

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
SHEBOYGAN COUNTY SUPPORTIVE SERVICES	: Case 133
LOCAL 110, AFSCME, AFL-CIO	: No. 44937
	: MA-6464
and	:
	:
SHEBOYGAN COUNTY (HUMAN SERVICES)	:
	:

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Sheboygan County Supportive Services Local 110, AFSCME, AFL-CIO.
Mr. John Bowen, Personnel Director, on behalf of Sheboygan County.

ARBITRATION AWARD

Sheboygan County Supportive Services Local 110, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Sheboygan County, hereafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and David E. Shaw was designated to arbitrate in the dispute. A hearing was held before the undersigned on March 1, 1991 in Sheboygan, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by April 5, 1991. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues.

The County would state the issues as being:

Is the issue arbitrable in the name of the grievant (William Bernico) since the former employee was a probationary employee without recourse to the grievance procedure and not represented by Local 110 Sheboygan County Supportive Services AFSCME, AFL-CIO.

If the answer to the first question is that the issue is arbitrable the question then becomes interpretation of: "Did the County violate Article 20 - Sick Leave, Paragraphs 1, 3, and 4 when it did not pay an unused sick day of eight (8) hours to a terminated employee?"

If a violation of contract has occurred what shall the remedy be?

The Union would frame the issue as follows:

Did the Employer violate the contract, Article 20 when it did not pay out the employee, Bill Bernico, sick leave upon termination. If so, what is the appropriate remedy?

The undersigned concludes that the issues to be decided may be framed as

follows:

1. Is the grievance of William Bernico arbitrable?
If so, then:
2. Did the County violate Article 20, Sick Leave, Section 4, of the parties' 1989-1991 Agreement when it failed to pay William Bernico for one (1) day of accumulated sick leave upon termination?

If so, what is the remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1989-1991 Agreement are cited:

ARTICLE 1

RECOGNITION

The Employer recognizes the Union as the exclusive bargaining agent for all regular full-time and part-time personnel employed by Sheboygan County in the Court House and in auxiliary departments and buildings (but specifically excluding therefrom all elected public officials, supervisors, professional employees of the Human Services Department, all deputized employees of the Sheriff's Department, all nurses, and all confidential employees, with regard to negotiations with the Employer on questions of wages, hours and conditions of employment.

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ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer.

By way of further enumeration and not as a limitation because of such enumeration, the Employer shall have the explicit right to determine the specific hours of employment and the length of the work week and to make such changes in the various details of the employment in the various employees as it, from time to time, deems necessary for the effective and efficient operation of County business.

The right to contract for any work it possesses and to direct its employees to perform such work wherever located is specifically reserved to the Employer.

The Union agrees that it will, at all times, promote the proper operation of County government and will make diligent efforts to protect the public interests of Sheboygan County.

Sheboygan County may adopt reasonable rules and amend the same from time to time and the Union agrees to cooperate in the enforcement thereof.

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ARTICLE 18

HOLIDAYS

All employees except as herein provided, shall be granted eleven (11) paid holidays during calendar year 1989, 1990 and 1991. They are as follows:

. . .

- d. Probationary employees shall be eligible for the herein described holiday pay except two (2) "Floating Holidays" as defined by contract as they occur while serving their probationary period, and the preceding paragraph (c) rules shall apply. It is further understood that if the probationary employee does not complete the required probationary period, the holiday pay that has been received shall be deducted from the employee's final paycheck.

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ARTICLE 19

VACATIONS

1. Employees Who Earn Vacation: All employees shall earn vacation, except temporary employees.

2. Continuous Service: Continuous service shall include all the time the employee has been in continuous employment status in permanent position. The continuous service of an employee eligible for vacation shall not be considered interrupted if he/she:

- a. Was absent for less than thirty (30) calendar consecutive days;
- b. Was on an approved leave of absence;
- c. Was absent on military leave;
- d. Was absent due to injury or illness.

3. Computing Years of Service: In determining the number of full years of service completed, credit shall be given for all time employed by Sheboygan County in a permanent position. Any absence of more

than thirty (30) calendar days except for military leave and absence due to injury or illness arising out of county employment and covered by the Worker's Compensation Act shall not be counted. Only the most recent period of continuous service may be counted in determining an employee's length of service.

4. Eligibility: After completion of the first twelve (12) months in a permanent position, employees shall be granted non-cumulative vacation based on accumulated continuous service as follows:

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a. Part-time Employees: Employees who are regularly employed for less than twelve (12) months out of the year in continuous county employment shall be granted pro-rata vacation.

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5. Computing Vacation:

b. Upon termination of employment vacation shall be pro-rated and paid.

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ARTICLE 20

SICK LEAVE

1. Employees Who Earn Sick Leave: Sick leave shall hereafter accrue at the rate of eight (8) hours of sick leave for each calendar month of service for each employee working a regular shift of forty (40) hours and employees working a regular shift of thirty-seven and one-half (37-1/2) hours shall earn seven and one-half (7-1/2) hours of sick leave for each month of service.

a. Sick leave allowance shall be accumulated in the employee's sick leave account until a maximum of nine hundred (900) hours has been accrued, except for Custodian, Maintenance Man I, Maintenance Man II, Soil Conservation Technician, Programmer Analyst, Programmer II, Programmer I, Control Clerk II, Control Clerk I, Computer Operator II, and Computer Operator I positions whose maximum shall be nine-hundred sixty (960) hours.

b. Sick leave credits in any given year shall not be earned for any period of absence without pay or time otherwise not worked or paid for, except that for administrative purposes any approved absence or absences totalling thirty (30)

calendar days or less in a calendar year may be disregarded.

- c. All sick leave in excess of the maximum hours specified in (a) above accumulated during any calendar year shall on the first payday in the following January be paid to the employee at the rate of one hundred percent (100%) of the employee's previous year's hourly wage.
- d. Sick leave shall not be used until it has been accrued.
- e. Part-time employees shall accrue sick leave pro-rated on the basis of time worked.
- f. For new or returning employees, seven and one-half (7-1/2) or eight (8) (as applicable) hours of sick leave shall be added if the employment commences before the 16th day of the month, and if the employee commences work on the 16th day or thereafter, no sick leave shall be added for that period.

3. Eligibility for Sick Leave: Each permanent employee who has earned sick leave credits shall be eligible for sick leave for any period of absence from employment which is due to his/her illness, bodily injury, exposure to contagious disease, attendance upon his/her immediate family (defined as wife, husband, and children) where employee's presence is required or death in the immediate family (defined as husband, wife, children, parents, brothers and sisters, grandparents, step children, and step parents) of the employee or spouse.

- a. The department head has the duty to require that the employee make other arrangements, within a reasonable time for the attendance upon children or other persons in the employee's care.
- b. The department head may require a medical certificate to justify the granting of sick leave in excess of three (3) days' duration.
- c. Sick leave shall be withdrawn on an hourly basis calculated on the basis of the regularly scheduled work shift of the employee involved. (That is to say an employee working eight (8) hours day out on a sick leave shall have withdrawn from his/her account eight (8) hours of sick leave for each day of absence. Likewise, an employee scheduled on a seven and one-half (7-1/2) hour day shall have withdrawn

seven and one-half (7-1/2) hours for each day of absence.) Withdrawals for portions of the work day shall be on the basis of the actual time lost, rounded out to the next one-half (1/2) hour.

4. Effect of Termination of Employment: Upon termination of their employment all employees shall be paid for their unused accumulated sick leave at their then-existing wage subject to the following conditions:

- a. The accumulated sick leave shall not be paid out while an employee is on an approved leave of absence.
- b. Whenever a permanent employee is laid off due to lack of work or funds any unused accumulated sick leave allowance may, at the option of the employee, be continued in effect in expectation of being rehired by any department, but such deferral shall not be for longer than one (1) year.

5. Sick Leave on Holidays or Days of Work Suspension: In the event that a holiday falls on a regular work day within the week or weeks taken as vacation or sick leave, such holiday shall not be charged as vacation or sick leave. For any day on which work is suspended such suspension shall not be construed to extend sick leave to an employee in such status at the time.

6. Medical Appointments: Sick leave may be used for medical, dental and optical appointments.

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ARTICLE 22

PROBATIONARY PERIOD

All newly hired employees without previous county experience in the job to which they are hired shall serve a probationary period of six (6) months. Probationary employees may be terminated without recourse to the grievance procedure, but the requirements for the termination reports shall be followed.

The following definitions shall apply:

- a. A regular full-time or regular part-time employee is hereby defined as a person hired to fill a regular position.
- b. A temporary employee is one hired for a specified period of time and who will be separated from the payroll at the end of such period.

- c. A temporary employee who becomes a regular employee without a break in continuous service shall be deemed to have served their probationary period upon completion of six (6) months of service. His/her seniority shall date from the original time of hiring.

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ARTICLE 24

SENIORITY

Sheboygan County shall, during the life of the herein contract, for the employees covered by the same, recognize seniority as herein provided.

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C. Layoff

For the purpose of layoff, the County recognizes seniority therefore, whenever the County determines it is necessary to decrease the work force and to layoff employees, such layoff shall, subject to the following procedures, be in inverse order of the employee "seniority". The order of layoff shall be as follows:

1. Temporary Employee/Position: Temporary employees in the involved department in which the work force is being reduced shall be laid off first.
2. Probationary Employees/Position: Probation-ary employees in the involved department in which the work force is being reduced shall be laid off second.
3. Part-time Employees/Position: Part-time employees in the involved department in which the work force is being reduced shall be laid off third.

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An employee who has been laid off for twenty-four (24) months or more shall be considered on permanent layoff status.

ARTICLE 25

GRIEVANCE PROCEDURE

The County shall not be required to process any grievance which is based upon an occurrence more than thirty (30) days prior to the date of it being offered as a complaint, or a complaint which is filed more than thirty (30) days after the Union knew, or should have known of the existence of grounds for such complaint,

except that in discharge and suspension cases the time limit shall be five (5) working days. When an employee is suspended or discharged, the employee and the Union shall be notified in writing of such action and reason for same.

Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) or the Employer and the Union shall be handled as follows:

- (a) Step One: The aggrieved employee, the Union Steward and/or the Union Representative shall present the grievance to the direct supervisor, if any, of the individual involved in the grievance. The supervisor shall answer the grievance in writing within five (5) working days.
- (b) Step Two: Within five (5) working days of receiving the unsatisfactory answer at Step One (1) the aggrieved employee may appeal the grievance to the Department Head. The Department Head shall answer the grievance in writing within five (5) working days.
- (c) Step Three: If a satisfactory settlement has not been reached as outlined in Step Two (2) within seven (7) working days, the Union Committee or Union Representative may present the grievance to the Personnel Director. A meeting with the Personnel Director and Department Head shall be held within fourteen (14) days of actual receipt or at a mutually convenient arranged date. The decision of the Personnel Director shall be made within five (5) working days after the meeting. A written copy of the Personnel Directors decision shall be sent to the aggrieved party, the union and the Department Head of the aggrieved employee.
- (d) Step Four: If a satisfactory settlement is not reached as outlined in Step Three (3) within seven (7) working days the Union Committee or Union Representative may present the grievance to the Personnel Committee. Such a meeting, as outlined in this section shall be held within fourteen (14) calendar days of receipt of written request from the other party. The decision of the Committee shall be made within ten (10) days after said meeting. A written copy of the Personnel Committee's decision shall be sent to the aggrieved party, the union and the Department Head in question.

- (e) Step Five: If a satisfactory settlement is not reached as outlined in Step Four (4) either party may request the other to submit the grievance to arbitration. The parties shall then, by mutual written communication request the Wisconsin Employment Relations Commission to name an arbitrator from its staff. The arbitrator shall make a decision on the grievance which shall be final and binding on both parties.
- (f) Costs: The cost of the arbitrator shall be shared equally by the parties.

BACKGROUND

This grievance involves the County's refusal to pay the Grievant, William Bernico, for one day of accumulated sick leave upon his termination. Bernico was employed by the County on April 23, 1990 in the regular full-time position of Account Clerk I in the Community Services Division of the Human Services Department, a position in the bargaining unit represented by the Union. Bernico was in his probationary period when he was terminated effective June 8, 1990.

At the hearing, the parties stipulated to the following facts:

- (1) Employees can use accumulated sick days during their probationary period.
- (2) The Grievant did not use any sick leave during his probationary period.
- (3) The Grievant started work April 23, 1990 and terminated June 8, 1990.
- (4) The Grievant had one day of sick leave accumulated at the time of his termination.
- (5) Joint Exhibit No. 5 is the final check of the Grievant at termination, showing that the unused sick day was not included.

The grievance was filed on the County's refusal to pay Bernico for the one day of accumulated sick leave upon his termination. The County denied the grievance at all steps of the grievance procedure based on its interpretation of Article 20, Section 4 that pay for unused sick leave upon termination was only for "permanent" employees and not "probationary" employees. The parties were unable to resolve their dispute and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

With regard to the issue of arbitrability, the Union asserts that a probationary employe is covered by the parties' Agreement and falls within the recognition clause which states:

The Employer recongizes the Union as the

**exclusive bargaining agent for all regular full-time
and part-time personnel employed by Sheboygan County. .**

The evidence indicates that Bernico was classified as a regular full-time employe on the "Employe Action Sheet" (Jt. Exhibit #3). While the Agreement may limit what the Union is able to do with regard to representing a probationary employe upon termination, it certainly has the ability to grieve any other violations of the Agreement, such as payment of the wrong hourly rate. Further, the Union has the duty to represent probationary employes on such matters.

With regard to the merits of the grievance, the Union asserts that since the County stipulated that Bernico had accumulated sick leave, it is impossible to interpret the contract as excluding Bernico from the sick leave payout. That language says that all employes shall be paid for their unused accumulated sick leave, subject only to the exclusion of an employe on leave of absence or on layoff less than a year. Bernico did not fall under either exclusion.

The Union interprets the word "permanent" as meaning nontemporary and argues that is consistent with the testimony of its President, Zorn. Zorn testified that as far back as the 1978 negotiations, when she was on the Union's bargaining team, the only restriction on a probationary employe was with regard to holiday pay and that was subsequently modified to only "floating" holidays. She further testified that during that last round of negotiations the County tried to change the word "permanent" throughout the contract, but was unsuccessful. Zorn testified that the Union interprets the language in Article 20, Section 4, as meaning that a permanent employe means a regular employe, as opposed to a limited term or project employe.

In interpreting the meaning of the word "permanent," the Union asserts that the primary rule in construing a written agreement is that the true intent of the parties is to be determined from the instrument as a whole, rather than from a single word or phrase. It asserts that the word "permanent" as meaning nontemporary, is consistent with its usage in the Sick Leave, Vacation and other pertinent parts of the Agreement.

The Union also asserts that there is only one benefit under the Agreement that a probationary employe receives, but must pay back if he or she does not pass their probationary period, and that is floating holidays. That provision, Article 18 - Holidays, Section D, of the Agreement specifically requires that if a probationary employe does not complete the probationary period, the holiday

pay that has been received shall be deducted from that employe's final paycheck. That provision expressly refers to the probationary employe.

It is contended that the evidence offered by the County as to County Policy and Procedure and the County's Agreement with Local 2427 is irrelevant to this proceeding. The Union had no input into the Policy and Procedure addition referred to and no knowledge of that addition. Local 2427's Agreement is irrelevant and even if it is considered, the Union argues that the language in that Agreement differs from the language in the parties' Agreement, there being no eligibility or minimum hours required before employes receive benefits as required by the Local 2427 Agreement. The Union concludes that since Bernico did receive sick leave, it follows that he is entitled to a payout.

County

The County first takes the position that since the Grievant was a probationary employe, he had no recourse to the grievance procedure and was not represented by the Union. It asserts that a grievance submitted on behalf of a probationary employe is directly contradictory to the terms of probationary employment and the recognition of the Union.

With regard to the merits of the grievance, the County takes the position that probationary employes do not receive the sick leave payout under Article 20, Section 4, of the Agreement. It asserts that the testimony of Zorn falls short of proving the Union's interpretation of the provision as including probationary employes. The negotiation of holiday pay during probation does not establish that pay was achieved for unused sick leave during probation. Further, the County's proposal to eliminate the word "permanent" in the vacation and sick leave language does not support the Union's case. The County's efforts in that regard were based on new human resource concepts that the use of the word "permanent" could create legal difficulties. Also, if the parties are held accountable for their contract proposals, negotiations will be isolated to only final offers.

The County asserts that it did establish that it has a policy regarding sick leave payout. Page 4, paragraph f., of the County's "Policies and Procedures" provides that a probationary employe shall not be paid out for his or her accumulated unused sick days and further explains that unused sick days during probation will be returned if the employe leaves or is terminated during probation. The County also asserts that the language of these parties' Agreement is almost identical to that of the County's Agreement with Local 2427. This makes relevant the County's evidence as to the fringe benefit payouts of employes who were terminated during probation and had the sick days they used deducted from their final paychecks. If this applies to used sick days during probation, then it would also mean that unused days will not be paid.

The County concludes that the word "probation" means a period of trial or testing, while the word "permanent" means lasting or stable. The parties' Agreement, Article 20, regarding sick leave uses the word "permanent" and makes no reference to "probation" or "probationary." However, the term "probation" does occur in the County's Personnel Policy as it pertains to the basis for accrual, and the lack of payout and return of used sick days should a probationary employe terminate or be terminated. While the Union does not want to recognize the Personnel Policy, those work rules have existed since the parties' bargaining relationship and prior to that. The revision of the Policy in November of 1989 was only minor and it maintained its major tenets.

DISCUSSION

The County's contention that the grievance is not arbitrable is unpersuasive. Bernico held a regular full-time position and as such was in the bargaining unit represented by the Union and covered by the parties' Collective Bargaining Agreement. 1/ The parties' Agreement does not generally exclude probationary employes from its coverage and the grievance procedure also does not exclude probationary employes. The only exception to the latter is found in Article 22, Probationary Period, which expressly provides that "Probationary employes may be terminated without recourse to the grievance procedure..." If, as the County argues, probationary employes are generally excluded from access to the grievance procedure, such a statement would not be necessary. Thus, it is concluded that Bernico could grieve the County's refusal to pay him the day of accumulated sick leave upon his termination and that the grievance is arbitrable.

MERITS

The County essentially relies upon its Policies and Procedures Section 225, II, F, and the practice in the Institutions bargaining unit to support its position. The County's Personnel Director, Bowen, conceded on cross-examination that to his knowledge the Union had never been given a copy of the Policies and Procedures and had no input in its drafting. That being the case, even though Section 225 of Policies expressly states that probationary employes will not be paid out accumulated sick leave upon termination, the Union cannot be found to have acceded to that policy or such an interpretation of the Agreement. Similarly, the Union cannot be considered bound by the practice in another bargaining unit of deducting any sick leave used from the final paycheck of a probationary employe whose employment has been terminated. Bowen testified he was not aware of any instances where a probationary employe in this bargaining unit had his/her final paycheck similarly adjusted.

The provision in question, Article 20, Section 4, provides that "upon termination of their employment all employees shall be paid for their unused accumulated sick leave ...", subject only to certain express exceptions that do not apply in this case. The parties stipulated that Bernico had one day of unused accumulated sick leave at the time of his termination. Hence, on its face Article 20, Section 4, would appear to entitle Bernico to a pay out of one

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ARTICLE 1

RECOGNITION

The Employer recognizes the Union as the exclusive bargaining agent for all regular full-time and part-time personnel employed by Sheboygan County in the Court House and in auxiliary departments and buildings.

. . .

day of sick leave. Also, as the Union points out, where probationary employes are treated differently as to fringe benefits, the Agreement expressly so states, e.g., Article 18, Section d. That provision expressly states that while probationary employes shall be eligible for holiday pay, except the "floating" holidays that occur during their probationary period, if the employe does not complete the probationary period, the holiday pay received will be deducted from the employe's final paycheck. It is noted that there is no similar provision in the sick leave payout language of Article 20, Section 4. Therefore, it is concluded that Bernico was entitled to the pay out of one day of sick leave he had accumulated at the time of his termination and that the County violated Article 20, Section 4 of the Agreement when it failed to pay him for that day.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The County is directed to immediately make Bernico whole by paying him for the one day of accumulated sick leave pursuant to Article 20, Section 4, of the Agreement.

Dated at Madison, Wisconsin this 9th day of September, 1991.

By David E. Shaw /s/
David E. Shaw, Arbitrator