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 302 No. 44978 MA-6473
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:

> Over the past several months, we have met and had phone conversations regarding the County's interpretation of Section 2.12 (1) Sick Leave of the Memorandum of Agreement.
>
> Our position is that "a proportionate credit for employes who regularly work less than 40 hours per week" means employees should be credited according to the hours they actually work. The County's practice is to give credit only based on the employees status (full time, part time or pro-rata) regardless of whether the employee works 20 or 40 hours/week.
>
> Following a negative response from Mr. Taylor on 12/6/90, this is to inform you that the union intends to arbitrate this dispute pursuant to Section 4.03(3) of the Memorandum of Agreement.

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 Section 2.12(1) require computation of leave with pay based upon their proportionate regularly scheduled hours of work or instead upon their proportionate employee part-time status; and if so what is the appropriate remedy.

The County stated the issue as follows:

> Given the language of Section 2.12(1) and the practice of the parties, how shall this benefit be calculated or computed?

The undersigned frames the issue as follows:

> Is the sick leave accrual provided under Section 2.12(1) of the agreement computed on the actual hours of work or on the basis of employe status as set forth in Section 2.31(2)?

PERTINENT CONTRACTUAL PROVISIONS

> 2.12 SICK LEAVE.
>
> (1) Employes may be given leave of absence with pay for illness or disability of 3.7 hours for each pay period, or a proportionate credit for employes who regularly work less than 40 hours per week; provided, however, that such credit shall be cancelled for each pay period in which the employe is absent without pay for more than 3/8 of the required hours except absences due to disability in line of duty or leave for military service; and further provided that:

. . .

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 language of Section 2.12(1) is clear and provides that sick leave is to be calculated by giving a "proportionate credit for employes who regularly work less than 40 hours a week," which means the credit must be based on actual hours worked rather than the formal designation of part-time status. The Union notes that elsewhere in the contract where "status," rather than hours worked, is the basis for the calculation of a benefit, the parties adopted language to make that distinction clear. The Union notes the definition of employe status correlates to the employe's "established work week" and in computing personal days and compensatory time for holiday work, the contract references established workweek. In Section 2.12(1), the Union points out the absence of "established work week" and the parties' use of the term "proportionate credit," and it takes the position that this evidences that the parties must have intended hours actually worked rather than employe status applies to Section 2.12(1).

Alternatively, the Union insists that the practice cited by the County of basing sick leave accrual on status was developed at a time when the employe's established workweek and actual hours of work were nearly equal. It submits that the historical basis of established hours equating hours actually worked which underlies the practice no longer holds true. It asserts that the County regularly schedules employes more hours than indicated by their status and by using their status as the basis for computing the amount of sick leave accrual, the County realizes a windfall. It urges its interpretation of Section 2.12(1) would eliminate this abuse.

The Union argues that the evidence with respect to past practice must be rejected because such a practice was not known by the Union. It claims that for a past practice to be binding it must be known by both parties and here it wasn't because of the relative equality of scheduled work and actual work and the failure of the County until recently to regularly notify employes of their sick leave accrual. The Union maintains that it only became aware of the practice in 1990. The Union requests the Arbitrator to interpret Section 2.12(1) so as to require computation of "half-time" and "pro-rata" employes' sick leave be based on their actual hours of work and to order the County to recalculate the amount of accumulated sick leave from a date 90 days prior to September 12, 1990.

COUNTY'S POSITION

The County contends that any relief in this matter is limited to interpreting the agreement and not to determining the rights of individuals. It insists that the specific language of Section 4.03(3) is limited to merely defining and resolving a dispute over the interpretation of a contract provision and is different and distinct from a grievance arbitrated under Sections 4.02 and 4.03(2). The County relies on a past practice of at least 17 years that sick leave accrual is based on the assigned workweek rather than actual hours worked. It argues that Section 2.12(1) should be interpreted in light of the past practice and the grievance be denied.

DISCUSSION

Section 2.12(1) of the parties' collective bargaining agreement provides, in part, as follows:

> "Employes may be given leave of absence with pay for illness or disability of 3.7 hours for each pay

> period, or a proportionate credit for employes who regularly work less than 40 hours per week;" ...

The County's past practice in administering this provision is that a half-time employe earns 1.85 hours per pay period and that status paid time is used in lieu of time worked in calculating the credit.

The Union insists that the credit should be based on actual hours worked based on the "proportionate credit" language of Section 2.12(1) as half-time employes now work more than 40 hours in a pay period. Section 2.12(1) states a "proportionate credit" for employes who regularly work less than 40 hours per week. The emphasis here is on the regularity of the work hours in a week and even though an employe might work additional hours certain weeks, no additional credit would be required by the language as these would not be hours regularly worked. Thus, the employes' status as supported by the County past practice in interpreting this language is deemed the appropriate method for calculating such leave rather than actual hours worked. Furthermore, if an employe is regularly scheduled hours greater than the employe's present status, the employe can request a change in status under Section 2.31(1) so that the employe's status would match the actual hours worked or paid where these hours are regularly scheduled.

Thus, the accrual of sick leave under Section 2.12(1) is properly based on employe status rather than hours worked. The plain language supports this conclusion as does the past practice of the County. Section 2.31(1) provides the appropriate avenue to resolve any necessary changes in status due to a change in regularly scheduled hours with the resulting change in accrual of sick leave. Any changes in Section 2.12(1) to provide a different basis for accrual

of sick leave may be resolved in the next round of negotiations. Under the present agreement, the County's practice for the accrual of sick leave is deemed proper.

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

AWARD

The sick leave accrual provided under Section 2.12(1) of the parties' agreement is properly computed on the basis of employe status under Section 2.31(2) and not on the actual hours worked.

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

By _____
Lionel L. Crowley, Arbitrator