

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	
WOOD COUNTY COURTHOUSE EMPLOYEES	:	Case 112
UNION LOCAL 2486, AFSCME, AFL-CIO	:	No. 48206
	:	MA-7544
and	:	
	:	
WOOD COUNTY (COURTHOUSE)	:	
	:	

Appearances:

- Mr. Sam Froiland, Representative, Local 2486, AFSCME, AFL-CIO, appearing on behalf of the Union.
- Mr. Douglass F. Maurer, Personnel Director, Wood County, appearing on behalf of the County.

ARBITRATION AWARD

On October 20, 1992, Wood County Courthouse Employees Union Local 2486, AFSCME, AFL-CIO, hereinafter Union, requested the Wisconsin Employment Relations Commission to designate an arbitrator from its staff to hear and decide a dispute involving the grievance of Tim McNaughton, pertaining to use of funeral leave while on approved compensatory time and vacation leave. Wood County, hereinafter County or Employer, concurred in the Union's request for arbitration and a hearing in the matter was held on December 17, 1992, in the Wood County Courthouse. No stenographic transcript of the proceeding was taken and the parties filed post-hearing briefs by February 15, 1993.

BACKGROUND

In early May, 1992, the grievant, Tim McNaughton, advised his supervisor, Schroeder, that he was considering taking compensatory time and vacation time off for the week of May 25, 1992. Subsequent to that notification and about a week prior to the time specified, McNaughton made a written request for one hour of compensatory time off at the end of the day on Thursday, May 21, 1992, all of Friday, May 22nd off compensatory time, Monday, May 25th was the Memorial Day holiday, Tuesday and Wednesday, May 26 and 27, 1992, compensatory time off, and Thursday and Friday, May 28 and 29, 1992, vacation time off. This request was approved by his supervisor, Schroeder.

Late in the evening of May 21, the grievant's brother-in-law passed away. The next morning, May 22, 1992, at about 8:10 a.m., the grievant called his supervisor, Schroeder, and asked if he

could switch his scheduled time off from compensatory time to funeral leave. The funeral for his brother-in-law was held in Superior, Wisconsin, on Tuesday, May 26, 1992. McNaughton does not recall the specific response of Schroeder other than he came away with the impression that making the switch would be a problem, and that he would have to pursue the matter through the grievance procedure. Also, McNaughton does not recall if any reason was given as to why making the switch would cause a problem.

About a week after his brother-in-law's death, the grievant was advised by Schroeder that the substitution would not be permitted, and he would have to file a grievance if he wished to pursue the matter. However, around June 18th he received a letter from the Deputy Director of the Wood County Department of Social Services, Mr. Van Lysal, denying his request to change compensatory time to funeral leave. At no time was the grievant advised by Schroeder or anyone else that the County's reason for denying his request to substitute funeral leave for compensatory time or vacation would create future scheduling problems.

Van Lysal testified that Schroeder spoke with him about the grievant's request on the morning that the grievant called, and in fact, may have talked to him while the grievant was on the telephone. Van Lysal indicated that he did not make a decision with respect to the grievant's request that day because the grievant was already on an approved leave and there was no need to make an immediate decision. Van Lysal advised Schroeder that there might be a problem with the grievant's request because the issue was not spoken to in the contract, and therefore, he had some question as to whether the request should be granted. Van Lysal wanted to discuss the matter with the personnel office so that he would have all the information possible before making a decision as to whether to grant or deny the request. He testified that there was no consideration about scheduling problems if the substitution were allowed, and did not believe that any undue hardship would be created had the grievant's request to substitute funeral leave time for compensatory time or vacation time been granted. He consulted with the Personnel Department and was advised that the contract did not speak to the issue, and that to their knowledge such a substitution had not occurred before. Also, in his 27 years with the department he did not recall such an instance ever occurring before.

Van Lysal initially questioned the appropriateness of granting the request because the language of Article 12.01 - Funeral Leave, talks about three consecutive work days off, and in this case the grievant would not have been working in any event when the funeral leave time would have been used because he would have been off work on compensatory time or vacation. Further,

there were other clauses in the contract that dealt with substitution in other instances, whereas this clause did not deal with the issue. That was the source of his concern, and the reason for not giving the grievant an immediate response. It was the decision of Van Lysal and the Personnel Department to deny the grievant's request that precipitated the grievance.

ISSUE

The parties were unable to stipulate as to a statement of the issue at hearing. The County proposed that the issue be stated as follows:

Does the County have the right to establish rules and benefit interpretations that are not otherwise addressed by the labor agreement? Did the County violate the contract when it denied the grievant use of funeral leave benefits when he already was on other paid time off?

The Union, on the other hand, proposed the issue be stated as follows:

Did the Employer violate Article 12 of the collective bargaining agreement when it refused to grant Tim McNaughton funeral leave for the time period following May 22, 1992? If so, what is the appropriate remedy?

The undersigned believes the issue to be as follows:

Did the County's denial of the grievant's request to substitute funeral leave for Tuesday, Wednesday and Thursday, May 26, 27 and 28, 1992, for what had previously been scheduled as compensatory time off and vacation violate Article 12.01 of the parties' 1992-94 collective bargaining agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article 1 - Management's Rights

. . .

1.02.11 The Employer may enforce work rules and regulations now in effect and which it may issue from time to time not in conflict herewith.

. . .

Article 11 - Sick Leave

- 11.08 Sickness During Off Days: Employees sick during off days, vacations, leave of absence, and holidays may not claim additional compensation and deduction of such days from their sick leave accumulation.

. . .

Article 12 - Funeral Leave

- 12.01 In the event of death in the immediate family, an absence of up to three (3) consecutive work days will be allowed without loss of pay to attend the funeral and make other arrangements. (Immediate family is defined as including the following: Spouse, son, daughter, mother, father, sister, brother, mother-in-law, father-in-law, sister-in-law, brother-in-law, grandchild, stepparent, stepchildren, grandparent, son-in-law, and daughter-in-law.) In the event of the death of a grandparent(s)-in-law, an absence of one (1) work day will be allowed without loss of pay to attend the funeral and make other arrangements. Regular part-time employees shall receive pay for lost time when the above day or days falls during the employee's normally scheduled hours of work.
- 12.02 Notification: The employee is responsible for notifying his/her department head and/or immediate supervisor of a death pursuant to this Article.

Article 13 - Paid Holidays

. . .

- 13.03 If a holiday falls during an employee's vacation, the employee shall be granted an additional day off at the beginning or end of his/her vacation period or by

mutual agreement at some other time.

. . .

POSITIONS OF THE PARTIES

The Union notes that the testimony established that this was the first time in anyone's recollection that an employe had requested funeral leave be substituted for other paid leave after the other paid leave had previously been approved. Thus, the County's point that it had no history of paying funeral leave in the past when an employe was on other paid leave is irrelevant to establish the point that the contract prohibits doing so. The Union also rejects the Employer's argument that because the sick leave language of the contract precludes employes from using sick leave during other periods of paid time off the funeral leave clause should be read to prevent the same sort of substitution.

The Union insists that the basic arbitrable standard to be applied in this case is "to expressly state certain exceptions indicates that there are no other exceptions." In this case, because the language of the funeral leave clause does not preclude such a substitution, and the employe meets all the other requirements of eligibility to use funeral leave, this substitution should have been permitted. Finally, the Union argues that the County raised no issues of undue administrative or economic burden resulting from being required to grant the grievant's request for substitution in this case. The County admitted at the hearing that scheduling vacation or compensatory time for Social Worker IIs has not been a problem in the past, and other employes would be familiar with the grievant's client population and able to relieve him in the event that the vacation or compensatory time needed to be rescheduled. The Union concludes that the grievance should be granted, and the grievant should be credited with three days of vacation or compensatory time due him as a consequence of the County's failure to grant his request to substitute funeral leave for vacation or compensatory time.

To the contrary, the Employer believes that the Union has not established that the contract was violated in denying the grievant's request to use funeral leave in place of already scheduled vacation or compensatory time off. The contract language provides funeral leave benefits to employes who are presumed to be working and/or scheduled to work during the time sought for funeral leave. Here, because the grievant was already on paid time off he would have suffered no loss of pay to attend the funeral, and thus was not entitled to use the funeral leave. Further, there has been no history of the Employer paying an

employe funeral leave when the employe is already scheduled off on those days that he would be eligible to take funeral leave. Also, the Employer's survey of other employers in the area establish that four out of five follow guidelines similar to those applied by the County in this case.

The County also believes that arbitral precedent supports its position. It cites Elkouri and Elkouri for the proposition that "where the contract language used is 'pay for time lost' or 'paid leave of absence' while attending the funeral of a family member, arbitrators generally have denied such pay when the employe was on vacation or otherwise not scheduled to work." Also, in St. Louis Symphony SOC., 70 LA 475, 481-482 (1978) Arbitrator Roberts stated:

The significance of the silence of a collective bargaining agreement upon a subject matter is that management retains its common law rights towards that subject matter which it has not bargained away. The Union argument presupposes the Employer must have contract authority to take a particular action. In fact, the converse is true, and the Union must show that a particular act of management was contrary to contractual limitations placed upon management or obligations imposed upon management by the contract.

The evidence of this case establishes that because there has never been a prior instance where an employe has asked to substitute funeral leave for already scheduled paid time off, and absent any specific testimony relative to bargaining history, there can be no ascription of intent to this language to apply the rule of construction cited by the Union that to express one thing is to exclude another. Thus, the Employer concludes that it did not violate the agreement in this matter and that the Arbitrator should sustain the County's position and find that no contract violation occurred.

DISCUSSION

The basic facts in this case are not in dispute. The grievance was precipitated by a disagreement between the parties as to what is permitted or precluded by the funeral leave language of Article 12 of the collective bargaining agreement. The County contends that the grievant should not be allowed the three days of funeral leave to be taken in place of vacation or compensatory time already scheduled off because under the language of the funeral leave the days off will be allowed "without loss of pay to

attend the funeral." Because the grievant was already off work, the Employer believes that it was not obligated to grant the employe's request for substitution because to deny same would not have resulted in the grievant losing any pay in any event. The undersigned must presume from the fact that the County makes no other arguments respecting the grievant's ineligibility for funeral leave that the circumstances surrounding the request otherwise qualified the grievant for funeral leave pay. Also, the grievant in this case is not seeking double payment, in other words, not asking to be paid funeral leave in addition to receiving compensatory time or vacation pay for the days missed as was true in the case cited in the County's brief.

The Employer's principal argument presumes that the employe is working or scheduled to work at the time that the funeral leave is to be taken. However, there is nothing in the language nor was there any testimony respecting bargaining history to support such a presumption. There is not evidence to suggest that at the time that the grievant requested vacation and compensatory time off, and which time off was approved at least a week prior to his brother-in-law's death, he knew of his brother-in-law's impending death or that his planned time off was taken in anticipation of his brother-in-law's death. Thus, it cannot be argued that he knowingly chose to use vacation and/or compensatory time to cover his absence from work to deal with the death. Consequently, it must be presumed that he had planned to do other things with his requested time off. However, due to the untimely death of his brother-in-law, the reasons underlying his request for vacation and compensatory time off were superseded by the latter event, and those plans were put on hold until the crisis passed. If he had not attended his brother-in-law's funeral or otherwise spent time with the family grieving the death, the substitution of funeral leave for vacation and/or sick leave would be inappropriate. However, there is no evidence to suggest that occurred.

But for the grievant's earlier plans to be off work for other reasons, he would have been working on the days for which he later requested to substitute funeral leave, and his request would had to have been honored under the contract. Also, had he chosen to use vacation time or compensatory time to attend his brother-in-law's funeral and otherwise participate in the family grieving, he could have done so. But, to mandate that he use vacation or compensatory time for that purpose when he is contractually entitled to other paid time off for that purpose, merely because he had made plans to take time off from work for other reasons is not justified under the circumstances.

Also, the funeral leave language is written in the mandatory language, "will be allowed." There is no provision requiring approval. The employe is only required to give notice of a

qualifying death to his immediate supervisor or department head. Thus, considerations of how many employes are already off work on the days involved and the like, are not available to the County in the case of time off for funeral leave. The only considerations deal with which relative died, will he/she be attending the funeral and "making arrangements," and how many days he/she is eligible to be off. In light of this, it is unreasonable to conclude that the employe cannot use funeral leave merely because he has already requested and received permission to be away from work for other reasons on another form of approved leave.

Therefore, the undersigned has concluded that the grievant was eligible under the contract to receive three days of funeral leave to attend to his brother-in-law's funeral and substitute those three days for vacation or compensatory time which he had previously requested and had been granted. The County, by refusing to grant his request for substitution, denied him a contractual benefit to which he was entitled, and in so doing violated Article 12 of the collective bargaining agreement.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

The County's denial of the grievant's request to substitute funeral leave for Tuesday, Wednesday and Thursday, May 26, 27 and 28, 1992, for what had previously been scheduled as compensatory time off and vacation, violated Article 12.01 of the parties' 1992-94 collective bargaining agreement. Therefore, the County, to remedy this violation, shall credit the grievant's compensatory time account with 16 hours and his vacation balance with 8 hours and charge his absence on May 26, 27 and 28, 1992, to paid funeral leave.

Dated at Madison, Wisconsin this 10th day of May, 1993.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator