BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DUNN COUNTY JOINT COUNCIL OF UNIONS

and

DUNN COUNTY

Case 117
No. 63642
MA-12655

Appearances:

Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Unions.

Scott Cox, Corporation Counsel, Dunn County, appearing on behalf of the County.

ARBITRATION AWARD

The Unions and County named above are parties to a 2001-2003 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the Undersigned to hear a grievance involving sick leave accumulation. A hearing was held on July 27, 2004, at Menomonie, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on September 15, 2004.

ISSUE

The parties did not stipulate to the framing of the issue. The Arbitrator finds the County's framing of the issue to be appropriate:

> Did the County violate the collective bargaining agreement by discontinuing the temporary accumulation of sick days beyond the maximum accrual of 97 days? If so, what is the appropriate remedy?

BACKGROUND

The parties entered into the following stipulations of facts:

1. The above entitled parties, herein "Union" and "County," are privy to a Collective Bargaining Agreement providing for binding arbitration.

2. Article A-3, Section 1 of the Agreement reads as follows:

Article A-3: Sick Leave

Section 1. Accrual and Accumulation

It is agreed that preventative health care is a basic foundation to good on the job attendance and that good health is a major positive factor to maintain and improve morale and productivity in the work place.

Employees may accumulate up to ninety-seven (97) days of sick leave earned at the rate of one (1) day per month.

An annual record of sick leave earned and used shall be kept beginning the first full pay period after November 30.

3. Article A-3, Section 4 of the Agreement reads as follows:

Section 4. Low Usage Incentive Pay

a) Employees terminating in good standing who have a minimum of twenty-four (24) unused sick days will receive payment for 50% of their unused sick leave.

b) Employees who retire shall have the option to receive fifty percent (50%) of their accumulated sick leave in cash or to bank one hundred percent (100%) of their accumulated sick leave and utilize it towards the payment of health and/or dental insurance coverage.

c) Employees who have twelve (12) days unused sick leave shall receive three (3) days' pay. Employees who have either ten (10) or eleven (11) days unused sick leave shall receive two and one-half days' pay. Employees who have either eight (8) or nine (9) days unused sick leave shall receive two (2) days' pay. The amount of pay shall be based on the employee's current hourly wage. Unused sick days not paid in money annually according to this formula shall be added to

the employee's accumulative total. Employees who are eligible for incentive

pay may have the option of receiving the pay or credit the days eligible for payment to their sick leave balance. However, employees who have twelve (12) days unused sick leave and receive three (3) days' pay shall only have two days deducted from their sick leave account.

d) Sick leave will be converted at the employee's last wage rate.

e) The cut-off for determining payment of low usage sick leave will be the last day of the pay period which includes November 30.

4. For many years when an employee was at or near the maximum level of accrual, 97 days, the employee would carry a "temporary balance" of additional days accrued beyond the maximum accrual of 97 days. Each year, on the pay period that includes November 30, the payroll centers would refigure all sick leave and adjust any balances exceeding 97 days to 97 days. Beginning the next pay period, employees at the maximum accrual of 97 days would start accumulating 4 hours per pay period, 1 day per month. If an employee at the maximum accrual would use any sick leave during the year, it would subtract it from the "temporary" balance. The total was adjusted at the end of the pay period that includes November 30. The cycle would start all over again with the pay period that includes November 30.

5. For example, an employee that had 97 days of sick leave on or after the pay period that includes November 30, 2001, and did not use any sick leave for the following year, the employee would accumulate a temporary balance of 109 days until the pay period that includes November 30, 2003, in which it would be reduced to 97 days. If that employee would have used any sick leave during the time period of December 2001 through November 2002, the amount of used sick leave would be subtracted from the temporary balance in excess of the cap first.

6. Prior to January of 2003, County Administrative Coordinator Eugene Smith instructed the various payroll units, through Joanne Olson, Personnel Specialist, to cap employee sick leave accrual at 97 days.

7. That action was grieved by the Dunn County Joint Council of Unions on January 16, 2003. (Attachment omitted)

8. That grievance was ultimately resolved by Administrative Coordinator Eugene Smith's response dated February 11, 2003. In his response, Mr. Smith sustained the grievance, but only for period of the term of the Collective

expressed the County's intent to terminate the practice of allowing employees to accumulate a temporary balance in excess of 97 days and informed the Union that upon expiration of the current Collective Bargaining Agreement, employees will not be allowed to accumulate in excess of 97 days of sick leave. (Attachment omitted)

9. On August 6, 2003, the parties commenced negotiations for a successor agreement to the 2001-2003 Contract which would expire on December 31, 2003.

10. On August 7, 2003, the County sent a letter to the Union notifying that the practice relating to the temporary balance of sick leave was being repudiated and would terminate as of January 1, 2004. (Attachment omitted)

11. On December 3, 2003, the Union sent a response regarding the County's repudiation of the sick leave practice. (Attachment omitted)

12. On December 4, 2003, the County sent a letter in response to the Union's December 3, 2003, letter. (Attachment omitted)

13. In January of 2004, Eugene Smith instructed the various payroll units, through Joanne Olson, to cap employees' sick leave accrual at 97 days. Due to computer program difficulties, Mr. Smith's directive was not implemented until the first payroll in March, March 3, 2004.

14. On March 5, 2004, the Union grieved the County's action with regard to the sick leave accrual. (Attachment omitted)

15. On March 23, 2004, the County denied the grievance. (Attachment omitted)

16. The parties ratified a successor Agreement for the years 2004-2006 on February 18, 2004. Neither the County nor the Union in the negotiations attempted to change the language in Article A-3, Section 1 of the Agreement.

17. The matter is properly before the arbitrator and the grievance is timely.

The parties added the low usage incentive plan and reduced the accrual of sick leave from 120 to 90 days in 1974, and the 97 day provision came into the contract in 1988. The accounting method as described above has been in place for 30 years. Sherry Otto is an account technician in the Highway Department and has administered the sick leave balances for

one, two or three days, whether they had 15 days or 97 days accumulated. For example, an employee with 15 days of accumulated sick leave who did not use any sick leave during the year could either be paid three, two or one day or add it to his or her bank. An employee with the total of 97 days accumulation would get three, two or one day paid and that would get deducted from his or her temporary balance. When the County terminated the temporary balance, about 12 employees in the Highway Department had the top accumulation of 97 days of sick leave. When the County changed the practice, an employee with top accumulation and no use of sick leave could get paid for three days and their balance would go down to 95 days, because of the two day reduction per contract. Under the prior practice, the two day reduction would have come off the 109 day temporary balance.

Christine Kistner is a W-2 specialist at Human Services and is President of the Local. She noted that those employees at or near the maximum accumulation of sick leave felt they had lost a benefit. The employees felt that something that had been bargained had been taken away from them. John Waggoner, a service worker at the Highway Department, has been with the County for 19 years. He felt he lost a valuable benefit when they could carry the temporary benefit over, because now if he is sick, it takes a month for each day he loses to get back to the maximum accumulation. Before, that sick leave was taken out of the temporary balance.

Joann Olson is the human resource specialist in the County Administrator Coordinator's office for the past 26 years. She has administrated sick leave since October of 2003 and reviews sick leave for low usage. Before October of 2003, the County Clerk's office had done the payroll. Her office was aware of the practice of the temporary balance of sick leave accumulation that could go up to 109 days.

The County's Administrative Coordinator since March of 2001 has been Eugene Smith. In 2002, he became aware of the past practice while drafting revisions to a code for nonrepresented employees. He told Olson to stop the practice because he found it to be contrary to the contract language. The County then determined to continue the practice through the end of the current contract but repudiated it and implemented the new method of accounting for sick leave in March of 2004. Smith intended to implement it earlier but the payroll program had to be modified to do it.

THE PARTIES' POSITIONS

The Union

The Union asserts that the bargaining history of sick leave provisions supports its position. In 1974, the sick leave maximum cap of 120 days was reduced to 90 days, while the core language of the low usage incentive and the annual record keeping requirement was

incentive. The language in Section 1(b) that states that "All unused sick leave days not paid in money according to this formula shall be added to the employee's accumulative total" is the other half of the reward, the first part being the basic monetary reward. That sentence has not been changed in the 2004 contract.

The Union notes that Otto testified that the low usage incentive plan accounting methods began in 1974 and remained unchanged for 30 years. The accounting method clarified any ambiguity there might have been between the career-long maximum cap on sick leave and the yearly addition of unpaid low usage incentive earnings to the employee's accumulative total. While the maximum cap has varied from 90 to 95 to 97, the sentence that all unused sick leave days not paid in money are added to the employee's accumulative total has not changed. So the accounting method allowed this sentence to co-exist with the maximum cap. At the time of the repudiation and termination of this benefit, the newly hired Administrative Coordinator was unaware of the lengthy contract bargaining history of this language.

The Union argues that the low usage incentive plan is separate and distinct from the sick leave maximum accrual cap provision. The plan of Section 4(c) is structured over a yearly period rather than the entire career period of the maximum cap accrual bank. There are no maximum cap restrictions on plan participation – it does not matter if an employee has 10 or 90 days in their maximum cap accrual bank. It is based solely on annual sick leave usage. The plan is designed for equal rewards for all employees without any stated exception. If an employee is at or near their maximum, they are allowed to carry a temporary balance of such days. Although the low usage plan is separate and distinct from the career-long maximum cap, the temporary balance can only be used within the yearly period when the numbers are refigured and adjusted to conform with the 97 day maximum cap. The sick leave pay out upon termination or retirement is never based on more than the 97 day maximum cap.

The Union contends that the accounting method at issue met all the tests of a bona fide practice, that it was constant, uninterrupted, clear and mutually accepted. The accounting method is considered by employees to be a benefit. It is not a stand alone practice, but clarifies the labor agreement, and therefore, cannot simply be repudiated. The practice clarifies any conflict that might exist between the Section 1 maximum cap and the Section 4 low usage incentive plan and fills the gap between the two sections. It may appear complex to the outside observer but has worked between the parties for 30 years without confusion or complaint.

In bargaining for the 2004 collective bargaining agreement, the County had ample opportunity to either bargain the benefit out of the contract language or bargain language to make it clear that the low usage incentive plan was subservient to the maximum cap on sick leave. They did neither. The Union quotes Arbitrator Mittenthal to note that where past practice has established a meaning for language that is used in an agreement, the practice can only be terminated by mutual agreement or the parties rewriting the ambiguous provision to

the accounting procedure leads to an absurdity, because employees who have used the least sick leave over the years are the ones harmed by this action. Surely, this was not the intent of the parties when they bargained the low usage incentive sick leave plan.

The County

The County asserts that there is no need to look at the past practice because the language regarding the maximum sick leave accrual in the agreement is clear and unambiguous. Although the Union alleges that the past practice is actually written into the contract, it is an unwritten practice existing apart from the contract. The second sentence of Article A-3 states that "Employees may accumulate up to 97 days of sick leave earned at the rate of one (1) day per month." That sentence clearly sets a maximum limit for accumulation of sick leave for employees. Furthermore, the management rights' clause gives the County the right to introduce new or improved methods or facilities or change existing methods or facilities.

The County does not dispute the existence of the past practice, but states that it is inconsistent with the clear and concise language of the contract. Arbitrators have found that clear contract language takes precedence over past practices. Here, the contract is neither silent nor ambiguous on the issue. Ninety-seven days means 97 days, not 109 days. Thus, the past practice is irrelevant to the outcome of the grievance. Arbitrators have disagreed on when a past practice can be unilaterally abrogated. One view is that the employer is not required to repudiate a past practice in bargaining where the practice was not binding due to the fact that the contract language prevails. Other arbitrators have found that a past practice is not subject to termination at any time but may be terminated at the end of a contract term by giving notice that it will not continue into the next contract.

The County indicated on August 7, 2003, after the bargaining commenced, that it was going to discontinue the practice of the accumulation of a temporary balance beyond the maximum of 97 days. The County has the right to rely on exercising the plain language of the contract. The notification that any practice contrary to the contract will not be recognized then shifts the burden onto the Union to get the language into the contract that allows for the accumulation and usage of a temporary balance of sick leave in excess of 97 days. Although the Union sat on its hands and said it was the County's burden, it was the Union's burden to bargain the existing practice back into the contract.

DISCUSSION

This case raises an interesting question about which party has the burden of obtaining contract language to secure a past practice which has been repudiated in negotiations. The answer is not one which can be universally applied, because each case is unique when it comes

to past practices and their relationship to contract language.

In this case, the Union has argued that the maximum accumulation of 97 days of sick leave in Article A-3, Section 1, is distinct from the low usage incentive pay provision in the same article, Section 4(c). There are two problems with that argument. First, the contract should be read as a whole, particularly the same Article dealing with sick leave. While the Union attempted to separate the maximum accumulation from the incentive by calling the maximum accumulation a career-long benefit, the maximum also applies every year, as the parties acknowledged when they refigured the numbers to go back to 97 every year. Secondly, Section 4(c) does not state anything about the maximum accumulation, except to say that unused sick days not paid in money are to be added to the accumulative total. Section 4(c) does not change the accumulative total in any fashion. There was apparently no need to repeat the 97 day total because it had been said before.

Therefore, the accounting practice that started 30 years ago was in conflict with the contract language.

The past practice is undisputed and meets the general criteria of a valid past practice. The County then repudiated the practice in a timely manner during bargaining. The Union believes that it was incumbent upon the County to obtain contract language to validate its own repudiation. First, it was hardly necessary to do so where the contract language should prevail over the past practice. Secondly, it was incumbent upon the Union to obtain language to accumulate sick leave over and above the 97 day maximum benefit clearly stated in the contract, which had been given by the past practice just repudiated. The Union cannot claim that a practice which is contrary to contract language somehow supersedes the language where the practice was repudiated and the Union did not negotiate the practice back into the contract.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin, this 12th day of October, 2004.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

KJM/anl