BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PORTAGE COUNTY

and

PORTAGE COUNTY COURTHOUSE, HEALTH CARE CENTER, DEPARTMENT OF HEALTH AND HUMAN SERVICES AND LIBRAY SYSTEM EMPLOYEES LOCAL 348, AFSCME, AFL-CIO

Case 178
No. 62712
MA-12417

Appearances:

J. Blair Ward, Assistant Corporation Counsel, Portage County, 1516 Church Street, Stevens Point, Wisconsin 54481-3598, appearing on behalf of the County.

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

ARBITRATION AWARD

Portage County, hereinafter referred to as the County, and Portage County Courthouse, Health Care Center, Department of Health and Human Services and Library System Employees, Local 348, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a disputed over the denial of benefits. Hearing on the matter was held in Stevens Point, Wisconsin on April 22, 2004. A stenographic transcript of the proceedings was prepared and received by the Arbitrator on May 6, 2004. Post hearing written arguments and the County's reply brief were received by the Arbitrator by August 5, 2004. Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties where unable to agree upon framing of the issue and agreed to leave framing of the issue to the Arbitrator. The Arbitrator frames the issue as follows:

> "Did the County violate the collective bargaining agreement when it denied to pay the grievant's October 2002 health insurance premium of $944.90, and denied the grievant the accrual of a sick leave day for July 2002 and denied the grievant the accrual of a sick leave day for October 2002?"
>
> "If yes, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS

A) The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to the following:

2. To establish reasonable work rules and schedules of work;

. . .

7. To comply with state and federal law;

. . .

The County agrees it will not use these management rights to interfere with the employees' rights established under this Agreement or for the purpose of undermining the Union or discriminating against its members.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by the Agreement may be processed through the grievance and arbitration procedure contained herein; however, during the pendency of any grievance or arbitration proceeding, the County can continue to exercise these management rights.

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ARTICLE 8 – GRIEVANCE PROCEDURE

H) Arbitration

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4. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract. The arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

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ARTICLE 13 – SICK LEAVE

A) Monthly Accrual: All employees will accrue one day of sick leave per month with no limit on the total accumulative total.

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ARTICLE 16 – INSURANCE

A) Health Insurance: Each new employee is eligible for health insurance coverage, to be effective no sooner that the first of the month following date of hire or the first of the month following thirty (30) days if hired after the 15th of the month. The County shall pay 95% of the cost of the single plan or family plan for 1/1/00 through 12/31/00. The county shall pay 93% of the cost of the single plan or family plan from 9/1/01 through 12/31/01. The County will pay 91% of the cost of the single plan or family plan from 1/1/02 to 12/31/02. Effective at the end of the day 12/31/02, the County will pay 90% of the cost of the single plan or family plan.

If an employee enrolls during the first 31 days of employment, coverage will be provided, subject to the pre-existing conditions provisions of the Plan.

If employee enrolls after the first 31 days of employment, coverage will be provided, subject to the pre-existing conditions and evidence of good health provisions of the Plan.

Employees with single plan coverage, who are not eligible for the disability insurance program, shall receive twenty-five dollars ($25.00) quarterly.

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ARTICLE 22 – PART-TIME EMPLOYEES

All benefits addressed in this contract shall be prorated for regular part-time employees based upon the number of hours worked. Exception: Nutrition Assistants are entitled only to holiday pay only when they work the holiday. Nutrition Assistants are entitled to call-in pay when called in. It is understood between the parties that the underwriter's regulations for life insurance (35 hours per week), health insurance (16 hours per week), disability insurance (30 hours per week), and the Wisconsin Retirement Fund rules and regulations (600 hours per year) shall control these provisions.

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PERTINENT COUNTY PERSONNEL POLICIES

9.02 HEALTH INSURANCE

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D. Employees on Leave of Absence - Employees on approved leaves of absence shall be permitted to remain on the plan for the duration of their leave of absence.

If an employee on a leave of absence is entitled to receive sick pay, vacation pay, or payment of compensatory time, their normal deduction for health insurance will be continued along with the County's contribution until such time as the employee either exhausts such payments or until the leave terminates.

If an employee on leave of absence is not receiving payment for sick leave, vacation pay or payment of compensatory time, the entire cost will be the responsibility of the employee, with the payment being due no later than the 10th of each month.

If an employee on leave of absence returns to continuous employment in sufficient time to work a major fraction of the month, that month's regular employer/employee contribution ratio will be re-established.

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9.07 SICK LEAVE:

A. Accumulation – Eligible employees will receive eight (8) hours of sick leave for each month or major fraction of a month of employment with no limit on accumulation.

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9.12 LEAVES OF ABSENCE:

A. Personal Leave: With the approval of their Department Head, regular employees may be granted personal leave without pay for periods not to exceed ten (10) days per year in order to provide for contingencies that require the employee to be away from his/her job during normal working hours but which cannot appropriately be charged to either vacation or sick leave. Personal leave shall not accrue and the Department Head shall monitor all use of personal leave.

B. Upon the recommendation of the Department Head, the Personnel Committee may grant a permanent employee leave without pay beyond ten work days for a period not to exceed six months, subject to the following conditions:

(1) Leave without pay shall be granted only when it is in the best interests of the County to do so. The interests of the employee shall be considered when he has shown by his record to be of more than average value to the County and when it is desirable to return the employee to service, even at some sacrifice. Requests for leave of absence shall be approved prior to the taking of such leave. When such leave is requested as an extension of sick leave, an acceptable physician's certificate shall be included.

(2) At the expiration of a leave without pay, the employee shall be reinstated in the position he/she vacated, or in an equivalent position, which is vacant at the time, if he/she meets the stated qualifications. If there is no a suitable vacancy available, his/her name shall be placed on an appropriate reinstatement list.

(3) Credit toward vacation and sick leave shall not be earned while an employee is on leave without pay, but insurance benefits may be retained if the employee pays them in full.

(4) Leave without pay shall not constitute a break in service; however, if the employee is on unpaid leave for more than ten (10) consecutive work days during a calendar year, it shall change employee's anniversary date correspondingly.

(5) A return to work earlier than the scheduled termination of leave date may be arranged between the Department Head and the employee.

(6) Employees on leave of absence will subject themselves to termination if actively employed elsewhere during the term of their leave.

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BACKGROUND

The fundamental facts in the instant matter are not in dispute. Kathleen Prior, hereinafter referred to as the grievant, began her employment with the County in 1997. The Grievant was hired as a Deputy Clerk II in the County's Clerk of Courts office and the Grievant was assigned duties as a traffic clerk. On November 4, 2002 the Grievant turned in her keys and informed the County she was terminating her employment. On June 12, 2002 the Grievant underwent surgery that prevented her from performing her duties. The Grievant returned to work under work restrictions on October 15, 2002. Her restrictions limited her to working only four (4) hours per day. The County, because the grievant did not work a major fraction of the month, required the Grievant to pay the entire amount of her health insurance premium, and, because the Grievant was on a leave of absence without pay for a major fraction of the month denied the Grievant the accrual of a sick leave day for the month of July 2002 and denied the grievant the accrual of a sick leave day for the month of October 2002. At the hearing the Union also pointed out the Grievant was credited on her pay check stub with eight (8) hours of sick leave for the month of

July 2002 and the County removed this from her account when she returned to work because the Grievant did not work the majority of the month of July 2002. The Grievant received compensation for 25.88 hours in the month of July 2002 and the Grievant worked 34.25 hours in the month of October 2002. There is no dispute that the County acted properly in determining the Grievant's benefits for the months of August and September 2002.

The County's actions were grieved and processed to arbitration in accord with the parties' grievance procedure. At the hearing the County's Personnel Manager, Laura Belanger, testified that the parties' collective bargaining agreement is silent concerning how benefits are accrued and paid out while an employee is on an approved leave of absence. Belanger also testified that the County's personnel policies require an employee to return to work in time to work a major fraction of the month for the County to pay the County contribution towards health insurance premiums. Belanger further testified that since she had been hired by the County in 1998 she had sent employees on a leave of absence a letter explaining the County's personnel policy and billing them when appropriate. Belanger also testified she did not send a copy of every letter she sent out to the Union.

The record also demonstrates that the County's payroll department automatically credits an employee with accrued sick leave on the second payroll of every month. The Grievant's July 2002 check and October 2002 check both credited the Grievant with eight (8) hours of sick leave. When an employee is on an approved leave of absence the County manually deducts the eight (8) hours of sick leave from the next check the employee receives. The County deducted eight (8) hours from the Grievant because the Grievant did not work a major fraction of the month of July 2002 and deducted eight hours from the Grievant because the Grievant did not work a major fraction of the month of October 2002.

Union President Collene Ottum testified she had been the Union president since 1993 and was a County payroll clerk from 1989 to 1996. Ottum further testified she was unaware that the County was requiring employees to pay health insurance premiums while they were on a leave of absence when the employee worked any portion of a month. Ottum further testified that there was no requirement that an employee work the majority of hours in a month to qualify for the Employer share of health insurance premium and that the employee only had to receive paid time during the month in order to qualify for sick leave accrual.

In July 2002 the Grievant received compensation for 25.88 hours. In October 2002 the Grievant received compensation for 34.25 hours and in November 2002 the Grievant received compensation for 8 hours. During the month of October the grievant worked four (4) hours per day from October 15 through October 29, 2004.

UNION'S POSITION

The Union points out the Grievant's July 26, 2002 pay stub indicated she had eight (8) hours of sick leave accumulated and that balance appeared on her October 18, 2002 pay stub. The Union also points out this sick time would have covered a medical appointment the grievant had on October 30, 2002. The Union argues the County deducted the earned eight (8) hours from July 2002 from the Grievant's accrual and the Union contends there is no provision in the collective bargaining agreement for such a reduction. The Union also argues there is no provision in the collective bargaining agreement for the deduction for eligibility for health insurance when an employee has paid time in a month of employment.

The Union argues because the Grievant had paid time in July 2002 she earned eight (8) hours of sick leave. The Union contends the July sick leave hours should be restored to the Grievant. The Union also argues the Grievant had paid time in October 2002 and therefore she earned another eight (8) hours of sick leave. The Union contends the October sick leave hours should be restored to the Grievant. The Union also argues that because the Grievant had paid time in October 2002 she qualified for continued health insurance. The Union argues the County denied the Grievant health insurance commencing with November 2002 and that the Grievant should be made whole for any medical expenses after the Grievant pays her portion of the health insurance premium.

In support of its position the Union points to the testimony of Union President Collene Ottum. The Union point's out Ottum was the County payroll clerk from 1989 to 1996. Ottum was therefore aware when employees made contributions towards health insurance premiums and when the County did not pay a portion of the health insurance premium. The Union points out that Ottum testified the County paid its portion of the health insurance premium whenever an employee was on a leave of absence for a portion of a month the County would pay the County's portion of the health insurance premium. The Union also points out this is the first instance the Union was aware of that a full-time employee was required to pay more than the full-time employee portion of the health insurance premium. The Union also points out this is the first instance the Union was aware of that a full-time employee would have to work a majority of the month to qualify for eight (8) hours of sick leave.

The Union points out that in two previous incidences, Union Ex. 14 and 15, the employees received full-time health insurance premiums and benefit accrual. The Union avers that if a full-time employee has one paid day in a month the full-time employee is entitled to accrue full benefits and have the County pay the County's portion of the health insurance premium. The Union argues that the collective bargaining agreement is specific concerning how employees earn benefits. The Union asserts that if the County desires to reduce or eliminate benefits the County has a burden to bargain the issue.

The Union concludes the County had no contractual basis for their position so the County invented one in a policy. The Union argues the County should not be successful in obtaining in grievance arbitration what it did not seek or obtain in bargaining.

The Union would have the Arbitrator sustain the grievance and direct the County to credit the Grievant with sixteen (16) hours of sick leave, afford her health insurance coverage for November 2002 when she pays her portion of the premium and allow the grievant to continue coverage if she pay the premium. The Union did not file a reply brief.

COUNTY'S POSITION

The County contends the Union's position that regardless how many hours an employee works for a particular month or regardless how many hours an employee is compensated for during a particular month, even if it is only for one day, the employee is entitled to the entire amount of the County contribution for health insurance is not supported by Article 16 of the collective bargaining agreement. The County contends Article 16 is silent on how to address the issue of County contribution towards health insurance premiums for a full-time employee who is on an unpaid leave of absence for all or a portion of their hours.

The County argues it has the right under Article 3- Management rights to establish reasonable work rules. The County contends that because Article 16 is silent concerning the instant matter the parties must look to the County's personnel policies which address this issue. The County argues Section 9.02 of the personnel policy addresses this issue and states the necessary requirements for an employee to receive the County's portion of the health insurance premium. The County points out the Grievant only worked twenty four percent (24%) of her normal work hours in October 2002. The County contends this is clearly short of the "major fraction of the month" requirement set forth in the County's personnel policy.

The County also contends the examples submitted by the Union to demonstrate there is a practice regarding health insurance premium contributions are factually different than the instant matter. The County points out in one example the employee worked thirty five (35) hours per week and in the other the employee worked thirty (30) hours per week. The County asserts these were sufficient hours to be working a major fraction of the month.

The County points out a September 11, 2001 letter to an employee which was copied to the Union informed the employee of the County's personnel policy. The County contends Personnel Director Belanger's testimony established a practice dating back to at least 1998 requiring employees to pay the entire amount of the health insurance premium. The County also point's out the Grievant's absence from work from October 30, 2002 to November 4, 2002 was considered unexcused by the County.

The County also contends it properly denied the grievant sick leave accrual. The County asserts the Grievant was improperly credited on her pay stubs for the two (2) sick leave days in dispute and the County argues it acted properly in deducting the days from her. The County argues that Article 13 of the collective bargaining agreement does not resolve the dispute because it does not address the situation facing the Grievant. The County argues the relevant portion of the County's personnel policies, Section 9.12, addresses the instant matter. The County contends this is a reasonable work rule in accord with Article 1, Management Rights. The County points out this provision requires the Grievant to work a major fraction of the month to be eligible for sick leave accrual. The County concludes that as the Grievant did not work a major fraction for the months of July and October 2002, or November 2002, the Grievant is not entitled to sick leave.

In its reply brief the County points out it is not disputed the Grievant worked from October 15 through October 29, 2002 and that she did not work at all for the County in November 2002. The County points out the Grievant worked less than one-half of what a full time employee would work. The County argues both the payment of health insurance premiums and the accrual of sick leave are subject to the same standard. The employee must work or receive benefits for a major fraction of the month to be entitled to the benefits.

The County point's out there is no reference in the grievance for a payment of the November health insurance premium. The County argues the Arbitrator should only address the month of October 2002. The County also argues Ottum's testimony is not supported by any facts or past practice. The County also argues the two examples cited by the Union are not applicable to the instant matter as the employees involved worked thirty-five (35) or thirty (30) hours per week, well beyond fifty percent (50%) of the hours available to work in a month.

In its Reply Brief the County again argues that because the collective bargaining agreement is silent concerning reduction of benefits the parties must turn to the Personnel Policies. The County asserts the policies clearly provide the proper method for addressing situations such as the instant matter.

The County also argues the Arbitrator should limit review to the grievance stated action of the denial of sick leave for the month of October. The County point's out the grievance does not mention anything about sick leave accumulation for the month of July, 2002. The County contends the Grievant was mistakenly credited with eight (8) hours of sick leave that was corrected manually. This occurred twice. The County contends that because the Grievant did not work or have benefits for a major fraction of those months the Grievant is not entitled to accrue any sick leave benefit or County paid health insurance premium.

DISCUSSION

The record demonstrates, as the Union has noted, that the collective bargaining agreement is silent concerning how sick leave is to accrue or insurance premiums paid when an employee is on an unpaid leave of absence. The record does demonstrate that on two previous occasions when this issue of pay for health insurance and accrual of sick leave was raised by the Union the County paid its full share of the premium and the involved employees' accrued sick leave. However, the County has argued these two instances are distinguishable from the instant matter because the employees worked thirty-five (35) and thirty (30) hours per week. While it is evident the two employees worked more hours than the Grievant, it is also evident that the two employees were full-time employees who worked less than a normal work schedule of forty (40) hours per week. Thus the Union argument that employees on an approved leave of absence who work any portion of a month are credited with accrued sick leave and the County pays its full portion of the health insurance premium has merit.

The County contends there is a past practice of the County using the County Personnel Policy to determine whether an employee on a leave of absence should accumulate sick leave and whether the employee is responsible for paying the full health insurance premium. The County submitted two exhibits to support this practice, Employer Ex. 3 and 4. The Union objected to these documents because it had requested any pertinent documents prior to the hearing and it had not received the documents. However, the documents do not establish that a past practice exists. Only one was copied to the Union (Em. Ex. 3). While this document informed the affected employee of the County's Personnel Policy concerning payment of health insurance premiums, it was silent concerning the accrual of sick leave. Further, there is no evidence the Union was informed how the employee's benefits were affected by the County's Personnel Policy. There is also no evidence that the Union was copied the second document (Em. Ex. 4). The Arbitrator finds one document stating the County's Personnel Policy concerning payment of health insurance premiums does not establish a binding past practice. Particularly when there is no evidence the County ever informed the Union what actions the County had taken in implementing the Personnel Policy. Thus the Arbitrator concludes that the County may have applied the Personnel Policy to employees on an unpaid leave of absence but there is no evidence the Union was aware of the County's actions applying the Personnel Policy to employees. In order for a practice to be binding it must be clearly enunciated and readily ascertainable over a period of time. Herein there is no evidence until the instant matter was grieved that would lead to a conclusion that the Union was aware that an employee who was on an unpaid leave of absence for any portion of a month did not have the County pay its portion of the health insurance premium or that the Union was aware that an employee who was on an unpaid leave of absence for any portion of a month was denied the accrual of a sick leave day. Therefore the Arbitrator concludes there is no evidence to support a conclusion that there was a binding past practice.

The County has also contended that the County Personnel Policies concerning health insurance premium payments and accrual of sick leave of employees who are on an unpaid leave of absence are reasonable work rules. The County Personnel Policy uses the terms "major fraction of a month" to use as a measure in determining whether an employee accrues a sick leave day or receives the Employer contribution towards payment of the health insurance premium. The Arbitrator notes here that Article 22, Part-Time Employees provides for the prorated benefits for part-time employees based upon the number of hours worked. Thus, because the parties have agreed to prorate benefits for part-time employees it could be deemed reasonable for the County to create reasonable work rules that govern the accrual and payment of benefits when a full-time employee takes an unpaid leave of absence. However, the instant matter is not a situation where the County prorated the Grievant's benefits based upon the actual hours the Grievant worked or received compensation. The Grievant was denied benefits because the Grievant had not worked a "major fraction of the month."

A careful review of the Personnel Policies demonstrates the terms "major fraction of the month" is not defined anywhere in the policies. Absent a definition of the terms "major fraction of the month" renders such a measure for determining benefits unreasonable. It allows the County to apply it differently to the same facts, e.g., if one-half (1/2) is not a major fraction a part-time employee could receive prorated benefits and a full-time employee on a leave of absence would receive none. Such a result is unreasonable given the provisions of the parties' collective bargaining agreement. In effect it denies a full-time employee a benefit that the employee has earned. Particularly when neither Article 13 nor Article 16 require a full-time employee to work a minimum number of hours in order to be eligible for sick leave or the County's contribution towards health insurance premiums. Therefore, because the County has not defined what a "major fraction of a month" means, and, because the application of the standard could deny a full-time employee benefits while a part-time employee received benefits for working the same number of hours the Arbitrator concludes the County Personnel Policy requiring to work "a major fraction of the month" to be eligible for sick leave accrual and payment by the County of the County's share of the insurance premium to be unreasonable.

Therefore based upon the above and foregoing the Arbitrator concludes the County violated the collective bargaining agreement when it denied to pay the grievant's October 2002 health insurance premium and denied the grievant the accrual of a sick leave day for July 2002 and the accrual of a sick leave day for October 2002. Neither Article 13 nor Article 16 require a full-time employee to work a minimum number of hours in order to be eligible for their respective benefits. The Arbitrator does not have the authority to add to the terms of the collective bargaining agreement. Because the Arbitrator cannot impose a minimum number of hours the appropriate remedy is to accrue sick leave days to the Grievant and direct the County do reimburse the Grievant for the County's failure to pay its portion of the October 2002 insurance premium. The record demonstrates the Grievant called in sick on October 30, 2002 and did not return to work until November 4, 2002 when she terminated her employment. Had

the Grievant accrued the July sick leave day and the October sick leave day she would have exhausted the benefit prior to November 1, 2002. Therefore the Arbitrator directs the County to reimburse the Grievant $944.90 for the October payment of the health insurance premium and directs the County to pay the Grievant two (2) days pay.

AWARD

The County violated the collective bargaining agreement when it denied to pay the grievant's October 2002 health insurance premium of $944.90, and denied the grievant the accrual of a sick leave day for July 2002 and accrual of a sick leave day for October 2002. The County is directed to reimburse the Grievant $944.90 and to pay the Grievant two (2) days pay.

Dated at Madison, Wisconsin, this 14th day of January, 2005.

Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator

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