

BEFORE THE ARBITRATOR

In the Matter of the Arbitration :
of a Dispute Between :
 :
ONEIDA COUNTY HIGHWAY EMPLOYEES, :
LOCAL UNION #79, AFSCME, AFL-CIO : Case 61
 : No. 41725
and : MA-5448
 :
ONEIDA COUNTY (HIGHWAY DEPARTMENT) :
 :

Appearances:

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Oneida County Highway Employees Local Union #79, AFSCME, AFL-CIO.
Mr. Lawrence Heath, Corporation Counsel, on behalf of Oneida County.

ARBITRATION AWARD

Oneida County Highway Employees, Local Union #79, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to chair the Arbitration Board and to hear and decide the instant dispute between the Union and Oneida County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned was appointed to arbitrate in the dispute. 1/ A hearing was held before the Arbitration Board on May 17, 1989 in Rhinelander, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by June 28, 1989. Based upon the evidence and the arguments of the parties, the Arbitration Board issues the following Award.

ISSUES

The Union would frame the issue as being:

Did the employer violate the Agreement by its failure to pay the grievant funeral leave upon the death of his wife's grandmother? If so, what is the remedy?

The County first raises an objection that the grievance is not procedurally arbitrable. With regard to the substantive issue, the County would frame it as follows:

Did the County properly comply with the provision of the contract in this matter?

IT is concluded that the issues to be decided may be stated as follows:

(1) Is the grievance procedurally arbitrable?

If the grievance is arbitrable, then:

(2) Did the County violate Article 21 - Leave With Pay, Section A, of the parties' 1988 Collective Bargaining Agreement when it denied the Grievant's request for funeral leave for attending the funeral of his spouse's grandmother? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The parties cite the following provisions of their 1988 Agreement:

AGREEMENT

The Oneida County, (sic) hereafter referred to as the "County", by its Personnel Committee, hereafter referred to as the "Committee", and the Oneida County Highway Employees, Local Union 79, of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to hereinafter as the "Union", hereby

1/ The undersigned was appointed to replace Arbitrator Askins who had subsequently become unavailable.

reach agreement for the purpose of enhancing the material conditions of the employees, to promote the general efficiency of the Oneida County Highway Department and to promote the morale, well-being and security of the employees. . . .

. . .

Article 6 - Grievance Procedure

. . .

Section D: If the grievance is not settled to the satisfaction of the Union, it shall be submitted, in writing, to the Personnel Committee, within ten (10) working days from the date of the Highway Committee's answer. The Personnel Committee and the Union shall meet, at a mutually agreeable time, to discuss the grievance. The Personnel Committee shall, within ten (10) working days from the date the meeting is held, give its answer to the grievance in writing to the Union.

Section E: If the decision of the Personnel Committee is not satisfactory to the grievant and the Union, the Union shall notify the Personnel Committee, within (10) working days from the date of the Committee's answer, that it intends to process the grievance to arbitration.

. . .

Section L: The arbitrator shall not modify, add to or delete from the express terms of the Agreement.

. . .

Article 10 - Sick Leave With Pay

. . .

Section D: No sick leave will be allowed an employee while on paid vacation.

. . .

Section F: The County shall have the prerogative to check on an employee who is absent on sick leave. Should the department head believe the sick leave benefit is being abused, he/she may request the County Nurse to visit the employee. If abuse of sick leave is proven the employee shall forfeit pay for that day and shall forfeit an additional three days of sick leave (either accumulated or to be accumulated, should the employee not have acquired three days of sick leave).

. . .

Article 21 - Leave With Pay

Section A: All employees shall be given a funeral leave with pay, not exceeding three (3) days to attend the funeral of the immediate family, to wit: Wife, husband, mother, father, step-mother, step-father, brother, sister, children, stepchildren, or adopted children, mother-in-law, father-in-law, the employee and his/her spouse's grandparents, and guardians.

Section B: Employees shall be given a paid funeral leave of one (1) day to attend the funeral of a brother-in-law or sister-in-law.

Section C: Employees must attend the funeral to receive the three day leave pay or the one day leave pay as outlined above.

BACKGROUND

The Grievant has been employed in the County's Highway Department for approximately ten and one-half years. The Highway Commissioner in the Department is Robert Maas.

On or about July 29, 1988 the Grievant underwent an emergency

appendectomy. The Grievant's physician provided a sick leave certificate indicating he should stay on sick leave until August 15, 1988 at which time he could return on a light duty basis and could return to full duty on August 29, 1988. The Grievant returned to work on light duty, but experienced problems and his physician provided a certificate stating he should be on sick leave status until August 25, 1988 and could return to regular duty on August 29th.

On August 20, 1988, while the Grievant was on sick leave status, his spouse's grandmother died. The Grievant attended the funeral and was a pall-bearer. The funeral was held locally, in Rhinelander, Wisconsin. The Grievant returned to work on August 29, 1988 and he requested that three days of sick leave be converted to funeral leave. That was the first time he notified Maas of his desire to take the funeral leave.

Maas denied the Grievant's request to retroactively convert three of his sick leave days to funeral leave. A grievance was filed based on the denial of his request. By letter dated December 12, 1988 the County Corporation Counsel notified the then Chief Steward for the Union, Stanley Pecor, that the grievance (Grievance 5-88) had been denied by the County's Personnel Committee. By letter dated December 28, 1988 to the chairperson of the Personnel Committee, Beverly Fagan, Pecor notified the Committee of the Union's intent to arbitrate "Grievance 6-88". Fagan received Pecor's letter on January 4, 1989 and it was postmarked January 3, 1989. Pecor called the County's Personnel Director, Carey Jackson, to advise him that there was a typographical error in his letter of December 28th in that it should have read "Grievance 5-88". There is a dispute as to whether Pecor called Jackson on December 29th or whether it was after the letter was received, as well as a dispute as to whether Jackson told Pecor he would "take care of it", as Pecor claimed.

The parties were unable to resolve their dispute and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union:

With regard to the County's objection that the grievance is "untimely" because the Grievant did not request the funeral leave until he returned to work, rather than prior to the funeral, the Union asserts there is no merit to the objection. According to the Union, there was no problem with scheduling work since the Grievant was on sick leave and would not have been at work in any event. Also, since this was the first time this type of situation had arose, the Grievant was not sure if he was eligible for funeral leave and thought he would ask when he returned to work. There is also no prior notice requirement stated in the Agreement, and while it usually would make good sense to give prior notice, the County suffered no inconvenience or demonstrable harm from lack of prior notice in this case. Lastly, the Union asserts the County never raised this objection prior to the hearing and it ought to be held to be without merit.

Regarding the County's objection that the Union's notice of intent to arbitrate was not sent to the County in a timely manner and did not refer to this grievance, the Union contends that Pecor testified he sent it on December 28, 1988, within the contractual time limits, and that he called Jackson on December 29th when he discovered the error in the reference to the grievance number and that Jackson said he would take care of it. Pecor was certain of the date as he had been directed not to conduct any Union business after December 31st when his term expired. Jackson admitted he received the call, but could not recall the date or what he said. Hence, Pecor's certain and specific testimony should outweigh Jackson's vague and uncertain testimony. The County was aware in a timely, if informal, manner of the Union's intent to arbitrate this grievance, 5-88, via Pecor's phone conversation with Jackson. In its reply brief the Union asserts that there is no evidentiary basis for the County's contention that the Union was aware of Fagan's change in status, nor was there any evidence to show that the Personnel Director, Jackson, was not an appropriate person to contact regarding this matter.

As to the merits of the grievance, the Union notes that Article 21, Section A, of the Agreement states, in relevant part, that "All employees shall be given funeral leave with pay." There are two clearly stated conditions that must be met to qualify for funeral leave: (1) the death must be in the employe's immediate family, as defined in Section A; and (2) the employe must attend the funeral. Both conditions have been met in this case, as demonstrated by the evidence, and there are no other conditions that must be met. The County is attempting to have the Arbitrator create an "unbargained exception", i.e., that an employe cannot use funeral leave while on sick leave, but the Arbitrator is precluded by Article 6, Section L, from modifying, adding to, or deleting from the terms of the Agreement. The Union also asserts that the parties know how to draft exceptions where they intend them, as demonstrated by Article 10, Section D, which expressly provides that sick leave is not allowed while an employe is on paid vacation. In its reply brief the Union asserts that there is no evidence to support any insinuation of sick

leave abuse in this case, nor was that ever given as a reason for denying this grievance. As to the County's citation of Elkouri and Elkouri in support of its contention that the Grievant was not entitled to paid funeral leave while he was already off work on paid sick leave, the Union asserts the citation is misplaced. In this case the contract states the benefit shall be given if certain criteria are met, and the Grievant has met those conditions. There is no need to consult secondary sources for guidance, and the clear and unambiguous language of the Agreement must be upheld.

County:

The County takes the position that the grievance should be denied on the basis of the Union's and the Grievant's failure to comply with the procedural time requirements in the Agreement; and that even if those requirements are not applied, the grievance should be denied as being without merit.

With regard to its position on timeliness, the County contends that its Personnel Committee considered the grievance at the Committee's December 1, 1988 meeting and issued its answer in writing to the Union within ten working days as required by Article 6, Section D, of the Agreement. Under Article 6, Section E, the Union was required to notify the Committee, in writing, within ten working days of the Committee's answer, that it intended to process the grievance to arbitration. The date of the Committee's answer was December 12, 1988 and ten working days from that date was December 28th, since December 23rd and 26th were considered as holidays per the terms of the Agreement. While Pecor's letter is dated December 28, 1988, the envelope it was delivered in was postmarked January 3, 1989. There was no evidence presented to explain the suggested delay in the postal service's processing and postmarking the letter.

It is asserted that as with the filing of briefs, tax returns, etc., it is the postmark on the mailed document that must be controlling in determining timeliness, otherwise the other parties are left open to the speculation of the filing party. In this case Pecor testified that his December 28th letter pertained to grievance 5-88, even though it only referenced grievance 6-88. He also speculated that he might have been confused as to whom he should send the letter, even though he sent it to Fagan, who had been the chair of the Personnel Committee since mid-November, 1988 and had chaired the Committee hearing on the grievance. Pecor also testified that the letter may have been delayed by the "Christmas rush", but there was no supporting testimony from anyone in the postal service. The County cites Elkouri and Elkouri, How Arbitration Works, 4th Ed., for the proposition that arbitrators have often found grievances to not be arbitrable where a party has failed to give timely notice to the other party of its intent to arbitrate. Also cited is an award in which the arbitrator relied on the postmarked date in determining that the notice of intent to arbitrate was not timely. In this case the Union was required to respond in writing, within ten working days of the date of the Committee's answer, as to the Union's intent to arbitrate the grievance. The letter sent in this case did not pertain to this grievance and was not postmarked in a timely manner. Although Pecor testified he called the Personnel Director on December 29th, Jackson testified that while he was not certain, his best recollection was that the call occurred on or after January 4, 1989, but he did not waive any deadlines. Either December 29th or January 4th are beyond the ten working day time limit and there is no indication in the Agreement or evidence that Jackson would be the person authorized to waive the time limits on behalf of the County.

Regarding the merits, the County notes that the Grievant was on sick leave at the time his spouse's grandmother died and was in the Rhinelander area. Maas testified it has been the practice in the County that requests for funeral leave must be made in advance. The Grievant could have made the request in advance, but did not. The practice of requiring requests in advance is reasonable as it permits the County to confirm whether the employe is eligible for funeral leave under Article 21 and whether it is Section A or B that applies. The practice also allows the County to arrange for someone to fill-in for the employe requesting leave. The County contends that the Union's assertion that the above reasoning does not apply in this situation, since the Grievant was already off work on sick leave, ignores the fact that the County has the right to a fair day's work for a fair day's pay. In that regard, if the employe is on sick leave, it is assumed there is a medical justification for the absence. If the employe feels he is physically able to attend a funeral, the County should be able to reasonably inquire whether the employe is able to be on active work status. The County then should also be able to make reasonable inquiry as to whether Article 21, Section A or B, applies to the situation. Further, if an employe is on sick leave under certain medical restrictions and an anticipated return to work date, then the County may reasonably expect that either those restrictions remain valid and/or the employe will not violate them. Under the circumstances in this case, if the Grievant had requested the funeral leave in advance and informed the County he would be a pallbearer, the County could have asked him if he had his doctor's approval to undertake that physical activity.

The County cites Elkouri and Elkouri for the proposition that where the contract language is "pay for time lost" or "paid leave of absence" for attending a funeral, arbitrators have generally denied such pay where the

employee is already on vacation "or otherwise not scheduled to work" 4th Ed., p. 759. The County asserts the contract language in question here is essentially the same as "paid leave of absence", and the same result should be reached.

Lastly, the County asserts that under the Agreement it has the right to check on an employee who is on sick leave. If an employee is well enough to be able to act as a pallbearer, the County should be given the opportunity to inquire whether the sick leave remains valid, and if it does, whether the employee will jeopardize his ability to return to work on the anticipated date by undertaking an activity not authorized by his doctor. Under Article 10, Section F, there is a forfeiture of pay if the employee is found to have abused sick leave. By failing to request the funeral leave in advance, the Grievant denied the County the opportunity to inquire in that regard.

In its reply brief the County asserts that its position that it is entitled to a fair day's work for a fair day's pay is supported both by Sec. 111.70(1)(a), Stats., and the opening paragraph of the parties' Agreement which also recognizes management's rights and responsibilities. The County also reiterates its contention that if an employee on sick leave feels at some point he is able to return to work, he has the obligation to immediately so advise the County. In this case the Grievant's ability to attend a funeral raised a question as to whether he should have been on sick leave at that point and that is when the County should have had the opportunity to inquire in that regard. If an employee's condition changes while he is on sick leave, for better or worse, he should advise his doctor and the County. In response to the Union's argument that the County suffered no harm by the Grievant's failure to make his request in advance, the County asserts it did suffer harm in that it was denied the exercise of its rights under the Agreement and possibly its right to a fair day's work for a fair day's pay. The County also asserts that the Agreement does not require either the grievance or the County's answer to be all inclusive, and asserts that it properly raised these concerns in the arbitration hearing.

The County asserts that, based on the procedural defects and the merits, the grievance should be denied.

DISCUSSION

Procedural Objection

The County sent its answer denying this grievance on December 12, 1988 and Pecor's un rebutted testimony is that he received it on December 14, 1988. As the Union could not respond to the answer till it was received, and since there is no evidence as to when the County's answer was postmarked, 2/ December 14, 1988 is the date utilized as the date from which the ten working days ran, which results in the Union having had until December 30, 1988 to advise the County it was going to arbitrate the grievance. The testimony of Pecor was that he was certain he called the Personnel Director on December 29, 1988 to advise him regarding grievance 5-88, and it was the testimony of the Personnel Director that he was not sure when Pecor called him, but that he thought it was January 4, 1989 or later. Given Pecor's certainty, along with the fact that he no longer held his Union office after December 31st, Pecor's testimony in that regard is credited. Contrary to the County's contention, Article 6, Section E, of the Agreement does not require that the Union's notice of its intent to arbitrate be in writing, rather, it only requires the Union to notify the Personnel Committee of its intent. Pecor's call to the Personnel Director on December 29th constituted adequate notification to the Committee of the Union's intent to arbitrate grievance 5-88. There is no evidence to indicate that the Personnel Director was not an appropriate person for the Union to inform of its decision so that it could be passed along to the Personnel Committee. To find that he was not would be an overly technical reading of the Agreement and would be to place form over substance.

On the foregoing bases, it is concluded that the grievance is arbitrable.

Merits

The issue is whether the Grievant, while on sick leave, was entitled to utilize funeral leave under Article 21 of the parties' Agreement in this case. The provision in question, Article 21, Section A, states "All employees shall be given a funeral leave with pay, not exceeding three (3) days to attend the funeral of the immediate family, to wit: . . .". As the County asserts, arbitrators have generally denied the use of funeral leave where the employee is already on a paid leave of absence and not scheduled to work, and the above language is essentially the equivalent of "paid leave of absence". The rationale is that the intended purpose of the funeral leave benefit is to protect the employee from loss of wages caused by having to miss work to attend

2/ The undersigned agrees that the postmark date is generally utilized in this regard, as it is least open to dispute.

a funeral. 3/ In this case the Grievant was not asking for a leave from work

3/ See Elkouri and Elkouri, 4th Ed. at p. 759 and the cases cited therein, especially Maui Pineapple Co., Ltd., 46 LA 849, 851 and Hiram Walker & Sons, Inc., 33 LA 629, 631-32.

to attend the funeral, as he was already on sick leave and unable to work at the time, rather, he was in essence asking for a leave from paid sick leave. The Grievant would not have suffered a loss of pay from missing work, since he was already off work on a paid leave. The fact that the parties have addressed the use of sick leave while an employe is on vacation has some relevance; however, without more, it is not enough to affect the reasoning that underlies this conclusion.

Based upon the foregoing, it is concluded that the County did not violate Article 21, Section A of the parties' Agreement when it denied the Grievant's request for funeral leave for a period during which he was already on paid sick leave.

On the bases of the above and foregoing, the evidence and the arguments of the parties, the Arbitration Board makes the following

AWARD

1. The grievance is arbitrable.
2. The grievance is denied.

Dated at Madison, Wisconsin this 9th day of October, 1989.

By _____
David E. Shaw, Chairman of the
Arbitration Board

I concur in this Award.

Charles A. Rude /s/
Member, Arbitration Board

I dissent from this Award.

Philip Salamone /s/
Member, Arbitration Board