

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 POLK COUNTY JOINT COUNCIL, :
 LOCAL 774-D, AFSCME, AFL-CIO : Case 54
 : No. 41604
 and : MA-5421
 :
 POLK COUNTY (GOLDEN AGE MANOR) :
 :

Appearances:

Mr. James Ellingson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 68, Rice Lake, Wisconsin, on behalf of the Union.
Mulcahy & Wherry, S.C., Attorneys at Law, 21 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin, by Ms. Kathryn J. Prenn, on behalf of the County.

ARBITRATION AWARD

Polk County Joint Council, Local 774-D, hereafter the Union, and Polk County (Golden Age Manor), hereafter the County, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, that the Wisconsin Employment Relations Commission appoint an arbitrator to hear and decide a dispute concerning the meaning and application of the terms of the agreement relating to funeral leave. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing, which was not stenographically recorded, was held in Balsam Lake, Wisconsin, on February 9, 1989. The County submitted written argument on March 13, 1989; the Union submitted a letter brief on June 30, 1989. Neither party submitted a reply brief.

ISSUE

Did the County violate Article X of the collective bargaining agreement when it denied the grievant's request for three (3) days of paid funeral leave?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

III.

RELEVANT CONTRACT PROVISIONS

ARTICLE VIII - SICK LEAVE

. . .

Section 8.04 Employees having reached the maximum sick leave accumulation limit shall have their account balanced according to the days used and earned in that calendar year.

. . .

ARTICLE IX - LEAVES OF ABSENCE

Section 9.01 Applications for a leave of absence for personal reasons shall be made to the (Institution GAM: Administrator) (Social Services: Director) (Highway: Commissioner) (Courthouse: Department Head).

Section 9.02 The Administrator, Director, Commissioner or department head may grant a leave of absence for thirty (30) days or less. Leaves of more than such time must be brought before the (Institution GAM: Board of Trustees) (Social Services: Social Services Board) (Highway: Highway Committee) (Courthouse: Respective Department Committee). Leaves of absence will not be unreasonably withheld.

Section 9.03 All leaves of absence shall be without pay. No fringe benefits shall be earned during a leave

of absence. No leave of absence shall be granted to seek other employment. Employees shall be granted a leave of absence for a period of up to two (2) years for serious illness or injury after the employee has exhausted accrued sick leave and vacation benefits.

Section 9.04 Seniority shall continue to accrue throughout the leave of absence up to thirty (30) days.

Leaves of absence of more than thirty (30) days shall not count toward seniority. Individuals on a leave of absence for five (5) days or less per anniversary year will not be prorated for sick leave, vacation or insurance.

. . .

Section 9.06 Employees shall make their own arrangements in advance for payments of health and surgical insurance for any full calendar month they are on leave of absence.

. . .

ARTICLE X - FUNERAL LEAVE

Section 10.01 In the event of a death of a member of the employee's immediate family, he/she shall receive three (3) days leave with pay at his/her regular rate of pay. Immediate family shall be defined as husband, wife, mother, father, children, stepchildren, sister, brother, grandparents, mother-in-law, father-in-law and grandchildren. In the event of a death of an employees brother-in-law or sister-in-law, he/she shall receive one (1) day leave with pay at their regular rate of pay.

Section 10.02 Additional time off may be applied for as a leave of absence.

Section 10.03 Employees will be allowed the necessary time off on the day of the funeral, with pay, to serve as a pallbearer. The employee shall notify the department head one (1) day prior to the funeral of his/her pending absence.

. . .

ARTICLE XVII - VACATIONS

Section 17.01 Effective January 1, 1976, employees shall earn paid vacations according to the following schedule:

A. Employees shall receive one (1) week vacation with pay for one (1) year of service;

B. Employees shall receive two (2) weeks of vacation with pay for two (2) years of service;

C. Employees shall receive three (3) weeks of vacation with pay for eight (8) years of service;

D. Employees shall receive four (4) weeks of vacation with pay for fifteen (15) years of service;

Section 17.02 The County agrees to pay all accrued vacation benefits, including the current year's benefits, on retirement and/or termination of employment.

Section 17.03 Upon completion of the initial probationary period, employees will be allowed to take their earned vacations on a prorated basis. Vacations must be taken in the anniversary year following the year in which it is earned or be forfeited, except that employees may elect to carry over up to one-half (1/2) of that vacation credit in the next anniversary year. Any vacation carried over must be taken in the carry-over year or be forfeited.

Section 17.04 Employees will be allowed to take split vacations and may elect to take vacation periods of one (1) day at a time. Employees must notify the Employer

of their intentions to take one (1) day of vacation as far in advance of that day as possible. The provisions of Appendix "D" shall apply to Golden Age Manor employees.

Section 17.05 Employees will be granted a leave of absence consecutive to their earned vacation as follows:

. . .

ARTICLE XXIX - ENTIRE MEMORANDUM OF AGREEMENT

Section 29.01 This agreement constitutes the entire Agreement between parties and no verbal statements shall supersede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that during negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and that opportunity are set forth in this Agreement.

BACKGROUND

The essential facts are generally not in dispute. The Grievant, Esther Hoffman, is a janitor at the County's Golden Age Manor. On April 7, 1988, she applied for an unpaid leave of absence for the period April 18 - July 18, to care for her seriously ill husband. The County granted this leave on April 13.

On June 21, Hoffman requested this leave be extended, starting on July 18 and ending on a date unspecified. This leave was granted on July 14.

On August 6, Hoffman's husband died. By mutual agreement, Hoffman determined her return-to-work date, and resumed her duties approximately ten days after her husband's death.

After returning to work, Hoffman requested three days paid funeral leave, which request was denied.

POSITION OF THE PARTIES

The Union contends that the relevant contractual language supports its position, in that the section cited by the Employer in denying the funeral leave request states that no fringe benefits "shall be earned" during a leave of absence. Implicitly, this must refer to those fringe benefits (e.g., sick leave, vacation and seniority) which compound based on length of work service, and not to funeral leave, which remains constant. Moreover, the collective bargaining agreement does not state that employes on a leave of absence are ineligible for funeral leave. On the basis of the clear and unambiguous language, the grievance should be sustained.

The County contends that funeral leave is not a financial bonus which an employe receives as compensation for the loss of a loved one; rather, it is a benefit which enables an employe to arrange for and attend the funeral without having to take time off and suffer a loss in pay. As the Grievant here was already on an unpaid leave of absence, and thus did not miss work due to her husband's death, she was not entitled to funeral leave. This conclusion is in accord with arbitral awards denying funeral leave pay to an employe already absent from work due to vacation.

The County further contends that past instances (one employe being denied funeral leave which she sought while on pregnancy leave, another being denied funeral leave which she sought while on leave of absence to care for a dying relative) indicate a consistent and standard response which must stand as precedent in this case.

The County concludes by expressing its sympathy to the Grievant, but, on the basis of contract language, arbitral authority and past practice, it urges denial of the grievance.

DISCUSSION

A woman takes an unpaid leave of absence from her job as a nursing home janitor to care for her seriously ill spouse. During her time off, he dies. Upon her return to work a fortnight hence, she files for three days paid funeral leave. Her request is rejected, as is her resulting grievance. The matter is brought to arbitration.

As arbitrator, my duty is to interpret the contract, and not to impose an award based on my perceptions of equity, mercy or justice. Notwithstanding the seriousness of the underlying matter, the usual rules of contract interpretation apply; thus, I first will consider the contract itself, to determine whether the plain meaning of its words provides a sufficiently clear answer.

The parties agree that Sec. 9.03 is critical to this controversy; predictably, they disagree on what Sec. 9.03 means. As noted above, this provision states that all leaves of absences shall be without pay, and the "(n)o fringe benefits shall be earned during a leave of absence . . .". The County's denial of the funeral leave was premised on this provision. The Union focuses on the word "earned", arguing that it connotes accumulating benefits, rather than utilizing them. That is, according to the Union, benefits which compound based on time at work (e.g., sick leave, vacation, seniority) are covered by this exclusionary clause, while funeral leave, which does not increase based on tenure, is not. Unfortunately, a standard reference book, the American Heritage Dictionary, fails to clarify this question, in that its definition of "earn" as "to gain or deserve" actually provides support for both positions (i.e., the Union position is that "no fringe benefits shall be gained", while the County counters that "no fringe benefits shall be deserved . . .").

Reference to other provisions of the contract, however, does provide support for the Union's interpretation. Clearly, sick leave and vacations are examples of fringe benefits. Article VIII, Section 8.02 (A) provides that regular full-time, regular part-time and regular seasonal employes "shall earn sick leave at the rate of one (1) day of each month of employment". Section 8.04 relates to employes with maximum sick leave accumulation having their account balanced according to the days "used and earned" in the relevant calendar year. Thus, in the article immediately proceeding the article on leaves of absence, the contract expressly differentiates between the earning of benefits and their usage.

A similar structure is present in the article on vacations, where Article XVII, Section 17.01, provides that employes "shall earn paid vacations according to the following schedule", which schedule is expressed terms of length of service. Further, Section 17.03 provides that nonprobationary employes will be "allowed to take their earned vacations" in a certain manner, and that vacations "must be taken" in the anniversary year in which "it is earned". Other aspects of Article XVII continue this schemata, e.g., Sections 17.04 and 17.05. Thus, again the contract expressly differentiates between the creation of a benefit (its being earned) and the use of a benefit

(its being taken). Here, then, the contract expressly provides for fringe benefits being earned on the basis of length of service; these, then, are the sort of fringe benefits which the contract contemplates when it states that "no fringe benefits shall be earned during a leave of absence". In contrast, the funeral leave allowance exists independent of length of service, other than expiration of the six-month probationary period. There is nothing in the contract to indicate that funeral leave is "earned" in the way discussed above; rather, an employe "shall receive" the funeral leave in the event of a death of a family member. Thus, reading this provision in context with the rest of the contract, I believe the Union's analysis has merit.

The contract provision ultimately at issue, of course, is Sec. 10.01, which states, in part, that, "(i)n the event of a death of a member of the employee's immediate family, he/she shall receive three (3) days leave with pay at his/her regular rate of pay". There are several noteworthy aspects about this provision, all of which support a broad interpretation.

Of primary import is the fact that the specific purpose of the leave is undesignated, other than being in connection with the death of a family member. That is, unlike in a good percentage of other contracts, this provision does not rest the leave on attendance at the funeral, travel, or other activities. It is also of paramount importance that the provision is non-specific regarding the days on which funeral leave may be taken; again, this is broad, rather than narrow, language.

Contract interpretation is based on contract language, and the language of this contract is decidedly different from the language in the arbitration cases cited by the County. In Murdock Machine & Engr. Co., 62 LA 547, the leave was available for "the first three (3) scheduled working days" following notification of the death. The contract at issue in Dayton Rogers Mfg. Co., 61 LA 382, provided that qualification for funeral leave "must be necessitated by the death and circumstances. It is not intended to compensate for time off merely because of the event of death." Similarly, the contract at issue in South-Western Publishing Co., 79 LA 82, explicitly restricted funeral leave to "three (3) work days for time lost from his regularly scheduled work due to the death and attendance at the funeral . . .". As these cases establish, the parties herein could well have made restrictive understandings explicit, if such understandings were indeed intended.

It is my presumption that contract interpretations which would lead to subtle shenanigans or reward duplicity are to be avoided. In that respect, it is noteworthy to recall what the Grievant did -- compared to what she could have done -- immediately upon the death of her husband. What she did was to inform the County that she would be returning to work in about a fortnight; what she could have done was to end her unpaid leave of absence promptly (the duration of which was left to her discretion), returned to work, and immediately taken her funeral leave. The County apparently acknowledges that such a course would have been consistent with even its interpretation of the contract. Such a course, however, is not one which I feel should be encouraged; good labor/man-agement relations must be based on straight dealings, not on clever manipulations. But the fact that such a course would have gotten for the grievant her funeral leave strengthens, in my mind, the Union's argument under the facts as they did occur.

The County's essential contention is that an employe who is already on an unpaid leave of absence cannot be eligible for a supplemental, paid funeral leave. But, as the distinguished arbitrator Sylvester Garrett has said, "it is hard to visualize anything more intimately connected with a death than being with the deceased in the final stages of a terminal illness". (United States Steel Corp., 57 LA 421.) As arbitrator Garrett explained in awarding funeral leave for time off taken prior to the death of the family member, "(s)ome element of judgment occasionally may be required on a case-by-case basis, and due heed given in a nonrecurring case of this sort, to achieving essential fairness when consistent with the manifest policy" of the funeral leave provisions.

The two instances of previous denials which the County cites establish, at most, that Hoffman was not prejudiced by disparate treatment. However, since one instance involved a pregnancy leave, and the details concerning the other are only sketchy, these occurrences do not constitute a binding past practice.

Hoffman took her leave of absence for the express purpose of caring for her terminally ill husband. A pronounced change in his condition -- either recovery or death -- would obviate her need for this leave. But upon his death, a new need arose -- the need for funeral leave. The manifest policy of funeral leave is to allow the bereaved employe the ability to tend to, and attend, the funeral of a designated family member, without loss of pay. Consistent with this policy, it is my judgment that essential fairness, and the essence of the collective bargaining agreement as reflected by the broad language therein, requires that, in this case, this Grievant be granted three days paid funeral leave.

Accordingly, it is my

AWARD

That this grievance is sustained, and the County shall pay to Esther Hoffman three (3) days pay at her regular rate of pay.

Dated at Madison, Wisconsin this 3rd day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Stuart Levitan, Arbitrator