BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MANITOWOC COUNTY HEALTH CARE CENTER EMPLOYEES LOCAL 1288, AFSCME, AFL-CIO

and

MANITOWOC COUNTY

Case 342
No. 56828
MA-10426

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54221-0370, appearing on behalf of the Union.

Mr. Steven J. Rollins, Corporation Counsel, Manitowoc County, 1010 South Eighth Street, Manitowoc, Wisconsin 54220, appearing on behalf of the County.

ARBITRATION AWARD

Manitowoc County Health Care Center Employees Local 1288, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Manitowoc 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 Union 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 Manitowoc, Wisconsin, on December 2, 1998. The hearing was transcribed and the parties filed post-hearing briefs and reply briefs, the last of which was received on March 2, 1999.

BACKGROUND

The grievant is a Certified Nursing Assistant employed at the Health Care Center and is guaranteed 80 hours of work each two weeks. On March 19, 1998, the grievant worked 4.75

hours and then went home sick. The Grievant called in sick on March 20 and 21, 1998. The grievant was out on sick leave for 19.25 hours. The grievant had only 10 hours of sick leave available which was applied toward the 19.25 hours, leaving 9.25 hours which the County deducted from the grievant's vacation bank. The grievant never requested vacation for the 9.25 hours or any other paid or unpaid leave. The grievant discovered that 9.25 hours of vacation had been deducted when she received her pay check on March 27, 1998, and the grievant then filed the instant grievance over the forced deduction of vacation time to cover her absence due to illness. The grievance was denied.

The County has had a policy that employes must exhaust all paid leave prior to going on an unpaid leave. The previous Health Care Center Administrator, Don Hall, believed that employes who called in sick and had no sick leave should go on unpaid status for the absence as this was more of a punishment. Mr. Hall left the County's employ and Julie Place was the Interim Administrator until Michael Thomas became the Administrator in March, 1998. Mr. Thomas noted that there was excessive absenteeism at the Health Care Center which generated as much as $14,000 in overtime for a two-week period. Mr. Thomas felt that by allowing employes to go on unpaid leave for an absence that he would have to cover the absence with someone else and again when the employe took vacation at a later date, whereas if vacation was required, then the absence need be covered only once. The change in philosophy resulted in employes being required to use vacation rather than unpaid leave and was the genesis of the instant grievance and this arbitration.

ISSUE

The parties stipulated to the following:

Did the Employer violate the collective bargaining agreement by requiring Linda Decker to use vacation after her sick leave was spent?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS RESERVED

. . .

The Employer agrees that all amenities and practices in effect for a minimum of twelve (12) months or more, but not specifically referred to in this Agreement, shall continue for the duration of this Agreement.

. . .

ARTICLE 14 – VACATIONS

. . .

D. Institutional seniority shall be given preference in selecting vacation time off.

E. Prior to March 1 of each year, vacation periods shall be selected by the employees. Selection of dates shall be by seniority. A vacation schedule shall be prepared and posted by the Employer on or before March 15 of each year. Seniority will not be recognized if vacation periods are not requested by March 1. Changes after March 1 may be made by mutual agreement. Special consideration shall be given for vacation day changes because of unusual circumstances.

. . .

ARTICLE 23 – LEAVES OF ABSENCE

A. Extended Illness and Disability Leave:

1. Length of Leave: Employees for prolonged illness or disability due to injury shall be granted an unpaid leave of absence for up to twelve (12) consecutive months.

. . .

E. Other Leaves**:** Unpaid leaves of absence in excess of thirty (30) days duration, for reasons other than those specified above may be granted by the Personnel Committee up to a maximum amount of time of one (1) year. Such leave may be extended for up to one (1) additional year by approval of the Personnel Committee. The Administrator may authorize leaves of absence for up to ten (10) working days; the Institutions Committee may authorize leaves up to thirty (30) days. All requests for leaves of absence shall be submitted in writing to the Administrator as soon as the need for a leave is known, but in no event later than thirty (30) days prior to the date the leave is desired.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the County seeks to impose a policy which changes a longstanding past practice of allowing unpaid leave when sick leave has been exhausted. It asserts the County imposes forced vacation without regard to an employe's planned vacation usage, whether or not it is already scheduled and without the employe's consent. It submits that this violates the contractual requirement of mutuality in changing vacation scheduling. It argues that the County's actions deprive the employe of vacation at the employe's selection and purpose.

It notes the practice has been to allow employes to take unpaid leave after exhausting paid sick leave for short periods of time. The Union maintains that the practice should be allowed to continue as forcing employes to take vacation violates Article 14, C., D., E. and H. It seeks the restoration of vacation deducted from employes who called in sick, after sick leave was exhausted and the employes made whole.

County's Position

The County contends that it did not violate the collective bargaining agreement when it applied available benefits to cover the grievant's absence from work. It points out that the grievant posted for guaranteed schedule of 80 hours of work per pay period and this meant that she was expected to be at work for those 80 hours or cover these hours in the form of authorized leave including sick leave, vacation leave and holiday leave. It notes that the contract permits leaves of absence to be approved by the County in certain circumstances but nothing authorizes an employe to be absent without approved leave. The County argues that it properly applied 9.25 hours of vacation to cover the grievant's full-time employment obligation. It observes that although the grievant told the County she was sick, she did not ask to apply sick leave, vacation pay or any other benefit to cover her absence and did not request she be granted unpaid leave. It claims the County treated her absence from work as an implied request that the County apply available benefits to satisfy her obligation to account for her full-time schedule. It asserts that it believed that the grievant did not intend to abandon her position so it applied 9.25 hours of vacation to cover her absence.

The County rejects the Union's argument that the language of Article 14, E. prevents the County from imposing the vacation leave because the grievant did not request it. It cites ST. CROIX COUNTY, CASE 134, NO. 51317, MA-8569 (UNPUBLISHED, BIELARCZYK, 1995) in support of its position that the County can deduct vacation to cover an employe's absence despite language which allows an employe a choice over the use of paid time. It argues that

unpaid leave is not available until paid leave has been exhausted and thus it was justified in treating her absence as an implied request and in applying available paid benefits to cover her absence.

The County contends that if it did violate the agreement, the appropriate remedy is to restore to the grievant 9.25 hours of vacation and to deduct 9.25 hours of pay and the County would have the right to take such disciplinary action as is appropriate to address this unapproved absence. The County concludes that it has not violated the agreement and the grievance should be denied.

Union's Reply

The Union rejects the County's claim that the grievant is asking to take leave without pay whenever she wants to because this ignores that there is no contention that the grievant was not ill. It notes that the County admits that the grievant called in sick and had left work due to illness. It asserts that the grievant was not just asking to take a day off. It observes that the County recognized that the grievant never requested vacation, yet treated her call in as an implied request for vacation which was a departure from past practice where the time off was without pay.

The Union argues that the County cannot rely on its new policy as the contract provides restrictions on the use of vacation which cannot be unilaterally contradicted by policy. It points out that after March 1, the County cannot change the vacation schedule and pay outs must be requested in writing by the employe. It cites BROWN COUNTY, CASE 614, NO. 55344, MA-9988 (SHAW, 9/98) for the proposition that restrictions in the collective bargaining agreement do not allow an employer to impose the use of vacation under the Family and Medical Leave Act. It argues that after exhausting sick leave, employes have been allowed to call in sick on a day-by-day basis for short sequences and have not been required to use vacation, especially when employes have not been notified that tolerance of this practice has ceased.

It notes that the contract does provide for leaves of absence under Article 23, A. and E. It submits that the County failed to require strict compliance with these provisions such that it is not clear where short-term leave belongs. It observes that for many years the County did not require medical certification or a written request. It states that the County cannot rely on this Article under the principle of estoppel by acquiescence.

The Union distinguishes the case cited by the County, ST. CROIX COUNTY, above, because there was no past practice and that was a case of first impression whether a deduction could be made for a double shift from PTO. It maintains that reliance on this case is totally unwarranted.

The Union also notes that the County's threat of discipline evinces a hostile attitude and in any case, no discipline is warranted. The Union concludes that the record demonstrates that the County violated the agreement and it should restore any vacation deducted from employes who called in sick and make them whole.

County's Reply

The County contends that the Union's "past practice" argument overreaches and ignores contract language and management's rights. It observes that the Union has asserted that the County must continue to permit employes to take unpaid leave without exhausting paid leave because it has done so in the past and the Union claims employes have the right to be off work without approved leave during brief absences after sick leave has been exhausted. The County submits that the Union's argument reaches well beyond the stipulated issue and must be dismissed. It claims that the Union's argument ignores Article 23 of the parties' agreement. It asserts that Article 23, H. governs leaves of short duration in that it states "The Administrator may authorize leave of absence for up to ten (10) working days." It insists that permitting an unpaid leave of a few days' duration is solely within the Administrator's determination. It submits that there is no binding past practice but rather the exercise of discretion reserved to management does not establish a binding past practice just because it chose to exercise it in the same fashion. The County concedes that although the prior Administrator permitted employes to take leave without pay, that was pursuant to his discretion under Article 23, H. and the present Administrator can exercise his discretion in a different manner where he has determined that the County's legitimate business interests justify such a change. It maintains that the exercise of discretion was neither arbitrary nor capricious but a proper exercise of the Administrator's discretion under the contract.

The County alleges that the Union's claim of a violation of Article 14, E. overlooks reality as well as the relevant language. It points out that Article 14, E. states that "changes in the vacation schedule are to be made by mutual consent," and the grievant made no request or agreement to change her vacation schedule. The County submits that the Union ignores the fact that the County acted in direct response to the grievant's failure to fulfill her contractual obligation to work her scheduled hours. It states that she failed to work the hours she was scheduled and thus sought to change the work schedule and the County merely paid her from sick leave and vacation. It insists that the Union's assertion is the same as that rejected in ST. CROIX COUNTY, SUPRA. Besides, the County notes that the contract provides for vacation changes because of unusual circumstances and these existed due to the grievant's failure to work when scheduled without enough sick leave to cover the absence, her failure to request any kind of leave to cover this absence and if she had, it would be within the Administrator's discretion to grant or deny the leave and it is unlikely that the Administrator would grant such a leave if the grievant had paid leave available. It contends that the grievant agreed to changes

in her vacation schedule when she decided not to come to work so the mutuality requirement of Article 14, E. has been met. The County observes that the Union's references to Articles 14, C. and 14, D. are irrelevant and to 14, H. is misplaced.

The County insists that the Union's proposed remedy is inadequate. It admits that the grievant would be entitled to have her leave restored if a remedy is required, but she must return the money paid out for the leave otherwise she would receive a windfall. It states that if there is a remedy, it should be as stated in the County's brief in chief.

The County concludes that for the reasons set out above, it has not violated the collective bargaining agreement and the grievance should be denied.

DISCUSSION

The undisputed facts establish that for a long period of time employes who were sick and gone for a day or two and had no sick leave balance were not paid for their absence nor was the absence charged to vacation or other paid time such as holidays. Although the County had a policy requiring employes to exhaust all paid leave prior to going on an unpaid leave, the Administrator of the Health Care Center, Mr. Hall, believed that the loss of pay would be an incentive for employes to maintain a sick leave balance. This policy which was meant to discourage employes from using sick leave or other leaves by a loss of pay for the absence also had an unintended benefit to employes in that an employe could schedule a vacation pursuant to the contract and that vacation would remain intact unless mutually agreed by the employe and the County to change it. An employe could make plans, reservations, etc., with the knowledge that the amount of vacation would remain available to cover his/her absence. Thus, there was a different policy at the Health Care Center which was started, fostered, encouraged and continued by the County at the Health Care Center until a new administrator replaced Mr. Hall. The new administrator decided to implement the County's policy that unpaid time due to illness must be covered by vacation or other paid leave reasoning that the County had to cover the employes' unpaid time off as well as vacation time off.

The parties rely on entirely different sections of the contract to support their respective positions. The County relies on Article 23, Section E., which addresses leaves of absence without pay and which authorizes the Administrator to grant unpaid leaves up to ten days. The County asserts that the former Administrator authorized leaves, whereas the new Administrator will not authorize leaves as long as the employe has paid time available. The Union relies on Article 14, Section E. related to scheduling vacations which provides that changes in vacation schedules may be made only by mutual agreement.

The County's assertion that the prior Administrator granted leaves of absence of short duration is not supported in the record. The Administrator did not authorize a leave; he required it. It was meant to be the stick and not the carrot to have employes not use sick leave.

The County's assertion that employes who have exhausted sick leave and are off due to illness make an implied request to use vacation or other paid time is a legal fiction. The sick employe was off because the employe was sick and without a request by the employe to cover it by use of vacation or other leave, there is no evidence the employe made an implied request, especially in light of the past Administrator's policy not to grant vacation or paid time to cover a sick leave absence where the employe had no sick leave balance. More realistically, the employe's notification could also be an implied request for leave without pay which has routinely been granted.

The County's reliance on ST. CROIX COUNTY, CASE 134, NO. 51317, MA-8569 (BIELARCZYK, 11/95) is misplaced. That case involved a deduction from personal time off for the second half of a double shift which the grievant had volunteered to work. After January 1, 1994, the parties' collective bargaining agreement specifically provided that employes asking for unpaid leave had to use all accumulated PTO. The instant contract contains no such provision. Instead, the County has implemented a policy which requires the use of any paid time before use of unpaid time. The instant case appears similar to ALLEN DAIRY PRODUCTS, 97 LA 988 (HOH, 1991), where the company by rule required the use of personal leave to cover an employe's absence. The Arbitrator noted that employes had significant input into when these days could be taken and the determination of the use of those days could not be solely within the discretion of the employer. Here, too, employes have a significant interest in when vacation may be taken and this is provided by Article 14 of the contract as well as past practice and the use of vacation is not solely within the discretion of the County. Article 14 provides for the selection of vacation by seniority and allows the use of vacation subject to seniority at times most desired by the employe. The County's new policy defeats the right of employe input into when he/she wishes to take vacation and this amounts to a unilateral modification of the contract. ALLEN DAIRY PRODUCTS, SUPRA, AT 992. Thus, the County's deduction of the grievant's vacation for her absence due to sick leave violated Article 14 of the contract. Any change requiring the use of paid time such as vacation or holidays due to an absence where sick leave has been exhausted should be addressed in negotiations rather than unilateral implementation by the County. Additionally, the Union's arguments with respect to past practice are persuasive. There is no evidence until the instant case that anyone was denied unpaid leave at the Health Care Center when they were absent due to illness and did not have a sufficient sick leave balance to cover the absence. As noted by Arbitrator Mawhinney in SCHOOL DISTRICT OF MELLEN, CASE 43, NO. 56406, MA-10273 (JANUARY, 1999), a case involving use of unpaid leave to extend a vacation, the arbitrator stated "Giving effect to this past practice promotes the parties' expectations and promotes stability in the bargaining relationship. Given the period of time and the number of different administrators, employes would expect leaves to be granted in a consistent manner and not by the personal preferences of different administrators." This holds true for the instant case and the past practice of allowing unpaid leave must continue until it is changed in negotiations.

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

AWARD

The County violated the collective bargaining agreement by requiring Linda Decker to use vacation after her sick leave was spent to cover her absence due to illness. The County shall, at the grievant's option, restore 9.25 hours of vacation with the appropriate deduction for wages paid for the 9.25 hours and it shall cease requiring the deduction of vacation or other paid leave for an absence due to illness when sick leave is exhausted unless mutually agreed until the practice is changed at the negotiating table.

Dated at Madison, Wisconsin, this 24th day of March, 1999.

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

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