

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BROWN COUNTY SHELTER CARE
EMPLOYEES, LOCAL 1901-F, AFSCME,
AFL-CIO

and

BROWN COUNTY (SHELTER CARE)

Case 568
No. 52478
MA-8989

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
on behalf of Brown County Shelter Care Employees, Local 1901-F, AFSCME,
AFL-CIO.

Mr. Kenneth J. Bukowski, Corporation Counsel, on behalf of Brown County.

ARBITRATION AWARD

Brown County Shelter Care Employees, Local 1901-F, 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 Brown County (Shelter Care), hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on August 15, 1995, in Green Bay, Wisconsin. There was a stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by October 23, 1995. 1/ Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated to the following statement of the issues and that there are no procedural issues:

1/ The time for filing reply briefs expired on November 3, 1995, and none were submitted.

Did the County violate the contract when it did not pay the grievant bereavement pay in addition to holiday pay for Thanksgiving Day, 1994; if so, what is the appropriate remedy? 2/

CONTRACT PROVISIONS

Article 10. HOLIDAYS

The following shall be recognized as paid holidays referred to in this Article. . .Thanksgiving Day. . .

During the week in which a holiday falls, each regular fulltime employee shall receive eight (8) hours of straight time pay in addition to h/er regular earnings. One-half (1/2) day shall be four (4) hours.

One and one-half (1 1/2) times the straight hourly rate shall be paid regular employees for all work performed on a holiday, in addition to the above holiday allowance.

. . .

Article 12. TIME OFF FOR BEREAVEMENT

Employees are hereby granted a three (3) consecutive day leave of absence with pay commencing the day of death or day following in the event of a death of a member of their immediate family. Immediate family is defined as: Husband, wife, children, grandchildren, parents, brother, sister, mother-in-law, father-in-law, step parents. A one (1) day leave of absence with pay shall be granted in the event of the death of grandparents, brother-in-law, sister-in-law, son-in-law, daughter-in-law, aunt, uncle, of the employee or h/er spouse.

In the event an employee is called upon to be a pallbearer, or to serve in a military funeral, one (1) day of leave will be allowed:

2/ The parties also stipulated that the remedy the Union is requesting is two (2) days of bereavement pay plus the holiday pay, which is a modification from the remedy originally sought in the grievance.

sick leave, vacation, or loss of pay, at the discretion of the employee.

...

Article 18. SICK LEAVE

...

(g) **SICK LEAVE ON HOLIDAYS.** 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. Such holiday may be taken in conjunction with the vacation whenever possible.

...

Article 20. VACATIONS

...

(f) **VACATION ON HOLIDAYS:** 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. If a holiday falls during an employee's vacation, s/he shall receive an additional day's vacation (paid).

BACKGROUND

The County maintains and operates a number of facilities and institutions, including the Brown County Shelter Care facility. The Union represents all regular full-time and regular part-time non-professional employees at Shelter Care. AFSCME also represents bargaining units at a number of other County facilities. The Grievant, Sandra Dudley, is a regular full-time employee at Shelter Care and works the 12:00 a.m. - 8:00 a.m. shift beginning Sunday night at midnight and ending at 8:00 a.m. on Friday, with Saturday and Sunday her regular days off. Shelter Care operates on a 24 hours per day, 7 days a week, schedule.

The facts in this case concerning the Grievant are not in dispute. The Grievant worked on Wednesday, November 23, 1994 (the day before Thanksgiving). The Grievant's father-in-law was dying of cancer at the time and she received a call from her husband at 6:10 a.m. that his

father "was going fast". The Grievant was making arrangements for someone to come in and cover for her when she received another call from her husband in which she learned that his father had died. The Grievant left work an hour early, taking one hour of vacation. The Grievant called work Wednesday afternoon and spoke to her supervisor to advise him that she would be off work for bereavement leave and nothing was said as to how the Grievant would be paid. The Grievant was off work on bereavement leave on Thursday (Thanksgiving) and Friday. The Grievant was scheduled to work on those days.

The Grievant indicated 8 hours of holiday pay and 8 hours of bereavement leave for Thursday, November 24, 1994 and 8 hours of bereavement leave for Friday, November 25, 1994. The Grievant received 8 hours of holiday pay for Thursday (Thanksgiving) and 8 hours of bereavement leave pay for Friday only.

A grievance was filed on the basis of the County's refusal to pay the Grievant 8 hours of bereavement leave pay for Thursday, Thanksgiving Day, in addition to the 8 hours of holiday pay she received. The parties attempted to resolve their dispute, but were unsuccessful, and proceeded to arbitration on the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union asserts that rather than relying upon the language of the Agreement, the County instead relies upon past practice in its payroll system as to the treatment of holiday pay when an employe is also entitled to other types of paid leave not mentioned in the holiday provisions. In the Shelter Care Agreement, bereavement leave is a paid leave not mentioned in the Agreement's holiday pay provision. The practice the County asserts exists is that bereavement leave is treated the same as vacation or sick leave, however, the Agreement in this unit only addresses those two areas as relates to substituting holiday pay for other forms of paid leave. Apparently the County's argument is that because the practice occurred in other of its bargaining units represented by AFSCME, it automatically applies to this bargaining unit. The Agreement covering Shelter Care is a separate document from the contracts negotiated at the County's Mental Health Center and it is illogical to argue that a payroll practice that exists in specific contracts automatically applies to a contract where the practice has never occurred. A practice is the product of a specific contract and Shelter Care has a separate, independent Agreement covering specific employes at a specific site. To prevail, the County must have established that the practice existed at Shelter Care and no evidence was submitted to establish such a practice. A threshold question in establishing whether there is a practice is the number of occurrences over time. The testimony established that this instance was the first where an employe was on bereavement leave on the same day that a holiday fell. Thus, there is no existing past practice at Shelter Care on the issue in question.

The Union next cites the language of Article 10 - HOLIDAYS, paragraph 2, of the

Agreement:

"During the week in which a holiday falls, each regular fulltime employee shall receive eight (8) hours of straight time pay in addition to h/er regular earnings. One-half (1/2) day [holidays] shall be four (4) hours."

When an employe is on bereavement leave the bereavement pay is the replacement for the employe's "regular earnings" he/she would have normally received for that week. Therefore, just as an employe who worked, the employe on bereavement leave is entitled to both the holiday pay and bereavement pay in the same manner the employe who worked would have received the holiday pay in addition to his/her regular earnings during a week in which a holiday fell. Thus, the Grievant would be paid no more in this instance than she normally would receive during a normal holiday work week. Under the County's interpretation, an employe on bereavement leave in a holiday week would receive one day less pay than if they had been working simply because they were on bereavement leave. That would be an absurd result.

The Union requests that the grievance be sustained, and the Grievant made whole.

County

The County first asserts that the purpose of bereavement leave is to provide individuals with time so they can attend to the funeral and other matters surrounding the death of a family member without suffering a loss of pay they would otherwise have received. The County cites the testimony of its Payroll Supervisor that in this case had the Grievant taken any other leave she would have received holiday pay for Thanksgiving and no other pay. To give an employe 8 hours of bereavement pay in addition to holiday pay would therefore result in a windfall to the employe due to the death of a family member and that is not the purpose of bereavement leave.

Second, the County cites the testimony of Nancy Tomshek-May, a Personnel Coordinator in the County's Human Resources Department, that at least since 1974 the practice has been that an employe on any type of leave on a holiday is paid only the 8 hours of holiday pay. The Payroll Supervisor's testimony was consistent with that of Tomshek-May that the manner in which the Grievant was paid was consistent with long-standing County practice.

Third, the County asserts that if the Union's interpretation prevails, the County would be

required to pay 4.5 days of wages for one person working one shift on Thanksgiving, i.e., the Grievant's replacement would receive holiday pay and time and one-half for that day pursuant to Article 10 - HOLIDAYS and the Grievant would receive 8 hours of holiday pay and 8 hours of bereavement pay. In essence, the Grievant would receive double time for 8 hours that day for not working and her replacement would receive two and one-half times pay. Such a result would be unreasonable. Therefore, the grievance should be denied.

DISCUSSION

To begin with, the practice in other bargaining units is not binding in this unit unless there is a showing that the parties have mutually considered this bargaining unit to be linked to the other County bargaining units represented by AFSCME, so that a practice that developed under a provision in the contract covering one unit was mutually understood to apply to all of the units with the same or similar language. There has been no such showing in this case. Further, the Administrator of Shelter Care for the past eight years testified that she was not aware of any other instances before the Grievant's where an employe was on bereavement leave on a holiday. Therefore, the record does not support a finding that there is a binding past practice under the Agreement covering this bargaining unit as to the manner in which an employe is to be paid when he/she is on bereavement leave on a holiday.

The practice as to how pay is handled when an employe is on vacation or sick leave does not provide any guidance as the practice is merely consistent with the express language of the Agreement. The parties' Agreement specifically provides that when an employe is on vacation or on sick leave when a holiday falls, that "such holiday shall not be charged as vacation or sick leave". That allows the employe to save the day of vacation or sick leave so that it can be used another day. This makes sense as both vacation and sick leave days are accumulated paid leave days to be used when an employe wishes (vacation) or the employe's or his/her's family health requires it (sick leave), and it would be of no benefit to the employe to charge his/her vacation or sick leave bank for a day on which the employe would already be entitled to the day off with pay for the holiday. Neither of these points apply to bereavement leave. The Agreement provides that the employe is entitled to three days of bereavement leave in the case of the death of the employe's father-in-law. Entitlement to bereavement leave arises when a family member dies and is not a form of paid leave that can be banked to be used at some other time. The purpose of bereavement leave is to allow the employe to be off work in order to attend the funeral and attend to family matters without suffering a loss of pay. To replace the day of bereavement leave with the holiday penalizes the employe in that he/she loses the extra day of pay he/she would have received if he/she had worked and the employe is not given an additional day of bereavement leave to use.

Contrary to the County's assertion, to permit the Grievant to use the bereavement leave and receive the 8 hours of holiday pay does not result in a windfall for the employe. Rather, to treat the Grievant in that manner is consistent with the language of Article 12. TIME OFF FOR BEREAVEMENT, granting a "three (3) consecutive day leave of absence with pay. . .", and is

not contrary to the provisions of Article 10, HOLIDAYS. The Grievant receives no more than what she would have received had she worked and places her in no better position than the employe who was on vacation or sick leave. Since bereavement leave cannot be banked like vacation or sick leave, it is consistent to give the employe holiday pay in addition to the bereavement leave, rather than not charging her for bereavement leave for that day. An employe who is on vacation or sick leave for the week in which a holiday falls on the employe's regular work day receives four day's pay for vacation or sick leave, 8 hours pay for the holiday and has the fifth day of vacation or sick leave to use another time for which the employe will also be paid, i.e., the equivalent of six paid days. Put another way, the employe receives five day's pay for the week they did not work, but is only charged for four days of paid leave.

Thus, it is concluded that the Grievant was entitled to both the 8 hours of holiday pay and the 8 hours of bereavement leave pay for Thanksgiving Day, and that by denying her the bereavement leave pay for that day the County violated Article 12 of the Agreement.

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 Grievant was entitled to bereavement leave pay for Thursday (Thanksgiving Day) and Friday, November 24 and 25, 1994, as well as the holiday pay for Thanksgiving Day. The County is directed to immediately pay the Grievant for eight (8) hours of bereavement leave pay she was entitled to receive under Article 12, of the Agreement for Thanksgiving Day of 1994 at her rate of pay at that time.

Dated at Madison, Wisconsin, this 10th day of April, 1996.

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