemployment Insurance Division which, after appeal, granted disability payments commencing June 28 and ending July 14. Subsequent to that, the grievant through her attorney filed a Writ of Mandamus in the Superior Court in San Francisco for further disability payments from May 26 to August 1, 1972, or, in the alternative, from June 28 to July 31, 1972. The Company has been joined in all of these proceedings. The decision of the Review Committee with respect to sick leave will cover a part of that period; and as the employee is not entitled to both sick leave and voluntary wage disability, a portion of her concern will be resolved and, as to the remainder, that is a matter for the court in disposing of the Writ of Mandamus.

Decision

1. Review Committee Case No. 1199 Under the facts set forth above, the requirement that the grievant commence her "maternity leave" May 9, 1972, was improper. The grievant is entitled to pay for the period in question.

2. Review Committee Case Nos. 1202 and 1261 The Review Committee is unable to resolve the basic issues raised in these two cases. It is the Committee's decision, however, that it would be impractical at this time to refer the matter to arbitration as would be the usual course of events under the procedures set forth in the Labor Agreement. Therefore, the cases will be resolved and settled in the following manner: Such settlement will be final and binding on the grievants, Union, and Company as to the amounts set forth; however, each will acknowledge that such settlement is a compromise to avoid arbitration and is not an admission on the part of the Company that such amounts are owing to the grievants under any provision of the Labor Agreement. And further, for the same reason, Union's and grievants' acceptance of such compromise settlement shall not be construed as an admission on their part that payments alleged to be due under the PSEA Voluntary Wage Benefit Plan are not a proper subject to be resolved under the provisions of Title 9 - GRIEVANCE PROCEDURE - of the Clerical Labor Agreement.

F. Santillan	$ 137.82
C. Wahlund	$ 112.77
L. N. Foss	
Secretary, Review Committee	Chairman, Review Committee
7-30-74	7-30-74
Date	Date