BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARSHFIELD EMPLOYEES, LOCAL 929 AFSCME, AFL-CIO

and

CITY OF MARSHFIELD

Case 150
No. 62150
MA-12177

Appearances:

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 35, Plover, WI 54467-0035, appearing on behalf of Local 929.

Ruder Ware, S.C., by **Attorney Dean R. Dietrich**, 500 Third Street, P.O. Box 8050, Wausau, WI 54402-8050, appearing on behalf of the City of Marshfield.

ARBITRATION AWARD

The Marshfield City Employees Local 929, hereinafter referred to as the Union, and the City of Marshfield, hereinafter referred to as the City or Employer, are parties to a collective bargaining agreement (CBA) which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. Pursuant to a request by the Union and subsequent concurrence by the City, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on March 25, 2003, 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 held into the matter in Marshfield, Wisconsin, on June 26, 2003, at which time the parties were given the opportunity to present evidence and arguments. The hearing was not transcribed. The parties filed post-hearing briefs by August 5, 2003, marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following decision and Award.

ISSUE

The parties were not able to stipulate to a statement of the issue.

The Union states the issue as follows:

Did the Employer violate the collective bargaining agreement when it denied Melvin Smith use of Emergency Leave for November 15, 2002?

If so, what is the remedy?

The City states the issue as thus:

Whether the City violated the collective bargaining agreement when it denied emergency leave under Article 7 – Emergency Leave to the Grievant for time off on November 15, 2002?

If so, what is the appropriate remedy?

The Arbitrator accepts the Union's statement of the issue.

RELEVANT CONTRACTUAL PROVSIONS

Article 7 – Emergency Leave

. . .

C) One (1) day at full pay shall be allowed for deaths of relatives during the work week (relatives include grandparents, grandchildren, in-laws, uncles, aunts, nephews, nieces and stepchildren).

. . .

Article 15 – Grievance Procedure

. . .

Section 5. The arbitrator shall have no authority or power to add to, modify, or delete from the express terms of this agreement.

. . .

BACKGROUND

The Grievant's grandmother passed away on November 9, 2002. Funeral services were to take place in Mesa, Arizona, on Thursday, November 14, 2002, and the burial was to take place in Salt Lake City, Utah, on Saturday, November 16, 2002.

Smith notified his supervisor, Brian Panzer, that he wished to take a day of emergency leave pursuant to Article 7 on Friday, November 15, due to the death and that he would not be attending the funeral services or the burial. His request was denied due to the fact that he would not be attending the services or the burial. Following the denial, he used a vacation day on that date and this grievance followed in due course.

THE PARTIES' POSITIONS

The Union

The Union argues that the contract language is clear and uncontrovertible and that it should he taken literally by this Arbitrator. Further, the City failed to introduce any evidence of past practice and even if it had done so, it would be irrelevant due to the clarity of the contract language.

The City

The City argues that although the agreement is silent on whether an employee must attend a funeral or wake to receive emergency leave, past practice shows that the City has consistently interpreted it to mean just that. Citing Elkouri, it reminds the Arbitrator that past practice may be used to "fill in gaps" where a CBA is otherwise silent in order to ascertain the intentions of the parties. It also refers the undersigned to the case of J.I. CASE CO., 93 LA 107, 109 (KATES, 1989) for the same proposition.

Brian Panzer, the Grievant's supervisor, testified that he has, since his initial employment with the City in 1984, interpreted the language of Article 7 to require the physical attendance at a funeral before emergency leave could be paid and that he has denied payment of same in the past for that reason. Therefore, the "practice is of longstanding duration and is consistent."

The City further argues that "generally" provisions that allow paid time off for a death are for the purpose of traveling to or attending a funeral or wake. It directs my attention to the case of WARNER & SWASEY CO., 47 LA 438, 440 (TEPLE, 1966) which supports its contention that emergency or "funeral" leave pay is normally not granted unless one attends the funeral and assists in making the arrangements for it. Arbitrator McGilligan, in his MARATHON

COUNTY (COURTHOUSE), CASE 234, NO. 52561, MA-9023, (MCGILLIGAN, 3/96) decision, found that funeral lease did not encompass family gatherings after a funeral or taking care of "personal needs" as part of the grieving process.

If the Arbitrator were to find in favor of the Union, he would he changing the terms of the agreement, a power not afforded to him by the terms thereof. This would be the case because since a past practice exists which has now become a part of the binding nature of the contract, reversing that practice would result in a change in the terms of it.

In conclusion, the City asserts that the consistent interpretation of the language by the City has created a past practice and that practice is that emergency leave will not be granted unless one attends a funeral or a wake during the work week. To rule otherwise would open the door to employees taking time off "for every death in the family." In short, it would give a day of emergency leave to employees without restriction or limitation.

DISCUSSION

The City urges the undersigned to find a binding past practice based upon the testimony of Mr. Panzer. The "past practice," says the City, is the denial of emergency leave under Article 7 to members of the bargaining unit who do not plan to attend either the funeral or the wake of a family member referenced in paragraph C of that article. The only evidence supporting such a finding comes from the testimony of Panzer who testified that he had always interpreted the subject language to mean that the employee had to attend the funeral or a wake in order to qualify for the leave and that he had consistently applied this interpretation to other employees over the years. When asked on cross examination for specific circumstances when he had denied this benefit in the past, and to whom, he was not able to recall such a case, specifically.

The City argues that this "past practice" may be used to "fill in the gaps" of contract language which have arguably left some important aspect of the parties intentions out. In the present case, according to the City, the "gap" in the language of Article 7 is the part which requires one to attend a funeral or wake for the deceased family member before becoming eligible for the leave. I agree that past practice may, in some instances, be used to fill in "gaps" and shed light upon the parties' true intent. But this is not one of them. The "gap" suggested to exist by the City is nothing more than the language the City wishes were there, but isn't. What language is there is a clear and quite unambiguous statement outlining that a bargaining unit member is entitled to emergency leave upon the death of one of the persons set forth therein. It does not require attendance at a funeral or wake. It requires the death of a relative, including grandparents. The Grievant's situation meets that requirement.

The City also argues that "Generally, provisions that allow paid time off for a death are for the purpose of traveling to or attending a funeral or wake" and cites case law in support of that argument. This argument is rejected. The cases cited by the City are not persuasive in

this matter because in each of those cases, the contract language in question contained language requiring attendance at a funeral. Also, I am constrained by the clear and unambiguous language of this contract and to inject another element into Article 7, specifically the requirement that employees physically attend a funeral or a wake, would change the meaning and effect of the current language. It would amount to a re-writing of the agreement and I do not have the authority to do that.

In light of the above, is my

AWARD

The Employer did violate the collective bargaining agreement when it denied Melvin Smith use of Emergency Leave for November 15, 2002. The remedy for this violation is:

1. The Grievant shall be credited with one (1) day of vacation and November 15, 2002, shall be considered a day of emergency leave under Article 7.

Dated at Wausau, Wisconsin, this 18th day of August, 2003.

Steve Morrison /s/
Steve Morrison, Arbitrator

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