

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TOWN OF MINOCQUA

and

**LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION (LEER) OF THE
WISCONSIN PROFESSIONAL POLICE ASSOCIATION (WPPA) FOR AND ON
BEHALF OF THE MINOCQUA PROFESSIONAL POLICE ASSOCIATION (MPPA)**

Case 3

No. 57049

MA-10496

Appearances:

Mr. William Korrer, Jr., Town Chairperson, P.O. Box 168, Minocqua, Wisconsin 54548-0168, appearing on behalf of the Town of Minocqua.

Attorney Richard Thal, 340 Coyer Lane, Madison, Wisconsin 53713, appearing on behalf of the Wisconsin Professional Police Association.

ARBITRATION AWARD

The Town of Minocqua, a Wisconsin municipality, hereinafter referred to as the Employer or the Town, and the Wisconsin Professional Police Association (WPPA), hereinafter referred to as the Association or WPPA, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances arising thereunder. The Association made a request, with the Town concurring, that the Wisconsin Employment Relations Commission designate a Commissioner or member of its staff to hear and decide a grievance filed by the Association. The undersigned was so designated. The hearing was not transcribed, the parties filed post-hearing briefs, and the record was closed on March 22, 1999.

BACKGROUND

On the evening of October 21, 1998, the Grievant herein, Kari Hanek, employed as a dispatcher by the Minocqua Police Department, learned of the death of her great-grandfather. Ms. Hanek, off-duty at the time, immediately telephoned Lieutenant Berray to request funeral leave to attend her great-grand-father's funeral.

5877

Page 2

Lieutenant Berray was temporarily in charge of the Department due to the vacation of Police Chief Raube. While still on the phone with Ms. Hanek, Lieutenant Berray read aloud the funeral leave provision of the parties' Collective Bargaining Agreement. He concluded that a great-grandparent would be considered a "grandparent" under the parties' Agreement. Accordingly, he advised the Grievant he would authorize funeral leave for her as soon as she knew when she would need it.

The following day, Dispatcher Hanek requested funeral leave for October 24 and 25. Lieutenant Berray authorized the requested leave, and Ms. Hanek subsequently utilized the leave.

On November 2, 1998, the Grievant was advised that the funeral leave authorization granted her by Lieutenant Berray had been overruled and withdrawn by Chief Raube who had by then returned from his vacation. Chief Raube's decision was based on his conclusion that Lieutenant Berray had erred in his interpretation of the funeral leave provision contained in the parties' Collective Bargaining Agreement and that the term "grandparents" listed therein did not include "great-grandparents."

Dispatcher Hanek was directed to cover her absence on October 24 and 25 caused by her attendance at her great-grandfather's funeral with two days from her "holiday bank."

On November 3, 1998 Dispatcher Hanek filed the instant grievance.

Dispatcher Hanek has since resigned her employment with the Town of Minocqua for personal reasons unrelated to this matter.

ISSUE

The parties do not agree as to the statement of the issue.

The Town suggests the following:

Did the Town violate the Collective Bargaining Agreement of the Parties when the Police Chief corrected an erroneous contractual interpretation of a subordinate lieutenant? If so, what is the appropriate remedy?

The Association proposed a different wording:

Given that the Grievant was told that she would receive paid funeral leave for October 24 and 25 (1998), did the Town violate the Collective Bargaining Agreement when it later denied her paid funeral leave? If so, what is the appropriate remedy?

I define the issue as:

Whether the Town violated the Collective Bargaining Agreement of the parties by the Police Chief's rescission of a funeral leave previously granted to an employee after the leave had been already taken? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISION

. . .

Section 9.03: Funeral Leave: Employees shall be allowed three (3) work days for funeral leave in the event of death in the Employee's immediate family (spouse, children, mother, mother-in-law, father, father-in-law, sister, brother, or the grandparents of the Employee or spouse). One (1) workday shall be allowed in the event of a death of a brother-in-law or sister-in-law. To be eligible for funeral leave, the Employee must notify the Chief of Police and must attend the funeral. Funeral leave shall be paid at the regular daily rate of the Employee.

POSITIONS OF THE PARTIES

Town

The Town urges that the grievance be denied. It believes Section 9.03, Funeral Leave, is very specific and clear in defining how much funeral leave may be granted, depending on the relationship of the employee to the decedent.

The Town asserts that "great-grandparents" are not listed in the definition of "immediate family" set forth in Section 9.03. It cites three WERC arbitration awards regarding funeral leave language as supportive of the Town's position: BROWN COUNTY (SOCIAL SERVICES), NO. 46974 (ENGMAN, 1992); PARA-PROFESSIONAL EMPLOYEES ASSOCIATION OF BROWN COUNTY DEPARTMENT OF SOCIAL SERVICES, NO. 53564 (MCLAUGHLIN, 1996); CITY OF RACINE, NO. 45204 (ENGMAN, 1991). The Town further points out that even Webster's New World Compact School and Office Dictionary, 1995, illustrates the difference between "great-grandparents" and "grandparents." A "great-grandparent," according to Webster's, is a parent of any of one's grandparents.

In view of the clear funeral leave language contained in Section 9.03 of the parties' labor agreement, the Town believes that Lieutenant Berray was mistaken in his interpretation of that language and Chief Raube was correct. The Town argues that "(m)anagement is within its rights to rescind incorrect decisions made by subordinates." It notes that Chief Raube is the

chief executive officer of the Police Department and the final department authority on all matters in policy, operations, and discipline. As such, he can and does take any necessary corrective action because of subordinates' decisions, according to the Town.

In conclusion, the Town reasserts that "great-grandparents" are not listed as a recognized relative for funeral leave purposes. The Town suggests that if the Association believes "great-grandparents" should be included in the funeral leave provision of the labor agreement, the Town would be willing to negotiate that issue at contract time.

Association

The Association does not argue that the term "grandparents" includes "great-grandparents" within the definition of "immediate family" in Section 9.03 of the parties' labor agreement. The Association posits, instead, that the doctrine of equitable estoppel should be applied. In support of its view, the Association cites two arbitration awards: TOWN OF WATERFORD, 68 LA 735 (CONNECTICUT STATE BOARD OF MEDIATION, 1977) and ARMCO, INC., 86 LA 928 (SEIDMAN, 1985).

In WATERFORD, SUPRA, the arbitrator estopped a municipality from claiming that its dental insurance plan didn't cover periodontic work performed on an employee because the employee hadn't started treatment until he had been advised by the Town's Office Manager that such work would be covered by dental insurance. However, the arbitrator allowed recovery of the cost of the treatment by the employee only to the point where the employee learned that the treatment was not covered, but continued with it anyway.

In ARMCO, SUPRA, the grievant started a course of treatment consisting of acupuncture for his son who suffered from a hearing deficiency. The grievant authorized the treatment only after his Personnel Relations Superintendent and the Company's Administrator of Contractual Benefits had assured him that the cost of the treatment was covered under the Company's medical plan. Although this turned out to be inaccurate information, the arbitrator ordered reimbursement by the Company to the employee of the cost of the acupuncture treatment on the grounds of detrimental reliance by the employee on assurances of Company representatives.

DISCUSSION

The Town urges that Section 9.03, Funeral Leave, is very specific in identifying deceased relatives whose funerals employees may receive leave time to attend. Significantly, in this matter, the Association makes no contractually based claim for funeral leave.

Indeed, I am satisfied that there is no contractually mandated benefit entitling employees to funeral leave to attend the funeral of a great-grandparent. The issue here, however, does not directly focus on what appears to have been an erroneous contractual interpretation by Lieutenant Berray.

Nor is the issue whether Chief Raube is permitted to correct the error of a subordinate. The issue, instead, centers solely on the timing of the action of Chief Raube in rescinding Lieutenant Berray's funeral leave authorization. Specifically, the inquiry here is whether an erroneous contractual interpretation by the Employer can be corrected *after* an employee has taken action in reliance on that interpretation.

The Association urges the application of the doctrine of equitable estoppel. In Wisconsin, "(t)he estoppel doctrine focuses on the conduct of the parties. The elements of estoppel are: (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment." *MILAS V. LABOR ASSOCIATION OF WISCONSIN*, 214 Wis. 2D 1, 11- 12, 571 NW 2D 656 (1997), citing *DEPARTMENT OF REVENUE V. MOEBIUS PRINTING CO.*, 89 Wis. 2D 610, 634, 279 NW 2D 213 (1979).

The doctrine is used not only by the courts, but by labor arbitrators as well. *TOWN OF WATERFORD*, 68 LA 736, 737 (CONN. STATE BD. OF MEDIATION AND ARBITRATION, 1977). Under proper circumstances the doctrine may be applied to public employers. Elkouri & Elkouri, How Arbitration Works, 5th Ed., Waiver & Estoppel, 579, BNA, Washington D.C.

In the instant matter, the initial action was Ms. Hanek's funeral leave authorization by Lieutenant Berray. Lieutenant Berray, of course, was acting as an agent for the Town against whom estoppel is here asserted.

Neither party denies that the grievant relied on Lieutenant Berray's action, or that her reliance was reasonable. The facts indicate that after learning of the death of her great-grandfather, due to the absence of the Police Chief, Ms. Hanek called Lieutenant Berray to inquire whether she would be entitled to funeral leave. Lieutenant Berray, of course, was in charge of the Police Department during the Chief's vacation absence, and had both the apparent and actual authority to act in the Chief's place. While on the phone with Ms. Hanek, Lieutenant Berray read aloud the article pertaining to funeral leave. He concluded that the term "grandparents" included "great-grandparents" and advised Ms. Hanek that she was entitled to funeral leave to attend the funeral of her great-grandfather. Under these circumstances, I believe Ms. Hanek's reliance on this authorization was eminently reasonable.

It was also to her detriment. For when Chief Raube returned from vacation and rescinded the funeral leave authorization, Ms. Hanek (who had already taken the two-day funeral leave) was required to cover the two days by giving up two days from her holiday bank.

In my opinion, this sequence of events and circumstances meet the qualifications for application of the doctrine of equitable estoppel.

This is not to say that Chief Raube could not have rescinded the erroneous funeral leave authorization *before* the leave had been actually taken by Ms. Hanek. 1/ Certainly, as the Town argues, the Chief has the right and responsibility to correct an erroneous interpretation by a subordinate who had been temporarily acting in his place. Had that circumstance occurred the doctrine of equitable estoppel would not apply. It could not, for any reliance at that point by Ms. Hanek on the then discredited and invalid authorization of Lieutenant Berray could not be deemed reasonable, but rather at her peril.

1/ Each of cases cited by the Town are consistent with the Town's suggested interpretation of its funeral leave provision in this matter. In BROWN COUNTY (SOCIAL SERVICES), SUPRA, the arbitrator found that funeral leave entitlement did not occur for the death of a "step child" because stepchildren were not included in the contractual definition of "immediate family." In PARA-PROFESSIONAL EMPLOYEES ASSOCIATION OF BROWN COUNTY, SUPRA, the arbitrator denied funeral leave to a grievant who contended that "immediate family" included her "step-mother-in-law," although this term was not included in the definition of "immediate family." In CITY OF RACINE, SUPRA, the arbitrator dismissed the grievance of an employee who wanted funeral leave in connection with the death of his spouse's grandfather because "grandfather-in-law" was not included in the contractual definition of immediate family. However, none of these cases offered fact situations in which funeral leave was rescinded after being first granted and actually taken by the employee.

AWARD

The grievance is sustained. Inasmuch as the grievant is longer employed by the Town of Minocqua, the Town is directed to make the grievant whole by payment to her of her regular rate of pay plus benefits for the two days from her holiday bank she was required to forfeit when the authorization for a two-day funeral leave was rescinded.

Dated at Madison, Wisconsin this 11th day of June, 1999.

A. Henry Hempe /s/

A. Henry Hempe, Arbitrator