

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
LOCAL UNION 1667, WCCME, AFSCME, AFL-CIO
and
VERNON COUNTY (VERNON MANOR)

Case 112
No. 57271
MA-10574

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656-3755, appearing on behalf of the Union.

Klos, Flynn & Papenfuss, Chtd., by **Attorney Jerome J. Klos**, 800 Lynne Tower Building, 318 Main Street, P.O. Box 487, LaCrosse, Wisconsin 54602-0487, appearing on behalf of the County.

ARBITRATION AWARD

Local Union 1667, WCCME, AFSCME, AFL-CIO, hereinafter Union, and Vernon County (Vernon Manor), hereinafter County or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances arising thereunder. The Association requested, and the County concurred in, the appointment of a Commission staff arbitrator to resolve a pending grievance. The undersigned was so designated on February 23, 1999. An arbitration hearing was held in Viroqua, Wisconsin, on May 12, 1999. The hearing was not transcribed. The record was closed on June 22, 1999, upon receipt of post-hearing written argument.

ISSUE

The parties stipulated to the following statement of the issue:

Did the County violate the collective bargaining agreement by requesting the Grievant to furnish the County with a doctor's slip after one (1) day of illness when the Grievant had no accumulated sick leave?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

**ARTICLE II
Management's Rights**

2.01 Subject to the provisions of this Contract and applicable law, the County possesses the right to operate the Manor and all management rights repose in it. These rights include, but are not necessarily limited to, the following:

- A. To direct all operations of the Vernon Manor;
- B. To establish reasonable work rules and schedule work;
- C. To hire, promote, transfer, schedule and assign employees to positions within the Vernon Manor.
- D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
- E. To relieve employees from their duties because of lack of work or other justifiable economic reasons;
- F. To maintain efficiency of Vernon Manor operations.
- G. To take reasonable action necessary to carry out the functions of the Vernon Manor in situations of emergency;
- H. To take whatever action is necessary to comply with State or Federal law;
- I. To introduce methods or facilities which are new or exist elsewhere;
- J. To change existing methods or facilities;

K. To determine the kinds and amounts of services to be performed as pertains to Vernon Manor operations; and the number and kinds of classifications to perform such services;

L. To contract out for goods; and

M. To determine the methods, means, and personnel by which Vernon Manor operations are to be conducted.

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ARTICLE VI Leaves of Absence

6.01 Application for leaves of absence for personal reasons shall be made in writing to the Administrator. A leave of absence may not be granted for the purpose of taking other employment. However, the term "other employment" shall not include election to federal, state, county or municipal offices, or Union duties. The written reply to all such requests will be given within five (5) days of receipt.

6.02 A period of up to one (1) year leave of absence shall be granted due to personal illness or disability due to accident, provided competent medical proof is furnished when requested to substantiate the necessity for continuing said leave. Additional time beyond the limit herein prescribed may be granted by mutual consent, provided medical information substantiates the continued disability of the employee.

6.03 The granting of such leave and the length of time for such leave shall be contingent upon the reasons for the request. The Administrator may grant leaves of absence without pay for fourteen (14) days or less without further authority of the Trustees. Leaves of absence for more than fourteen (14) calendar days shall be discussed with the Administrator by the employee, with representation by the Union if requested. The Administrator shall present such request to the Board of Trustees with a recommendation and all such leaves, if granted, shall be for a specific period of time.

6.04 Maternity Leave. Whenever an employee becomes pregnant, she shall furnish the Employer with a certificate from her physician stating the approximate date of delivery. State and Federal regulations will apply as to use of sick leave for pregnancy.

6.05 The Union shall be notified in writing by the Administrator in the Department involved at the time each leave of absence is recommended, denied, or authorized, indicating the duration of the authorization and at the time of subsequent renewals. Seniority shall continue to accrue during an authorized leave of absence as herein described.

6.06 Jury Duty. When an employee receives notice of jury duty, he/she shall notify his/her department head at once. He/She will be given leave for such jury duty and will be made whole for loss of pay during that period, provided, however, when considered necessary by Vernon Manor, because of the needs of the business at a particular time, or because of the difficulty of substitution for the particular employee, such employee will cooperate with Vernon Manor in requesting the postponement of such jury duty.

The employee, while on jury duty leave of absence, will, whenever his/her jury duty does not conflict with Vernon Manor work schedule, check with his/her immediate supervisor to determine whether or not he/she should report for work as he/she might be temporarily available. In the making of the employee whole, his/her wages will be computed as if he/she had worked his/her regular shift at straight time and will be paid in full therefor, minus the amount evidenced by this jury check.

6.07 Military Leave. An employee directly leaving for service in the Armed Forces of the United States shall be granted a leave of absence by the Employer in accordance with and by virtue of the terms of all applicable Federal statutes governing such military leaves of absence. As soon as such employee receives orders from the Armed Forces to report for military service, he shall immediately notify his department head in writing so that proper information may be maintained in the employee's personnel file at the Employer's office for future reference.

6.08 Fringe benefits earned shall not be lost when an employee is on leave of absence.

6.09 Employees who are eligible for leave under the Wisconsin Family and Medical Leave Law and/or the Federal Family and Medical Leave Act of 1993 will be granted leaves in accordance with the applicable law.

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ARTICLE VIII
Sick Leave

8.01 A regular full-time employee shall be entitled to accumulate a total of not to exceed ninety-six (96) days of sick leave at the rate of one (1) day per month, with days already accumulated to be incorporated in the ninety-six (96) days. A regular part-time employee shall accumulate sick leave at the rate of eight (8) hours for each one hundred and seventy-three (173) hours worked.

8.02 All employees shall receive full pay at the regular rate for the number of hours he/she would have worked when a sick day is taken. All employees shall receive one-half (1/2) day's pay for each one-half (1/2) day taken as sick leave, at the regular rate.

8.03 In order to qualify for such sick leave, an employee must report to his/her department that he/she is sick, not later than one (1) hour before the earliest time for which he/she is scheduled to report to work, except when said employee is taken ill after he/she starts his/her day's work. Each sick employee is subject to check to verify the alleged sickness by a County representative. Any employee, who, after a proper hearing, is found to have violated any sick leave regulation is subject to discipline or discharge to be determined by the department head and designated committee, subject to the grievance procedure.

8.04 If any employee is sick for more than three (3) days, the employee may be requested to present his/her department head a certificate of illness signed by a licensed physician or chiropractor. All sick leave forms to be furnished by the Employer and must be executed and returned by the employee upon returning to work.

8.05 An employee, when requested, shall have the option of using not to exceed two (2) days per year of employee's existing accumulated sick leave as authorized personal leave provided the time of usage has prior written authorization of the Administrator.

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BACKGROUND

On or about June 1, 1998, Pauline Brueggen, hereafter Grievant, called in sick on a day that she was scheduled to work. The County employee that received this call told the Grievant "OK" and that the Grievant would be replaced. At the time, the Grievant did not have any

available sick leave. Later that day, the County's Director of Nursing telephoned the Grievant and advised the Grievant that she would need to provide the County with a doctor's slip. The Grievant, who had intended to see the doctor, provided the County with the requested slip.

Shortly thereafter, the County posted the following:

SICK DAYS

ANY EMPLOYEE calling in without benefit of an earned sick day will be considered on unauthorized leave, and subject to disciplinary action, unless they have been treated by a physician who states they are unable to work.

On June 7, 1998, a grievance was filed alleging that the County had violated Article VIII, Section 8.04, and other provisions of the collective bargaining agreement by requesting that the Grievant provide the County with a slip from the doctor. The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

As Retired Administrator Jacobson's testimony demonstrates, prior to 1998, employees that called in sick were given an "absent day." Such employees were not disciplined for an "absent day" and were not required to furnish a doctor's slip on the first day of calling in sick without accumulated sick leave.

The County's posted "Sick Days" policy is contrary to a binding past practice. Accordingly, the County cannot unilaterally establish the policy.

Section 8.04 of the collective bargaining agreement provides the County with the right to request a medical certificate of illness if an employee is sick for more than three days. Implicitly, the County may not request such a certificate if the employee is ill for less than three days, as was the Grievant.

The grievance should be sustained. The Arbitrator should order the County to cease and desist from enforcing the "Sick Days" policy.

Employer

Section 8.04, which addresses situations of more than three days of illness, is not controlling. The instant dispute involves the right of the County to request medical proof of illness from an employe that had exhausted sick leave in order to provide the employe with an authorized, rather than an unauthorized, leave of absence.

Interim Administrator Jacobson believes that she posted the "Sick Days" notice prior to the incident that gave rise to the grievance. Regardless of whether or not this notice was posted prior to the incident that gave rise to the grievance, the County's conduct in requesting a medical proof of illness is within the County's contractual rights.

The record evidence does not support the Union's claim that the County's conduct is contrary to "past practice." The grievance is without merit and should be dismissed.

DISCUSSION

The right of the County to establish and enforce the posted "Sick Days" policy is not the issue that was presented to the undersigned. Accordingly, the undersigned makes no determination with respect to that issue.

As stipulated by the parties, the issue to be decided by the undersigned is as follows:

Did the County violate the collective bargaining agreement by requesting the Grievant to furnish the County with a doctor's slip after one (1) day of illness when the Grievant had no accumulated sick leave?

If so, what is the appropriate remedy?

The Grievant and Myrtle Jacobson, the Manor's Interim Administrator from the middle of February to the middle of July, 1998, agree that Jacobson posted the "Sick Days" policy. While Jacobson believes that this policy was posted in May of 1998, prior to the request that gave rise to the grievance, she could not recall the exact date of the posting. Nor did the County provide any documentation of the date of the posting.

The County's evidence is not sufficient to rebut the Grievant's testimony that she recalled being in the room when the policy was posted and that the policy was posted after the date of the request that gave rise to the grievance. The undersigned concludes, therefore, that the posted "Sick Days" policy was not in effect at the time of the request that gave rise to the

grievance. Accordingly, the County may not rely upon this policy to argue that the County acted reasonably and consistent with its management rights when it requested the Grievant to provide the County with a doctor's slip.

As the Union argues, Article VIII, Section 8.04, of the parties' collective bargaining agreement provides the County with the right to request a certificate of illness signed by a licensed physician or chiropractor if any employe is sick for more than three (3) days. This provision is found in the section of the collective bargaining agreement that addresses sick leave benefits. On the date in question, the Grievant had exhausted her sick leave benefits. Inasmuch as the Grievant's request did not involve a sick leave benefit, Section 8.04 is not germane.

The Union does not argue, and the record does not establish, that the Grievant requested, or was entitled to, any other type of paid leave. Thus, the Grievant's request on June 1, 1998 was for unpaid leave.

The Grievant's right to unpaid leave is governed by Article VI, Sections 6.01, 6.02 and 6.03 of the parties' collective bargaining agreement. Under Section 6.02, the County is required to grant up to one year's leave of absence "due to personal illness or disability due to an accident, provided competent medical proof is furnished when requested to substantiate the necessity for continuing said leave."

As the Union argues, the County had not previously requested a doctor's slip from employes that called in sick without available sick leave. Contrary to the argument of the Union, however, this conduct on the part of the County does not give rise to a binding past practice. Nor does it otherwise waive the County's Article VI, Section 6.02, right to request such slips. The reason being that the decision to request, or to not request, a medical slip is a choice to be made by management in the exercise of its management's discretion. A "practice" that is the product of management's discretion may be changed unilaterally by management.

It is not evident that the Grievant has been subjected to improper discriminatory treatment. At the time of the incident, the County had a severe staffing problem. Under the circumstances, it was reasonable for the County to limit leaves without pay to instances of verifiable illnesses. The conclusion that the County's conduct toward the Grievant was not improper discriminatory treatment is further supported by the fact that, shortly after the request that gave rise to the grievance, the County posted the "Sick Days" policy that was applicable to all bargaining unit employes.

Joan McCauley, a CNA, recalls that, after June of 1998, she was out of sick leave and called in sick. According to McCauley, she was not required to provide a doctor's slip. McCauley also stated that nine out of ten times she did bring in a slip. McCauley, however, could not recall any specific instance in which she did not provide a doctor's slip to the County.

When McCauley voluntarily provided a doctor's slip, the County would have no need to "request" such a slip from McCauley. McCauley's testimony concerning the failure of the County to "request" a doctor's slip from McCauley does not demonstrate that the Grievant has been the subject of improper discriminatory practices.

Moreover, the testimony of the current Administrator establishes that McCauley, unlike the Grievant, receives unpaid leave under the Family and Medical Leave Act. Employees receiving leave under the Family and Medical Leave Act have provided the County with competent medical proof of the need for such leave. Neither the testimony of McCauley, nor any other record evidence, demonstrates that the Grievant has been the subject of improper discriminatory practices.

CONCLUSION

The Grievant was absent from work for one day due to illness. Inasmuch as the Grievant had exhausted her sick leave, and it is not evident that the Grievant was entitled to use any other type of leave, the Grievant's absence from work is governed by Article VI, Sections 6.01, 6.02 and 6.03. By requesting the Grievant to furnish the County with a doctor's slip for her absence of one day, the County acted consistently with rights granted to the County under Section 6.02 of the parties' collective bargaining agreement.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The County did not violate the collective bargaining agreement when it requested the Grievant to furnish the County with a doctor's slip after one (1) day of illness when the Grievant had no accumulated sick leave.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 30th day of June, 1999.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator