BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CALUMET COUNTY HIGHWAY AND PARK EMPLOYEES, LOCAL 1362, AFSCME, AFL-CIO

and

CALUMET COUNTY

Case 106
No. 57798
MA-10746

Appearances:

Ms. Helen Isferding, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Charles Carlson, President, Carlson Dettmann Associates, LLC, appearing on behalf of the County.

ARBITRATION AWARD

Calumet County Highway and Park Employees, Local 1362, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Calumet 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 Chilton, Wisconsin, on October 27, 1999. The hearing was not transcribed and the parties made oral arguments at the conclusion of the hearing.

BACKGROUND

The basic facts underlying the grievance are not in dispute. The grievants, Geary Spykerman and Randy Becker, were denied funeral leave to attend the funeral of their

respective wife's uncle. Each was granted vacation for the day of the funeral. Grievances were filed over the denial of each request for funeral leave. The grievances were combined and it was stipulated are properly before the arbitrator

The parties had a prior arbitration over the same issue before Arbitrator Amedeo Greco who issued a decision on August 13, 1996, which stated the following findings:

> Having considered this matter, I find as follows:
>
> 1. The County, by virtue of the instant August 6, 1996, hearing has given effective notice to the Union that it will terminate at the expiration of the instant contract any past practice regarding the granting of funeral leave for a spouse's grandfather and grandmother and other family members.
>
> 2. Ecker and Sell shall be credited with paid funeral leave for the funerals they attended on December 13, 1995, and April 2, 1996, for their spouses' grandfather and grandmother. In addition, paid funeral leave for the death of a spouse's relatives such as a grandfather and grandmother shall be given to all employes in the County's Highway Department up to December 31, 1997, when the current contract expires.

The language of the parties' contract was not changed in the successor to the 1995-97 collective bargaining agreement.

ISSUE

The Union stated the issue as follows:

> Did the County violate the collective bargaining agreement and past practice when it refused to grant one day of funeral leave to Becker and Spykerman for the funeral of each wife's uncle?
>
> If so, what is the appropriate remedy?

The County stated the issue as:

Did the County violate the contract when it refused to grant one day of funeral leave to grievants, Geary Spykerman and Randy Becker?

If so, what is the appropriate remedy?

The undersigned adopts the Union's statement of the issue.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE VII – MANAGEMENT RIGHTS RESERVED

. . .

7.04 The Employer agrees that all amenities and practices now in effect but not specifically referred to in this Agreement, shall continue for the duration of this Agreement.

. . .

ARTICLE X – LEAVES

. . .

10.03 Funeral Leave – Three (3) working days leave with pay will be allowed for death within the immediate family. Immediate family shall mean: mother, father, spouse, son or daughter (including step-parents and step-children). Up to three (3) working days leave with pay will be allowed in the event of the death of a brother, sister, mother-in-law, or father-in-law. One (1) working day funeral leave with pay will be allowed for death within the extended family. Extended family shall mean: grandparent, grandchild, aunt, uncle, niece, nephew, and in-law. Funeral leave shall not be available for deaths of relatives of ex-spouses.

UNION'S POSITION

The Union contends that the grievance should be sustained because the past practice clause applies and employes have been granted this benefit in the past. It argues that the County tried to change the language and failed to do so, dropping its proposal and the contract language remained unchanged. It observes that the Greco Award was non-precedential so it

has no application to the instant case. It insists that the interpretation and language did not change, so the past practice continued and this is supported by the County's attempt to change the language.

It asks what does "in law" in the third paragraph of Article X mean but what the parties' past practice demonstrates which was to allow funeral leave. It asserts that the parties knew how to write out the meaning of "in law" and the County proposed new language to do so. The Union states that there was no change to the third paragraph so "in law" means the spouse's grandparent, grandchild, aunt, uncle, etc., and the grievance should be sustained.

COUNTY'S POSITION

The County contends that the words "in law" means brother-in-law and sister-in-law. It argues that it was not obligated to change the language as the Award of Arbitrator Greco applied which eliminated the past practice. It claims that it was not necessary to change the language of the contract as the County's interpretation in light of said Award controlled. It submits that it offered the language to change Section 10.03 for clarification purposes only and not to change the meaning of the language. It contends that the grievance should be denied.

DISCUSSION

The issue presented in this case is whether the past practice of granting paid funeral leave for the death of a spouse's relative, such as an uncle, continued under the present collective bargaining agreement. The Union claims the practice continued until the County successfully changed it in negotiations and the County claims it was changed by the Greco Award.

The basic rule with respect to changing a past practice is set out in Elkouri and Elkouri, How Arbitration Works (BNA, 5th Ed.) at pp. 643-644, where the author stated:

> Even absent any such change in the underlying basis of a practice, an impressive line of arbitral thought holds that a practice that is not subject to unilateral termination during the term of the collective agreement is subject to termination at the end of said term by giving due notice of intent not to carry the practice over to the next agreement; after being so notified the other party must have the practice written into the agreement to prevent its discontinuance. Arbitrator Richard Mittenthal explained:

> Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For * * * if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.
>
> That inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding. (footnotes omitted)

Arbitrator Greco's Award made it clear that the County was giving notice that the past practice related to funeral leave for a spouse's relative would terminate at the end of the contract. Item 1 of the Award states as follows:

> 1. The County, by virtue of the instant August 6, 1996, hearing has given effective notice to the Union that it will terminate at the expiration of the instant contract any past practice regarding the granting of funeral leave for a spouse's grandfather and grandmother and other family members.

Thus, the Union was on notice that the practice would not carry over and it was incumbent on the part of the Union to have the practice written into the contract to prevent its discontinuance. Terence Ecker's testimony that the past practice continued after the contract expired would render the Greco Award meaningless because then no effective notice of the termination of the past practice would have been given. The mere fact he did not understand it as expiring does not establish that it did not expire. The express terms of the Award indicates that it expired.

In negotiations for the instant agreement, the Union made no proposals and insisted that the language not change. The Union made no assertion that the past practice that had been terminated would be resurrected. Therefore, the language continued but without the past practice related to funeral leave for a spouse's relatives.

The mere fact that the County sought to clarify the contractual language without changing its meaning does not establish that the County made a proposal and was unsuccessful such that the Union would prevail. Again, referring to Elkouri and Elkouri, How Arbitration Works (BNA, 5th Ed.) at 505:

> However, where a proposal in bargaining is made for the purpose of clarifying the contract, the matter may be viewed in a different light. Arbitrator Sidney A. Wolff explained:
>
> > [I]t is fundamental that it is not for the Labor Arbitrator to grant a party that which it could not obtain in bargaining.
> >
> > This restriction, however, has its limitations. If, in fact, the parties were in dispute, on the proper interpretation of a contract clause and one of them unsuccessfully sought in collective bargaining to obtain clarification, it would not necessarily follow that the interpretation sought by the unsuccessful party was wrong. (footnote omitted)

Thus, it is concluded that the past practice had been terminated and under the present contract language, though not changed, employes have no right to funeral leave for a spouse's relative such as grandparent or uncle.

The Union has inferred that the past practice gave meaning to the term "in law." This argument runs counter to the Union's reliance on Sec. 7.04 because Sec. 7.04 only applies to amenities and practices not specifically referred to in the agreement, yet Sec. 10.03 specifically refers to "in law" in providing for funeral leave. Secondly, the notice of discontinuance of the past practice in the Greco Award would have no meaning at all because generally a past practice that gives meaning to a contract term cannot be discontinued by notice. Finally, the plain meaning of "in law" has no applicability to aunts, uncles, or grandparents. The dictionary defines brother-in-law, sister-in-law, son-in-law, father-in-law, mother-in-law and daughter-in-law but does not list uncle-in-law or grandparent-in-law as these are not defined terms. Thus, the plain language precludes a reference to past practice as an aid to interpret the language. Therefore, the language of the contract does not grant the benefit sought here and any separate past practice has been discontinued by proper notice.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes the following

AWARD

The County did not violate the collective bargaining agreement and past practice when it refused to grant one day of funeral leave to Becker and Spykerman for the funeral of each spouse's uncle, and therefore, the grievances are denied.

Dated at Madison, Wisconsin, this 8th day of November, 1999.

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

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