

## BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

BROWN COUNTY  
(MENTAL HEALTH CENTER)

and

BROWN COUNTY PROFESSIONAL  
EMPLOYEES UNION, LOCAL 1901-E  
(REGISTERED NURSES),  
AFSCME, AFL-CIO

Case 383  
No. 41641  
MA-5424

### Appearances:

Mr. James W. Miller, Staff Representative, Wisconsin Council 40, AFSCME,  
AFL-CIO, on behalf of the Local Union.

Mr. John C. Jacques, Assistant Brown County Corporation Counsel, on behalf  
of the County.

### ARBITRATION AWARD

According to the terms of the 1987-1988 collective bargaining agreement between Brown County, hereafter the County, and the Brown County Professional Employees Union, Local 1901-E. (Registered Nurses), AFSCME, AFL-CIO, hereafter the Union, the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and resolve a dispute involving whether Mary Steckart (hereafter the Grievant or Steckart), should have received holiday pay for the Thanksgiving holiday in 1988 which occurred while Ms. Steckart was on an approved, unpaid leave of absence. The undersigned was designated and after having made full written disclosures to the parties to which no objections were filed, hearing in this case was held on April 6, 1989 at Green Bay, Wisconsin. No stenographic transcript of the proceedings was taken. The parties agreed to submit briefs but they waived the right to file reply briefs. All briefs were received by the undersigned by June 1, 1989.

### ISSUE

The parties were unable to stipulate to the issue or issues before the arbitrator, but they agreed to grant the undersigned the authority to frame the issue(s) herein. Therefore, based upon all of the relevant evidence in this case, the issue shall be as follows:

Did the County violate the collective bargaining agreement

when it failed and refused to pay the Grievant, Mary Steckart, holiday pay for the Thanksgiving holiday in 1988 which occurred while Ms. Steckart was on an approved, unpaid leave of absence; if so, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

### ARTICLE 2. RECOGNITION AND BARGAINING UNIT

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The parties agree that at all times during the period in which the Union is certified as the bargaining agent for employees described above, the parties shall not:

(a) Refuse to bargain in good faith with each other regarding mandatory subjects of bargaining at any time during the period the Union is certified nor change nor threaten to change any wages, benefits, or terms of conditions of employment which are mandatory subjects of bargaining at any time during the period the Union is certified.

### ARTICLE 6. MAINTENANCE OF BENEFITS

The Employer agrees to maintain existing benefits that are mandatory subjects of bargaining and are not specifically referred to in this Agreement.

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### ARTICLE 10. HOLIDAYS

The following shall be recognized as paid holidays referred to in this article: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, one-half (1/2) day on Good Friday, one-half (1/2) day on the day before Christmas, one-half (1/2) day on the day before New Year's Day, and Personal Day (three - to be taken with prior approval of supervisor). One personal holiday is to be taken in the first four (4) months of the calendar year; the second personal holiday is to be taken in the second four (4) months of the calendar year; and the third personal holiday is to be taken within the last four (4) months of the calendar year. The day off will be scheduled on a date that is mutually agreeable between the employee and the supervisor.

### ARTICLE 13. LEAVE OF ABSENCE

Any employee who wishes to absent himself from his employment for any reason other than medical leave, bereavement, jury duty, or any other reason specifically provided for in this Agreement, must make application for a leave of absence from the Employer. Whenever possible, all requests for leaves shall be made in writing at least fifteen (15) days previous to the start thereof. The Employer shall determine whether or not justifiable reason exists for granting a leave of absence. No leave shall be granted for the purpose of seeking other employment. The term "other employment" shall not include election or appointment to Federal, State, County or Municipal offices or fulltime Union duties. Such leaves must be renewed at the end of the period. Upon return from said leave of absence (not exceeding ninety (90) days) the employee shall return to the position held at the time the leave of absence was granted. The Union shall be notified of the leaves granted and the duration of such leave.

Insurance while on Leave: An employee on granted leave of absence without pay shall be allowed to continue to maintain hospital and surgical care, dental, and life insurance, providing the employee pays the full premium in advance each month to the business office.

### ARTICLE 18. SICK LEAVE

All employees covered by this Agreement shall earn sick leave which shall accrue at the rate of eight (8) hours of sick leave for each calendar month of service.

(a) SICK LEAVE: Sick leave allowance shall be accumulated in the employee's base sick leave account until a maximum of nine hundred sixty (960) hours has accrued. The list of accumulated hours shall be posted each January.

(b) ABSENCES: Sick leave credits in any given year shall not be earned for any period of absence without pay or times otherwise not worked or paid for, except that for administrative purposes any approved absence or absences may be disregarded.

(c) ACCRUAL REQUIRED BEFORE USE: Sick leave shall not be used until it has been accrued.

- g. (sic) SICK LEAVE ON HOLIDAYS: In the event that a holiday falls on a regular work day within the week or weeks taken as vacation or sick leave, such holiday shall not be charged as vacation or sick leave. Such holiday may be taken in conjunction with the vacation whenever possible.

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## BACKGROUND

The Grievant has been employed by the County as a Registered Nurse for approximately the past five years. In 1988, the Grievant suffered an injury to her neck which was not work-related but which later required surgery. As a result, the Grievant went on paid sick leave and then when her sick leave ran out, she went on an approved leave without pay while recuperating from her neck surgery. Whether the Grievant is entitled to holiday pay for the Thanksgiving holiday (November 24) in 1988, which occurred while the Grievant was on her unpaid leave of absence, is the ultimate issue raised in this case.

## STIPULATED FACTS

The parties stipulated to the following facts upon which the Union principally relied, choosing, as it did, not to call any witnesses herein:

1. Mary Steckart requested and received a leave of absence without pay which commenced on October 5, 1988 in the afternoon, and she returned to work therefrom on December 15, 1988.
2. Mary Steckart was not paid holiday pay for Thanksgiving, 1988.
3. On September 1, 1988 Steckart requested to use one personal day on November 25, 1988 and on September 2, 1988 Steckart's request was approved by her supervisor. This was all prior to Steckart's request for and the commencement of her leave of absence without pay.
4. Under the effective agreement, unit employees get three personal days off with pay per year, one day to be used (with supervisory approval) or lost in each four-month period.

## ADDITIONAL FACTS OF RECORD

The Employer called several witnesses which the Union cross-examined. The Union chose not to call any witnesses, as stated above.

Nancy Tomchek-May, Personnel Coordinator for the Mental Health Center who had worked for the Center in various capacities, including payroll, since 1974, testified that on September 1, 1988 the Grievant requested in writing to use her third personal day on November 25, 1988. The Grievant's supervisor approved this request on September 2nd and forwarded the necessary form to the scheduling office. On October 13th, the scheduling office marked the

form "approved" and recorded it in the schedule. 1/ On November 23, 1988, payroll processed the request for this paid personal day for Steckart.

Documentary evidence submitted by the County showed that on September 6, 1988, the Grievant went on paid sick leave due to the injury to her neck; that Ms. Steckart had used up all of her accumulated sick leave by approximately noon on the afternoon of October 5, 1988. Sometime prior to October 5, 1988 but after September 2, 1988, the Grievant made a verbal request for an approved leave of absence without pay. This request was granted and Ms. Steckart began her leave of absence without pay on the afternoon of October 5, 1988. Ms. Steckart returned to work from this leave of absence on December 15, 1988. The only day for which the Grievant received pay between the afternoon of October 5th and December 15th was November 25, 1988, for which she received personal day pay. The only contractual named holiday which fell during the Grievant's leave without pay was Thanksgiving. The Grievant did not receive holiday pay for Thanksgiving.

As a general rule, Tomchek-May stated, the scheduling office puts together employee schedules by listing scheduled work hours for each employee during each two-week pay period based upon their seniority. Consistent with County practice, while Steckart was on sick leave and unpaid leave of absence, the scheduling office continued to set up Steckart's schedules but the County arranged in each instance for another employee to fill in for Steckart. Tomchek-May stated, and the County's records showed, that Steckart was scheduled to work on Thanksgiving (November 24) and on November 25, 1988. Tomchek-May stated that the reason Steckart had been granted a paid personal day for November 25th was due to several factors. First, Steckart had requested and had received supervisory approval to use a personal day for November 25th prior to Steckart's requesting and going on paid sick leave. Second, Tomchek-May stated that she believed Steckart was entitled to the personal day despite being on unpaid leave of absence at the time because if Steckart were not allowed to use this personal day as she had requested, Steckart would have lost the paid personal day off entirely, pursuant to the contract.

Tomchek-May further stated that it has been her experience with the County that employees in this unit cannot and have not accrued vacation benefits while on leave without pay but that employees on such leaves accrue seniority. Tomchek-May stated that Steckart was treated consistently with these policies.

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1/ Ms. Tomchek-May stated that the scheduling office normally approves time off based upon the number of employees available to cover facility operations on a particular day. The scheduling office can deny a request for paid time off if there are insufficient employees available to work. If this occurs, the scheduling office returns the leave request form to the employee with an indication that the request for leave was denied.

Also, Tomchek-May testified that pursuant to the contract, employees like Steckart who take unpaid leaves are not entitled to full benefits during their unpaid leaves, but that employees on vacation or paid sick leave are entitled to full benefits. In this regard, Tomchek-May stated that, in her opinion, the only benefits to which Steckart was entitled while on leave without pay were ongoing Workers' Compensation protection, accrual of seniority and the right to purchase insurances through the County by paying the full premiums in advance. Tomchek-May noted that Steckart had paid for her own insurances for the months of October through January but that the County had reimbursed Steckart for premiums paid in December and January. 2/ Tomchek-May also testified that in keeping with County policy, Steckart had accrued vacation for the months January through October, 1988 since Steckart had been on the payroll as of the first day of each of those months; but Steckart did not accrue vacation in the months of November and December, 1988, based upon this first-day-of-the-month principle.

Ms. Tomchek-May stated that, in her opinion, the accrual of vacation benefits in Article 19 and the definition in Article 19(a) of "Continuous Service" has no bearing on the County's actions in this case. Tomchek-May stated that, in her view, continuous service determines the rate at which an employee may earn vacation which, Tomchek-May claimed, is different from the accrual of benefits. Finally, Tomchek-May testified without contradiction that since the advent of the Union in 1980, no unit employee has been paid for a named regular holiday while the employee was on an unpaid leave of absence; and that this issue has never been raised by the Union or any employee before the instant grievance was filed. Tomchek-May stated that another unit employee, Brooke Murawski, had previously been on an approved, unpaid leave of absence during a holiday period and Ms. Murawski had not sought pay for the regular, named holidays which fell during her unpaid leave.

James Deprez, Administrator of the Mental Health Center since 1980, essentially corroborated Ms. Tomchek-May's testimony. He stated that during his tenure, the County has never paid an employee in any bargaining unit or any of the County's administrative employees for a named holiday which occurred while the employee was on an unpaid leave of absence. Deprez also stated that in his capacity as a member of the Center's, bargaining team he could not recall any instance in which the Union had either brought up or requested during negotiations that employees on unpaid leaves should be paid for contractual, named holidays. Finally, Deprez stated that it has been the County's policy not to pay employees for holidays falling during an unpaid leave of absence. In his opinion, Deprez stated that the agreement does not require such payments,

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although Deprez also admitted that the agreement does not prohibit holiday pay payments to employees on unpaid leaves.

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2/ Tomchek-May stated that the County's policy is that if an employee is on the payroll on the first day of the month, the County will pay the full County contribution toward all insurances for that employee, and the employee will accrue vacation and other benefits for that month.

## POSITIONS OF THE PARTIES

### Union

In its grievance form, the Union cited the following provisions of the agreement as relevant here: Article 2(a); Article 6, paragraph 1; Article 10, paragraphs 1 and 2; Article 18(g).

In its brief, the Union argued that the grievance should be sustained and the Grievant made whole for the Thanksgiving holiday, 1988. The Union noted that Article 18 merely requires that the person be a "regular full-time employee" in order to be eligible for holiday pay and that the Grievant must have been such an employee in order to have received approval for an unpaid leave of absence under Article 13. The Union also noted that Article 18 contains no other qualifying language, such as language requiring eligible employees to have worked the scheduled day before and/or the scheduled day following the holiday. Furthermore the Union pointed out that Article 13 of the agreement does not limit entitlement to holiday pay while on a leave of absence. Rather, it merely limited the absent employee's entitlement to insurance coverage while on a leave. The Union also pointed out that entitlement to vacation benefits under the contract is not cut off by a leave of absence (Article 19). 3/ Finally, the Union

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3/ ARTICLE 19. VACATIONS reads as follows:

All regular employees shall be entitled to a vacation. Each employee shall earn annual vacations, based on the anniversary of employment in the following manner:

One (1) year of employment.....5 work days per year  
at 40 days pay

Two (2) years of employment.....10 work days per year  
at 80 hours pay

Five (5) years of employment.....15 work days per year  
at 120 hours pay

Eight (8) years of employment.....16 work days per year  
at 128 hours pay

Ten (10) years of employment.....18 work days per year  
at 144 hours pay

(Footnote 3/ continued on page 8)

pointed out that where a holiday falls during a period that an employee is on vacation or sick leave, such holiday is not to be charged against sick leave or vacation, as provided in Article 18.

Based upon these provisions, the Union argued that it is reasonable to conclude that the Grievant was entitled to receive holiday pay for Thanksgiving, 1988. In essence, the Union asserted that nothing in the agreement specifically prohibits such a finding of entitlement. In addition, the Union contended that granting the Grievant holiday pay for Thanksgiving, 1988 would be wholly consistent with the County's decision to grant the Grievant a paid personal day for the day after Thanksgiving (November 25, 1988). The Union asserted that both

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3/ (Continued)

Thirteen (13) years of employment.....	19 work days per year at 152 hours pay
Fifteen (15) years of employment.....	20 work days per year at 160 hours pay
Eighteen (18) years of employment.....	21 work days per year at 168 hours pay
Twenty (20) years of employment.....	23 work days per year at 184 hours pay
Twenty-five (25) years of employment.....	25 work days per year at 200 hours pay

(a) CONTINUOUS SERVICE: Continuous service shall include all the time (sic) employee has been in continuous employment status in a regular position. The continuous service (sic) an employee eligible for a vacation shall not be considered interrupted if he:

1. was on an approved leave of absence,
2. was absent on military leave,
3. was absent due to injury or illness.

days were contractually paid holidays and that it was therefore logically inconsistent for the County to grant one paid holiday, a personal day, while denying the Grievant pay for the Thanksgiving holiday.

### County

The County argued that the grievance should be denied and dismissed. The County asserted that the purpose for granting holiday pay is generally to insure that employees do not suffer a loss of expected earnings due to the fact that they do not work on a holiday falling during their normal work week. This purpose, the County contended, would not be served by paying the Grievant (then on an unpaid, approved leave of absence) for the Thanksgiving holiday in 1988. Furthermore, the County asserted that as a general rule, arbitrators do not grant holiday pay in the absence of a specific provision calling for holiday pay while an employee is on such a leave of absence.

Thus, the County contended, since there is no specific provision requiring it to pay holiday pay to those on leaves of absence, the County urged that no such holiday pay should be granted to the Grievant here. In this regard, the County argued that personal days and holidays are distinguishable under the agreement. The County argued that a personal day, unlike a contractual (national) holiday, clearly vests in the employee for a particular four-month period and must be

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3/ (Continued)

(b) **COMPUTING YEARS OF SERVICE:** In determining the number of full years of service completed, credit shall be given for all time employed by Brown County in a regular position. Only the most recent period of continuous service may be counted in determining an employee's length of service.

(c) **ELIGIBILITY:** After completion of the first twelve (12) months in a regular position, employees shall be granted noncumulative vacation based on accumulated continuous service as set forth above.

. . .

(e) **TERMINATION CREDIT:** If an employee terminates his employment for any reason during the year, he shall receive vacation pay at the rate of one twelfth (1/12th) of the total from the anniversary date of his employment to the termination date for each month of service during that year in addition to any accumulated vacation due to the employee for prior credits.

used with the approval of the supervisor during that four-month period or it is lost. Since the Grievant requested to use one personal day on November 25th and since she received supervisory approval to use that personal day prior to going on her unpaid leave of absence, the County argued, implicitly, that the Grievant's use of a paid personal day on November 25th is neither material nor relevant to whether the County is required to pay the Grievant holiday pay for a national, contractually-recognized holiday falling during her unpaid leave of absence.

The County pointed to evidence of past practice which it asserted showed that the County has never paid an employee on an unpaid leave for a national, contractually-recognized holiday falling during the period of his/her unpaid leave. The County also pointed to Article 13 and 18(g), neither of which mention that those on unpaid leaves of absence are entitled to holiday pay. Specifically, the County noted, that since Article 18(g) does not mention unpaid leaves of absence but does address itself to holiday pay/time-off entitlement for those on sick leave or vacation, a conclusion is inescapable that the parties intended to exclude those on unpaid leaves of absence from the holiday pay/time-off entitlement.

## DISCUSSION

This case hinges upon the proper construction of several Articles of the effective agreement and an analysis of how these Articles work together and/or separately. Initially, I note that Article 10, "Holidays," does not specifically cover what the outcome should be in the situation at hand.

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3/ (Continued)

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Article 10 merely lists paid holidays, describes personal days and employee entitlement to and usage of these benefits. In regard to employee entitlement to the three personal days detailed in Article 10, I note that the language clearly indicates that so long as the employee schedules a personal day on a date that is within the four-month period and so long as the date selected is mutually agreeable to the employee and his supervisor, the employee will receive one personal day in each four-month calendar period without further limitation. This analysis of the Article 10 language relating to personal days is also consistent with the County's position in this case and its past practice.

Article 18(g) is the section of the sick leave provision which addresses itself to what should occur when a holiday falls during an employee's vacation or sick leave. It is significant in my view that personal days and unpaid leaves of absence are not mentioned in Article 18(g). Thus, I believe that by excluding these items, the parties evidenced an intent that Article 18(g) should be specifically applicable only to those situations listed therein--where a holiday falls during a week or weeks in which an employee has taken vacation or sick leave and the holiday otherwise would have fallen on the employee's regular work day. Furthermore, the covered benefits listed in Article 18(g)--sick leave and vacation--both involve employees who are in pay status. There is no mention of any application of Article 18(g) to non-paid situations. In addition, I note that Ms. Tomcheck-May and Mr. Deprez stated without contradiction that since at least the advent of the Union, the County has never paid an employee for a holiday which fell during the employee's unpaid leave; and that recently, such a situation occurred with former employee Murawski, and that Murawski did not grieve the denial of holiday pay for holidays that fell during her unpaid leave of absence. In all of these circumstances, Article 18(g) is not applicable to the Grievant's case.

I turn now to Article 19, "Vacations." The Union asserted that since the Grievant's service was continuous during her unpaid leave and since she was a regular employee and entitled to her annual vacation under Article 19 despite her unpaid leave, she should have received Thanksgiving holiday pay as well. I disagree. As I read Article 19, it states that all regular employees are entitled to a vacation based upon their years of continuous service with the County. Article 19 does not mention either holidays or personal days. Significantly, the clause relating to "continuous service" is contained in the Vacation Article only and the continuous service concept does not appear in sections of the contract dealing with Holidays, Sick Leave or other Leaves of Absence. Had the parties intended the concept of "continuous service" to be more broadly applied, they could have reserved an article number for the provision and separated it from the Vacation provision or they could have used the concept in other Articles of the agreement. The parties chose not to do this. In my opinion, by placing the continuous service provision in Article 19, the parties made it clear that they intended that an employee's years of service for purposes of calculating annual vacation entitlement would not be diminished by the employee's taking an approved unpaid leave. A broader application of the concept of continuous service is simply uncalled for in this case. Thus, I conclude that the continuous service language of Article 19 properly applies only to vacations and is not applicable in this case.

The Union has also argued that Articles 2(a) and 6 at paragraph 1 support its arguments in this case. I can find no violations of these portions of the agreement based upon the facts of this case.

The Union is correct in its assertion that Article 18 does not require or limit an employee's right to claim holiday pay by, for example, requiring the employee to have worked the day before and/or the day after the holiday. This lack of limitation, however, does not require a conclusion that employees on unpaid leaves must be paid holiday pay while on such leaves. In my view, it defies logic to assert that an employee who has requested and received approval for an unpaid leave of absence could expect that he/she would receive holiday pay while on such an unpaid leave. Article 13 makes clear by its exclusions as well as its statements what specific benefits the employee on an unpaid leave can expect to receive: the right to purchase insurances through the County. The fact that the parties did not mention employee entitlement to holiday pay, vacation or sick leave during an unpaid leave, in these circumstances leads to the necessary conclusion that the parties never intended an employee in non-paid leave status to receive these benefits.

I am not persuaded by the Union's argument that because the contract does not prohibit payment of holiday pay to an employee on an unpaid leave, that I should order the County to pay the Grievant for the Thanksgiving holiday. It is a generally accepted arbitral principle that for an arbitrator to order that a specific benefit be paid, there should be either an affirmative and specific contractual basis for such an order, or if the contract is silent on the subject there should be a clear, consistent and long-standing past practice of paying the benefit before such an arbitral order would be appropriate. Neither of these situations exists in this case.

Nor am I persuaded by the Union's argument that the County's payment for the Grievant's November 25th personal day is inconsistent with its refusal to pay the Grievant for Thanksgiving, 1988. As discussed in detail above, I believe that personal days are distinguishable from paid holidays under the agreement, such that one personal day vests automatically in each employee in each four-month period so long as a date therein for the personal day is mutually agreed upon and approved by the supervisor. Paid holidays are not treated in this manner under Article 10.

In this case, the Grievant fulfilled all of the contractual requirements and she was therefore properly paid for one personal day. The fact that the Grievant later went on an unpaid leave of absence did not affect (and should not have affected) the County's payment of one personal day's pay to the Grievant in these circumstances. The Grievant's entitlement to one personal day's pay simply has no bearing upon or relevance to the question whether she was entitled to Thanksgiving holiday pay while on an unpaid leave.

Based upon all of the relevant evidence in this case, I conclude that the grievance must be denied and dismissed.

AWARD

The County did not violate the collective bargaining agreement when it failed and refused to pay the Grievant, Mary Steckart, holiday pay for the Thanksgiving holiday in 1988 which occurred while Ms. Steckart was on an approved, unpaid leave of absence.

Dated at Madison, Wisconsin this 17th day of July, 1989.

By \_\_\_\_\_  
Sharon Gallagher Dobish, Arbitrator