

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CHIPPEWA COUNTY

and

**THE LABOR ASSOCIATION OF WISCONSIN, INC.
LOCAL NO. 904**

Case 157
No. 55047
MA-9878

Appearances:

Ms. Victoria L. Seltun, Weld, Riley, Prenn, and Ricci, S.C., 3824 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the County.

Mr. Thomas A. Bauer, Labor Consultant, The Labor Association of Wisconsin, Inc., 206 South Arlington, Appleton, Wisconsin 54915, appearing on behalf of the Union.

ARBITRATION AWARD

Chippewa County, hereinafter referred to as the County, and the Labor Association of Wisconsin, Inc., Local #904, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties request the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr. to arbitrate a dispute over the denial of time-off without pay. Hearing on the matter was held in Chippewa Falls, Wisconsin on September 14th, 2001. Post-hearing arguments were received by the undersigned by October 29th, 2001. Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

ISSUE

The parties agreed upon the following issue:

“Did the County violate the collective bargaining agreement when it denied the grievant zero time on April 19th, 2001?”

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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Article IV – Grievance Procedure

Section 1 – Definition: A grievance shall mean a dispute between an employee and the County or the Association and the County concerning the interpretation or application of this contract as it relates to wages, hours, discipline, discharge and/or working conditions. A grievance filed by the Association must be signed by a duly authorized representative of the Local.

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Section 3 – Time Limit: If it is impossible to comply with the time limit specified in the procedure because of work schedule, illness, vacation, etc., these time limits may be extended by mutual consent in writing. The failure of the employer representative to respond, at any step, shall be deemed a denial and the grievant may proceed to the next step.

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Step 5 – Steps in Procedure:

STEP 1: The grievance will be submitted orally to the immediate supervisor. In the event the grievance is not satisfactorily resolved at that level, the grievance will be submitted, in writing, to the Department Head within fourteen (14) calendar days after the grievant knew or should have known about the event giving rise to the grievance. The Department Head will investigate the grievance and respond, in writing, within seven (7) calendar days after receipt of the grievance.

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Article V- Leave of Absence

Section 1 – Duration and Benefit Proration: The Department Head may grant up to forty (40) hours of unpaid time off annually but with benefits paid/accrued, to accommodate necessary employee needs. Additionally, unpaid leaves of absence for personal reasons may be granted for up to one (1) year. Applications for such leaves shall be made to the Department Head. The length of time for such leaves shall be contingent upon the reasons for the request. All leaves of absence under this document shall be without pay, including fringe benefits, except as provided for under the forty (40) hours provision, above, and in State and federal Law. Personal leaves will not be granted for vacation purposes if such leave interferes with the normal work flow in the department.

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BACKGROUND

Amongst its various governmental operations the County operates a Department of Public Health. Beginning with the 1989 collective bargaining agreement the parties have had a provision which allows employees to take time-off without pay (zero time). Prior to the instant matter the County has enacted several policies to police the use of zero time including the following:

- a. With the exception of medical, emergency or family leaves, time-off without pay requests around the holiday seasons will not be approved. (2-9-02).
- b. Time without pay leave can be canceled if there is an agency emergency, i.e. food or waterborne outbreak. (9-9-98)
- c. Paid leave time will be a priority over leave without pay. Leave without pay won't be acted on until 2 weeks before that date. (8-26-98)
- d. Unpaid leave can be denied in order to maintain staffing levels. (7-30-98)

None of the above were grieved by the Union. On January 25, 2001 employees were informed that zero time would be approved for emergent events only and that the time could not be used for vacation, etc., unless provided for in the labor agreement. Employees were also informed by Department Director Jean Durch she had concerns about the increasing number of zero time requests, that the County had to accommodate three (3) employees taking intermittent Family

Medical Leave Act leave, and concerns by staff that they had more work than time allowed. On March 21, 2001 Karen Holden, hereinafter referred to as the grievant, requested eight (8) hours of time-off without pay for April 19, 2001 in order to perform some errands, cleaning and painting. On April 5, 2001 the grievant's request was denied because the County deemed the request not an urgent/emergent need. Thereafter the matter was grieved and processed to arbitration in accord with the parties' grievance procedure. The record demonstrates that after the denial of zero time the grievant requested and received paid time-off for April 19, 2001.

The record demonstrates that prior to January 25, 2001 the County had approved time-off without pay for the following reasons (the list is not inclusive of all approved time-off):

- a. rest and recuperation
- b. child's birthday
- c. painting walls
- d. attending a conference
- e. high school playoffs
- f. national wrestling championships
- g. traveling
- h. time with family
- i. field trip with kids
- j. freezing rain
- k. foolish enough to enroll granddaughter in swimming class in Eau Claire at 5:00 p.m. and can't make it in time
- l. relatives visiting
- m. kids on spring break
- n. visitor coming from out of town

In addition many approved requests gave no reason for the request for zero time.

Union's Position

The Union contends that since at least 1989 the concept of zero time has existed in the parties' collective bargaining agreement. The Union argues that time off without pay is used to accommodate necessary employee needs. The Union points out that the County has granted zero time for various reasons. The Union argues that when the County unilaterally limited the use of zero time to urgent/emergent needs the County unilaterally changed a long standing past practice. The Union further points out that since 1997 the plethora of reasons that the County granted zero time included no reason at all. The Union also points out that after it denied the grievant's request the County granted a March 12th, 2001 request for zero time as a result of spring break for children and a July 9th, 2001 request for family time.

The Union also asserts there is no evidence the bargaining unit has abused the use of zero time. The Union contends the practice has been unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time. The Union points out that for twelve (12) years zero time has been available to employees.

The Union also stresses that it has recognized the need for certain restrictions to be placed on zero time. These include: to maintain staffing levels, that paid time-off has a greater priority, that it can be cancelled in emergency's and that it cannot be used in conjunction with holidays. The Union argues it has cooperated with the County in dealing with reasonable concerns on the use of zero time. The Union points out there is no evidence the County has ever denied the use of zero time because the request was not for urgent/emergent needs of the employee. The Union argues the County's attempt to limit use of zero time to only urgent/emergent needs is unreasonable and violates the parties' past practice.

The Union would have the undersigned sustain the grievance, direct the County to cease and desist further violations of Article V, direct the County to grant the grievant's request for paid time off for April 19, 2001, and that her paid time off be credited back to her leave bank.

County's Position

The County contends there is no binding past practice regarding approving leave without pay request. The County asserts the granting of a time-off without pay request is permissive not mandatory. The County points out the grievant had 105.11 vacation hours, 22.55 compensatory hours, and 8 floating holidays. The County contends the grievant had no urgent or emergent need for time-off without pay.

The County also argues the grievance is untimely and therefore should be dismissed. The County points out the grievant had fourteen (14) days to file a grievance after the January 25, 2001 staff meeting whereat employees were informed of the "emergent needs only" time-off without pay. The County points out that if the Union were truly concerned about the unreasonable application of management authority the Union certainly would have pursued the matter prior to March 21st, 2001. The County argues the record demonstrates the Union acquiesced in the County's attaching of restrictions to the zero time benefit.

The County also asserts it did not violate the collective bargaining agreement by refusing to grant the grievant's zero time request as time-off without pay is a discretionary benefit. The County points out Article V, states "may" be granted. The county argues this language is clearly permissive and the decision to grant zero time rests exclusively with the discretion of the Department Head. The fact the County has not exercised its discretion does not mean it has waived it. The County also asserts that the fact it has granted some request in the past does not mean it will grant all such request in the future. The County also asserts there must be evidence of arbitrary or discriminatory conduct in the exercise of its discretion in order for the Union to prevail. The County further asserts changing factors can allow for a change in granting requests.

The County contends that it has attempted to grant zero time requests when doing so does not interfere with the efficient operations of the Public Health Department. The County points out that over the years it has put restrictions on the use of zero time. Further, that Director Durch had concerns about increasing request, employees on medical leave, and staff concerns about workload. Therefore Director Durch determined to only grant zero time requests based upon emergent needs. The County points out Durch only granted four (4) request in early 2001, a broken windshield, a power outage, a school closing and a need to pick up a certified letter. The County concludes there is no evidence in the record it acted in an arbitrary or discriminatory manner.

The County also argues that where a contract reserves discretion to management, the manner in which it chooses to exercise that discretion does not establish a binding past practice. The County asserts the Union's position cannot be sustained in light of the express reservation in the collective bargaining agreement giving management the right to determine through its own judgement or discretion those instances which qualify for time-off without pay. The County contends the fact it granted some employees forty (40) hours in 1998, 1999 and 2000 does not create a past practice that overrides the County's ability to use its discretion. The County asserts that consistent with sound management practices it determined that because caseloads were high, the County was short staffed, and, there was a need to schedule around employees on intermittent Family and Medical Leave Act leave, zero time requests would be restricted to emergent needs only. The County argues time-off for errands, cleaning and painting is not an emergent need. The County also asserts it is not a necessary employee need but a personal convenience. The County argues that is what vacation is for. The County concludes it is not unreasonable exercise of judgement to deny the request for time-off without pay on April 19th, 2001.

The County would have the undersigned deny the grievance.

DISCUSSION

The record demonstrates that at a staff meeting on January 21st, 2001 employees were informed by Durch that request for time-off without pay would be approved for emergent needs only. The County has argued that because the Union did not file a grievance over this matter within fourteen (14) days, as required by Step 1 of the grievance procedure, the Union has acquiesced and therefore the grievance should be denied. However, until management acted on it's statements concerning "emergent needs" there was no violation of the application of the terms of the collective bargaining agreement. The undersigned finds the Union did not waive its right to file a grievance until management acted on the January 21st, 2001 notice to employees. Thus, when the grievant grieved the April 7th, 2001 denial of her request to take time-off without pay on April 19th, 2001 the grievant timely grieved the County's actions.

Article V, Section 1, of the parties collective bargaining agreement clearly provides that the Department Head may grant up to forty (40) hours of unpaid leave. The use of the term “may” by the parties allows management the discretion to determine whether to approve or not approve requests. Management can, as it has argued, use various relevant factors when making a decision. Because factors change over time the fact management approved a request in the past does not mean it must approve all requests of a similar type in the future. Thus, as herein, where management was concerned about workload, staff size, and individuals on medical leaves, it can use these factors in determining whether or not to grant a leave without pay.

Article V, Section 1, further states the unpaid time off is to be used “... to accommodate necessary employee needs.” In the undersigned’s opinion “necessary employee needs” is not synonymous with “urgent/emergent needs”. For example, to attend a real estate closing may be a necessary employee need because it has to be done during normal work hours. It would not be an urgent/emergent need. The undersigned finds that when the County created a standard of “urgent/emergent” for approval of time-off without pay it therefore unilaterally narrowed the interpretation of Article V, Section 1, to only requests concerning emergencies. The undersigned therefore concludes the County’s denial of the grievant’s request because it was not “urgent/emergent” violated Article V, Section 1.

The undersigned notes here that had Durch included in her denial that she was denying the request because of workload, staff size, and/or personnel being on medical leave a different conclusion would be reached. As noted above the granting of leave without pay is a matter that the County can use discretion when approving. The undersigned also notes here that had Durch denied the leave because it was not a “necessary employee need” a different review would be required. Such a determination could include a review of the parties’ practice in attempting to ascertain what the parties intended.

Having found the action of denying the grievant’s leave request because it was not an urgent/emergent need violated the parties collective bargaining agreement the undersigned directs the County to cease and desist violating Article V, Section 1. The County is also directed to grant the grievant’s request for unpaid time off, credit her for the paid time off she was required to use on April 19th, 2001, and dock her pay the necessary amount. The grievance is sustained.

AWARD

The County violated the collective bargaining agreement when it denied the grievant zero time on April 19th, 2001.

The County is directed to grant the grievant's request for zero time, credit her for the paid time off she was required to use, and deduct from her pay the necessary amount.

Dated at Madison, Wisconsin, this 11th day of February, 2002.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

