

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1667, AFSCME, AFL-CIO

and

VERNON COUNTY

Case 127

No. 60352

MA-11588

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Mark B. Hazelbaker, Attorney at Law, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a 2000-2002 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear and decide a grievance involving personal days. The undersigned was appointed and held a hearing on January 10, 2002, in Viroqua, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by July 22, 2002.

ISSUE

The parties ask:

Did the County violate the collective bargaining agreement by denying the request of employee number 70 for a personal day on October 20, 2000? If so, what is the appropriate remedy?

BACKGROUND

The facts are not in dispute. The collective bargaining agreement states in Section 8.05:

An employee, when requested, shall have the option of using not to exceed two (2) days per year of employee's existing accumulated sick leave as authorized personal leave provided the time of usage has prior written authorization of the Administrator.

Employee #70 is Doris Poole, who has worked at the County's nursing home, Vernon Manor, for 22 years as a nursing assistant. She asked for a personal day to be taken on October 20, 2000, and it was denied. Poole had two days of sick leave accumulated, and she was told that she did not have enough sick days to use a personal day.

Judy Clark is the President of the Union and has worked at the Manor for 28 years as a nursing assistant. She has been the Union President for 10 years and has been in contract negotiations. The contract language in Section 8.05 came into the contract about four years ago when the Union asked to use two sick leave days as personal days. The language has not changed, although the Employer proposed to change the language in the last round of negotiations. The County proposed that employees have at least 10 accumulated sick leave days before they could use a personal day. The Union did not agree with that proposal, and the County dropped it. Clark agreed with the County that it could deny a personal day if there were not enough people to work.

Nancy Witthoft has been the Administrator of Vernon Manor for the past three and a half years. She was involved in contract negotiations for the last contract and wanted Section 8.05 clarified as to how to grant a personal day off. Witthoft testified that the Union resisted any change, and noted that the Administrator had the right to deny personal days, because the language called for prior written authorization. The word "accumulation" bothered Witthoft. She looked at the dictionary, which calls an "accumulation" a collection or a heaping or gathering.

Witthoft looks at each employee's situation, including each one's accumulation of sick leave. If an employee has only two or three days of accumulated sick leave, she will deny it. If someone has four or five days, she is likely to grant it if that person can be replaced. While the number seven was mentioned as the necessary number of sick leave days to use a personal day, there is no hard and fast rule. Witthoft feels that there should be more than one or two days accumulated to use personal leave. In one case, an employee with an emergency was granted a personal day although she had only three days of sick leave accumulated. Witthoft testified that when employees use a personal day and then need a sick day but have nothing banked, the employee may be disciplined for taking an absent day. Personal days have never been granted unless the employee can be replaced.

The Manor tries to replace absent employees when possible. Patient care may be affected if there are absent employees. Staffing levels are smaller than in the past, and the types of residents require a higher level of care.

THE PARTIES' POSITIONS

The Union

The Union asserts that the County is attempting to unilaterally implement a change in the contract that it could not achieve in negotiations. The instant issue involves a mandatory subject of bargaining and such a change cannot take place unless it is negotiated with the Union.

The Union further argues that the language of Section 8.05 is clear and unambiguous and that the clear intent of the parties was that employees could not use a personal day unless they had enough of a sick leave accumulation to cover the personal day or days, since personal days are deducted from accumulated sick leave.

If an employee has only one day of accumulated sick leave, it is still an accumulation of sick leave and is sufficient to cover a request of one day of personal leave. In this case, the Grievant had two days of accumulated sick leave, which is clearly enough to cover the one day of personal leave that she requested.

As a remedy, the Union asks that the Arbitrator order that employees may use personal leave as set forth in Section 8.05 of the collective bargaining agreement as long as the employee has an accumulation of sick leave of one or more days.

The Employer

The Employer asserts that its licensed nursing home is operating very tightly, with only as many nursing assistants and staff as needed. When employees use leave precipitously and excessively, it disrupts patient care, and the facility must call in people to work, usually at overtime rates of pay. When the County proposed a policy under which employees with less than seven days of sick leave would not be eligible to take personal days, the Union said it was unnecessary because the Administrator can approve the timing of use of personal days and adopt regulations on the use of sick leave. After the current agreement was executed, the Administrator implemented the policy at issue here.

The County submits that it has the right to impose reasonable regulations on the use of sick leave. The right to take personal leave is not absolute but is subject to the approval of the Administrator as to the timing. The rule adopted by the Administrator is a rule affecting the

timing of the request – it defers the leave to the point where an employee has seven accumulated sick days. It is undisputed that the Grievant had a sick leave balance of just two days when the County refused her request to take a personal day off.

The regulation involved is supported by a strong rationale and need and is not an arbitrary imposition on the workforce. The Administrator has not denied personal leave altogether but barred employees from using their last few days irresponsibly. An employee with a good attendance record has no problem, and the only employees threatened by the policy are those who keep using their sick leave constantly. Those employees stretch the thin resources of the facility. The Employer acted in a reasonable manner to safeguard its ability to take care of the residents.

The County argues that there is no past practice forbidding it from implementing the regulation at issue. Past practices do not constitute a waiver of clear contract language, and the failure of the Employer to exercise a management right does not mean that the right no longer exists. After not acting on the authority of the contract's clause authorizing adopting of regulations on sick leave for many years, the Administrator felt compelled to adopt a regulation limiting use of sick leave. That is not a breach of a past practice, it is the implementation of a necessary work rule.

Finally, the Employer asserts that the proposed remedy would render the contract language superfluous. The Employer would have no power to control the timing of personal days or to adopt regulations on the use of personal days or sick leave. The parties agreed that the right to use sick days as personal days is not absolute. To hold that the Administrator must allow employees to use personal days as they demand would read the approval requirement out of the agreement. The approval language expressly allows the Administrator to determine the timing of the use of personal leave, and there is no limit on the Administrator's unilateral discretion to determine the timing of the leave for any reason.

DISCUSSION

The collective bargaining agreement provides the option of using two sick leave days per year as personal leave, with prior written authorization. The personal leave is to be deducted from the employee's accumulated sick leave, as stated in Section 8.05:

An employee, when requested, shall have the option of using not to exceed two (2) days per year of employee's existing accumulated sick leave as authorized personal leave provided the time of usage has prior written authorization of the Administrator.

The parties dispute how much accumulated sick leave one must have in order to use a personal day. There is no issue in this case about the County's right to deny personal days for any other reason, and the Union does not object to denial in certain circumstances, such as shortage of staff.

However, the Union correctly notes that the County sought to put a number on the accumulation of sick leave days that one must have before taking a personal leave day out of the sick leave bank, and it failed to achieve such a number in bargaining. The County cannot get through arbitration that which it failed to achieve in bargaining. Therefore, the County has violated the collective bargaining agreement by placing a threshold number on the accumulation where the parties discussed this very issue but did not agree to change the contract language.

The County makes an interesting argument, stating that it has the right to determine the timing of the use of personal leave and that it would have no power to control the timing of personal days if the grievance were sustained. However, the County may not use the language regarding the "time of usage" to *deny* the usage. That is what is really happening here. It is not a matter of deferring the use of personal leave to another more convenient time, but denying it based on the lack of a number of sick leave days. And that number has been entirely at the discretion of the Administrator, leaving lots of flexibility in the granting or denying of personal leave. If an employee never had more than two days of sick leave banked, he or she would never be able to exercise his or her option under Section 8.05 to use a personal day, and the deferral of personal leave would become a permanent denial of personal leave.

While the Administrator may be helping employees protect their sick leave to avoid discipline in the future when they become sick and have no sick leave or vacation time left, the employees must face that risk if they choose to have a personal leave when they have so little time left of sick leave accumulation. It is their option, wise or not. The denial of personal leave based on lack of a certain amount of accumulated sick leave violates the contract.

The Arbitrator may not add language to the labor contract. Where the parties did not agree to set an amount of accumulated sick leave that one must have before allowing personal leave to be deducted, the Arbitrator may not arbitrarily add a figure to that either. The contract uses the term "existing accumulated sick leave" and that means as long as an employee has some sick leave, at a minimum enough to cover the personal day being requested, it violates Section 8.05 of the contract to deny the employee the option to use it on the basis that one must have more accumulation of sick leave.

As to the remedy, the County should give the employee, Doris Poole, a personal day of her choice, so long as sufficient staff is available and so long as Poole has some sick leave accumulated from which the personal day may be deducted.

AWARD

The grievance is granted.

The County violated Section 8.05 of the collective bargaining agreement when it denied the Grievant, Doris Poole, the use of a personal day based solely on the fact that Poole had only two days of accumulated sick leave. The County is ordered to offer Poole a choice of personal leave in accordance with the restrictions of sufficient staff levels and the presence of some accumulated sick leave sufficient to cover the personal leave.

Dated at Elkhorn, Wisconsin, this 9th day of August, 2002.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator