

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**PINE VALLEY MANOR EMPLOYEES UNION,
LOCAL 3363, WISCONSIN COUNCIL OF COUNTY
AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO**

and

RICHLAND COUNTY (PINE VALLEY)

Case 137
No. 59855
MA-11430

(Rochelle Mindham Funeral Leave Grievance)

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

LaFollette, Godfrey & Kahn, S.C., Attorneys at Law, by **Attorney Jon E. Anderson**, One East Main Street, P.O. Box 2719, Madison, Wisconsin 53701-2719, appearing on behalf of the Employer.

ARBITRATION AWARD

Pursuant to a request by Pine Valley Manor Employees Union, Local 3363, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, herein "Union", and the subsequent concurrence by Richland County (Pine Valley), herein "County" or "Employer", the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on May 10, 2001, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on July 31, 2001, in Richland Center, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on September 23, 2002.

STIPULATED ISSUES

1. Did the Employer violate the terms of the labor contract when it granted the Grievant two (2) and not three (3) days of funeral leave following the death of her grandmother?
2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND

Facts Giving Rise to the Instant Dispute

Rochelle Mindham ("Grievant"), a Certified Nursing Assistant working at the Pine Valley Healthcare & Rehabilitation Center ("Center"), contacted the Center on February 2, 2001 to advise of the death of her grandmother and to request a funeral leave day for Saturday, February 3, 2001. The Grievant indicated that she wanted the day on Saturday, February 3, 2001 to assist her family in making funeral arrangements. A paid funeral leave day was granted. The Grievant reported to work on Sunday, February 4, 2001 and on Monday, February 5, 2001 following her first day of paid funeral leave.

On Monday, February 5, 2001, the Grievant requested funeral leave for Wednesday, February 7, 2001 and Thursday, February 8, 2001. The funeral for her grandmother was going to be held on February 7, 2001 in Richland Center, the same community where the Center is located. The Grievant was not scheduled to work on Tuesday, February 6, 2001.

A paid funeral leave day was ultimately granted for February 7, 2001, the day of the funeral. A paid funeral leave day was not granted for February 8, 2001. The Grievant had requested this day (February 8) to spend time with her family. The Grievant was given the opportunity to take the day off and use benefit time (vacation or personal holiday) or take the day off without pay. The Grievant decided that she would work on February 8, 2001.

On or about February 9, 2001, Director of Nurses Angie Alexander informed the Grievant that management did not like to grant funeral leave for the day after the funeral.

A grievance was timely filed on February 13, 2001 alleging that the Center had violated the collective bargaining agreement by not granting the Grievant the three days off that she sought. The grievance was denied in an undated memorandum from the facility Administrator, Kathy Cianci, addressed to Union President Loren Abraham and the Grievant. Cianci stated:

Ms. Mindham is requesting pay for a third day of funeral leave for the death of her grandmother. Ms. Mindham took 1 funeral day after the death of her relative before the funeral to assist with the arrangements. She then worked and took off the day for the funeral. She requested the day off after the funeral to spend with her family.

Ms. Mindham was informed that this day could not be used as funeral leave but that she could request the day off as a vacation day or personal holiday and it would be granted. She declined and chose to work the day.

Union contract Article 14.01 states that funeral leave may be taken up to three days. . . (Emphasis in the original). The amount of time should be reasonably necessary under all circumstances, such as time required in order for the employee to arrange for the funeral of the deceased and to attend the funeral of the deceased.

This provision does not provide any funeral leave after the funeral to deal with family.

Pine Valley is sensitive to the fact that some people may request additional time after a death in the family and has been flexible in allowing the employee to use vacation or personal days in conjunction with the funeral leave. Ms. Mindham was offered this option by her supervisor.

Ms. Mindham received her funeral leave per union contract and facility past practice.

This grievance is denied on these merits.

The Union appealed the grievance to the County's Personnel Committee. The Committee denied the grievance at its meeting on March 15, 2001. The Union then filed a Request to Initiate Grievance Arbitration in a letter to the Wisconsin Employment Relations Commission on April 6, 2001.

Bargaining History and Past Practice

Section 14.01 of the January 1, 1997 – December 31, 1999 collective bargaining agreement stated:

Article 14 – Funeral Pay

14.01 A maximum of three successive scheduled work days time off with pay will be granted for the funeral of an employee's spouse, child, step-child, son-in-law, daughter-in-law, parents, mother-in-law, father-in law, grandparents, grandchildren, brother, sister, brother-in-law or sister-in-law. The administrator may grant as must (sic) time off without pay as he/she deems necessary. Part-time employees receive full pay for qualifying absences where the employee would have worked.

Union Representative David White testified that the newly bargained (present) language mirrors the language contained in the other bargaining units of County employees represented by the Union. White stated the language has always been interpreted in the other units to give the employee the choice to determine how much of the three days she/he needed to take. However, White admitted on cross-examination that he may not be aware of the practice in the other units and that he is only contacted when there is a dispute. White added that the new language providing for "up to three days" removed the Employer's discretion in granting funeral leave and gave employees "more flexibility" in scheduling funeral leave.

Union Representative White also testified that he was not aware of any instances in this unit where an employee desired to take three days of funeral leave, but was not permitted to do so.

Administrator Cianci testified that early in her career as an Administrator (about four years previous), she had received a call from Union Representative White in which he discussed a dispute that arose about the amount of funeral leave that was being granted to an employee. However, she could not recall how much time was ultimately provided that employee or how the dispute was resolved.

The administration of the Center determines how much funeral leave it grants an employee on a case-by-case basis. It takes into consideration who the deceased is, whether the employee is participating in the funeral arrangements, what travel is involved, and whether the employee actually attends the funeral. The facility does not automatically grant three days of funeral leave and, except in the case of travel, does not grant funeral leave for days after the funeral. The facility does not allow "post funeral arrangement time off."

PERTINENT CONTRACT PROVISIONS

Article 4 – Management Rights

4.01 The management of Richland County and the Pine Valley Healthcare and Rehabilitation Center and the direction of the working forces shall be vested exclusively in the Employer. Such management and direction shall include all rights inherent in the authority of the Employer, including, but not limited to the right to hire, recall, transfer, promote, demote, discharge or otherwise discipline, and to layoff employees. Further, the Employer shall have exclusive prerogatives with respect to assignments of work, including temporary assignment, scheduling of hours including overtime, to create new, or to change or modify operational methods or controls, and to pass upon the efficiency and capabilities of the employees. The Employer may establish and enforce reasonable work rules and regulations. Further, to the extent that rights and prerogatives of the Employer are not granted to the Union or employees by this Agreement, such rights are retained by the Employer except as limited by the terms of this Agreement.

...

Article 14 – Funeral Pay

14.01 Funeral Leave: In the event that a death in the immediate family of an employee requires his/her absence from work, the employee may be absent up to three (3) days without loss of pay for the regular work days for which he/she would have worked but for his/her absence. Immediate family shall include spouse, parent, child, step child, sibling, mother-in-law, father-in-law, brother-in-law, sister-in-law and employee's or spouse's grandparent or grandchild. The amount of time taken off should be reasonably necessary under all circumstances, such as time required in order for the employee to arrange for the funeral of the deceased and to attend the funeral of the deceased. Part-time employees receive full pay for qualifying absences where the employee would have worked.

POSITIONS OF THE PARTIES

Union's Position

The Union basically argues that the Grievant is entitled to three (3) days of funeral leave under the labor contract.

In support thereof, the Union argues that the language of the agreement clearly provides that it is the *employee* who has the right to determine how much leave is to be taken, subject to the three day limitation, and provided that the time taken is “reasonably necessary.” (Emphasis in the original).

The Union claims that the Employer’s interpretation of the language (management determines how many of the three days the employee will get) is nonsensical. For example, the Union argues that such an interpretation means the Union got nothing for the bargain. The Employer had an unfettered right to determine if, when, and to what extent an employee received funeral leave, in the absence of a Union contract and the resulting bargaining obligations; and still retains all the discretion it previously had to minimize funeral leave under the current contract. This is not a reasonable interpretation of the outcome of the bargain.

The Union also claims that the Employer’s interpretation which provides that unless travel is involved, no funeral leave is permitted after the funeral, leads to the untenable position of providing greater or lesser funeral leave benefits on the basis of the employee’s religious or ethnic affiliation.

The Union further argues that the Employer’s position does not make sense, and is unfair. In this regard, the Union maintains that the phrase “such as” should not be interpreted narrowly to mean that funeral leave is to be granted for *only* 1) preparing for and 2) attending the funeral. (Emphasis in the original). Any “reasonably necessary” activity should qualify the employee for the time. The purpose of this language is not to impose stiff limits on the grieving employee, but to ensure that employees are not abusing the benefit by engaging in purely recreational pursuits while off on “funeral leave.” The purpose of bereavement leave is to allow the employee to be off work in order to attend the funeral and to attend to family matters without suffering a loss of pay. This is the only interpretation that makes sense and gives a reasonable meaning to all terms of Section 14.01.

Finally, the Union argues that its interpretation is consistent with the practice and language of the Employer in all other bargaining units it represents.

Based on the entire record, the Union requests that the Arbitrator sustain the grievance and award the Grievant the third (3rd) day of funeral leave that she requested.

Employer’s Position

The Employer first argues that employees are not entitled to three (3) days of funeral leave under the terms of Section 14.01 of the labor contract. In this regard, the Employer

claims that this contract clause provides that an employee may be absent “up to three (3) days” for a death covered by the clause which requires that the employee be absent from work.

Secondly, the Employer argues that the disputed contract language clearly recognizes that management has a right to regulate funeral leave.

Thirdly, the Employer argues that the change in contract language from the 1997-1999 labor contract to the 2000-2001 labor contract does not support the Union’s position that employees get three (3) days of funeral leave upon request.

Fourth, the Employer argues that it has a practice of regulating funeral leave both under the “old” (1999) contract and under the new contract language effective in 2000.

Fifth, the Employer claims that it has no obligation to grant funeral leave for an employee to grieve with family members the day after the funeral since the leave requested is funeral leave, not bereavement leave. (Emphasis in the original).

Sixth, the Employer argues that denial, under the facts presented here, was appropriate.

Finally, the Employer argues that the evidence of other labor contracts is not relevant and is not compelling.

For the reasons noted above, and based on the entire record, the Employer requests that the grievance be denied and the matter dismissed.

DISCUSSION

At issue is whether the Employer violated the terms of the labor contract when it granted the Grievant two (2) and not three (3) days of funeral leave following the death of her grandmother.

The Union argues that the Employer violated the contract by its action while the Employer takes the opposite position.

There is no dispute that Section 14.01 governs the Grievant’s request for funeral leave or that the death of the Grievant’s grandmother was an event which qualified the Grievant to receive the benefit specified in said contract provision.

Section 14.01 provides that “the employee may be absent up to three (3) days without loss of pay for the regular work days for which he/she would have worked but for his/her absence” when a death in the immediate family of the employee requires his/her absence from work. Section 14.01 also provides that the “amount of time taken off should be reasonably necessary under all circumstances, such as time required in order to arrange for the funeral of the deceased and to attend the funeral of the deceased.”

The Union first maintains that the above language clearly provides that it is the *employee* who has the right to determine how much leave is to be taken, subject to the three day limitation, and provided that the time taken is “reasonably necessary.” (Emphasis in the original).

The language of Section 14.01 cannot be considered clear and unambiguous since both parties have made plausible, but conflicting, arguments regarding its interpretation. The ambiguity flows from the reference to “the employee may be absent *up to* three (3) days.” (Emphasis added). It also flows from the reference to “the amount of time taken off should be *reasonably necessary* under all the circumstances, *such as* time required in order for the employee *to arrange for the funeral* of the deceased and *to attend the funeral* of the deceased.” (Emphasis added). Read together, these references limit the funeral leave benefit to three (3) days, as pointed out by the parties, but do not specify the exact scope of the limitations, or who determines them. For example, the three-day cap may imply the Employer must approve funeral leave requests, or that funeral leave days are taken at the employee’s discretion. The Union believes that the Grievant has a right to three (3) days of funeral leave provided that the time taken is “reasonably necessary.” Under the Employer’s view, the Grievant has a restricted right consisting of, at most, three (3) days of funeral leave when an employee’s absence from work is required. (Emphasis in the original).

The Employer also opines that the contract does not define all the circumstances which would require an employee to be away from work, but it does reference a list of two circumstances where the absence would be “reasonably necessary” under the circumstances. These include “time required in order for the employee to arrange for the funeral of the deceased and to attend the funeral of the deceased.” The question posed is whether the language should be interpreted narrowly as advanced by the Employer to mean that funeral leave is to be granted for only 1) arranging for and 2) attending the funeral or broadly, as proposed by the Union, to permit grieving with family the day following the funeral. The language does not expressly provide an answer to this question. In addition, the reference to attending the funeral cannot be considered clear since the Employer does allow time away from work to attend the funeral of the deceased to include travel time, depending on the circumstances.

Past practice and bargaining history are appropriate guides to resolve contractual ambiguity.

The Union argues that its interpretation of the disputed contract language is consistent with the practice and language of the Employer in all other AFSCME-represented bargaining units. It is true that the relevant contract language at Pine Valley is the same as the funeral leave language in all other AFSCME-represented bargaining units. (Joint Exhibit No. 6). However, it is not clear what the practice is in the other units represented by AFSCME. Union Representative David White testified that all other AFSCME contracts have been interpreted in a manner that would support the Union's interpretation in this case. (Emphasis in the original). Yet White admitted on cross-examination that he "may not be aware" of how the County interprets the funeral leave provision in other units and that he is only contacted when there are disputes. There is no persuasive evidence in the record as to whether employees in other units represented by AFSCME have the right to determine how much funeral leave is to be taken or whether they may take time after the day of the funeral to grieve with family members. (Emphasis added).

Union Representative White also testified that he had handled a grievance in the Highway Department that dealt with an issue concerning the retroactive application of an expanded funeral leave definition. White stated funeral leave was granted for the day after the funeral as part of the settlement of the grievance. However, as pointed out by the Employer, the fact that an employee was granted three days of funeral leave including the day after the funeral in one instance is not controlling. Nor was any evidence introduced as to why the Employer agreed to a day of funeral leave after the funeral as a settlement of the grievance. (Emphasis added). In addition, there is no evidence in the record that supports a finding that by agreeing to the aforesaid settlement the County was agreeing to the Union's interpretation of the disputed contract language.

Even if all of the other AFSCME contracts have been interpreted in a manner that would support the Union's interpretation in this case, the Union's argument still must fail. (Emphasis added). The practice in other bargaining units is not binding in this unit unless there is a showing that the parties have mutually considered this bargaining unit to be linked to the other County bargaining units represented by AFSCME, so that a practice that developed under a provision in the contract covering one unit was mutually understood to apply to all of the units with the same or similar language. BROWN COUNTY (SHELTER CARE), Case 568, No. 52478, MA-8989 (Shaw, 4/96). There has been no such showing in this case. The Union argues that it is reasonable to surmise that the parties, in reaching the agreement to bring the disputed language into conformity with the other County contracts, "did so with the expectation that the interpretation would be in conformity." However, according to the County, the contract language changed, but not substantively in a way that undermined

management's practice of regulation of funeral leave. Testimony of the Employer's Director of Human Resources, Linda Beggs. The term "consecutive" was eliminated during the bargain, but the general promise of a maximum of up to three (3) days of funeral leave continued. Id. When the new contract language became effective, management did not change what it had been doing for at least the previous fourteen years. Id. Employees receive funeral leave based on what they require in light of all of the circumstances. Id.

Both parties cite a number of rules of contract interpretation to support their interpretation of the disputed contract language. Over the years, arbitrators have looked to the principles of contract language for guidance in interpreting collective bargaining agreements. However, the principles of contract interpretation serve only as guides and should not be used as rigid or undeviating rules to be followed as methodically as though labor relations were an exact science. *Labor and Employment Arbitration*, Volume 1, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 9, "Contract Interpretation and Respect for Prior Proceedings", by Jay E. Grenig, s. 9.01[1], 9-3 and 9-4 (1998).

Cases involving funeral leave provisions have turned upon the precise wording of the funeral leave or "bereavement" pay clauses, and arbitrators appear to be inclined toward strict construction of such clauses. Elkouri and Elkouri, *How Arbitration Works*, (BNA, 5th Ed., 1997), p. 1040.

In the absence of past practice or bargaining history to the contrary, the Arbitrator finds that the Grievant's request for three days of funeral leave unpersuasively reads the limitations stated in Section 14.01 out of existence. The grievance seeks an automatic entitlement to three (3) days of funeral leave. This is inconsistent with the reference to "*up to three (3) days.*" (Emphasis added). More significantly, this reads the reference to "to attend the funeral of the deceased" out of existence since there is no question the Grievant attended the funeral on one day only. WAUSHARA COUNTY, Case 42, No. 47317, MA-7230 (McLaughlin, 7/92). It also reads the reference "to arrange for the funeral of the deceased" out of existence since it is undisputed that the Grievant received one day of funeral leave for that purpose as well.

The County's application of Section 14.01 is more compatible with the contract language. The provision provides that in the event of a death in the immediate family of an employee requiring his/her absence from work, an employee may be absent "*up to three (3) days*" "to arrange for the funeral of the deceased" and "to attend the funeral." (Emphasis added). The provision does not state that the employee shall be absent three (3) days or that the employee shall be granted three (3) days to arrange for and/or to attend the funeral. (Emphasis added). The words "up to" imply a certain amount of discretion on the part of the County in granting funeral leave. To deny the County this discretion effectively eliminates the express limitation that funeral leave is granted an employee for the amount of time "reasonably

necessary under all the circumstances, such as time required in order for the employee to arrange for the funeral of the deceased and to attend the funeral of the deceased.” WAUSHARA COUNTY, supra.

The Union argues that under the County’s interpretation of the disputed contract language the phrases “to arrange for the funeral of the deceased” and “to attend the funeral” leave out an important function like grieving with family members the day following the funeral. The Union opines that this is unfair. However, as noted above, arbitrators strictly construe funeral leave provisions. Typically, funeral leave is distinguished from bereavement leave by being tied to attendance at the funeral of the deceased; bereavement leave is usually somewhat broader in its scope. *Labor and Employment Arbitration, supra*, Volume 2, Chapter 30, “Leaves of Absence”, by Andria S. Knapp, s. 30.05, 30-26 (2001). For example, if a contract specifically states that paid leave will be allowed to attend the funeral of a member of the employee’s immediate family, arbitrators have held that such a leave provision includes attendance at the funeral and necessary travel time but does not include absences to aid bereaved relatives or to attend to the estate. Elkouri and Elkouri, supra. In the instant case, the contract provides for paid leave “to arrange for the funeral” and “to attend the funeral” but makes no mention of leave solely for bereavement purposes. The Arbitrator agrees with the Union regarding the importance of grieving with family members following a funeral. However, the Arbitrator is reluctant to read something into the agreement that the parties themselves did not agree to. Therefore, the Arbitrator finds it appropriate to interpret the funeral leave provision narrowly in the manner submitted by the Employer.

The Union argues, however, that the Employer’s interpretation of the funeral leave language is nonsensical because the Union didn’t get anything for its bargain. A comparison of the change in contract language from the 1997-1999 labor contract to the 2000-2001 labor contract does not support the Union’s position. For example, the term “consecutive” was eliminated which directly benefited the Grievant herein who received one day of funeral leave on Saturday, February 3, 2001 to arrange for the funeral, and one day of funeral leave on the following Wednesday, February 7, 2001 to attend the funeral. Under the prior labor contract, the Grievant’s funeral leave request herein could not have been granted.

In addition, the 1997-1999 labor contract provided a maximum of three successive scheduled work days time off with pay will be granted “for the funeral” of certain family members. The 2000-2001 labor contract expanded the circumstances under which an employee could be granted funeral leave to include time off “to arrange for the funeral of the deceased.” Under a strict interpretation of the 1997-1999 labor contract the Employer was not obligated to grant funeral leave “to arrange for the funeral of the deceased.”

It is also true, as pointed out by the Employer, that the contract changes strengthened management's right to evaluate and to respond to leave requests. For example, the term "consecutive" was eliminated during the bargain, but the general promise of a maximum or "up to" three (3) days of funeral leave continued. Another change that strengthened management's role in this area was the interjection in the new language that the employee's absence from work must be "required" before funeral leave can be granted. This language was not in the previous collective bargaining agreement. (Emphasis in the original).

Other changes included the incorporation of the phrase "reasonably necessary" under all the circumstances, such as time required to arrange for the funeral of the deceased and to attend the funeral of the deceased. This language was not in the old contract.

The Union further argues that the purpose of the disputed language "is not to impose stiff limits on the grieving employee, but to ensure that employees are not abusing the benefit by engaging in purely recreational pursuits while of (sic) on 'funeral leave'." The Union adds: "The purpose of bereavement leave is to allow the employee 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), supra. "The administration of Pine Valley Manor has forgotten this plain fact."

The problem with the above argument is that we are not talking about bereavement leave here; the contract provides for "Funeral Pay." (Emphasis added). As noted above, absent evidence to the contrary, funeral leave is not normally interpreted to include grieving with family members the day after the funeral. In BROWN COUNTY (SHELTER CARE), Arbitrator Shaw interpreted a contract provision entitled "Time Off For Bereavement" in sustaining a grievance and finding that the grievant "was entitled to bereavement leave pay for Thursday (Thanksgiving Day) and Friday, November 24 and 25, 1994, as well as the holiday pay for Thanksgiving Day." It was in the context of interpreting the aforesaid contract provision providing for bereavement leave that Arbitrator Shaw made the above statement. BROWN COUNTY (SHELTER CARE), supra, is distinguishable from the instant dispute, and Arbitrator Shaw's statement of the purpose of bereavement leave is not applicable to a dispute involving a funeral leave provision.

Finally, the Union argues that the Employer's interpretation of funeral leave discriminates against employees based on an employee's religious or ethnic affiliation. In particular, the Union points out that under the Employer's interpretation of the disputed contract language no funeral leave is permitted after the funeral unless travel is involved. Accordingly, since Jewish "tradition holds that the funeral is held 'no more than two nights after the death,' Jewish staff members will likely receive no more than one paid funeral leave day, whereas their Christian counterparts will usually get three."

The Union raises an interesting issue. However, the Union cites no contract provision or evidence in support of this argument. Nor is this the stipulated issue before the Arbitrator. In addition, the record supports a finding that the Employer exercised its managerial discretion to grant funeral leave to the Grievant in a reasonable and nondiscriminatory fashion. Finally, since all bargaining unit members (Christian and Jewish staff members alike) receive funeral leave “to arrange for the funeral of the deceased and to attend the funeral of the deceased” and for travel to and from the funeral, the Arbitrator finds that the language, on its face, is not discriminatory. Therefore, the Arbitrator likewise rejects this argument of the Union.

Based on all of the above, and absent any persuasive evidence or argument to the contrary, the Arbitrator finds that the answer to the issue as framed by the parties is NO, Richland County Pine Valley Healthcare & Rehabilitation Center did not violate the collective bargaining agreement in allowing Rochelle Mindham two (2) and not three (3) days of funeral leave following the death of her grandmother.

In reaching the above conclusion, the Arbitrator has addressed the major arguments of the parties. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator’s decision.

Based on all of the foregoing, and the entire record, it is my

AWARD

That the grievance filed in the instant matter is denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 21st day of October, 2002.

Dennis P. McGilligan /s/

Dennis P. McGilligan, Arbitrator

