BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between KENOSHA COUNTY EMPLOYEES' LOCAL 70, AFSCME, AFL-CIO and KENOSHA COUNTY (Highway Deprtment)	Vacation grievance of Anthony Lovetro, Jr. dated 9-20-90 Case 108 No. 44921 MA-6458

Appearances:

Mr. Frank Volpintesta, Corporation Counsel, Kenosha County Courthouse, 912 - 56th Street, Kenosha, WI 53140, appearing on behalf of the County.

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, PO Box 624, Racine, WI 53401-0624, appearing on behalf of the Union.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and decide a dispute concerning the above-noted grievance under the grievance arbitration procedures contained in the parties' 1989-91 Agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing in the County Highway Department office in Kenosha on February 27, 1991. No transcript was made of the proceedings. However, by agreement of the parties the Arbitrator maintained an audio tape recording of proceedings for his exclusive use in award preparation.

The parties summed up their arguments on the record at the hearing and waived the filing of post-hearing written briefs. Accordingly, the evidence and arguments in the matter were fully submitted as of February 27, 1990.

ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the County violate the Agreement by refusing to grant Grievant Lovetro Accident & Sickness benefits instead of vacation as regards the week of August 6-10, 1990 or any portion thereof?

2. If so, what shall the remedy be?

FACTUAL BACKGROUND

The Grievant is a Truck Driver who has been employed by the County at the Highway Department since 1979. His normal hours of work are 7:00 AM-3:30 PM, Monday-Friday.

Grievant requested and was granted a vacation block consisting of the week of Monday, August 6 through Friday, August 10, 1990. Grievant submitted that request well in advance of the vacation week involved, but it was apparently not submitted during the initial structured rounds of vacation selection. Grievant also took an emergency vacation day on Friday, August 3, 1990, on short notice.

Grievant traveled to Kentucky on August 2. While there he became acutely ill with what was at least initially diagnosed as "probable viral meningitis," a potentialy life-threatening condition. He was hospitalized in Elizabethtown, Kentucky from 1:28 AM on Monday, August 6 until sometime on Wednesday August 9.

Sometime during his hospitalization, Grievant telephoned the Department and informed a Department clerical employe of his hospitalization. Grievant acknowledged that he did not, during that conversation or at any other time (other than by filing of the grievance), specifically request that his vacation days be canceled or rescheduled, but he does recall that at some point during that phone call or thereafter, the clerical employe informed him that he would be treated as covered by Accident and Sickness [A&S] benefits throughout his hospitalization.

Upon medical clearance, Grievant returned to work on Wednesday, August 22. He submitted doctors' statements regarding the nature of his hospitalization and illness to appropriate County personnel. At some point thereafter he was informed that the County was treating him as having been on vacation throughout the week of August 6-10 and on A&S benefits only as regards the workdays he missed beginning the following Monday, August 13.

Grievant filed the subject grievance on September 20, asserting that it had been his understanding that he went off vacation and onto A&S benefits from the first day of his hospitalization, and requesting that he be given a week of vacation back with the week of August 6-10 charged to Accident and Sickness benefits. The grievance remained unresolved through the pre-arbitral steps and was submitted to arbitration as noted above.

At the hearing, the Union presented evidence showing that the County has allowed employes to take funeral leave benefits in lieu of what would otherwise have been scheduled vacation days. Specifically, former Highway Commissioner Gene A. Scharfenorth wrote the following answer regarding a grievance dated 11/4/86:

> The grievance states that Mr. Vanderwerff was on vacation when his father passed away and funeral leave was denied.
>
> Section 14.1 of the Local #70 contract makes reference to funeral leave "in special circumstances." If [It?] has been interpreted that a special Circumstance did occur in that a death in the family occurred while on vacation.
>
> Therefore, Mr. Vanderwerff will be given 3 consecutive days off with pay. These days may be taken anytime between the date of this letter and December 31, 1986.
>
> The grievance will thus be considered settled at step two.

Over Union relevance objections, the County presented evidence showing that no grievances were filed in at least three instances in the last three years or so in which the County has interpreted and applied materially the same contract language as in the Agreement to require the affected employes in other AFSCME-represented County units to use scheduled days of vacation rather A&S benefits when the employe would have been eligible for A&S but for the scheduled vacation. Each of those other AFSCME units--the Professional Social Services unit, the Courthouse and Social Services Clerical unit, and the Institutions unit--is and has always been covered by its own agreement with the County separate from the Agreement at issue herein, though the units have had a common AFSCME Council 40 staff representative. At the time the A&S language was first included in the AFSCME agreements in 1975, that issue and certain others were coalition-bargained with the County by a combined bargaining team for the various AFSCME units involved.

PERTINENT PORTIONS OF THE AGREEMENT

ARTICLE IX - VACATIONS

> Section 9.1 Entitlement. All full-time employes who shall have six (6) months continuous service by June lst, shall receive one (1) week of vacation with pay at the regular rate for forty (40) hours of work; ….
>
> Section 9.2 Termination. An employee who is entitled to a

vacation at the time of terminating his employment shall be paid for his vacation at the time of severing his status; …

Section 9.3. Employees who have one (1) year of service or more by June 1 may take their vacation and receive their vacation pay at any time from January 1st to December 31st. Employees who have at least six (6) months service but less than one (1) year, by June 1st may take their vacation at any time from January 1st to December 31st, but will not receive their vacation pay prior to June 1st.

Section 9.4. Vacation preference shall be selected on the basis of seniority by May 1st of year vacation is to be taken. The employee with the most seniority makes first selection and so on, but the employees can mutually switch vacation periods if it can be done without inconvenience to the County. Employees not making a vacation selection by May 1st, must take vacation periods remaining. Up to five (5) days of vacation may be taken in one-half (1/2) day increments, with the approval of the department head.

Section 9.5 Emergency Leave. Up to five (5) days' emergency leave may be granted to each employee, provided the employe notifies the department head before taking the time off. such leave shall be charged against vacation time.

. . .

Section 9.8 Vacation Usage. Effective 1/l/88, those employees who earn 20 days of vacation per year shall have the privilege of using up to 5 vacation days in one day increments with the approval of the department hear, which shall not be unreasonably denied, with a 24 hour notice, except in case of emergency or illness when a minimum 1/2 hour notice shall be required.

ARTICLE X - HOLIDAYS

Section 10.1. Number of Holidays ….

Section 10.2. Eligibility. Any employee shall be required to work the scheduled day immediately preceding the holiday and the scheduled day immediately following to receive holiday pay for the holidays set forth in this article. However, the day before and the day after shall be waived in the case of an employee who has an

excused absence.

Section 10.3. Holiday During Vacation. If the holiday comes during the employee's vacation, he shall be granted an additional day off with pay at the beginning or the end of his vacation period or by mutual agreement at some other time.

ARTICLE XI - ACCIDENT AND SICKNESS PAY MAINTENANCE PLAN

Section 11.1 Accident and Sickness Pay Maintenance Plan. Effective January 1, 1975, an Accident and Sickness Pay Maintenance Plan was established. The following benefits will be paid in case of non-occupational accident or illness:

(a) All regular full-time employes will receive thirty (30) calendar days at full pay with coverage starting on the first day of accident, first day of hospitalization, first day of out-patient surgery and seventh (7th) day of illness.

(b) From the 31st day to the 365th day, an employee will receive two-thirds (2/3rds) of his regular pay. Regular pay means forty (40) times the employee's regular straight-time hourly rate.

(c) Benefits under this plan are not limited to one (1) accident or one (1) illness per year, but are available any time an employee has an accident or becomes ill; provided that if an employee has received benefits hereunder and there should be a recurrence of the same condition or illness, no waiting period will apply if there is a recurrence within two (2) weeks of return to work. If there is a recurrence after two (2) weeks on the job, another waiting period will apply.

(d) No payment will be made under the Accident and Sickness Insurance Plan unless the employee submits an application for benefits and a doctor's statement shall be submitted to the Personnel Department who shall make the necessary arrangements for the payment of benefits.

(e) If, while an employee is being paid under the Accident and Sickness Insurance Program, a wage increase occurs during his absence, he will be paid benefits reflecting such increase.

(f) Benefits will be paid under the Accident and Sickness Pay Maintenance Plan for pregnancy or for any matter relating to pregnancy. The benefits will start after a physician has certified that the employe is no longer able to work on account of disability resulting from pregnancy, and shall continue until such time as the doctor certifies that the employee is able to return to work.

Section 11.2 Casual Days. Except as otherwise provided below, every employee, in addition to the above coverage, will be entitled to five (5) casual days off if employed on January 1 of any calendar year which may be used for any purpose.

. . .

(a) Time off without pay shall not be granted if an employee has unused vacation days, except in case of illness, or unused casual days.

(b) Casual days will be granted if written notice of the employee's intent to take such days is received by his/her department head at least twenty-four (24) hours prior to the scheduled date of such time off. The employee need not give any reason for the casual day taken under this subsection. In the event of an emergency, shorter advance notice will be acceptable and a casual day will be granted by the department head.

(c) If an employee is unable to report to work due to sickness the employee must notify his or her department head not later than one-half (1/2) hour before his scheduled starting time. The employee shall state the reason for his absence and the expected leave of absence. Any days taken under this section shall be charged to an employee's remaining casual days.

(d) Any casual days not used during a year will be paid to the employee on or before March 1st following the end of the calendar year, however, an employe who voluntarily terminates during a calendar year will not be paid for unused casual days.

(e) Casual days may be used in less than full day or less than (1/2) day increments for personal business, doctor or dental appointments.

(f) If an accident occurs while an employee is on a casual day, the

employee will not be charged for the casual day if the accident occurs before noon.

Section 11.3 Proof of Disability. The County shall have the right to require the submission of adequate medical proof of the employee's disability due to accident or illness. Should there be an extended period of disability, the County shall have the right to require periodic medical proof of the employee's disability.

Section 11.4 Injury or Illness on Job. If any employee appears to be injured or ill while on the job, or there is reason to believe that an employee needs medical attention, his supervisor shall have the right to require the employee to furnish a statement from a licensed physician before returning to work that the employee is capable of performing the work required by his job. The County shall send such employee to the doctor at its expense on working time.

. . .

ARTICLE XIV - FUNERAL LEAVE

Section 14.1 Immediate Family. In the event of a death of an employee's father, mother, husband, wife, brother, sister, son, daughter, father-in-law, mother-in-law, or daughter and son-inlaw, such employee will be paid for straight time lost from scheduled work not to exceed three (3) consecutive scheduled workdays falling between the date of death and the date of the funeral, both inclusive, except in special circumstances.

. . .

POSITION OF THE UNION

The Agreement language in Sec. 11.1(a) and (b) clearly and unambiguously provides that "All regular full-time employes will receive thirty (30) calendar days at full pay with coverage starting on the first day of … hospitalization;" and that "Benefits under this plan are not limited to one (1) accident or (1) illness per year, but are available any time an employee has an accident or becomes ill. . . ." Grievant was a regular full-time employe who was hospitalized beginning on August 6. The County's refusal to treat the week of August 6 or any part of it as covered by the A&S plan benefits violates that clear language.

Because the meaning of the Agreement language is clear and unambiguous, no

consideration of evidence outside the language of the Agreement is necessary or appropriate. Accordingly, the Arbitrator should disregard the County's evidence regarding past practice.

Even if evidence about past practice is considered, it supports the Union's case, and not the County's. All the County's evidence showed is that three employes did not grieve the County's failures to grant them A&S benefits in lieu of scheduled vacation days. The County has not shown that the Union leadership of the bargaining units involved in those incidents were ever made aware of the County's actions, let alone the leadership of Local 70. Without a showing of Union knowledge, the necessary element of mutuality of understanding necessary for a past practice to be binding is missing. The Union, on the other hand, has shown that the County formally resolved a grievance by granting funeral leave in lieu of scheduled vacation days. This shows that the County has allowed another Agreement benefit to be taken in lieu of and without loss of what were previously scheduled vacation days. The County should have done the same thing in Grievant's case.

The approach urged by the Union in this case is also consistent with the express provision in Sec. 11.1(f) that, "If an accident occurs while an employee is on a casual day, the employee will not be charged for the casual day if the accident occurs before noon." As the County argues and the Agreement essentially indicates, casual days can be used as the equivalent of a vacation day. That provision provides another example, in addition to the County's admitted administration of funeral leave in relation to scheduled vacation days, in which A&S benefits can be substituted for the functional equivalent of a scheduled day of vacation without loss of the (casual) day where A&S eligibility arises during a scheduled (casual) day off.

The County's references, for the first time in its post-hearing arguments, to Workers Compensation exceptions and to possible problems with carrying over end-of-year vacations should be disregarded as unsupported by any evidence developed during the hearing and as irrelevant to the facts of the case at hand.

For the foregoing reasons, the Arbitrator should sustain the grievance and grant Grievant in 1991 what he was improperly deprived of in 1990, to wit, five additional vacation days off.

POSITION OF THE EMPLOYER

The Agreement language relied on by the Union is not free of ambiguity. The reference in Sec. 11.1(c) to A&S benefits being "available any time an employee has an accident or becomes ill. . . " can (and indeed should) be read as part of the definition of the number of times during a calendar year that an employe can take A&S benefits, rather than as a definition of how A&S is to be administered in relation to other Agreement benefits. In any event, the quoted language cannot be interpreted as literally as the Union urges since the first sentence of Sec. 11.1 makes clear that A&S benefits do not apply to at least some times when an employee "has an accident or becomes ill," specifically those involving "occupational" (i.e., Workers Compensation) situations.

The Union's proposed interpretation cannot be what the parties intended. In the Grievant's situation at issue, the County planned for Grievant to be off on his scheduled vacation in accord with the Grievant's selection of the week at issue pursuant to the contractual procedure. It is not fair to the County to allow the Grievant to now change those scheduled days, especially since the evidence indicates that he never requested or received County approval for cancellation or rescheduling of the week of vacation in question.

The Union's proposed interpretation could in other circumstances produce obviously unintended results. Since the County does not permit employes to carry over vacation from year to year, if an employe were to have an accident or be hospitalized during a scheduled vacation during the last week of the calendar year (or during any other week after which there are no blocks of vacation time remaining available in the calendar year), it would be impossible to reschedule the vacation days as the County is being asked to do in the instant grievance.

Significantly, where the parties have mutually agreed to allow A&S benefits to apply in lieu of paid time off, they have expressly so provided in the Agreement. Thus, Sec. 11.1(c) is an express provision which in effect makes A&S accident benefits applicable in lieu of and without loss of a casual day if the accident occurs before noon of the casual day involved. Similarly, in the funeral leave language of Sec. 14.1, the parties have expressly provided that "in special circumstances" the employe can be granted paid funeral leave in circumstances and/or length exceeding the norms set forth therein. The grievance settlement cited by the Union was specifically based on the provision that exceptions were permitted in "special circumstances." Unlike those particular types of situations, however, the parties have not expressly provided anywhere in the Agreement for A&S benefits to apply in lieu of a scheduled vacation as the Union proposes.

Accordingly, where the question of whether otherwise available A&S benefits apply during a scheduled vacation has arisen under the materially-parallel language in each of three other AFSCME units, the County has uniformly responded just as it did in this case, without any grievance ever being filed on the subject. Because those other units are also AFSCME units, and because the language was first negotiated by a coalition that included Local 70, and because the Union has not presented evidence to the effect that the Local 70 leadership was unaware of the County's mode of interpreting the A&S and vacation provisions in situations of this kind, the Union should be deemed bound to the longstanding and uniform practice represented by the three examples presented for the record herein.

For all of those reasons, the County requests that the grievance be denied in all respects. If the Arbitrator somehow finds a violation, the County opposes any relief in the form of time off.

DISCUSSION

The central question here is whether A&S benefits are payable in lieu of vacation where the conditions that would otherwise entitle the employe to A&S benefits occur during a previously scheduled vacation. The Arbitrator finds this case to turn on the appropriate interpretation of the vacation and A&S provisions of the Agreement when read as parts of the Agreement as a whole.

The fact that Grievant did not specifically request a change in the dates of his vacation has no bearing on the proper disposition of the grievance both because Grievant's acute medical condition would excuse any technical failure on his part to make such a request, and because it appears that Grievant's non-request may have been in reliance on an assurance from the clerical employe he spoke with when he called in to the effect that he would be treated as on A&S from the beginning of his hospitalization. Indeed, from the documentary evidence submitted, it appears to have been the County's initial inclination to treat Grievant consistent with the clerical employe's assurance, with a reversal in that stance coming at some later point in time.

The County's past practice evidence does not have a bearing on the outcome of this case either. The fact that employes in three other AFSCME units of County employes have not grieved similar treatment by the County in the past does not, in the Arbitrator's view, bind Local 70 in any way. The County must show that the practice on which it relies was either actually known of and acquiesced in by the Local 70 leadership or that the practice was such that the Local 70 leadership reasonably knew or should have known of it in all of the circumstances. The County's evidence in this case falls well short of those standards.

The Agreement does not specifically state either that A&S benefits are or are not available on previously scheduled vacation days. The Union and Grievant understandably rely heavily on the language in Sec. 11.1(c) about A&S benefits being "available any time an employee has an accident or becomes ill…." However, as the County points out, the context of that clause is a sentence which appears intended to clarify the effects on A&S benefits of an employe's receipt of A&S benefits for a previous occurrence, rather than to clarify the effects on A&S benefits of the employe's eligibility for another form of paid time off under the Agreement.

The Union and Grievant also understandably rely heavily on the language in Sec. 11.1(a) that A&S coverage begins with the first day of a hospitalization. However, the question presented in this case is not so much about when A&S eligibility starts as it is about whether scheduled vacation days are days on which an employe experiences a loss of pay for which A&S benefits are payable to maintain the employe's regular pay defined in Sec. 11.1 (b) as "forty (40) times the employee's regular straight-time hourly rate." While the Sec. 11.1(a) coverage period of thirty calendar days at full pay unquestionably starts "on the first day of accident, first day of hospitalization, first day of out-patient surgery," etc., the first day for which the employe would receive A&S benefits would be the first day on which the employe normally would have worked, which may or may not be the first day of hospitalization. If, for example, the first day of hospitalization was a Saturday for a Monday-Friday workweek employe, the first day for which the employe would be entitled to have full pay maintained by payment of S&A benefits would be

the following Monday, and then only if the hospitalization continued that long.

A scheduled vacation day is neither a day on which the employe normally would have worked nor a day as to which the employe would suffer a loss of regular pay by reason of accident, hospitalization or illness. For that reason the Arbitrator finds both that the language of Sec. 11.1 (a) and (c) does not mandate adoption of the Union's proposed interpretation of those provisions, and that unless the Agreement as a whole or the Union's past practice evidence persuasively support the Union's interpretation, the Union's interpretation must be rejected.

A review of the balance of Art. 11 and of the Agreement does not provide persuasive support for the Union's proposed interpretation. Section 11.2(f) contains an express provision that a casual day will not be charged in the event of an accident occurring prior to noon on a day being taken by the employe as a casual day. Read together with the balance of Art. 11, therefore, that section means that A&S benefits, rather than casual day benefits, would apply in such circumstances with the casual day credited back to the employe. Similarly, Section 10.3 expressly sets forth circumstances in which another Agreement benefit (a paid holiday) would be paid in lieu of a scheduled vacation day that coincides with the holiday; and that Section further expressly provides that in such a circumstance, the employe "shall be granted an additional day off with pay at the beginning or the end of his vacation period or by mutual agreement at some other time." As the County points out, there is no similar express provision in the Agreement for A&S benefits to be paid in lieu of scheduled vacation days or for employes to be granted additional days off with pay where A&S benefits would be applicable but for a scheduled vacation. The Arbitrator concludes that had the parties intended an arrangement for S&A benefits similar to that provided in Sec. 11.2(f) or 10.3, above, they would have expressly set it forth in the Agreement.

Finally, the Union's evidence concerning the parties' past practice in relating Agreement funeral leave and vacation benefits also does not provide persuasive support for the Union's proposed interpretation herein. It is true that the record establishes that the County has granted funeral leave in lieu of scheduled vacation days. However, it appears from the language of the grievance answer relied on by the Union that the County has done so on the strength of an express proviso in the Sec. 14.1 funeral leave language to the effect that the funeral leave benefits defined in that Section are subject to extension and modification "in special circumstances." There is no similar proviso in the S&A language and no evidence that the County has applied the S&A language in a manner parallel to the funeral leave provision relied on by the Union.

For all of those reasons, the Arbitrator concludes that A&S benefits are not payable in lieu of vacation where the conditions that would otherwise entitle the employe to A&S benefits occur during a previously scheduled vacation. It follows that the grievance must be denied.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND

AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. The County did not violate the Agreement by refusing to grant Grievant Lovetro Accident & Sickness benefits instead of vacation as regards the week of August 6-10, 1990 or any portion thereof.

2. The subject grievance is denied and no consideration of remedy is necessary or appropriate,

Dated at Shorewood, Wisconsin this 26th day of May, 1991.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator