

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WINNEBAGO COUNTY

and

**WINNEBAGO COUNTY SHERIFF'S
PROFESSIONAL POLICE ASSOCIATION**

Case 324
No. 58537
MA-10983

Appearances:

Attorney John A Bodnar, Corporation Counsel, Winnebago County, 415 Jackson Street, P.O. Box 2808, Oshkosh, Wisconsin 54903-2808.

Mr. Patrick J. Coraggio, Labor Consultant, Labor Association of Wisconsin, Inc., 2835 North Mayfair Road, Suite 24, Wauwatosa, Wisconsin 53222.

ARBITRATION AWARD

Winnebago County, hereinafter referred to as the County, and Winnebago County Sheriff's Professional Police Association, hereinafter referred to as the Association, are parties to a collective bargaining agreement which provides for finding and binding arbitration of grievances. Pursuant to the parties joint request the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the denial of sick leave and compensatory leave. The parties waived a hearing and submitted a stipulation of facts to the undersigned on June 21, 2000. Briefs and reply briefs were received by the undersigned by August 16, 2000. Full consideration has been given to the evidence and arguments presented in rendering this Award.

ISSUE

The parties agreed upon the following issues:

“Did the County violate the collective bargaining agreement by denying the grievant’s request to use one and one-half hours sick leave and six and one-hours of compensatory time when he called in sick on December 16, 1999?”

“If so, what is the appropriate remedy?”

Did the County violate the collective bargaining agreement by denying the grievant the right to accumulate one day of sick leave for December, 1999?

“If so, what is the appropriate remedy?”

PERTINENT CONTRACTUAL PROVISIONS

. . .

**ARTICLE 12
SICK LEAVE WITH PAY**

All employees shall accrue sick leave with pay benefits at the rate of one (1) day for each month of completed service. If an employee has been on leave of absence without pay any time during the month-period used to determine sick leave with pay, he shall not accrue any sick leave with pay for said month. Unused sick leave with pay shall accumulate to a maximum of one hundred twenty (120) workdays. An employee shall be eligible to use sick leave with pay for a period of absence from employment, which is due to his personal illness, bodily injury, or exposure to contagious disease.

As a condition for sick leave payment, absences to be covered by this provision shall be reported to the Chief Deputy or other designated employee at least one (1) hour prior to the scheduled starting time for work, except in case of emergency. Absences of three (3) successive working days or longer shall require a physician’s statement as to the nature of the illness or injury and its probable duration.

Employees qualified to receive sick leave with pay shall be compensated for each day of absence at the regular rate said employee was receiving immediately preceding the current sick leave. Sick leave with pay shall not be granted for less than one-half (1/2) day.

Employees with five (5) or more years of seniority who retire upon becoming eligible therefor, or retire thereafter, or who die during the period when they are employed by the County (not upon quit or discharge) shall receive a sick leave termination benefit of one-half (1/2) a normal day's straight time pay based upon the base rate only, for sick leave up to a maximum of ninety (90) days (maximum payout forty-five (45) days) straight time pay. Such benefit shall be paid to the employee upon retirement.

In the event of the death of an employee, this benefit shall be paid to the designated beneficiary or, if none is designated, to his next of kin.

...

STIPULATED FACTS

STIPULATION OF FACT

RE: Winnebago County (Sheriff's Department)
Labor Association of Wisconsin, Inc.
Case 324 No. 58537 MA-10983
Grievance No. 00-06
Roger Peters

The parties to this Stipulation of Fact are Winnebago County, hereinafter referred to as the "County" or "Employer", and the Labor Association of Wisconsin, Inc., for and on behalf of its affiliate local, the Winnebago County Sheriff's Professional Police Association, hereinafter referred to as the "Association", regarding the above referenced grievance pertaining to the grievance of Roger Peters, hereinafter referred to as the "Grievant". The parties to this Stipulation of Fact agree to the following:

1. That there is a collective bargaining agreement in full force and effect between the County and the Association at all times material hereto.
2. That the Grievant, Roger Peters, is a member of the bargaining unit covered by the collective bargaining agreement referenced in paragraph 1 at all times material hereto.
3. That on December 16, 1999, the Grievant was scheduled to work from 10:00 p.m. until 6:00 a.m.

4. That at approximately 8:00 p.m. on Thursday, December 16, 1999, the Grievant called in sick indicating that his previously injured ankle was throbbing and he was physically unable to report for work. The Grievant requested to use one and one-half (1 ½) hours of sick time and six and one-half (6 ½) hours of compensatory time to cover the eight hours of pay.
5. That the phone call was made from a tavern where he had supper with several other deputies and the name of the tavern is "The Bar".
6. That prior to making the phone call the Grievant did not consume any alcoholic beverages.
7. That the Grievant went to his residence at approximately 9:00 p.m. and later left his residence and was driven to Witzke's Tavern by Michelle Guenther, arriving sometime between 9:00 p.m. and 10:00 p.m. on December 16, 1999, to attend a holiday party.
8. That the Grievant was at a party at Witzke's Tavern until approximately 2:00 a.m., at which time he left and returned to his residence.
9. That the Grievant's request for 1 ½ hours of sick leave was approved by Sergeant Edward Clements on December 21, 1999.
10. That the Grievant's request for 6 ½ hours of compensatory time off was denied by Sergeant Edward Clements on December 21, 1999.
11. That subsequently, William J. Wagner, Director of Human Resources, by letter of January 10, 2000, denied the use of 1.5 hours of sick leave, a copy of which is attached to Grievance 2000-06.
12. That the County deducted 1.5 hours of pay from the Grievant's paycheck covering the pay period commencing on 12-2-99 through 1-5-00.
13. That at all times material hereto there were no rules, regulations, policies, memorandums or other written documentation expressly prohibiting the conduct of employees who use sick leave.
14. That there is no dispute that the Grievant had an ankle injury.
15. That neither party has raised any procedural objections to this grievance.

16. That the parties agree that the 16 page report produced by Captain William Tedlie is attached hereto and a part of this Stipulation of Fact.
17. That the 16 page transcript of the interview of the Grievant by Captain William Tedlie on Tuesday, December 21, 1999 at approximately 3:00 p.m. in the presence of Association Representative Cheryl Eischen is attached hereto and a part of the Stipulation of Fact.

Dated this 9th day of June, 2000.

John Bodnar /s/
John Bodnar
Corporation Counsel
Winnebago County

Patrick J. Coraggio /s/
Patrick J. Coraggio
Labor Consultant
Labor Association of Wisconsin, Inc.

POSITIONS OF THE PARTIES

Association's Position

The Association contends the matter before the undersigned revolves around whether an employee that is unable to perform his duties as a law enforcement officer should be restricted from attending activities or events outside of his residence while recouping from a physical injury. The Association points out the County's Director of Human Resources, in denying the grievant's request for sick leave and compensatory time, in his January 10, 2000 letter specifically stated the County did not grant sick leave for "holiday party attendance". The Association argues the County was so distressed over the grievant's decision that it had Sheriff's Department Captain William Tedlie conduct an investigation into the matter to determine whether the grievant may have violated certain Rules and Regulations of the Department. The Association asserts this investigation failed to produce any evidence the grievant abused his sick leave rights and therefore the County did not proceed with any disciplinary action. The Association points out that the County's actions in denying the grievant's requests was punishment resulting in the inability of the grievant to accumulate a sick leave day.

The Association contends the County's actions are not only an unreasonable exercise of Article 2, Management Rights, but also a clear violation of Article 12, Sick Leave With Pay. The Association asserts that because the County's actions are disciplinary, the burden shifts to the County to justify it taking disciplinary action.

The Association points out that the County does not dispute the grievant had a ankle injury, demonstrated in Stipulation of Fact # 14. The Association contends the County's stipulation of the ankle injury is demonstrative that the grievant was solely and exclusively unable to report to duty because of a bodily injury. The Association further points out that had the grievant remained in his residence his request would have been granted.

The Association also argues the County's actions are compounded by the fact it failed to find any rule violations by the grievant. The Association points to Stipulation of Fact # 13, noting there are no rules or regulations governing an employe's conduct during sick leave. Had there been such a policy the grievant would have been forewarned that he could forfeit his sick leave rights if he elected not to stay home on the night in question. The Association stresses that Captain Tedlie's investigation concluding that there were no rule violations is evidence that the grievant did not act in a manner that would aggravate his injury. The Association also argues that the County's actions in denying the grievant's request for compensatory time violates the Fair Labor Standards Act (FLSA). The Association points out compensatory time off request can be denied if they unduly disrupt the operations of the public agency but asserts there was no such disruption in the instant matter.

County's Position

The County contends that the nature of proof required for an explanation as to whether sick leave is justified depends on the facts and circumstances of each case. The County also argues it has an obligation to make reasonable inquiries concerning the basis for a sick benefit claim. The County points out the grievant acknowledged he had been aware for approximately one week of an employee Christmas party, that he was scheduled to work the evening of that party, and that the party was scheduled to start at 10:00 p.m. The County further points out that the grievant called in sick from a tavern between 7:30 p.m. and 8:00 p.m., that he stayed at the bar and had a beer to drink after he called in sick, and that the grievant then went to a second bar at approximately 9:00 p.m., where the Christmas party was to be held, where he was informed by a fellow employee he might be in trouble because he called in sick and then went to the party. The County also points out the grievant then went home and when the employee who informed him he might be in trouble came to his residence and convinced him to return to the party, he did, and then he stayed until at least 12:30 a.m.

The County asserts sick benefits are to be used when an illness prevents an employee from performing his employment duties. The County contends it did not act in an arbitrary or capricious manner in questioning the grievant. The grievant had claimed he was unable to work as a result of a throbbing ankle but was present at two taverns that evening and consumed alcoholic beverages at both taverns. The County concludes it had probable cause to question the grievant. The County argues that once it questioned the grievant's actions the burden shifted to the grievant to demonstrate he was indeed so ill he was unable to work the evening of December 16, 1999.

The County contends the grievant did not provide any verification that his ankle was so sore and throbbing that he could not physically perform his duties or that he could not perform any duties that night. The County points out that although the grievant contended his ankle was throbbing, after calling in sick he continued to drink alcoholic beverages and traveled to a party at a tavern on two separate occasions and then stayed out to the wee hours of the morning. The County asserts it is reasonable to conclude that a person who has an injury to an ankle which is so sore as to prevent him from performing his duties would retire to their residence and take appropriate actions to remedy their condition. The County also points out that if this was a Worker's Compensation injury the grievant would have been required to report the injury to his supervisor. The County stresses that the grievant took no such action.

The County concludes that given the grievant's actions and the statements of the witnesses the County acted well within its rights to find the grievant was not legitimately sick and home from work on December 16, 1999 and that he abused his sick leave benefits on that date. Further, that the County did not violate the collective bargaining agreement when it denied the grievant's sick leave and compensatory leave requests and denied him the right to accumulate one day of sick leave.

The County would have the undersigned deny the grievance.

Association's Reply Brief

The Association argues that contrary to the County's contentions, Article 12 establishes a procedure for calling in sick. The Association points out the grievant followed this procedure. The Association also asserts that the County has the burden to seek verification if it has concerns over an employee's use of sick leave. The Association asserts the County has acknowledged the grievant had an ankle injury and that there was no burden on the grievant to provide any proof of injury as the absence was less than three (3) days. The Association also asserts the instant matter is not a Worker's Compensation matter.

The Association contends that there was no specific requirement that the grievant remain at his residence given the nature of his injury. The Association also points out the Arbitrator does not have the authority to add to the terms and conditions of the collective bargaining agreement by placing such a requirement into the collective bargaining agreement.

The Association would have the Arbitrator sustain the grievance and direct the County to make the grievant whole.

County's Reply Brief

In its reply brief the County asserts that this is not a Fair Labor Standards Act (FLSA) matter. Further, that it can require that the use of compensatory time be requested within a reasonable amount of time so as not to disrupt the operation of the Sheriff's Department. The County points out the grievant called in "sick" and did not request compensatory time. The County again asserts that the ankle injury was due to a work accident and that the grievant did not file a Worker's Compensation Report. The County contends the grievant called in sick and stated he was unable to report to work than subsequently went to a tavern to party. The Grievant presented no medical evidence to support his claim and no evidence to demonstrate his injury would of prevented him from perform sedentary or deskwork.

The County would have the Arbitrator deny the grievance.

DISCUSSION

As noted above the facts herein are not in dispute. The grievant called in sick from a bar. The grievant's illness was a bodily injury, a broken ankle that had screws in it and this injury caused the grievant continuing problems. On the night in question the grievant claimed the ankle was throbbing, painful. He called in and requested one and one-half (1 ½) hours sick leave and six and one-half (6½) hours compensatory time. The grievant than had two or three "tappers" and drove to the bar where a party was to be held. He talked to some fellow employees and acknowledged he could be in trouble for being at a bar after calling in sick. He then went home. Next a fellow employee came to his residence and together they returned to the party bar arriving at approximately 10:00 p.m. and he stayed until approximately 2:00 a.m.

Had the grievant gone directly home and stayed at his residence no questions would have been raised. However, the County has the obligation to police the provisions of the collective bargaining agreement. Thus when the County learned an employee that had called in requesting sick leave was observed at a bar, the County was obligated to investigate. Herein the grievant claimed his ankle was throbbing and so he called in sick requesting a combination of sick leave and compensatory time to cover the absence. The grievant then stayed at the bar he was at, had several more beers, went to a second bar, went home and then returned to the second bar where he remained until approximately 2:00 a.m. The undersigned finds that it is reasonable for the County to conclude that such actions do not demonstrate that the grievant's bodily injury prevented him from reporting to work. In effect, it is reasonable for the County to conclude that if the grievant was well enough to sit in a tavern for four hours or more, he was well enough to report for duty and do deskwork. Further, there is no evidence that the County was being arbitrary, capricious or discriminatory in the denial of the grievant's requests. Thus the Undersigned concludes there was no contractual violation when the County denied the grievant's requests.

The undersigned would note here that he is not the court of jurisdiction to determine whether the County's actions violated the Fair Labor Standards Act. Thus if the County's denial to grant the grievant six and one-half (1 ½) hours compensatory time was based solely on the fact that it caused an overtime situation, such an action may conflict with the requirements of the Act. However, the record demonstrates the grievant requested the time off because he claimed he was ill with a sore ankle and that his request was denied because he was observed in a tavern for several hours after he made his request. As noted above, it is reasonable for the County to conclude that if the grievant was well enough to go to a tavern with a sore ankle he was well enough to report to work.

Having denied the grievant his request the grievant was placed on leave without pay. The collective bargaining agreement clearly states that a leave without pay results in the loss of the ability to accumulate a sick leave day for that month. Therefore the County's actions in denying the grievant the accrual of one (1) sick day do not violate the collective bargaining agreement.

Based upon the above and foregoing and the evidence and arguments presented the undersigned concludes the County did not violate the collective bargaining agreement when it denied the grievant's request for time off on December 16, 1999. Nor did the County violate the collective bargaining agreement when it denied the grievant the right to accumulate a sick leave day for December, 1999. The grievance is denied.

AWARD

Winnebago County did not violate the collective bargaining agreement when it denied the grievant's request for one and one-half hours sick leave and six and one-half hours compensatory time when he called in sick on December 16, 1999.

Winnebago County did not violate the collective bargaining agreement when it denied the grievant the right to accumulate one day of sick leave for December, 1999.

Dated at Madison, Wisconsin this 18th day of October, 2000.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

EJB/gjc
6145.doc

