

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**GRANT COUNTY EMPLOYEES UNION  
LOCAL 918, AFSCME, AFL-CIO**

and

**GRANT COUNTY**

Case 75  
No. 57418  
MA-10615

*(Cindy Kratcha Grievance)*

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Appearances:

**Mr. David White**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

**Mr. Frank A. Matel**, Personnel Director, on behalf of the County.

**ARBITRATION AWARD**

The above-captioned parties, herein "Union" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Lancaster, Wisconsin, on June 10, 1999. The hearing was not transcribed and the parties subsequently filed briefs that were received by June 28, 1999. Based upon the entire record and the arguments of the parties, I issue the following Award.

**ISSUE**

The parties have agreed to the following issue:

Did the County violate Article 13 of the contract when it failed to make payback sick leave payments to certain part-time employees in 1999 and, if so, what is the appropriate remedy?

### **BACKGROUND**

This case turns on whether the County violated Article 13 of the contract when it failed to pay grievant Cindy Kratcha and certain part-time employees in the County's Center on Aging for part of their unused sick leave. The County had made such payment to them in 1996, 1997 and 1998. No other part-time County employees, including those in any other AFSCME bargaining units, received such payment.

Donna Haines, the Director of Finance at the County's Orchard Manor nursing facility, testified that part-time employees at that facility, who are represented by AFSCME, since about 1979 have not been paid for unused sick leave unless they accumulate 192 hours of unused sick leave; that this practice has "never been questioned"; that the pertinent contract language relating to this issue has not changed throughout that time; and that employees at that facility have been paid pursuant to the County's policy which does not pay part-time employees for their unused sick leave unless they too, like full-time employees, have 192 hours accumulated in their sick leave bank.

Deb Udelhoven, an Administrative Assistant in the County's Health Department, testified that she oversees the sick leave buyback plan; that the plan started in about 1982, before the Union came on the scene; that it has always been administered in the same way since then; that, "We do the same as Donna [Haines] does" in not paying part-time employees for their unused sick leave unless they accumulate 192 hours; that she "real informally" has told part-time bargaining unit employees about the County's policy; and that, "They know they are not eligible."

On cross-examination, Udelhoven stated she could not recall the specific names of any part-time employees who were denied sick leave payouts and that she does not know how the sick leave payout plan is applied to the County's Courthouse employees.

### **POSITIONS OF THE PARTIES**

The Union claims that the County violated Article 13 of the contract by not making payback sick leave payments to certain part-time employees who had not accumulated 192 hours of unused sick leave. It argues that the term "day" in Article 13 must be prorated for part-time employees to mean four (4) hours so that they are entitled to a buyback of their sick leave if they accumulate 96 hours of unused sick leave; that a past practice supports its position; that evidence from other bargaining units is "not relevant"; that evidence from the County's Health Department "should be given little weight"; and that "the practice of the parties is not the result of error."

The County asserts that its denial of the sick leave payback was in accord with the contract; that the “intent and past practices” of the parties support “defining a ‘day’ as eight hours” rather than the four hours claimed by the Union; and that any prior payouts “were made in error and should not be considered a binding past practice.”

### DISCUSSION

This case turns on Article 13 of the contract, entitled “Sick Leave”, which states in pertinent part:

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13.02 Accrual: Sick leave shall accrue at the rate of one (1) day per month for full-time employees. Regular part-time staff shall accrue sick leave at a rate proportionate to the percent of time worked; for example, half-time staff would accrue one-half (1/2) day monthly.

13.03 Pay Back:

A) Employees will be paid for all scheduled days off for illness or injury provided they have successfully completed their initial probationary period, but not to exceed the amount accrued. When and if an employee maintains at least 24 days for a 12 month period, beginning January 1, the employee at the end of the 12 month period may be paid for half of the sick leave not used but accrued during that 12 month period. The maximum number of days paid at the end of a 12 month period will not exceed six (6) days. The remaining days shall be retained in the employee’s sick leave account.

B) One-half (1/2) of the accumulated sick leave shall be paid to the employee upon retirement at age 62 or older. In the event the employee retires prior to age 62 with an unreduced retirement benefit, the employee shall receive payment for one-half (1/2) of the accumulated sick leave.

I find that Article 13 is unambiguous on the question of whether part-time employees are entitled to sick leave payback if they have more than 96 hours of accumulated sick leave but less than 192 hours, as this language, on its face, does not expressly address this question and the conflicting claims by both parties show just how unclear this language really is.

The Union also relies on Article I, Section 1.03(B), the contractual recognition clause, which states that all regular part-time employees are entitled to “all fringe benefits as provided in this Agreement on a pro-rata basis except that insurance benefits shall not be prorated.” Here though, part-time employees are granted this benefit on a pro-rata basis provided that they have 192 hours of accumulated sick leave in their sick leave bank. This dispute thus centers on whether part-timers must meet this threshold requirement rather than whether, if eligible, they receive this benefit on a pro-rata basis.

Article 14, Section 14.05 of the contract, entitled “Requirements”, for example, reflects this eligibility principle because it states that holidays will be granted only if employees “work their scheduled work day before and after the holiday, or the day scheduled as the holiday, unless on paid leave.” If part-timers meet this eligibility requirement, they receive holiday pay.

The Union certainly has advanced a persuasive case why the County’s eligibility requirement should be changed so that sick leave can be bought back if part-timers have more than 96 hours of unused sick leave. For since the purpose of the payback program is to encourage attendance at work (at least from the County’s perspective), one would think that it would be in the County’s own self-interest to encourage, to the greatest extent possible, its part-time employees to not use their sick leave on the same footing as the County’s full-time employees as far as working the same number of “days”. But here, by making part-time employees work twice as long on their half “days” to reach the 192 hour eligibility requirement set for full-time employees, its current policy does not do that. To achieve perfect equality, the 192 hour threshold thus should be reduced to 96 hours for part-time employees, just as contended by the Union.

But, what should happen on this issue is a separate question of what the contract provides and whether the contract is clear and unambiguous. Absent any language which expressly refers to this eligibility question, I find that the contract is ambiguous and that it thus is appropriate to consider parol evidence such as bargaining history and past practice to determine how this language has been applied in the past.

As for bargaining history, both parties stipulated at the hearing that there never was any specific discussion of this issue in past contract negotiations. As a result, the Union never expressly obtained the benefit it seeks here at the bargaining table.

As for past practice, Director of Finance Haines and Administrative Assistant Udelhoven both testified about the County’s unbroken past practice of not granting this benefit to any employees other than those employed in the Center on Aging – and then only for the last few years. Thus, Haines testified that such benefits have not been paid since about 1979 and

Udelhoven testified that they have not been paid to any other part-time employees since about 1982. While the Union asserts their testimony should be disregarded, I view it as an invaluable aid showing that even other part-time employees in other AFSCME-represented bargaining units do not receive this benefit.

That is why this benefit need not be granted to any part-time employees other than those employed at the Center on Aging.

However, a past practice has existed of making such payout to certain part-time employees employed at the Center on Aging for the last several years. While the County argues that such payouts were made in error, those employees nonetheless rightly came to view such payments as an economic benefit. That being so, the County is required to continue those payments to those employees for the duration of the contract, as they have become part of their established wages. If the County wants to stop those payments to those employees, it must bargain over that issue with the Union at the contract's duration.

In light of the above, it is my

**AWARD**

1. That the County violated Article 13 of the contract when it failed to make payback sick leave payments to certain part-time employees employed at its Center on Aging in 1999 who had accumulated more than 96 hours of unused sick leave.
2. That to rectify that contract violation, the County shall make whole those employees by paying them for their unused sick leave days.
3. That to resolve any questions arising over application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

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

Amedeo Greco /s/

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Amedeo Greco, Arbitrator

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