

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
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 JUNEAU COUNTY HIGHWAY EMPLOYEES : Case 87
 LOCAL 569, AFSCME, AFL-CIO : No. 44157
 : MA-6181
 and :
 :
 JUNEAU COUNTY :
 (HIGHWAY DEPARTMENT) :
 :

Appearances:

Mr. Laurence Rodenstein, Staff Representative, Wisconsin Council 40,
 AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719 on behalf
 of the Union.
Ms. Angeline D. Miller, Corporation Counsel, Juneau County, Courthouse,

Room 1

ARBITRATION AWARD

Juneau County Highway Employees Local 569, AFSCME, AFL-CIO, hereafter the Union, and Juneau County (Highway Department), 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 subsequently concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance relating to leave. Hearing was held in Mauston, Wisconsin, on October 4, 1990; it was not stenographically transcribed. The parties completed their briefing schedule on November 6, 1990.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The Union frames the issues as follows:

1. Did the County violate the contract when it refused to grant a leave of absence to grievant, Terry Cilley?
2. If so, what is the appropriate remedy?

At hearing, the County framed the issues as follows:

1. Was the grievance timely filed?
2. Was the grievance properly filed?
3. Did the County abide by the terms of the contract when it refused to grant the grievant a leave of absence for educational purposes?
4. If so, what is the appropriate remedy?

In its brief, the County framed the issues in the following manner:

1. Did the grievant properly follow the procedures of Article IV to bring this matter before the Arbitrator. If not, may the Arbitrator decide the merits of the case?
2. Did the County violate the provisions of Article VII when it denied a leave of absence for educational purposes which exceeded 6 months in length?

The Arbitrator frames the issues as follows:

1. Was the grievance properly and timely filed?
2. Did the County violate the collective bargaining agreement when it refused to grant a leave of absence for educational purposes to the grievant, Terry Cilley?
3. If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

Terry Cilley, hereinafter referred to as the grievant, is employed on a

full-time basis as a Patrolman by the Juneau County Highway Department. Early in 1990, the grievant applied for a leave of absence from his aforesaid position for the purpose of attending the Oakhill Bible College located in Northwestern Minnesota. The intended course of study was two semesters in length, commencing in September and concluding the following May. The grievant's proposed studies were designed to enable him to work more effectively with youth using God and the Bible as his guide. During his studies, while on the unpaid leave of absence, the grievant intended to take part-time work as his sole means of support.

On February 26, 1990, Juneau County Personnel Director Chris Archambault presented the grievant's leave request to the County's Personnel Committee. The Personnel Committee's response was that the "collective bargaining contract does not allow for 1 yr LOA for education and it should be denied."

On March 7, 1990, the grievant approached Steve Steensrud, Juneau County Highway Commissioner, with a verbal request for a twelve (12) month leave of absence for educational purposes. The County Highway Committee was meeting at the time and the grievant requested that the Committee make a decision regarding his leave request. The request for a year's leave of absence for educational purposes was denied by the Highway Committee. The County denied the request because it was outside the County's established leave policy. The grievant was verbally informed and aware of the Highway Committee's decision on or about March 7, 1990.

On April 3, 1990, at the request of the County Personnel Director, the County Personnel Committee again addressed the issue of the grievant's educational leave. This time the request was submitted for a nine (9) month leave to begin September 9, 1990. Two (2) members of the Highway Committee were present at this meeting after they were notified that the matter was to be brought before the Personnel Committee. The Personnel Committee's decision was to send the matter back to the Highway Committee, and that the dispute "should be worked out between the Union and the Highway Committee."

On April 24, 1990, County Highway Commissioner Steensrud issued a letter to the grievant as follows:

After much discussion, it was decided by the Juneau County Highway Committee to deny your request for a leave of absence.

On April 25, 1990, the grievant filed a grievance against the County. The grievant alleged a contract violation under Article VII, page 5, 1st sentence: "The Highway Committee failed to follow contractual provisions for leave of absence." For relief, the grievant requested that a "leave of absence be permitted in one of the following manners, 4 months in 1990 and 5 months in 1991 or 6 months starting September 4, 1990 with 3 month extension. This would provide for the 9 month time span required to attend college."

On May 3, 1990, the County Highway Commissioner sent the following letter to the Union:

This letter is to state that we do not acknowledge your grievance. The reason for this is that according to the contract, Article IV, Grievance Procedure, Paragraph E, Step 1 or 2, you have 20 working days to file the grievance. The 20 day time limit expired on April 5, 1990.

On May 24, 1990, T. N. Frederick, County Corporation Counsel at the time, sent the following letter to the grievant:

The Negotiating Committee after reviewing on May 17th the above-referenced matter determined that your request for settlement or corrective action cannot be granted. The Highway Committee declined to grant you an unpaid leave of absence under Article VII of the collective bargaining agreement at its regular meeting on Wednesday, March 7, 1990 that you attended; however, your appeal from that Committee's decision was not taken within 10 working days as provided under the grievance procedure.

The County granted Dennis Dodge, then a unit employe, a two (2) month educational leave of absence in the spring of 1988. Dodge was paid his regular hourly rate of pay, except for health insurance, by the township of Germantown (the town was reimbursed by the State) while he pursued his law enforcement studies. Dodge took his leave in the spring rather than the winter in order to accommodate the County's work load needs.

Over twelve years ago the County granted another employe, Arnie Penskower, a six (6) month educational leave of absence.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE IV - GRIEVANCE PROCEDURE

A. Definition of a Grievance: A grievance shall mean a dispute which may arise between the parties, including the application, meaning or interpretation of this agreement.

B. Subject Matter: A written grievance shall contain the statement of the grievance, the relief sought, and the date.

C. Time Limitations: Time limits may be extended by mutual consent of the parties.

D. Termination of Grievance: Any grievance shall be considered terminated if it is not taken from one step to the next.

E. Steps in Procedure:

Step 1: The employe, with his/her representative, may orally explain his/her grievance to his/her supervisor no later than twenty (20) working days after he/she knew or should have known of the cause of such grievance. In the event of a grievance not involving health or safety, the employe shall perform his/her assigned work task and grieve his/her complaint later.

Step 2: If the grievance is not presented or is not settled at the first step, the employe and his/her representative shall prepare a written grievance and present it to the commissioner within twenty (20) working days after he/she knew or should have known of the cause of such grievance. The commissioner will further investigate the grievance and submit his/her decision to the employe and his/her representative in writing within seven (7) working days after receiving notice of the grievance.

Step 3: If the grievance is not settled at the second step, the grievance committee may appeal the written grievance to the highway committee within seven (7) working days after receipt of the written decision of the commissioner. The highway committee shall discuss the grievance with the grievance committee within ten (10) days. Following said conference, the highway committee shall respond within

ten (10) working days in writing. Failure to respond by highway committee shall be construed as a decision favorable to the employee. Upon request of either party in interest, conduct a hearing for the purpose of ascertaining the facts involved in said dispute, in which case the ten (10) days shall not run until after the conclusion of the hearing.

Step 4: If the grievance is not settled at the third step, the grievance committee may appeal the highway committee's decision to the negotiating committee within ten (10) working days of the receipt of the written decision of the highway committee. The negotiating committee shall discuss the grievance with the grievance committee by means of a hearing. The negotiating committee shall then respond within ten (10) days in writing.

ARTICLE VI - EMPLOYER'S RIGHTS

Subject to the provisions of this contract and applicable law, the County possesses the right to operate county government and all management rights repose in it. These rights include, but are not necessarily limited to the following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules and schedule work;
- C. To hire, promote transfer, schedule and assign employees to positions within the county highway department;
- . . .
- F. To maintain efficiency of county government operations;
- G. To take reasonable action necessary to carry out the functions of the County in situations of emergency;
- H. To take whatever action is necessary to comply with state or federal law;
- I. To introduce methods or facilities which are new or exist elsewhere;
- J. To change existing methods or facilities;
- K. To determine the kinds and amounts of services to be performed as pertains to county government operations; and the number and kinds of classifications to perform such services;
- . . .
- M. To determine the methods, means and personnel by which county operations are to be conducted;
- N. Provided, with regard to paragraphs H through M above, the County will comply with its duty to bargain on such matters to the extent required by law.

ARTICLE VII - LEAVE OF ABSENCE

Written leave of absence, without pay, for periods not to exceed six months in any year will, for justifiable reasons only, be granted by the Employer to any full-time employee, provided such employee does not accept employment elsewhere. A written leave of absence up to twelve (12) months without pay shall be granted to any full-time employee for illness or for a non-compensable injury, provided such employee does not accept employment elsewhere during said leave, and further provided such employee satisfied the Employer by a medical doctor's certificate that he/she is unable to report to work. The employee to whom written leave of absence has been granted, shall be entitled, at the

expiration of the time stated in such leave, to be reinstated to the position to which he/she was employed at the time the leave was granted. Failure to grant a leave of absence does not entitle the employee to be reinstated.

UNION'S POSITION:

The Union first argues that the County's arbitrability claims are without merit. In regard to the timeliness claim, the Union maintains that March 7 should not be the day the grievance clock begins tolling as argued by the County. Instead, in the opinion of the Union, March 7 represents only the initial turndown of the County. The Union maintains the County and the grievant continued to discuss the education leave request from March 7 until the final turndown by the County on April 24. The Union contends that the grievance was filed the following day (April 25) on a timely basis.

The Union also maintains that the leave request was properly submitted as provided for under Article IV of the collective bargaining agreement. The Union adds that the "remedy sought is sufficiently precise for the Arbitrator to frame a proper remedy . . . if the instant grievance is sustained."

With respect to the merits of the dispute, the Union maintains that the three (3) requirements set forth in the contractual leave provision for granting the grievant's request have been met. One, the reason for the leave (bible college education to enable grievant to work with and to counsel Christian youth) is clearly praiseworthy. Two, the leave request did not exceed a six month period in a year as that term is understood in the agreement. In this regard the Union makes two claims: one, the grievant's requested leave arrangement meant "that no single leave was longer than six months"; and two, the grievant's request for "leave from September of year 1 to May of year 2 satisfies the contractual requirement that the leave not be for a period of more than six months in any year." (In support of this contention, the Union claims the Agreement provides for a specific calendar year rather than a consecutive twelve (12) month period of time when computing the maximum length of time - six (6) months-available for education leave under Article VII).

In addition, the Union feels the third requirement that an "employee does not accept employment elsewhere" has been met because the County allowed another employe (Dodge) under similar circumstances to seek compensation. In this regard the Union maintains that neither Dodge or the grievant were seeking employment elsewhere as that term is commonly understood (a change in career or permanent job change) but only earning money so they could afford the education they were after.

Finally, the Union contends that the winter manning requirements of the County could be met in the grievant's absence by utilizing the relief crew. Consequently, the County showed no business necessity for denying the grievant's request.

Based on all of the above reasons, the Union prays that the Arbitrator sustain the instant grievance, and permit the grievant to take his educational leave as requested.

COUNTY'S POSITION:

In support of its contention that the Arbitrator should deny the grievance and dismiss the matter, the County emphasizes the following principal arguments.

1. The leave request has never been properly submitted as provided for under Article IV of the contract. It was never submitted to a supervisor or in writing to the Highway Commissioner or the Highway Committee as provided for in Article IV, Section E, Steps 1, 2 and 3. It was submitted "informally" contrary to the requirements and intent of the grievance procedure.
2. Arbitral precedent establishes that: 1) a grievance filed after grievance timelines have expired is not arbitral and 2) an untimely grievance deprives an arbitrator of jurisdiction to hear the matter. Article IV, Section D, provides that grievances shall be considered terminated if not taken from one step to the next. Article IV, Section E, Step 1, provides that a grievance must be filed within twenty (20) working days after the cause of the grievance. The grievance was denied by the County Highway Committee on March 7; the grievant filed his grievance on April 25, more

than twenty (20) days after the incident giving rise to the grievance; therefore, the grievance was untimely filed under the agreement.

3. The County retains full rights under Article VI, particularly sections A, F, and M, to deny a non-medical leave request which interferes with the efficiency of County Highway operations during peak work load periods during the winter months. Article VII limits leaves of absence to six months except for medical reasons. The County Highway Department liberally interprets educational leaves. However, the problem here is not the purpose of the request, only the timing and length.
4. The established past practice of the County within the past eight years has been to arrange employee leaves for non-medical reasons at a time which takes into account peak work load periods during the winter months. The County has granted educational leave for six months or less if taken during non-peak work load periods during the warmer seasons of the year.
5. Contract language specifically notes that while on leave an employee is not to hold other employment. The grievant stated that he wanted to be employed elsewhere during his absence. Arbitral precedent and Article VII support the County's denial of his leave request for this reason.
6. The past practice regarding the educational leave granted Dennis Dodge is not applicable herein. Nor is the other example cited by the Union (the one over ten years ago) applicable.
7. The provision allowing for six (6) month non-medical leave is limited to that time frame; there are no provisions in the contract allowing for extensions as there is for medical leaves.
8. The intent of the County in establishing the language of "any year" in Article VII was to mean any twelve (12) month period beginning with the date of the leave given. The language does not state any "calendar" year. If the Arbitrator determines that a consecutive leave totaling nine (9) months is possible based on a "calendar" year then an employee would need to submit two separate leave requests, one for the months of leave to be taken in this calendar year and another request for the leave to be taken in the next calendar year. The grievant did not do this.
9. An extended leave creates personnel and management problems for the County in that a viable position must be held open for an extended period of time and there are no guarantees, after such an extensive leave, the absent employee will return.
10. The grievance should be dismissed for the foregoing reasons.

DISCUSSION:

Procedural Issues

The County maintains the grievance is not arbitrable, asserting two alleged procedural defects: one, that the grievance was not properly filed, and, two, that the grievance was not timely filed. While it is true that the grievant pursued his leave request before several County committees and management representatives, he did not actually file a written grievance until the final County turndown on April 24, 1990. The next day the grievant effectively filed a written grievance with the County as required by Article IV, Section E. 2/ In the written grievance, the grievant stated the

2/ The record indicates that the grievant was unable to present his grievance orally to his immediate supervisor within the meaning of Step 1 of the grievance procedure because his supervisor was sick on the date in

nature of the grievance, the alleged contract provisions violated and the requested remedy. The above actions satisfy the requirements of the grievance procedure.

As to the second objection that the grievance was untimely filed, the Arbitrator finds erroneous the assumption that the grievance timelines began to run on March 7, 1990, when the County Highway Committee turned down the grievant's leave request. On March 7, the County Highway Committee turned down a request from the grievant for a twelve (12) month leave. Following this denial, the grievant requested a nine (9) month leave. This request was not finally denied by the County until April 24, 1990. (emphasis added) Contrary to the County's assertion, this turndown is the event which gave rise to the instant grievance. The grievant filed a written grievance over same on April 25, 1990 well within the twenty (20) working day period for filing grievances contained in Article IV, Step 2. Therefore, based on the foregoing, the Arbitrator also rejects this procedural objection by the County.

Based on all of the above, the Arbitrator finds that the answer to the procedural issue as framed by the undersigned is YES, the grievance was properly and timely filed.

The Merits

The Union argues that there are three (3) requirements set forth in Article VII which are necessary preconditions for a leave request to be contractually valid:

1. That the reasons for the leave are "(f)or justifiable reasons only. . ."
2. That the leave is "(f)or periods not to exceed six months."
3. "(p)rovided such employee does not accept employment elsewhere."

The Union maintains that all three (3) preconditions have been met in the instant case and, therefore, the County violated Article VII by denying the grievant's request for educational leave. For the reasons listed below, the Arbitrator disagrees that all three requirements have been met thereby requiring the County to grant the leave request.

There is no dispute that the reason for the grievant's leave request is praiseworthy and justifiable - studying the Bible as a means of assisting the youth of Juneau County. A question remains as to whether the last two preconditions have been met.

The second precondition requires that the proposed leave not exceed six (6) months. The grievant's request was for a nine (9) month leave of absence. However, the grievant's request was for leave from September of year one to May of year two with a County work break in between. Therefore, the Union opines that no single leave was longer than six (6) months. The Union argues that such a request does not violate the requirement that no leave exceed six months because said request is split over two calendar years. The Union, relying on the contract principle noscitur a sociis, argues that the term "year" in Article VII refers to calendar year, not a consecutive twelve (12) month period as argued by the County, in order to reach the aforesaid conclusion. The Arbitrator, however, does not agree. A more reasonable interpretation is that "year" refers to a period of twelve months. Such an interpretation permits employes to take leaves for educational purposes for up to six (6) months while minimizing disruption to the County's work place. If the parties had intended a "year" to mean "calendar year" they could have so provided in a clear and precise manner as they did elsewhere in the contract. 3/ Based on the foregoing, the Arbitrator rejects this claim of the Union's.

The Union also argues that the grievant met the conditions of the third requirement set forth above. The record, however, does not support a finding regarding same. The language used in setting forth the instant leave provision is directive in nature. That is, the agreement directs the County to grant a leave when the preconditions have been met. Contrary to the Union's assertion, however, the third precondition also has not been met. Article VII clearly

question. However, the grievant did present a written grievance to the Highway Commissioner on April 25, 1990 as required by Step 2 of the grievance procedure. Finally, the aforesaid written grievance then was sent to the Highway Committee at Step 3. After the County Highway Committee turned down the grievance at Step 3, the grievance was appealed to the Negotiating Committee pursuant to Step 4 of the grievance procedure.

2/ Article XIII, paragraph 5.

provides that employes on leave "not accept employment elsewhere." It is undisputed that the grievant planned to get another job to support himself while attending Bible college. This is not the same as Dennis Dodge being reimbursed by the Township of Germantown through the use of the State monies for the training he received. However, assuming arguendo that it is, the Union still has not established a past practice strong enough to overcome the clear contract prohibition on accepting employment elsewhere while on leave. Therefore, the Arbitrator rejects this claim of the Union as well.

Based on all of the foregoing, the Arbitrator finds that the answer to the substantive issue as framed by the undersigned is NO, the County did not violate the collective bargaining agreement when it refused to grant a leave of absence for educational purposes to the grievant, Terry Cilley, and its is my

AWARD

That the grievance is denied and the matter dismissed.

Dated at Madison, Wisconsin this 12th day December, 1990.

By _____
Dennis P. McGilligan, Arbitrator