

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**BROWN COUNTY SHELTER CARE
EMPLOYEES, LOCAL 1901-F, AFSCME, AFL-CIO**

and

BROWN COUNTY (SHELTER CARE)

Case 625
No. 57579
MA-10680

Appearances:

Mr. Robert Baxter, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2065 East Baraboo Circle, DePere, Wisconsin 54115, appeared on behalf of the Union.

Mr. John Jacques, Assistant Corporation Counsel, Brown County, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, appeared on behalf of the County.

ARBITRATION AWARD

Brown County Shelter Care Employees Local 1901-F, AFSCME, AFL-CIO, hereinafter the Union, and Brown County (Shelter Care), hereinafter the County, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to bereavement leave. The Commission designated William C. Houlihan to serve as the impartial arbitrator. Hearing in the matter was held in Green Bay, Wisconsin on September 23, 1999, with a stenographic transcript being prepared by October 12. The parties filed written arguments by November 11, 1999 and waived reply briefs.

ISSUE

The Union states the issue as follows:

Did the Employer violate the collective bargaining agreement by denying the grievant, Steve Felter, three (3) days of bereavement leave? If so, what is the appropriate remedy?

The County states the issue as follows:

Did the Employer violate Article 12 of the labor agreement by refusing to grant three paid non-consecutive scheduled work days to Stephen Felter as Bereavement Leave for February 2 and 3, 1999?

I believe the issue to be:

Did the County violate the collective bargaining agreement by denying the grievant, Steve Felter, bereavement leave for February 2 and 3, 1999? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE

...

Article 6. MAINTENANCE OF BENEFITS

The Employer agrees to maintain existing benefits that are mandatory subjects of bargaining not specifically referred to in this Agreement. Any benefits which are mandatory subjects of bargaining presently in effect, but not specifically referred to in this Agreement, shall remain in effect for the life of this Agreement. Personal effects such as glasses, watches, etc., damaged or destroyed by clients, shall be replaced by the Employer. Employees shall be given a copy of their evaluations.

The above stipulations are intended to cover normal conditions that occur or exist; however, should special conditions arise on matters that are mandatory subjects of bargaining, said matters are to be taken up with the Union to arrive at a satisfactory solution.

...

Article 12. TIME OFF FOR BEREAVEMENT

Employees are hereby granted a three (3) consecutive day leave of absence with pay commencing the day of death or day following in the event of a death of a member of their immediate family. Immediate family is defined as: Husband, wife, children ... father-in-law, step parents. A one(1) day leave of absence with pay shall be granted in the event of the death of grandparents, brother-in-law ... uncle of the employe or h/er spouse.

In the event an employe is called upon to be a pallbearer, or to serve in a military funeral, one (1) day of leave will be allowed: sick leave, vacation, or loss of pay, at the discretion of the employe.

In the case of the death of a member of the immediate family of a regular part-time employe in the bargaining unit, the employe will be granted an excused absence to attend the funeral of up to three (3) calendar days starting on the day of death or the day following the death through the next day after internment. If during this leave, the employe has scheduled work days, the employe will be paid for those scheduled work days (to a maximum of three (3)). The employe will not be paid for any of the three (3) days which are non-scheduled work days. The immediate family is defined the same as above.

In the case of death of a grandparent ... or uncle of the employe or the employe's spouse, a regular part-time employe shall be granted one (1) day with pay to attend the funeral provided such day is a scheduled work day. If the funeral is not a scheduled work day, the employe will not be paid for this one (1) day.

BACKGROUND

The essential facts of this matter are not in dispute. Steve Felter has been a youth care worker for the Brown County Shelter Care for ten years, and a union steward for about seven or eight years. This grievance concerns how many paid days off he was entitled to following the death of his wife's father.

When his father-in-law became critically ill on the morning of Friday, January 29, 1999, Felter notified his supervisor and took five and one-half hours of family sick leave to go to the hospital. Felter's father-in-law died about an hour after he arrived at the hospital, sometime between 11:00 and 11:30. The attending funeral home received the body sometime

on Sunday, with a wake taking place on Monday and the funeral on Tuesday, February 2. Felter was not scheduled to work on Saturday or Sunday. He was scheduled to work on Monday and Thursday.

On Tuesday, a Shelter Care supervisor called to inform Felter that he was not entitled to bereavement leave for Tuesday and Wednesday, and that he would have to either return to work on Wednesday or use some other form of leave.

After returning to work on Thursday, February 4, Felter submitted a time card which requested bereavement leave for Monday February 1 to Wednesday February 3. This request was denied, and Felter used personal leave for February 2 and 3. On February 9 Felter filed a grievance seeking to be made whole, by restoration of those two personal leave days and utilization of two days as bereavement leave.

On April 26, 1999, Brown County Human Resources Director James Kalny wrote to Union Staff Representative Bob Baxter as follows:

Stephen Felter is employed at Brown County Shelter Care and works Monday through Friday, 8:00 a.m. to 4:00 p.m. On Friday, January 29, 1999, while at work, Mr. Felter was informed of the death of his father-in-law. He worked three (3) hours and used sick leave for the remaining five (5) hours of that day.

When Mr. Felter submitted his time card, he used Bereavement Leave for Monday through Wednesday, February 1, 2 and 3, 1999. His supervisor, Peggy Shimon, informed him that in accordance with the bargaining unit contract, his Bereavement Leave could not include February 2 and 3, 1999. He was asked to select another type of paid leave for those two days and he chose to use Personal Leave.

On February 9, 1999, Mr. Felter filed a grievance alleging a violation of Article 12, Time off for Bereavement, lines 281 - 284 of the collective bargaining agreement, stating the "County declined to pay three Bereavement days due to the death of father-in-law."

Mr. Felter seeks as relief that he be made whole for loss of wage and benefits.

The contract language states, "Employees are hereby granted a three (3) consecutive day leave of absence with pay commencing the day of death or day following in the event of a death of a member of their immediate family." In this case, the date of death would have been Friday, January 29, 1999. Mr. Felter had worked three hours of his scheduled day and chose to use Sick Leave for the

time he didn't work that day. His Bereavement Leave commenced January 30, 1999, the day following the death.

In grievance 94-094, a Brown County at Shelter Care employee grieved, among other things this same language. The County's response was that the contract language turned on the phrase ".consecutive days". The County reasoned that the issue of whether a person was scheduled to work is irrelevant. The specific benefit granted by the contract goes to the days immediately following the death. Based on that prior grievance, Mr. Felter would have January 30, 31 and February 1, 1999.

Of those three days, however, Mr. Felter was only scheduled to work on February 1, 1999, and it is that day, the third day of the three consecutive days, that Mr. Felter is entitled to eight hours of Bereavement Leave pay.

The County's response further reasoned that the contract does not say, "Fulltime employees are hereby granted a three (3) consecutive workday leave of absence with pay (excluding non-scheduled or days off)...." as is the language in Local 1901 contract. Nor does the contract say, "Whenever a death occurs to a member of the immediate family of an employee, the County shall compensate the employee for any time lost from work during the next three (3) succeeding work days following said death" as stated in the Courthouse contract. It is, and was, clear that the Shelter Care contract language is different and it is logical that different language will lead to different benefits.

In addition, the above referenced 1994 grievance was arbitrated. During the course of the arbitration, the Union determined not to arbitrate the above stated interpretation of the bereavement language. Thus the Union is on notice of the interpretation and elected not to challenge the County's interpretation in the recent past. Nor did the Union attempt to negotiate a change in the language to address this matter in the last contract negotiations.

As much as we sympathize with Mr. Felter for his loss, we must interpret the contract as has been the established practice and as it is written. Since Mr. Felter was paid Bereavement Leave in accordance with the contract as it is written, we must deny the grievance.

The Union thereafter submitted the grievance for arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union argues as follows:

The language of the collective bargaining agreement is clear and unambiguous, and therefore the grievance should be sustained. The employer errs by focusing with laser-like precision on the provision that the bereavement leave is taken in consecutive days from the day of death (or the day after). The employer has clearly violated the collective bargaining agreement, and its interpretation yields an absurd result, flies in the face of a logical interpretation and flies in the face of the mission of the County Human Services Department.

It makes no sense for the employer to argue that bereavement leave has to be taken prior to the employe receiving the body for wake, funeral and burial. The arbitrator should sternly rebuke the employer for bothering the grievant about the nature of his leave during a time of emotional distress.

Even the if the language is not considered clear and unambiguous, the grievance should still be sustained, because the employer's interpretation leads to an absurd result. The purpose of bereavement leave is to allow an employe time to deal with the physical arrangements of the funeral, to be present at the funeral, and to deal with the family's emotional needs. Accordingly, the grievance should be sustained.

Further, the employer has not proven that a past practice exists, in that there is no practice which is of uniform application, long duration and mutual agreement. Indeed, this specific situation has never occurred before. Thus, the grievance should be sustained.

The 1994 grievance involving Sandy Dudley has no precedential value with regard to the present dispute, and should be disregarded. The primary issue in that case was whether or not Ms. Dudley should be paid holiday pay for Thanksgiving while she was on bereavement leave.

The grievance should be sustained for three reasons. The language in the collective bargaining agreement is clear and unambiguous, granting three consecutive days leave of absence with pay. Further, there is no past practice concerning this issue. Finally, no prior grievance arbitration has any precedential value in this matter.

In support of its position that the grievance should be denied, the employer argues as follows:

The term “consecutive days” in the bereavement leave clause is clear and unambiguous. There can be no doubt that the word “consecutive” can mean anything but three consecutive calendar days and could not mean non-consecutive scheduled workdays. If the term “consecutive day” could be construed to mean non-consecutive scheduled workdays, there would be no limit as to when three paid scheduled workdays could be used as bereavement leave. The County cites the following passage from Elkouri:

Funeral Leave

Cases involving funeral leave provisions have turned upon the precise wording of the funeral leave or “bereavement” pay clause, and arbitrators appear to be inclined toward strict construction of such clauses. Thus, where the contract specifically stated that a certain number of days of paid leave would be allowed to attend the funeral of a member of the employee’s immediate family, arbitrators have held that such leave provision includes attendance at the funeral and necessary travel time but does not contemplate absences to aid bereaved relatives or to attend to the estate. In addition, where the contract provided for “consecutive” days off, the arbitrators interpreted “consecutive” to mean calendar, and not scheduled, workdays. Moreover, where the language used is “pay for time lost” or “paid leave of absence” while attending the funeral of a family member, arbitrators generally have denied such pay when the employee was already on vacation or otherwise not scheduled to work.

The Union is requesting that the arbitrator alter the plain terms of the collective bargaining agreement, which the arbitrator has no power to do.

There is no violation of the collective bargaining agreement when the employee has been freed from work for three consecutive days with no loss of pay from the day of death or the day after. The County granted the grievant three consecutive days off; now the grievant is claiming a five day period, to receive a fourth and fifth day as paid scheduled workdays. He used other paid leave for those days, and was not forced to work on the day of the funeral.

The bargaining history and past practice preclude any entitlement of three paid non-consecutive workdays as bereavement leave. Also, fringe benefits are usually strictly construed to mean what they specifically grant because there are no implied fringe benefits.

DISCUSSION

The collective bargaining agreement grants to employes “a three consecutive day leave of absence with pay commencing the day of death or day following in the event of the death” of a member of the immediate family. The grievant’s father-in-law was, under the collective bargaining agreement, a member of the immediate family. The only question is whether the three consecutive days are calendar days or work days. If they are calendar days, the grievant’s right to bereavement leave extended from Saturday through Monday; if they are work days, the grievant was entitled to bereavement leave through Wednesday.

The employer contends the days are calendar days, and correctly notes that the parties could have specified work days, as the County and AFSCME did in another bargaining unit. To the County, the term “consecutive days” is clear and unambiguous, leaving no valid argument that they could mean anything other than consecutive *calendar* days. The County goes on to argue that there can be no violation of the agreement when the employe has been freed from work for three consecutive days with no loss of pay. The County’s argument in this regard ignores a portion of the sentence which creates the benefit. What the employe is entitled to is “. . . a three consecutive day leave of absence with pay. . .” That is different from a release for three consecutive days with no loss of pay. Construing consecutive days as synonymous with calendar days similarly ignores the contractual “. . . with pay.” The County concludes that unscheduled days which fall within the three consecutive day period are to be unpaid days. This, too, ignores the contractual mandate that the leave be “with pay.”

The County notes that it has negotiated agreements with AFSCME which explicitly provide for the benefit sought in this proceeding. For instance, the Mental Health Center Agreement provides that bereavement leave consists of:

. . . three consecutive work days of leave of absence with pay (excluding non-scheduled or days off). . .

The County contends that different language yields different results, and that these parties have demonstrated the ability to negotiate the benefit the union seeks in this proceeding, if that was what was intended. The Mental Health Center language is more explicit. That fact, standing alone, does not direct a conclusion that the language of this agreement does not generate the same benefit under the circumstances presented. Nor does it, by implication, soften the meaning of the “with pay” provision.

The words “with pay” must be accorded some meaning. Read literally, this contract provides three consecutive days with pay. On its face, this is regardless of whether the employe was scheduled to work. Both parties reject this construction and it is at odds with the purpose underlying the clause. The language could be construed to require pay when one or more of the three consecutive days falls on a day when the employe is scheduled to work, as urged by the Employer. Such a construction requires clarification of the provision. In the alternative, the clause could be read to provide paid release for three consecutive working days, as claimed by the Union. This construction also requires some clarification, though less than does the meaning argued by the County.

Both parties contend the clause is clear and unambiguous, though neither seeks a literal application. In the face of ambiguity, it is helpful to examine the purpose of the provision, and benefit. These parties have previously arbitrated over aspects of bereavement leave and have some arbitral guidance in this area. In a prior award, Arbitrator Shaw held: “The purpose of bereavement leave is to allow the employe to be off work in order to attend the funeral and attend to family matters without suffering a loss of pay.” BROWN COUNTY (SHELTER CARE), Case 568, No. 52478, MA-8989 (Shaw, 1996). As noted above, the funeral took place on Tuesday.

I do not believe that Saturday and Sunday can be considered “leave of absence with pay” within the meaning of the contract. As a distinguished arbitrator held in a similar case, “a day that is not a scheduled work day, and is the employee’s day off, belongs exclusively to the employe; such day is not one over which the company can assert control or authority including the consideration of such day for leave of absence or for any other purpose.” WARNER & SWASEY CO., 52 LA 1158 (Dworkin, 1969). Also see SHERWIN-WILLIAMS CO., 22 LA 1 (Kelliher, 1954).

I also find unpersuasive the County’s reliance on the 1996 Shaw Award, which sustained the grievance of an employe who sought bereavement leave pay as well as holiday pay for Thanksgiving Day. In that matter, the grievant, following denial of her grievance, withdrew her request for the non-consecutive calendar day of bereavement leave. She purportedly did so because funeral-related matters were concluded by the time her 12:00 p.m. – 8:00 a.m. shift began. Whatever the reason for her withdrawal, that arbitrator never considered the matter pending this dispute.

I do not believe there is bargaining history or past practice to support either position in this dispute. Jim Hermans, Shelter Care Superintendent, testified to the following, on direct examination:

Q: And did you have a meeting with any – prior to denying the grievance, did you have a meeting with any of the union representatives for Mr. Felter?

A: We met – and when I say “we,” myself and Peggy Shimon – with Mr. Felter and Union Steward Jean Elliot, and we met within the required time period. I don’t have a copy of the contract in front of me, but within this required time period we sat down to discuss the grievance to make sure that we were in understanding of what was being grieved and why it was being grieved.

Q: And did you ask Ms. Elliott whether it had ever occurred in the past that someone would be paid a bereavement day when they were not normally scheduled to work?

A: Yes.

Q: And what did she say?

A: At that time they were not able to provide any past practice or other case situations where that had come up.

...

Q: Has there ever been a situation where a funeral has ever been four days after the date of death that you know of in the past?

A: Not that I can recall.

...

On cross-examination, Hermans testified as follows:

Q: Are you aware of any occurrences with any employees where they had a death and the day of the funeral they were interrupted by a weekend or had a weekend fall between?

A: No, I’m not. I don’t recall any situation like that at this point.

Q: Would it be fair to say then that this is a set of circumstances that’s not occurred before?

A: In my experience here.

...

If anything, the foregoing testimony supports the proposition that this is a case of first impression for these parties.

I believe that the provision should be construed to interpret “day” as “workday”. This construction breathes meaning into all words and phrases used by the parties and is consistent with the purpose of the benefit.

AWARD

That the grievance is sustained. The County shall adjust its time and payroll records to reflect that Stephen Felter was on bereavement leave, not personal leave, on February 2 and 3, 1999.

Dated at Madison, Wisconsin this 30th day of August, 2000.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

