BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PORTAGE COUNTY CORRECTION OFFICERS ASSOCIATION, WPPA, LEER DIVISION

and

PORTAGE COUNTY

Case 141
No. 56558
MA-10327

Appearances

Mr. Richard Thal, WPPA General Counsel, appearing on behalf of the Association.

Ms. Therese Freiberg, Personnel Director, appearing on behalf of the County.

ARBITRATION AWARD

Portage County Correction Officers Association, WPPA-LEER, hereinafter referred to as the Association, and Portage County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Stevens Point, Wisconsin on August 11, 1998. The hearing was not transcribed and the parties filed post-hearing briefs by September 14, 1998. The parties reserved the right to file reply briefs but neither party did and the record was closed on September 24, 1998.

BACKGROUND

The parties' 1996-97 collective bargaining agreement contained the following provision on sick leave:

SECTION VII - SICK LEAVE

> A. Employees will accrue one day sick leave per month with no limits on accumulation. When an employee is off sick, the day or days will be deducted from the employee's accumulated total.

This language assumed that employes worked an eight-hour day.

Since approximately 1989, the Correction Officers have been on a seven on - seven off schedule where they averaged 10 ½ hours per shift and the shift could be 8, 10, 10 ½ or 11 hours per day. The above language was interpreted as an employe accruing 8 hours of sick leave a month and when the employe was off sick on a day, he was paid for the day and his sick leave account was only decreased by 8 hours even though the employe may have been actually scheduled to work and paid for 10 or 11 hours. In negotiations for the 1998-2000 collective bargaining agreement, the County proposed that when employes would be off sick, they would have sick leave deducted on an hour for hour basis. The County also proposed an increase of $.17/hr. as a quid pro quo for this change and that paid time off for serious illness in the employe's immediate family would also be deducted on an hour for hour basis. As a result of negotiations, Section VII was changed to read as follows:

SECTION VII - SICK LEAVE

> A. Employees will accrue eight hours sick leave per month with no limits on accumulation. When an employee is off sick, the time off will be deducted from the employee's accumulated total.

There was another practice which was not discussed by the parties during the negotiations over the sick leave language. That practice was that an employe who reported for work and left before completing one-half of his/her shift, had one day deducted from sick leave but if the employe completed one-half or more of the shift before going home sick, the employe was paid for the entire shift. Thus, an employe could work the first six hours of an eleven-hour shift and then go home sick and was paid for eleven hours with no deduction from sick leave. On March 13, 1998, an employe who worked more than one-half her shift and went home sick, had the sick time hours deducted on her paycheck. The Association filed a grievance which was denied and appealed to the instant arbitration.

ISSUE

The parties where unable to agree on a statement of the issue. The Association frames the issue as follows:

> Did the County violate the Collective Bargaining Agreement when it discontinued its practice of paying a full day's pay (with no deduction of accumulated sick leave as long as the employee worked in excess of one-half the shift) to employees who report to work but go home sick? If so, what is the appropriate remedy?

The County frames the issue as follows:

Did the change in contract language wording, which specifically states that all sick leave will be charged for all "time off", change the practice of the parties?

The undersigned adopts the issue as stated by the Association.

PERTINENT CONTRACTUAL PROVISIONS

SECTION VII - SICK LEAVE

A. Employees will accrue eight hours sick leave per month with no limits on accumulation. When an employee is off sick, the time off will be deducted from the employee's accumulated total.

Association's Position

The Association contends that the County violated the parties' collective bargaining agreement by discontinuing its practice of paying an employe with no deduction from accrued sick leave when the employe leaves work due to illness after working one-half or more of an assigned shift. It maintains that the County has agreed to a sick leave provision which through a series of contracts incorporated an established practice concerning compensation of employes who work a partial shift and then leave due to illness. It claims that this practice was confirmed in 1991 in the resolution of a dispute over the sick leave provision and the policy has been applied since 1991 and has become part of the collective bargaining agreement. The Association argues that the County is wrong in its position that the new sick leave provision allows it to unilaterally discontinue this practice because the language of Section VII is ambiguous as it is susceptible to different plausible interpretations. The Association asserts that in 1991 the parties agreed that an employe would be considered "off sick" before completing a half shift but not "off sick" after completing half the shift. It claims that the County has long agreed with this interpretation of "off sick" and cannot now reasonably claim that this interpretation is not plausible, thus the language is ambiguous and the arbitrator should consider past practice, prior grievance settlements, bargaining history and the fact that it was the County that proposed changes in the sick leave language.

As to past practice, the Association claims that it has become an integral part of the contract and the party desiring to discontinue it, has the burden of negotiating a change. It observes that the County has not bargained to change the practice, and it violated the contract when it unilaterally discontinued the practice. The Association alleges that bargaining history supports its position as the County never discussed discontinuing the practice at the bargaining table. It points out the County admits it did not explicitly bargain over changing the practice and asks that the change in language be considered an undisclosed desire to change the practice. It asks that this claim be rejected as the County could have expressly told the Association that it wanted to change the practice.

The Association submits that the County's reliance on the $.17 wage increase in exchange for the sick leave language change allowed it to discontinue the practice is erroneous as it did not change the practice in issue in the instant case. It submits that the $.17 increase was not bargained in exchange for the right to discontinue the partial absence compensation practice and cannot be used to justify denial of the grievance.

The Association contends that language must be interpreted against the party who proposed it. It takes the position that the County could have made clear its intentions to repudiate the practice but proposed ambiguous language and any ambiguity should be construed against the County.

The Association concludes that the County violated the contract by discontinuing the past practice of paying employes, who worked one half or more of a shift and then leave due to illness, a full day's pay without any deduction of accrued sick time. It asks that the County be ordered to restore the practice and make employes whole.

County's Position

The County contends that the clear language of the contract provides for the hour-for-hour deduction of sick leave. It asserts that contrary to the Association the language of Section VII is clear and unambiguous and there is no need for the Arbitrator to engage in interpretation. It states that the majority rule is that when contract language is changed or eliminated, the parties intended to change the meaning of their agreement. It submits that the change in language from "day or days off" to "time off" was intended to end the practice of paying employes for a full day's work without any deduction from accrued sick leave when an employe reported to work and worked only part of his/her scheduled shift. The County points out that the cost savings it calculated was shared with the Association and a review of the Labor Agreement Summary (Ex-7) establishes the parties' intent to change the practice and method for deducting sick leave for absences of all duration. It argues that acceptance of the Association's position would render the language change meaningless.

The County claims that the intent of the parties when the language was negotiated is the primary criterion for its interpretation. The County does not deny that whole days of absence were discussed and partial days were not but the change in language was meant to charge employes for all time missed not just full days. It takes the position that had the parties intended only full days, they would have said so and instead used the words "time off" in place of "day or days off". It argues that all the prior practices occurred under the "day or days off" language and the new "time off" language changed all the prior practices. It labels the Association's assertion that the change applies only to full day absences as unreasonable and irrational. It claims no evidence was presented that a limited application of "time off" was the intent of the parties. It states that the Association should not be given an interpretation it failed to obtain in negotiations. It concludes that the grievance must be denied.

DISCUSSION

Generally, past practice can be used to establish the intent of ambiguous contract language but cannot be used to give meaning to language that is clear and unambiguous. Elkouri & Elkouri, How Arbitration Works, (4th Ed., 1985 at pp 454-55). The Association contends that the language is ambiguous, whereas the County contends that it is clear and unambiguous. The language of Section VII, A. was changed in negotiations for the 1998-2000 contract. The changes were that in the first sentence, "one day" was changed to "eight hours" and in the second sentence, the words "day or days" were replaced by "time off". The prior practice with respect to full days off due to illness involved the definition of day or days. The one day in the first sentence was eight hours and the day deducted was also eight hours even though the employe was scheduled to work ten or eleven hours. The new language clearly provides that time off on sick leave will be deducted so all ten or eleven hours will be deducted when an employe is off sick. As to the practice of working one-half or more of the shift, that practice is also related to the word "day" in Article VII before the change. In the February 22, 1991 letter (Ex-9), it states, in part,

> . . . the County will restore the six (6) hours deducted on August 8, 1990 from the above-mentioned grievant's sick leave account. The County then shall deduct one (1) day from the grievant's sick leave account for August 8, 1990.
>
> The following is our understanding of the policy for the use of sick leave if an employee reports for work and leaves before the end of the shift because of illness:
>
> > When a deputy reports for work and leaves before completing one-half (1/2) of his/her shift, the County shall deduct one (1) day from the sick leave account for that shift. When a deputy reports for work and completes one-half (1/2) or more of the shift, the deputy shall be paid for the full shift and no deduction from the sick leave account. (Emphasis added).

This practice is based on the "day or days" language which was changed.

A past practice which is apart from any language in the contract generally continues until notice is given that the practice will be abrogated at the end of a contract term. Then it is up to the party seeking to protect the practice to secure language in the contract continuing it.

On the other hand a practice which has a basis in contract language can be abrogated simply by a change in that language. In the instant case, the past practice as to full days and working a half shift fleshed out what the parties meant by the word "day or days." When that language was changed to "time off", both past practices with respect to full or partial days on sick leave were no longer binding on the parties.

The Association relied on the fiction that the words, "off sick," were interpreted by the parties as working less than one-half shift and if an employe worked one-half shift or more, the employe was not "off sick". The evidence failed to support this argument and "off sick" was given its normal meaning that an employe was off work due to illness. Thus, the Association's argument is not persuasive.

The language of Section VII, A in the 1998-2000 contract is clear and unambiguous and must be applied according to its express terms and the prior past practices are contrary to the language and are no longer applicable.

Although this particular past practice was not discussed in negotiations, it is still no longer effective. The new language clearly contradicts the past practice and while the effect of the new language may not have been fully explained or appreciated, the parties bargained over the language and reached an agreement on it. The fact the full ramifications were not explained does not render the language ineffective to change a past practice which clearly falls within its terms.

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

AWARD

The County did not violate the parties' collective bargaining agreement when it discontinued its practice of paying a full day's pay without any deduction from sick leave to employes who report for work and work one-half or more of their shift and then go home sick, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 8th day of October, 1998.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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