BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 990, AFSCME, AFL-CIO

and

KENOSHA COUNTY

Case 215
No. 62311
MA-12235

(Kerkman – Temporary Work)

In the Matter of the Arbitration of a Dispute Between

LOCAL 990, AFSCME, AFL-CIO

and

KENOSHA COUNTY

Case 216
No. 62312
MA-12236

(Kerkman – Temporary Work)

Appearances:

Mr. John P. Maglio, Staff Representative, AFSCME Council 40, AFL-CIO, P.O. Box 624, Racine, WI 53401-0624, appearing on behalf of Local 990.

Ms. Lorette Pionke, Senior Assistant Corporation Counsel, Kenosha County, 912 - 56th Street, Kenosha, WI 53140, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to the stipulation of the parties, the undersigned was jointly selected by Local 990, AFSCME, AFL-CIO (hereinafter referred to as the Union) and Kenosha County (hereinafter referred to as the County) to hear and decide a dispute concerning the appropriate use of a temporary employee.

A mediation session was held on July 10, 2003. A hearing was held on September 24, 2003, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and argument as was relevant to the dispute. The parties submitted the case on oral arguments at the close of the hearing, whereupon the record was closed.

Now, having considered the evidence, the contract language, the prior arbitration awards, the arguments of the parties, and the record as a whole, the undersigned makes the following arbitration award.

ISSUE

The parties could not stipulate to a statement of the issue and agreed that the Arbitrator should frame the issue in his award. The Arbitrator advised the parties that he would use the following statement of the issue:

> Whether the use of Carol Kerkman 1/ for vacation coverage violated the collective bargaining agreement, including prior arbitration awards interpreting that agreement? If so, what is the appropriate remedy?

1/ This case involves prior arbitration awards by Arbitrators Edward Krinsky, Joseph Kerkman and the undersigned. The temporary employee at issue shares the same last name as Arbitrator Kerkman. To avoid confusion, she is referred to in the text of this Award as "[CK]".

RELEVANT CONTRACT LANGUAGE

2001-2003 AGREEMENT

> This Agreement made and entered into by and between the County of Kenosha, Wisconsin, hereinafter referred to as the County, and the Kenosha County Courthouse and Social Services Clerical Employees Local 990, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter referred to as the Union, is as follows:

ARTICLE I - RECOGNITION

Section 1.1. Bargaining Unit. The County hereby recognizes the Union as the exclusive bargaining agent for Kenosha County Courthouse employees and Social Services Clerical employees, excluding elected officials, County Board appointed administrative officials, and building service employees for the purposes of bargaining on all matters pertaining to wages, hours and all other conditions of employment.

Section 1.2. Management Rights. Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position is changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this Agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

Section 1.3. Other Employee Groups. The County shall not initiate, create, dominate, aid or support any employee group for any bargaining during the term of this Agreement.

Section 1.4. Fair Share. The County hereby recognizes the Fair Share Principle as set forth in Wisconsin Statute 111.70 as amended. The Union, as the exclusive representative of all of the employees in the bargaining unit, shall represent all such employees, both Union and non-Union, fairly and equally, and all employees in the bargaining unit shall be required to pay their proportionate share of the cost of such representation as set forth in this Article.

No employee shall be required to join the Union, but membership in the Union shall be made available to all employees who apply, consistent with the Constitution and By-Laws of the Union. No employee shall be denied Union membership on the basis of race, creed, color, sex or national origin.

The County shall deduct from the first paycheck of each month an amount, certified by the Treasurer of members, from the pay of each employee in the bargaining unit. With respect to newly hired employees, such deduction will commence on the month following the completion of the ninety (90) day probationary period.

The aggregate amount so deducted, along with an itemized list of the employees from whom such deducted were made, shall be forwarded to the Treasurer of Local 990 within then (10) days of the date of such deductions were made. Any changes in the amount to be deducted shall be certified to the Employer by the Treasurer of Local 990 at least thirty (3) days prior to the effective date of such change.

ARTICLE III - GRIEVANCE PROCEDURE

Section 3.1. Procedure. Any difference or misunderstanding involving the interpretation or application of this agreement or a work practice which may arise between an employee or the Union covered by this agreement and the County concerning wages, hours, working conditions or other conditions of employment shall be handled and settled in accordance with the following procedure:

. . .

Step 5. All grievances which cannot be adjusted in accord with the above procedure may be submitted for decision to an impartial arbitrator within ten (10) working days following receipt of the County's answer to Step 4 above. The arbitrator shall be selected by mutual agreement of the parties; or, if no such agreement can be reached within five (5) days after notice of appeal to arbitration, the Union or the employer may request two (2) panels of seven (7) arbitrators each from the Federal Mediation and Conciliation Service. The arbitrator shall be selected from the panel by each party alternately striking a name from the panel until only one (1) name remains, the party desiring arbitration striking the first name. Expenses of the arbitrator shall be shared equally by the parties.

The authority of the arbitrator shall be limited to the construction and application of the terms of this Agreement and limited to the grievance referred to him for arbitration; he shall have no power or authority to add to, subtract from, alter or modify any of the terms of this Agreement. The decision of the arbitrator shall be final and binding upon the Union and the County.

. . .

ARTICLE VI - SENIORITY

Section 6.1. Probationary Period. New employees shall be on a probationary status for a period of ninety (90) days. During such probationary period, employee shall not be entitled to any fringe benefits under this Agreement except for the appropriate wage rate to be paid for work actually performed. During this probationary period, neither the Union nor the employee shall have recourse to the grievance procedure in case of discharge. If still employed after such date, seniority shall date from the first day of hiring. Until a probationary employee has acquired seniority, he shall have no reemployment rights in case of layoff.

. . .

Section 6.3. Temporary Assignments. The County, in exercising its rights to assign employees, agrees that an employee has seniority in a job classification, but may be temporarily assigned to another job to fill a vacancy caused by a condition beyond the control of management. Any employee so temporarily assigned shall be returned to his regular job as soon as possible. Temporary assignments shall not be considered transfers. Temporary assignments shall not be extended beyond ninety (90) days.

. . .

Section 6.5. Notice of Termination. Any full-time employee covered by this Agreement whose employment is terminated for any reason other than disciplinary action, shall be entitled to two (2) weeks notice.

All employees shall give two (2) weeks' notice, in writing of their intention to sever their employment with the County. If an employee fails to give such notice, any earned vacation pay shall be forfeited. Earned vacation time shall not be counted toward the two (2) weeks' required notice.

. . .

ARTICLE X - VACATIONS

Section 10.1. Entitlement. During the first year of service, all full-time employees will accrue vacation at the same rate as casual days as outlined in section 12.2. All employees having had one (1) year or more of service by June 1st, shall received [sic] two (2) weeks of vacation with pay at the rate of eighty (80) hours of work. All employees with seven (7) years or more of service shall

receive three (3) weeks of vacation with pay at the regular rate of one hundred twenty (120) hours or work provided, however, any employee reaching his seventh (7th) anniversary date during the calendar year shall be entitled to three (3) weeks of vacation during such calendar year. All employees who have completed fifteen (15) years of continuous service with Kenosha County shall be entitled to four (4) weeks of vacation with pay at the regular rate of one hundred sixty (160) hours of work and shall be so entitled in the year in which they accumulate such continuous service. All employees who have completed twenty-five (25) years of continuous service with Kenosha County shall be entitled to five (5) weeks of vacation with pay at the regular rate of two hundred (200) hours of work and shall be so entitled in the year in which they accumulate such continuous service.

. . .

ARTICLE XIX - PART-TIME EMPLOYEE BENEFITS

Section 19.1 Part-time Employee Defined. A part-time employee is defined as one who is regularly scheduled to a lesser number of hours than a full-time employee as provided for in the work schedule of Article IV.

Section 19.2. Temporary Employees. Employees who are employed on a temporary basis shall not receive fringe benefits.

. . .

BACKGROUND

The County provides general governmental services to the people of Kenosha County in southeastern Wisconsin. The Union is the exclusive bargaining representative of certain of the County's employees, including non-supervisory workers in the Courthouse and the clericals in the Social Services Department.

The instant grievances were filed in February and March of 2003, protesting the use of a temporary employee, [CK], to provide vacation relief. These grievances are the latest in a series of cases involving the use of non-bargaining unit personnel to perform bargaining unit work. The cases began with a negotiated settlement agreement in 1982, followed by arbitration awards by Arbitrator Edward Krinsky in 1984 and Arbitrator Joseph Kerkman in 1988 and 1992, and a Consent Award by the undersigned in 1994.

The 1982 Settlement Agreement and the 1984 Edward Krinsky Award

In December of 1982, the parties negotiated an agreement concerning the use of non-bargaining unit personnel. The second paragraph of that agreement provided "That the Employer will not assign bargaining unit work on a continuous basis to non-bargaining unit person(s) and/or agency." A number of grievances arose concerning the meaning and application of this agreement, and in November of 1984, Arbitrator Edward Krinsky issued an award on the cases. Arbitrator Krinsky noted the ambiguity of the phrases "bargaining unit work" and "continuing basis" and observed that the parties had no agreement on the meaning of these terms. He found that bargaining unit work consisted of the duties routinely performed by the classifications listed in the Appendices to the collective bargaining agreement. He declined, however, to provide a definition for what constituted a "continuing basis," reasoning that the parties had submitted specific grievances to him rather than the task of defining their terms for them. He advised the parties that he would resolve the grievances using his "own impartial, but subjective sense of where "continuous" starts and stops" but that if they wished to avoid future disputes, they should reach agreement on the meaning of the phrase. [KRINSKY, at page 26]. On consideration of the grievances, Arbitrator Krinsky determined that the County violated the agreement in three cases involving the use of General Relief recipients to do unit work and one instance of using a temporary services agency to do unit work. In three other cases – one involving a General Relief recipient, one involving a supervisor and one involving a temporary services firm, the arbitrator found no violation. Arbitrator Krinsky limited his remedy to a cease and desist order.

The 1988 Joseph Kerkman Award

One year after the Krinsky Award was issued, another series of grievances were processed to arbitration over the issue of bargaining unit work. The parties selected Arbitrator Joseph Kerkman, but the cases were held in abeyance for a period of time, including a period of mediation. The parties were not able to reach agreement, and Arbitrator Kerkman heard the case, issuing his Award in September, 1988.

Arbitrator Kerkman noted that, following Circuit Court confirmation of the Krinsky Award, the County had ceased its use of General Relief workers to perform bargaining unit work, but continued to use contracted services for that purpose, giving rise to the cases before him. The Union identified 36 contracted employees whom it believed had performed bargaining unit work in violation of the collective bargaining agreement and/or the 1982 Settlement Agreement and/or the Krinsky Award. Arbitrator Kerkman determined that the Settlement Agreement was the proper focus for his analysis. He observed that the Krinsky Award was silent as to any direct contractual violations and expressly disclaimed any intent to define the terms of the Settlement Agreement for the future. Thus, the Award itself could not be violated, and there was no clear guidance as to the contract's role in the bargaining unit work disputes. The Settlement Agreement, on the other hand, directly spoke to the use of non-unit personnel for the performance of unit work.

Arbitrator Kerkman undertook to provide a definition of the term "continuous basis." Drawing on the 90-day period used by the parties in the collective bargaining agreement to define the permissible duration of temporary assignments, probationary periods and the time at which deductions for Union dues from new employees' paychecks would begin, he concluded that a "continuous basis" meant the use of non-unit personnel to fill a job, without interruption for a period of more than 90 days. In crafting this definition, he cautioned that the limitation of 90 days would apply to both the job being filled and to the non-unit worker. Thus, the Employer could not assign a temporary employee to a job for 89 days, followed by the assignment of a different temporary worker to the same job for another 89 days. [KERKMAN, at pages 13-14].

Having defined the standard for deciding what it meant to use a non-unit person on a "continuing basis," Kerkman proceeded to review the 36 grievances before him. He found that 16 of the cases were violations of the Collective Bargaining Agreement and the Settlement Agreement entered into pursuant to it, and ordered the County to cease and desist the assignment of bargaining unit work to non-unit personnel on a continuing basis. He further ordered that the Union be paid the equivalent of dues for 101 months, the amount of time that dues should have been paid by the non-unit personnel. 2/

2/ In June of 1992, Arbitrator Kerkman issued a second Award, clarifying the application of his 1988 Award. The parties asked Arbitrator Kerkman to clarify how temporaries were to be paid during their first 90 days, and how they were to be paid after the 90th day. Arbitrator Kerkman determined that temporary employees provided by temporary services firms would be paid according to their agreement with that firm. For those employed directly by the County, the Arbitrator found that they should be paid the negotiated rate for the job they were filling. After the 90th day, they would continue to be paid the negotiated rate, but Union dues would be deducted.

The 1994 Consent Award

Subsequently, the parties had further grievances concerning the use of non-bargaining unit personnel in the County's operations. On January 26 and August 15, 1994, they met with the undersigned arbitrator. Ultimately they were able to reach agreement on those portions of the dispute dealing with temporary employees. They reached a stipulation and requested that it be issued as a Consent Award. On August 19, 1994, the undersigned issued his Consent Award.

> The following considerations shall govern the County's use of temporary employees, pursuant to the 1993-95 collective bargaining agreement between Kenosha County (County) and Local 990 (Union).

1. SPECIAL PROJECTS

A bona fide special project is a task or group of functions of defined duration which is not the normal on-going work of the bargaining unit.

Advance notice shall be given to the Union of the nature of the project, the number of employees involved and the expected duration of the project.

A bona fide special project may employ temporary employees for the duration of the project up to thirty-six months. If the project is unexpectedly delayed or extended, notice shall be given to the Union as soon as the County becomes aware of the delay or need for extension. The use of temporary employees for bona fide special projects shall not extend beyond forty-eight months total without the written agreement of the Union. "Months" means calendar months.

2. ABSENCE OF REGULAR EMPLOYEES

The County may utilize a temporary employee to fill-in for a regular employee who is on a legally/contractually authorized leave of absence. The temporary employee, or employees, may remain in the position in question for the duration of the leave of absence. If the County is notified by the absent regular employee that he/she will not be returning to work with the County, the position shall be dealt with as with any other vacancy of a regular employee.

3. HIRING FREEZE

During a hiring freeze, the County may employ temporary employees for up to 180 calendar days. At the conclusion of 180 calendar days, the County shall either fill the position in question, through contractual procedures, or leave the position vacant.

4. FILLING OF VACANCIES

When the County is making a bona fide attempt to fill a vacancy in accordance with the collective bargaining agreement, temporary employees may be used in said position for the duration of the County's efforts to fill the vacancy.

5. BUMPING

For the purpose of this agreement, temporary employees shall only have the right to bump other temporary employees, provided they meet the criteria in the collective bargaining agreement, and, further, the temporary employees they choose to bump has at least 45 days of further temporary employment remaining.

6. JURISDICTION

The parties agree that Daniel J. Nielsen shall retain jurisdiction over this issue, and any future disagreement as to the terms of this consent award, or the predecessor Krinsky/Kerkman awards, or any other settlement agreements, if any, shall be resolved by Mr. Nielsen.

. . .

The Instant Grievances

In addition to its Courthouse, the County operates other facilities, including the Western Kenosha County satellite office at Highways 50 and 45. In the Spring of 2000, the County decided to open an elected officials' office at the satellite facility, to provide citizens in the western portion of the county with better access to the services of the County Clerk, County Treasurer, Register of Deeds and Clerk of Courts. The office was to be staffed by a single clerical employee. In meetings with the Union about the proposed office, the parties discussed the need for a backup employee to staff the office if the regular employee was absent for vacation or other reasons. Although the Union proposed designating specific people to serve as backups, the County ultimately decided to rotate the management of the office, and the responsibility to provide backup for absences, among the elected officials. In the Fall of 2000, Karen Klawwitter was hired to staff the office and the Clerk of Courts office was assigned responsibility for supervising the office through the end of 2001.

In 2002, responsibility for overseeing the satellite office was transferred to the County Treasurer's office, which has a smaller workforce than does the Clerk of Courts. Whereas vacation coverage prior to 2002 was provided by a bargaining unit employee from the Clerk of Courts office, the County Treasurer instead sought agreement from the County Personnel office to hire [CK], a recently retired employee of her department, as a temporary employee to cover absences. [CK] was thought to be a good choice for the position, because the job required working alone and the handling of cash, and [CK] had been considered a trustworthy and reliable employee. The Personnel office approved the use of [CK] for vacation relief in 2002.

The request to use [CK] to cover absences at the satellite office was renewed in 2003 when the County Clerk assumed responsibility for the office. The Clerk's office had lost funding for a position, forcing an incumbent employee to bump into a vacant position in another office, and this left two full-time employees and the Clerk to staff the Courthouse office. Early in the year, the Clerk was planning to be out of town at the same time her Deputy Clerk was to be on vacation. The Clerk arranged for Klawwitter to work at the Courthouse for the time she and her Deputy were both gone, and had [CK] cover the satellite office.

In 2002, [CK] worked 196.75 hours as a temporary employee between January and November, including two 40-hour stretches. Through late September of 2003, Kerkman worked 199.50 hours, including two 40-hour stretches and one of 32 hours.

At the arbitration hearing, in addition to the facts recited above, the Union presented the testimony of Local 990 President Theresa Hannes who stated that she had been unaware of the use of any temporary employees for vacation coverage prior to Klawwitter's grievances. She expressed the opinion that the use of [CK] for that purpose was a clear violation of the 1994 Consent Award, which, by referring to "legally/contractually authorized leave of absence" limited the use of temporaries to Accident and Sickness leaves. During the processing of the grievance, Hannes spoke with Personnel Director Brook Koons, who told her he would have the staff in the elected officials' offices cross trained to provide vacation relief. Koons also proposed to negotiate a rate for temporary employees and limit their use to a maximum number of days. Hannes rejected these proposals. She did cite one agreement between the parties on temporary employee pay, a memo initiated by the Union in 1995. Koons did not agree to most of the points in the memo, but in 1997 he did sign off on one point, promising that temporary employees would start at the bottom of negotiated the pay scale. Hennes noted that [CK] was paid well above the starting rate for the job at the satellite office. 3/

3/ This testimony was objected to, and the Arbitrator ruled that it was admissible for purposes of judging the County's claim of overall compliance with the agreements on temporary employees. He also ruled, however, that the grievances did not make any mention of [CK's] pay rate, and that the Award would not include any remedial order adjusting [CK's] wages or otherwise addressing the substance of this issue.

On cross-examination, Hennes stated that she believed all of [CK's] hours in 2002 and 2003 were vacation relief, and that her belief was based on what she was told by other employees. She expressed the opinion that it did not really matter whether the hours were worked for vacation relief or some other purpose, since the 1994 Award allowed temporaries to be used only to cover Accident and Sickness leaves, and the County could not show that the hours were for that limited purpose.

Assistant Director of Personnel Services Diane Yule testified that the Personnel Department controlled the budget for temporary employees. She said that other County Departments were rarely allowed to use temporaries to cover vacations or other short term absences, and that they were generally directed to use internal backups. Yule said, however, that temporary employees had been used for vacation relief on a fairly regular basis during her 15 years of employment with the County and that this practice did not change after the 1994 Consent Award. Addressing that Award, she expressed the opinion that the allowance for temporary employee coverage for a "legally/contractually authorized leave of absence" encompassed vacations, which are expressly authorized under the contract. Yule noted that the cases cited in the Krinsky and Kerkman Awards included several where the non-unit employees were used for vacation coverage.

Yule stated that [CK] had not worked for 90 days in either 2002 or 2003, but if she had, the County would have deducted Union dues from her check. Yule also noted that there were no Local 990 employees on layoff while [CK] was used for vacation relief. While one position was eliminated in the County Clerk's office, and a notice of layoff was issued, the affected employee moved to a different job, and was not laid off.

On cross-examination, Yule testified that the County's policy on voluntary terminations required two actual work weeks advance notice to the County, exclusive of vacation or other leave, or forfeiture of separation benefits. She agreed that there were non-precedential agreements between the parties on the use of temporary employees, dealing with those areas where the Consent Award was silent.

Personnel Assistant Kristen Fox testified that she is responsible for processing requests for temporary employees, though she noted that some Department heads occasionally went directly to Brook Koons. This is what the County Clerk did in 2003 when she requested the employment of [CK]. At Koons' direction, Fox prepared an e-mail to the County Clerk allowing the use of [CK] at the satellite office for vacation relief and Accident and Sickness coverage for a maximum of 30 days during the 12 months from October, 2002, through October, 2003. The e-mail noted that there was an expectation that the elected officials would cross-train their staffs to allow for internal vacation coverage in the future. Koons later clarified this to allow for 20 of the days to be used in full week increments, and the remaining 10 to be used in lesser increments.

Fox presented a cumulative record of the temporary employees, other than [CK], authorized for vacation coverage for Local 990 employees between 1993 and 2002, showing 14 other instances:

OFFICE	FROM	TO	TEMP EMPLOYEE
Information Services	5-05-93	5-26-93	Mary Trentadue
Office Services	6-03-93	6-21-93	Irmgard Knautz
Office Services	7-10-93	7-01-93	Irmgard Knautz
Register of Deeds	4-04-94	4-08-94	Adena Daniel
Office Services	6-16-94	7-01-94	Irmgard Knautz
Information Services	9-30-94	9-30-94	Jessica Erickson
Information Services	10-07-94	10-07-94	Jessica Erickson
Information Services	11-11-94	11-11-94	Jessica Erickson
Register of Deeds	4-04-94	4-08-94	Adena Daniel 4/
Aging	3-02-95	3-14-95	Mary Jonker
Circuit Court	6-17-97	7-16-97	Kristy Farm
Emergency Services	3-24-00	3-31-00	Anita Aiello
Veterans Services	3-02-01	3-12-01	Anita Aiello
Veterans Services	4-29-02	5-03-02	Anita Aiello

4/ It is not clear whether this is a duplicate entry or if the listed dates are a typographical error.

Fox stated that the hours shown on this listing were only vacation relief hours, and that many of the temporary employees could have substantial additional hours for Accident and Sickness coverage. She agreed that [CK] had many more hours worked for vacation relief than did the other listed temporary employees.

Additional facts, as necessary, will be set forth below.

POSITIONS OF THE PARTIES

The Union

The Union takes the position that, after 21 years of litigation over the issue, the County still fails to properly limit its use of temporary employees. The prior awards set clear limits on how and when temporary employees would be used. The Krinsky Award recited their agreement not to use temporary employees on a continuing basis, and gave examples of what

constituted a continuing basis. Arbitrator Krinsky found multiple cases of temporary employees being used for period of five weeks to two months, and concluded that these were "continuing" uses of temporaries that violated the contract. Arbitrator Joseph Kerkman followed up, finding that any assignment cumulating to 90 days or longer was continuous and that some assignments of shorter duration could be continuous.

Here, the County has used [CK] to perform what is clearly bargaining unit work, and she has performed this work for more than 90 cumulative days. On its face, this violates the Kerkman and Krinsky Awards. Moreover, the County has paid [CK] at a rate far in excess of what the contract allows. It has also laid off a bargaining unit employee, while still employing [CK], notwithstanding the fact that temporary employees do not have seniority. It has failed to cross-train the elected officials' staffs to meet coverage needs, despite its claim that it would do so. Simply put, the County has completely ignored all of its agreements with Local 990 in order to satisfy its desire to employ [CK].

The County's arguments for using [CK] are unavailing. The County points to the 1994 Nielsen Consent Award, which allows the use of temporaries to cover "a legally/contractually authorized leave of absence" and interprets this to include vacations. However, it is clear from the context of that Award that it addresses only long-term leaves. Otherwise, it would not make provisions for dealing with an employee who elects not to return from a leave, since that is not a consideration when an employee takes a vacation. The County also claims a practice of using temporary employees to cover vacations. There may have been some intermittent use of temporaries for that purpose, but there is no evidence that the Union knew or consented, and in any event all of the cited instances were for very brief durations. There is nothing in the record that comes close to the extensive, long term employment of [CK].

The County should be ordered to cease and desist its use of temporary employees for vacation coverage, and to make the Local Union whole for lost dues by paying to the Union the dues owed for [CK's] tenure as a temporary past 90 days.

The County

The County takes the position that the Union misreads the prior arbitration awards, and thus the grievance lacks merit. The County has historically used temporary employees to cover absences dues to vacations. The 1988 Kerkman Award discusses at least three instances in which the reason temporaries were used was to cover employee vacations. Arbitrator Kerkman made no finding that that was an illegitimate use of such employees. Following the Kerkman Award, the 1994 Nielsen Consent Award further clarified the use of temporary employees for vacation relief. That Award specifically allows the County to employ temporaries to cover "a legally/contractually authorized leave of absence" and there can be no serious argument that vacations are not contractually authorized leaves. The County notes that in the nine years since that Award, it has consistently used temporaries, as necessary, when employees were on vacation.

The County argues that, in addition to not proving any restrictions on vacation relief, the Union has not even proved that the bulk of [CK's] hours were for vacation relief. Some of those hours were plainly covering for Accident and Sickness leaves. Moreover, the Union's complaint about [CK's] pay rate is not raised in the grievance and is not properly before the Arbitrator. If the Union wishes to pursue that issue, it should file and process a grievance over it – it cannot simply bootstrap that argument into this case. Contrary to the Union's claim that it is flaunting the contract, the County argues that [CK's] higher rate of pay was warranted by the peculiar circumstances of the Highway 45 office. The employee assigned to that office handles cash and must work alone, dealing with a wide variety of issues. Edna Highland explained that [CK], because of her long record of service and high skill level, was uniquely well suited to this assignment.

The Union's other complaints – about the lack of cross-training and the seniority status of temporaries – all turn on proposals and side deals that are either not signed or not relevant. There is no valid agreement that modifies or limits the rights the County enjoyed at the time of the 1988 Kerkman Award or the 1994 Consent Award. As both documents allow the use of temporary employees for vacation relief, there can be no contract violation. Accordingly, the grievance must be denied.

DISCUSSION

The issues in this case are what agreement(s) and/or Awards are applicable to the use of temporary employees for vacation relief, and whether the County's use of [CK] to provide vacation relief in the elected officials' satellite office and in the County Clerk's office violated any such agreements or Awards.

What Governs The Use of Temporary Employees for Vacation Relief?

Both parties make arguments about the use of temporary employees under the 1988 Kerkman Award and the 1994 Consent Award. 5/ Arbitrator Kerkman established that 90 days was the measure of when the use of a non-bargaining unit worker became continuous, and thereby violated the 1982 Settlement Agreement and the 1984 Krinsky Award. The Kerkman Award was not confined to temporary employees – it addressed the performance of unit work by all non-unit personnel, including contractors, public aid recipients and supervisors. The 1994 Consent Award is specific to temporary employees. It discusses a number of situations in which they may be used, and the limitations on their use. It was clearly intended as more than just an application or an extension of the rules set by Arbitrators Krinsky and Kerkman. Instead of relying on the "continuous basis" standard used in their Awards, or the more specific 90-day standard set by Kerkman, the Consent Award separately defines allowable time periods for the various circumstances addressed by the Award - 36 months for bona fide

special projects, 180 calendar days when a hiring freeze is in effect, the duration of a vacancy while bona fide efforts are made to fill the job, and the duration of a "legally/contractually authorized leave of absence" when a regular employee is absent from work.

5/ The 1994 Consent Award was, of course, issued by me. The terms of that Award were agreed by the parties, following a lengthy mediation. I have no current recollection of the specifics of the discussions leading to the agreement of the parties, and I cannot say whether the parties discussed what was meant by "legally/contractually authorized leave of absence." The decision in this matter is based upon a reading of the document in light of the evidence and arguments presented at hearing.

The introductory paragraph to the 1994 Consent Award states that: "The following considerations shall govern the County's use of temporary employees, pursuant to the 1993-95 collective bargaining agreement between Kenosha County (County) and Local 990 (Union)." The only plausible reading of this language is that the circumstances described in the Award are those in which temporary employees may be used, and the rules for using those employees are those set in the Award. The necessary implication of this is that the parties did not contemplate the use of temporary employees in other circumstances. From the structure of the agreement, and the language used, I conclude that the Krinsky and Kerkman Awards do not apply to temporary employees, and that the 1994 Consent Award was intended to be the sole relevant document for resolving disputes over the use of temporaries. 6/

6/ This finding is not intended to displace the 1992 Award by Arbitrator Kerkman, which addresses the compensation of temporary employees. The Consent Award does not speak to that topic.

Does the Use of [CK] Violate the 1994 Consent Award?

The grievances at issue here complain of the use of [CK] to cover the vacation absences of Karen Klawwitter in the satellite office, and to replace Klawwitter when she was temporarily reassigned to the Courthouse to cover for the absence of the County Clerk and her Deputy. The second point in the Consent Award addresses the use of temporaries to fill-in in the absence of a regular employee:

> **2. ABSENCE OF REGULAR EMPLOYEES**
>
> The County may utilize a temporary employee to fill-in for a regular employee who is on a legally/contractually authorized leave of absence. The temporary employee, or employees, may remain in the position in question for the duration

> of the leave of absence. If the County is notified by the absent regular employee that he/she will not be returning to work with the County, the position shall be dealt with as with any other vacancy of a regular employee.

The Union argues that this language applies only to Accident and Sickness leaves under the contract, while the County argues that it covers all leaves, including vacation. Aside from Hannes' assertion that this language is limited to Accident and Sickness leaves, there is nothing to show that the language has so narrow a scope. On its face, it covers all contractual leaves of absence, and the contract contains numerous references to such leaves beyond Accident and Sickness (e.g. Article XIII – Jury Duty, Article XIV – Military Leave, Article XV – Funeral Leave, and Article XVII – Personal Leave, Leave of Absence Due to Illness, Education leave, Veteran's Education leaves, Pregnancy Leave, and Union Business leave). Moreover, there are a variety of statutory leaves, most notably Family and Medical Leave, which the plain language of the provision would encompass. It is clear that the Consent Award extends well beyond Accident and Sickness Leave. The question is whether the parties' intended the term "leave of absence" to include vacation.

A leave of absence, by definition, is a period of time during which an employee has permission to be absent from work without risking the severance of the employment relationship. The term itself is easily broad enough to include annually recurring leaves, such as vacations. That alone is not dispositive of the grievance. Parties use terms of art in their negotiations, and it is conceivable that these parties could have distinguished between vacation benefits and other leaves. If there is evidence that these parties meant such a distinction, the Consent Award can be read as the Union urges.

In attempting to distinguish vacations and other short-term absences from leaves of absence that can be covered by temporaries, the Union notes that the provision for notice by an absent employee that he or she will not return from leave is at least somewhat inconsistent with interpreting the provision to include short-term leaves. Employees on vacation are expected to return to work. Having said that, employees on all leaves are generally expected to return to work. The purpose of seeking an approved leave is to secure the employee's right to reclaim his or her job after a period away. The possibility of not returning does arise in health related leaves, while it probably would not for jury leave or funeral leave. The paragraph speaks to all leaves, and the notice provision does not appear to modify that. While the Union is correct that the entire paragraph must be read in context, it must also be treated as a coherent whole. Had the parties meant to exclude short-term leaves, they could have expressed that thought in clear terms. They did not, and the notice provision is more reasonably read as covering a contingency that may or may not arise, than as a modification of the term "legally/contractually authorized leave of absence."

For its part, the County points to the fact that it has used temporaries for vacation coverage over the years before and since the Consent Award, and argues that this demonstrates the parties' mutual understanding that such use is permissible. I agree that the history of using

temporary employees supports the County's interpretation, but I am not persuaded that it shows a mutual understanding. The County's policy is to discourage requests to use temporary employees for short-term absences, and in most cases it has only been allowed in one person offices where internal coverage is not possible. Not including the use of [CK], the County has used temporaries for vacation coverage on an average of once per year since the Consent Award. Given that it is a rare occurrence, and most likely to happen in offices where other bargaining unit members will not be present, Hannes' testimony that she and other Union officials were not aware of the practice is credible. A practice which is not known to both parties is not proof of any mutual understanding. While I conclude that the County has interpreted the Consent Award as allowing the use of temporary employees for vacation relief, that interpretation does not have any binding effect on the Union.

The term "contractually authorized leave of absence" would, in the normal parlance, include vacations. Neither the structure of the provision nor the practices of the parties indicates that they meant to use this phrase in a special, narrower sense to exclude short-term leaves. For this reason, I conclude that the 1994 Consent Award does allow the County to employ temporary employees to fill-in for employees who are absent on vacation. It follows that the County did not violate the contract by its general use of [CK] to cover for Karen Klawwitter, and the grievance challenging that practice is denied.

The second grievance presents a slightly different fact situation, and leads to a different conclusion. The Consent Award does not provide for the use of temporary employees as a means of securing flexibility in general staffing. Instead, it specifically and narrowly allows the use of a temporary employee to "fill-in for a regular employee who is on a legally/contractually authorized leave of absence." In 2003, the County Clerk and her Deputy were both going to be out of the office at the same time. To cover the office, the Clerk reassigned Klawwitter to the Courthouse, and covered the satellite office with [CK]. In that instance, [CK] was not filling in for an employee who was on leave. The Deputy assigned to the satellite office was on duty, but had been temporarily reassigned. The position at the satellite office is a specific job, tied to that specific location, and the use of a temporary employee to cover that job when the incumbent was not on leave is not permissible under the Consent Award.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The use of Carol Kerkman for vacation coverage, to replace an employee who was herself on vacation, did not violate the collective bargaining agreement, including prior arbitration awards interpreting that agreement.

2. The use of Carol Kerkman to replace an employee who was temporarily reassigned to another position violated the collective bargaining agreement, including prior arbitration awards interpreting that agreement.

3. The appropriate remedy is for the County to cease and desist the use of temporary employees to replace employees who have been temporarily reassigned to another position.

Dated at Racine, Wisconsin, this 16th day of February, 2004.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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