BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY

and

KENOSHA COUNTY LOCAL 990
AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO
COURTHOUSE AND SOCIAL SERVICES CLERICAL

Case 239
No. 64311
MA-12867

Appearances:

Thomas G. Berger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 044635, Racine, Wisconsin 53404-7013, appearing on behalf of the Union.

Attorney Frank Volpintesta, Corporation Counsel, Kenosha County Courthouse, 1010-56th Street, Kenosha, Wisconsin 53140-3738, appearing on behalf of the County

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County" or "Employer," are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on January 11, 2005. Hearing was held on March 14, 2005, in Kenosha, Wisconsin. The hearing was not transcribed and the parties made oral argument at the conclusion of the hearing.

Based upon the entire record and arguments of the parties, I issue the following decision and Award.

ISSUES

The parties were unable to stipulate to the issues. The Union poses the following issues:

1. Did the County properly deny implementation of the A&S plan to the Grievant instead of forcing the Grievant to use four hours of casual time?

2. If not, what is the appropriate remedy?

The County proposes that the Arbitrator frame the issue based on the entire record.

Having reviewed the entire record, the Arbitrator adopts the Union's framing of the issue.

DISCUSSION

Arleen Milligan ("Grievant") requested and was granted four (4) hours of casual time for an eye doctor appointment. The casual time was from noon until 4:00 p.m. on September 9, 2004. While at her appointment, the doctor ordered immediate eye laser surgery. The next day the Grievant asked for A&S benefits from September 9th through 14th. The County denied her A&S benefits for the day of her surgery but put her on that benefit until she returned to work on September 14th.

Casual days are used for personal business such as doctor appointments and can be used incrementally. At the end of the year, casual days not used are paid out.

At issue is whether the County violated Article XII, Section 12.1(a) of the collective bargaining agreement when it denied the Grievant the use of the A&S benefit from the first day of outpatient surgery.

Article XII, Section 12.1 provides for the following A&S benefits to be paid in case of non-occupational accident or illness:

> (a) All regular full-time employees will receive thirty (30) calendar days at full pay with coverage starting on the first day of accident, if authorized by a physician, first day of hospitalization, first day of out-patient surgery and seventh (7^{th}) day of illness.

The Union argues that the County violated Article XII, Section 12.1(a) by denying the Grievant A&S benefits on the day of her surgery (September 9th) while the County takes the opposite position.

The language in Section 12.1(a) clearly provides that A&S coverage begins with the first day of outpatient surgery. However, the question before the Arbitrator is whether A&S benefits are available to an employee on a previously scheduled casual day.

The case relied upon by the County supports the Arbitrator's conclusion that the County acted properly herein.

In KENOSHA COUNTY, Case 108, No. 44921, MA-4871 (Gratz, 5/91), the grievant, a truck driver, requested and was granted a vacation block consisting of the week of Monday, August 6 through Friday, August 10, 1990. While on vacation the grievant became acutely ill and was hospitalized from Monday, August 6th until sometime on Wednesday, August 9th. During his hospitalization he was informed by a County clerical employee that he would be treated as covered by Accident and Sickness [A&S] benefits throughout his hospitalization. Later he was informed by the County that it was treating him as having been on vacation throughout the week of August 6-10 and on A&S benefits only as regards the workdays he missed beginning the following Monday, August 13th. The grievant then filed a grievance asserting that it had been his understanding that he went off vacation and onto A&S benefits from the first day of his hospitalization, and requesting that he be given a week of vacation back with the week of August 6-10, 1990 charged to Accident and Sickness benefits.

The contract language interpreted by Arbitrator Gratz in the aforesaid case is almost identical to the contract language in question in this case. It provided in Section 11.1(a) as follows:

> All regular full-time employees will receive thirty (30) calendar days at full pay with coverage starting on the first day of accident, first day of hospitalization, first day of out-patient surgery and seventh (7^{th}) day of illness.

Arbitrator Gratz framed the question before him as whether A&S benefits were payable in lieu of vacation where the conditions that would otherwise entitle the employee to A&S benefits occurred during a previously-scheduled vacation. KENOSHA COUNTY, *supra*, p. 6. He found that the contract did not specifically state that A&S benefits were or were not available on previously-scheduled vacation days. Id. He also found that the contract stated that A&S benefits began with the first day of a hospitalization. KENOSHA COUNTY, *supra*, p. 7. He then stated that the question presented in the dispute was not so much when A&S eligibility started as it was about whether scheduled vacation days were days on which an employee experienced a loss of pay for which A&S benefits were payable to maintain the employee's regular pay. Id. He reasoned that while A&S coverage unquestionably began "on the first day of accident, first day of hospitalization, first day of outpatient surgery," etc. "the first day for which the employee would receive A&S benefits would be the first day on which the employee normally would have worked," which may or may not have been the first day of hospitalization. Id. He noted, for example, that if " the first day of hospitalization was a Saturday for a Monday-Friday workweek employee, the first day for which the employee would be entitled to have full pay maintained by payment of the S&A benefits would be the following Monday, and then only if the hospitalization" occurred that long. Id.

In the instant case, the contract does not specifically state that A&S benefits are or are not available on a previously-scheduled casual day. As noted above, it also states that A&S benefits begin with the first day of outpatient surgery.

Arbitrator Gratz concluded that a scheduled vacation day was neither a day on which the employee normally would have worked nor a day as to which the employee would suffer a loss of regular pay by reason of accident, hospitalization or illness. Id. For that reason, he found that the disputed contract language did not mandate adoption of the Union's proposed interpretation of the contract provisions to allow A&S benefits to be substituted for previously-scheduled vacation days.

Arbitrator Gratz found support for these conclusions in the fact that other parts of the agreement expressly set forth circumstances in which one agreement benefit could be substituted for another. In particular, Arbitrator Gratz noted that Section 11.2(f) of the agreement contained an express provision that a casual day would not be charged in the event of an accident occurring prior to noon on a day being taken by the employee as a casual day. Id. He concluded that said provision read together with the rest of Article 11 meant that A&S benefits, rather than casual day benefits, would apply in such circumstances with the casual day credited back to the employee. Id.

Here, the agreement contains identical contract language. Section 12.2(f) provides that "If an accident occurs while an employee is on a casual day, the employee will not be charged for the casual day if the accident occurs before noon." However, no accident occurred to the Grievant before noon. The Grievant was not credited back with a causal day. She took and was paid a casual day in a half (1/2) day increment for the afternoon of September 9, 2004. Consequently, the Grievant's scheduled casual time was neither a day on which she normally would have worked nor a day as to which she would suffer a loss of regular pay by reason of accident, hospitalization, outpatient surgery or illness.

Contrary to the Union's assertion, the decision by Arbitrator Gratz in KENOSHA COUNTY, *supra*, is applicable to the instant dispute. In both KENOSHA COUNTY, *supra*, and the instant case, the contract language in question is basically the same and the facts and circumstances giving rise to the grievance are very similar. In KENOSHA COUNTY, *supra*, Arbitrator Gratz found that A&S benefits were not payable in lieu of vacation where the conditions that would otherwise entitle the employee to A&S benefits occurred during a previously-scheduled vacation. KENOSHA COUNTY, *supra*, pp. 6-7. In the present case, the Arbitrator concludes, based on the rationale articulated by Arbitrator Gratz in KENOSHA COUNTY, *supra*, that A&S benefits are not payable to the Grievant in lieu of a casual day where the conditions that would otherwise entitle her to A&S benefits occurred during a previously-scheduled afternoon casual day.

Past practice supports the above conclusion. In this regard, the Arbitrator notes that the County has consistently applied the KENOSHA COUNTY decision since 1991 to deny A&S benefits to an employee in lieu of vacation where the conditions that would otherwise entitle the employee to A&S benefits occur during a previously scheduled vacation. In other words, the County has only paid A&S benefits on the first day on which an employee normally would have worked except where the agreement or past practice expressly provide for a different result.

Based on all of the foregoing, the Arbitrator finds that the answer to the question as framed by the Union is YES, the County properly denied implementation of the A&S plan to the Grievant and instead properly required her to use four hours of casual time on the day of her surgery.

Based on all of the above, it is my

AWARD

The instant grievance is hereby denied, and the matter is dismissed.

Dated at Madison, Wisconsin this 20th day of June, 2005.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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