BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
FEDERATION OF NURSES AND HEALTH PROFESSIONALS, LOCAL 5001, AFT, AFL-CIO	:	Case 301 No. 44977 MA-6472
and	:	
MILWAUKEE COUNTY	:	

Appearances:
Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, by Mr. Timothy E. Hawks, appearing on behalf of the Union.
Mr. Timothy R. Schoewe, Deputy Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

The Federation of Nurses and Health Professionals, Local 5001, AFT, AFL-CIO, hereinafter referred to as the Union, and Milwaukee County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the binding arbitration of certain disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance over the interpretation of the parties' agreement. The undersigned was so designated. Hearing was held in Milwaukee, Wisconsin on August 15, 1991. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on October 8, 1991.

BACKGROUND

The Union's Chief Steward, Joan Lossing, sent a letter dated September 12, 1990 to Mr. Henry Zielinski, the County's Director of Labor Relations, which stated as follows:

> Pursuant to Section 4.03 paragraph (3) of the Memorandum of Agreement, I am requesting a meeting to discuss the interpretation of section 2.12 par (1) and section 2.11 paragraph (4)(a) as these sections relate to part-time and pro-rata employees. In view of the fact that the County's interpretation impacts to a great extent the benefits of those employees who are retiring during this "window period" it is imperative that this matter be discussed and if necessary arbitrated as soon as possible.

The parties met but were unable to resolve the dispute and on December 13, 1990, Lossing sent the following letter to Zielinski:

> Pursuant to Section 4.03 (3) of the Memorandum of Agreement, we have met and had numerous conversations over the issue of the County's interpretation of Section 2.11 (a) Retirement System. The practice, as we understand it, is to pay retirement leave based on an employee's status (full time, part time) as opposed to the 30 days of accumulated sick leave which is stated in the contract, thus a part time employee would be paid 120 hours even though she may have accrued much more than that. We believe the contract requires 240 hours.
>
> Although we have received nothing in writing from your office, on 12/6/90 I clearly understood Mr. Taylor to say that your position remains unchanged, thus, the dispute is being referred to arbitration.

ISSUE:

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

The Union framed the issue as follows:

> In regard to part-time employees, does the word "days" as it is used in Section 2.11(4)(a) mean eight hour days; or instead does it mean a proportionate part of a day where the proportion is determined by the employee's part time status; and if so what is the appropriate remedy.

The County stated the issue as follows:

> Given the language of Section 2.11(4)(a) and the practice of the parties, how shall this benefit be calculated or computed?

The undersigned frames the issue as follows:

> Is the retirement leave set forth in Section 2.11(4)(a) prorated on the basis of employe status as set forth in Section 2.31(2)?
>
> If not, what remedy is appropriate?

PERTINENT CONTRACTUAL PROVISIONS

> 2.11 RETIREMENT SYSTEM.
>
> . . .
>
> (4) Upon retirement, employes shall have the following options:
>
> (a) A retirement leave may be taken, the duration of which shall not exceed 30 days of accumulated sick leave plus 16 hours for each 100 hours or fraction

thereof of accumulated sick leave in excess of 240 hours.

. . .

2.31 CHANGES IN EMPLOYE STATUS.

(1) Whenever an employe requests to change status, within classification, such an employe shall notify the appointing authority in writing. A list of said requests will be maintained, based on seniority. When positions are filled, first consideration shall be given to the most senior qualified employe having a request on file for a status change. Pro-rata employes may increase or decrease their hours of work within their position and work unit with the approval of their appointing authority.

(2) For purposes of this section, employe status shall mean:

(a) Full Time - Those employes with an established work week of 40 hours per week.

(b) Half Time - Those employes with an establish-ed work week of 20 hours per week.

(c) Pro-Rata - Those employes with an established week of more than 20 but less than 40 hours per week.

(d) Pool - Those employes hired on an hourly basis in accordance with Section 3.14.

. . .

4.03 SELECTION OF ARBITRATOR

. . .

(3) INTERPRETATION OF MEMORANDUM OF AGREEMENT: Any dispute arising between the parties out of the interpretation of the provisions of the Memorandum of Agreement shall be discussed by the Federation with the Department of Labor Relations. If such dispute cannot be resolved between the parties in this manner, either party shall have the right to refer the dispute to arbitration in the manner prescribed in par. (1), except as hereinafter provided.

The parties may stipulate to the issues submitted to the arbitrator and shall present to such arbitrator either orally or in writing, their respective positions with regard to the issues in dispute. The arbitrator shall be limited in his deliberations and decision to the issues so

defined. The decision of the arbitrator shall be filed with the Department of Labor Relations.

UNION'S POSITION

The Union contends that the County's practice regarding the computation of a part-time employe's "retirement leave" leads to an absurd construction of the contract. The Union asserts that the County is "double dipping" the part-time employe in that it is reducing the sick leave earned at a proportionate rate by the same fraction of full-time employment. The Union points out that a full-time employe earns 3.7 hours of sick leave per pay period and a half-time employe earns 1.85 hours per pay period. The Union notes that if an employe is sick, one hour of sick leave is used for each hour of absence and an hour of sick leave has the economic value of one hour's pay. The Union submits that this computation has the consequence of establishing parity between full-time and half-time employes and the "principle of proportionality" regarding part-time employes' benefits, which is used throughout the contract, is followed by this method of calculation.

The Union argues that the County has not properly calculated the "retirement leave" under Section 2.11(4)(a). It submits that if a half-time employe uses sick leave to cover lost time, the amount earned would be applied, but when the employe retires, the County reduces the amount of accumulated sick leave for a half-time employe by one-half again, so that if the part-time employe had accumulated 48 hours of sick leave, the County would grant the part-time employe only 24 hours. It claims the result is absurd especially in light of the plain and unambiguous language of Section 2.11(4)(a). It refers to the contractual provision which states that sick leave is earned in hours, not days and part-time employes work full days rather than reduced hours per day. Additionally, it notes the anomaly that a half-time employe with over 240 hours of sick leave would get paid for only 120 hours but would then receive the 16 hours for each 100 hours over the original 240 hours. It insists that this result is also absurd. The Union points out that Section 2.11(4)(a) contains no language on proportionality and the County discriminates against part-timers by reducing the value of their accrued but unused sick leave for no rational reason. It submits that all employes accrue sick leave on an hourly basis and nothing in the language of Section 2.11(4)(a) distinguishes employes or limits the 240 hours to full-time employes. The Union concludes that the County's computational method simply flies in the face of the language of the contract.

The Union maintains that the County's reliance on past practice must fail because it cannot be used to contravene the clear and unambiguous language of the contract. Additionally, the Union claims that there is no binding past practice with respect to retirement leave because the County's computation was not known by both parties to the dispute as only a very small percentage of employes who retire are part-time and actually receive the retirement leave benefit. The Union alleges that the County practice would have been challenged if the Union knew of it as it considers this practice particularly obnoxious.

With respect to the remedy, the Union contends that it is not limited to prospective application and the County is estopped from asserting such a defense now because it was not timely raised during the first steps of the grievance procedure thereby inducing the Union into not filing grievances on behalf of individuals who retired in the interim. It submits that the Arbitrator has the jurisdiction and inherent power to remedy any violation he finds as long as the remedy draws its essence from the four corners of the contract.

The Union asks that Section 2.11(4)(a) be interpreted such that half-time and pro-rata employes suffer no reduction in retirement leave and that relief be granted retroactive to 90 days prior to September 12, 1990.

COUNTY'S POSITION

The County contends that the remedy sought in this matter is limited to an interpretation of the Agreement and no remedial relief may be granted. It points out that Section 4.03(3) is limited to defining and resolving a dispute over interpretation and is different from proceeding under Sections 4.02 and 4.03(2) of the contract. It submits that an actual aggrieved employe must initiate a grievance, not the Union, and therefore fashioning remedial relief is outside the jurisdictional ambit of the Arbitrator.

With respect to the interpretation of Section 2.11(4)(a), the County maintains that the term "30 days" means days rather than hours as provided in other sections and is based on normal work week assignments, so a 20 hour a week employe would only get 120 hours of payment. The County argues that the County's past practice going back some 17 years without any grievances or complaints being filed supports its position. It points out that the Union presented no evidence in support of its position and only argued its interpretation. It maintains that arbitrators may refer to past practice to interpret ambiguous language and the dispute here evidences ambiguity in the language, thus, the past practice for so many years provides the appropriate interpretation. It insists that the Union should not be allowed to amend the contract in arbitration but must do so through contract negotiation. The County asks that the Arbitrator concur with its interpretation. It further asks that the request for any individual relief be dismissed as outside the Arbitrator's jurisdiction in this case.

DISCUSSION

Section 2.11(4)(a) of the parties' collective bargaining agreement provides that "a retirement leave may be taken, the duration of which shall not exceed 30 days of accumulated sick leave plus 16 hours for each 100 hours or fraction thereof of accumulated sick leave in excess of 240 hours." The language is clear and unambiguous. It contains no qualifiers for any proration on the basis of hours worked or any type of status, whether full-time, part-time or pro-rata. The County's reference to "days" in Section 2.11(4)(a) as being the averaged days per week does not make sense as the provision when read as a whole indicates the days are eight hours of sick leave, not work days, as sick leave is earned in hours. Without any change in meaning, Section 2.11(4)(a) could have just as easily stated "not to exceed 240 hours of accumulated sick leave plus 16 hours for each 100 hours or fraction thereof exceeding 240 hours." Thus, the County's argument is not persuasive. The County has also referred to past practice, however, past practice can only be used as an aid to interpret ambiguous language. Here, the language is not ambiguous but is clear. Additionally, the County's rationale for the proration practice makes no sense whatsoever. A full-time employe who retires after 15 years with no use of sick leave would have accumulated the same amount of sick leave as a half-time employe who worked 30 years and never used sick leave. There is nothing in the contractual language or common sense for concluding that the 30-year employe would only be entitled to 1/2 the accumulation of the 15 year employe. The County's practice may never have been challenged because few part-time employes retire or that any sick leave accumulation by them was minimal. In any event, the past practice must be rejected as the language of Section 2.11(4)(a) is clear and unambiguous and must be given effect. All employes must be given the retirement leave according to the express terms of the agreement which is according to the amount of sick leave accumulated with any reference to employe status.

With respect to the remedy, the undersigned is bound by the provisions of Section 4.03(3) of the agreement and cannot add to or detract nor revise the language of the agreement. The Union brought the instant grievance pursuant to Section 4.03(3) which permits grievances over the interpretation of the agreement and the decision of the arbitrator is limited to interpreting the contract. The purpose is to obtain an interpretation where no violation has occurred so future conduct can be conformed to the terms of the agreement as interpreted by the arbitrator and no remedial relief can be granted where an interpretation is sought under Section 4.03(3). 1/

Based on the above and foregoing the record as a whole and the arguments of the parties, the undersigned issues the following

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1/ Milwaukee County, unpublished (Malamud, 6/91). Although in a recent case between the parties, (Ex. 7) the County argued that remedial relief be limited, this factor alone does not estop it from asserting a lack of jurisdiction to grant remedial relief in this matter.

AWARD

The retirement leave set forth in Section 2.11(4)(a) of the parties' agreement is not pro-rated based on employe status as set forth in Section 2.31(2), but rather the County is obligated to grant retirement leave based on the amount of sick leave accumulated without any reference to whether an employe is full-time, half-time or pro-rata. The undersigned is without jurisdiction to grant any remedial relief for past failures of the County to comply with Section 2.11(4)(a) as interpreted above.

Dated at Madison, Wisconsin this 31st day of October, 1991.

By _____
Lionel L. Crowley, Arbitrator