

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**TOWN OF BELOIT FIREFIGHTERS,
LOCAL 2386, IAFF, AFL-CIO**

and

TOWN OF BELOIT

Case 33
No. 56842
MA-10431

(Allen Cass Grievance)

Appearances:

Mr. Jeffrey P. Sweetland, Shneidman, Myers, Dowling, Blumenfeld, Ehlke, Hawks & Domer, Attorneys at Law, 700 West Michigan Street, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Town of Beloit Firefighters, Local 2386, IAFF, AFL-CIO.

Mr. James R. Scott, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Town of Beloit.

ARBITRATION AWARD

The above-captioned parties, herein “Union” and “Town”, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in the Town of Beloit, Wisconsin, on February 7, 2000. The hearing was not transcribed and both parties subsequently filed post-hearing briefs that were received by April 17, 2000.

Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Did the Town violate Article XIII of the contract when it refused to let grievant Allen C. Cass double up two half days of sick leave and thereby grant him one full day's sick leave on October 8, 1998, to take care of his newborn child and, if so, what is the appropriate remedy?

BACKGROUND

The Fire Fighters here work 24 hour shifts, followed by two full days off. They therefore receive 24 hours pay when they take off a full sick leave day and 12 hours when they take off half of a sick leave day.

Grievant Cass has been employed since 1997, thereby entitling him to 14 working days of full pay and 14 working days of half pay as sick leave.

Grievant Cass' daughter was born on June 18, 1998. (Unless otherwise stated, all dates herein refer to 1998). In order to care for her, he by memo dated June 16 informed Fire Chief Loren Lippencott:

...

I will be using my sick time for family leave for the care of my new born child. I have at the presant (sic) time 14 full days of sick time and 14 half days of sick time. I will be taking the following days for family leave 6-19, 6-22, 6-25, 7-4, 9-8, 9-11, 9-14, 9-17, 9-20, 9-23, 9-26, 9-29, 10-2, 10-5 using full sick days. Then on 10-8 I will be using a half sick day from 0700-1900 and another half day from 1900-0700 hrs. (Joint Exhibit 3).

...

By memo dated July 1, (Joint Exhibit 2), Town Administrator Tim Savage informed Cass and Fire Chief Lippencott:

...

On Allen's request for Family Medical Leave he requested the use of two (2), half sick days to be applied to his day off on October 8, 1998. The half sick days are not to be doubled up. He does have the option of using a half sick day and one half of another type of leave, such as vacation.

...

The Union on July 7 grieved the Town's refusal to grant Cass the two one-half sick leave days off he requested for October 8 when it filed the following grievance:

...

Fire Fighter Alan Cass requested in writing that two (2) half sick days be combined to make one full day in order to apply this towards the Family Medical leave he had requested. In a interoffice memorandum the Town Administrator denied this request. The memorandum stated that he would only be able to use one (1) half sick day and another half day of another type of leave. The memorandum also states that "half sick days are not to be doubled up".

Local 2386 demands that Fire Chief Alan Cass be allowed to use two (2) half days of sick time to make up one (1) full day. The Local exercises this right as the Town has set a precedent with Lt. Jeff Miller in 1997 while he was off on sick time and in doing so has created a mandatory subject of bargaining. Local 2386 also demands that this time be allowed as there is no such language in the current bargaining agreement that does not allow an individual to use his/her sick time in such a manner.

Cass subsequently took off 14 full sick leave days to take care of his baby and he used vacation and/or compensatory time to miss work on October 8 after his request to double up two half days of sick leave was denied. Cass answered, "That's the definition" when asked on cross-examination whether a half pay day is the same as a half working day.

...

Several witnesses testified about how sick leave had been granted in the past.

Union President Jeffrey A. Miller testified that "I received my full wages" in 1997 when he missed work for about three months because of surgery; that he then exhausted his full day's sick leave by doubling up three days; that Fire Chief Lippencott in 1997 expressly told him that he had spoken to Town Administrator Tim Savage and that his half sick days were being doubled up; that he does not know who approves sick leave on behalf of the Town; and that he personally never discussed his sick leave use in 1997 with Town Administrator Savage.

On cross-examination, Miller testified that the current contract was agreed to in August-September, 1998, after he returned to work in 1997; that he is not sure how the new contract language was added; and that he could not recall the Fire Chief's "exact words" regarding his 1997 sick leave.

Retired Fire Fighter Steven D. Ahrens testified that he was on medical leave in 1998 because he had a heart attack; that he then used vacation time, compensatory time, and half sick leave days once he had exhausted his full sick leave days; and that, "I don't honestly remember" the conversation he then had with Fire Chief Lippencott regarding his sick leave usage. (Ahrens' sick leave time is set forth in Town Exhibit 1.) He added that the Town initially doubled up his half day sick leave days; that he subsequently told the Town that he did not want to double up his half day sick leave days because he needed to remain on the payroll for as long as possible to retain his health care benefits; and that the Town honored his request by reverting back to granting him one half sick leave day.

On cross-examination, he said that the Town could have terminated him at that time and that the Town could have saved money in health care premiums if it terminated him earlier.

Town Administrator Savage testified that he never personally granted half sick leave days to Miller in 1997 because such routine requests are handled at the department level; that "it did not dawn on me" when he first saw that Ahrens' sick leave was being doubled up (Employer Exhibit 1) and that if he had realized what it represented, he would not have approved it; and that he denied grievant Cass' 1998 request to double up his half-day sick leave days on October 8 because employees are only entitled to receive a half-day's sick leave for each entire day they are absent. He added that the Town is opposed to doubling up sick leave because receiving half a day's pay is "an incentive to report to work" and because the plan already is very "generous". He also said that the question of past practice never came up when the past practice clause was agreed to in the 1997-98 negotiations.

On cross-examination, Savage said that Fire Chief Lippencott never discussed with him the doubling up of Ahrens' half-day sick leave days; that the Chief instead told the Town's Treasurer what to do; that the Treasurer never spoke to him about doubling up Ahrens' one-half day sick days; that he "gave it cursory review" because the letter does not expressly state that sick leave is to be doubled up; that he did not know about Miller's situation until after the instant grievance was filed; and that there are no one-half sick leave days under the contract, only one-half pay working days.

Union Vice-President Emerterio L. Harold sat in on the contract negotiations leading up to Article XIII of the contract. He first testified that then-Town negotiator Jim Clay stated in those negotiations that the new language in Article XIII, Section 6, (Joint Exhibit 4), brought the Town in compliance with the Family and Medical Leave Act ("FMLA"), but he

went on to say he could not “recall the exact discussion” and who said what. He also said that he does not know when Section 7 was first put in the contract and that there was no discussion in the negotiations regarding the full days versus half days sick leave issue in dispute here.

On cross-examination, he said that he does not remember the Union’s counterproposal on this issue and that he is not suggesting that employees at retirement and/or death who have seven full sick days and seven half sick days receive 14 full sick leave days under the Union’s theory in this case. Instead, said he, they only would receive 10 ½ days, i.e., the seven full days and seven half days.

POSITIONS OF THE PARTIES

The Union maintains that the Town’s refusal to allow Cass to double up his half days of sick leave to cover one day of FMLA leave was “not consistent with the Wisconsin FMLA” under Article XIII, Section 6, of the contract and that the Town’s denial violated the parties’ past practice. As a remedy, the Union asks that the Town be ordered to restore one-half day to Cass’ vacation bank.

The Town, in turn, contends that the contract clearly establishes that the half days in issue “are not half sick days but rather, full days at half pay”, and that the FMLA and Section 103.10, Stats., do not provide to the contrary.

DISCUSSION

This dispute largely turns on Article XIII of the contract, entitled “Sickness and Accident Benefits Full-Time Employees and Salaried Personnel”, which states in pertinent part:

Section 1 – Establishment. BE IT RESOLVED by the Town Board of the Town of Beloit, Rock County, Wisconsin that the following sickness and accident plan be established to reduce financial hardship which employees might experience as a result of physical disability for which they have been granted authorized leave of absence.

Section 2 – Allowance.

Maximum Allowance:		
Length of Service	Full Pay	Half Pay
Less than one month	None	None
One month to one year	7 working days	7 working days
One year to five years	14 working days	14 working days
Five years thru nine years	21 working days	21 working days
Ten years thru fifteen years	35 working days	35 working days
Sixteen years and over	45 working days	45 working days

Section 3 – Renewal of Benefits. These sickness and accident benefits are the maximums for any calendar year. If an employee has been repeatedly absent for short time periods because of accident, illness, or other reasons, such time as the employee has been absent and paid for will be deducted from the above to determine the maximum.

...

Section 6. Medical leaves of absence shall be administered in a manner which is consistent with the Wisconsin or Federal Family and Medical Leave Act. (Depending on which FMLA the employee elects to utilize) Employees requesting a leave of absence must make application to his/her Department Head. Said application shall be accompanied with a physician’s statement indicating the nature of the illness and/or medical condition and the probable return date upon which the employee may return to work.

...

This language establishes two different kinds of sick leave pay: “FULL PAY” for a certain number of “working days” and “HALF PAY” for a certain number of “working days”. This difference has one central purpose: after an employe has exhausted his/her sick leave days at

“FULL PAY”, he/ she only receives “HALF PAY” for the remaining days he/she is out on sick leave. In that way, there is an incentive for employees to return to work after they exhaust their working days at “FULL PAY” because they then only receive “HALF PAY”.

The Union’s grievance seeks to obliterate this difference by trying to convert “HALF PAY” to “FULL PAY”, thereby in essence creating a bank of hours that can be used interchangeably once all the “FULL PAY” days are gone. But if the parties wanted to create a bank of hours, they surely could have used the terms “hours” and “bank” rather than the term “HALF PAY”. The fact that they did not do so establishes that they never intended for the result sought by the Union. Hence, the contract must be interpreted the way it is written, i.e., that after they exhaust their sick leave days at “FULL PAY”, employees are to receive “HALF PAY” when they miss a day of work because of illness, as that serves as an incentive for them to return to work.

Contrary to the Union’s claim, this does not violate the Wisconsin FMLA (Section 108.10(5)(b), Stats.), as employees under state law are only entitled to substitute paid sick leave for unpaid family leave: It does not entitle employees to receive more sick leave than they are actually entitled to under a collective bargaining agreement. That is why none of the cases cited by the Union involved situations where employees attempted to receive a new contractual benefit such as trying to convert two half days’ pay into one full days’ pay.

The Union also claims that the Town’s actions violated the parties’ past practice in violation of the Memorandum Of Understanding which states:

- Notwithstanding the terms and conditions of the collective bargaining agreement between the Town and the Union, neither party shall be precluded from introducing evidence of the past conduct of the parties for the purpose of interpreting ambiguous language in the existing collective bargaining agreement in any hearing or other proceeding.

It is true that the Town in 1997 and 1998 allowed Firefighters Miller and Ahrens to combine two half days of sick leave into one full day of sick leave so that they would not lose any money during their absences. However, Town Administrator Savage – who must personally approve all such sick leave requests - testified that he was unaware of those situations when they occurred and that if he had been aware of them, he would not have approved them.

Miller, however, testified without contradiction that Fire Chief Lippencott told him that he, Lippencott, had spoken to Savage, and that Savage had approved Miller’s sick leave. Since Miller’s testimony was uncontradicted, and since Lippencott – who never testified – never disputed Miller’s account, it appears that Savage may have known about Miller’s situation.

However, a binding past practice by definition must be “(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.” (Footnote citations omitted) *How Arbitration Works*, Elkouri and Elkouri, p. 632 (BNA, 5th Ed., 1997). Here, the one instance involving Miller is insufficient to constitute a “fixed and established practice accepted by both parties.” In addition, since Savage testified without contradiction that he was unaware of Ahrens’ situation, it does not count. As a result, there is no binding past practice on this issue. Absent that, Article XIII of the contract must be applied as written, which means that employes cannot double up their sick days at “HALF PAY” to make up a sick day at “FULL PAY”.

In light of the above, it is my

AWARD

That the Town did not violate Article XIII of the contract when it refused to let grievant Allen Cass double up two half days of sick leave so that he could take one full day’s sick leave on October 8, 1998, to take care of his newborn child. His grievance is therefore denied.

Dated at Madison, Wisconsin this 5th day of June, 2000.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

AAG/gjc
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