

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
COLUMBIA COUNTY HIGHWAY DEPARTMENT
AFSCME LOCAL 995, AFL-CIO

and

COLUMBIA COUNTY

Case 245
No. 65256
MA-13167

(Donated Sick Leave Grievance)

Appearances:

Mr. Joseph Ruf III, Corporation Counsel, Columbia County, Columbia County Courthouse, P.O. Box 63, Portage, Wisconsin 53901, appearing on behalf of Columbia County.

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of Columbia County Highway Department AFSCME Local 995, AFL-CIO.

ARBITRATION AWARD

Columbia County Highway Department AFSCME Local 995, AFL-CIO, and Columbia County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance concerning the application and interpretation of the terms of the agreement relating to the donation of sick leave from one employee to another. The Commission appointed Stuart D. Levitan as the impartial arbitrator. Hearing in the matter was held in Portage, Wisconsin, on January 19, 2006, with a transcript being made available to the parties on February 13. The parties submitted written arguments, the last being received on April 26, 2006.

ISSUE

The parties stipulated to the following statement of the issue:

Did the employer violate the collective bargaining agreement when it denied the sick leave donation request? If so, what is the remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS

3.01 The management of the Highway Department and direction of the working forces is vested exclusively in the Employer, including, but not limited to, the right to hire, suspend, or demote, discipline or discharge for just cause, to transfer or lay off because of lack of work or other legitimate reasons, to subcontract for economic reasons, to determine any type, kind, and quality of service to be rendered to the citizenry, to determine the location, operation and type of the physical structures, facilities, or equipment of the Highway Department, to plan and schedule service and work, to plan and schedule any training programs, to create, promulgate and enforce reasonable work rules, to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement. The Union expressly recognizes the prerogative of the Employer to operate and manage its affairs in all respects with its responsibilities.

...

ARTICLE 11 – SICK LEAVE

11.01 Each regular employee shall be credited with one (1) day of sick leave for each month of his/her probationary period at the completion of the probationary term of employment and shall accumulate further sick leave credit at the rate of one (1) day per month of employment to a maximum accumulation of 120 days. To be eligible for sick leave benefits, the employee must have completed the probationary period. The employee shall make a written request for sick leave benefits on the form provided by the Employer. An employee may be required to provide a physician's statement to substantiate illness of more than one (1) day, upon request of the Highway Commissioner or designee, when there is credible evidence of suspected abuse. Upon credible evidence of suspected abuse, an employee may be required to provide a physician's statement to substantiate illness when sick leave is used either the day proceeding or the day after vacation days(s). Worker compensable illnesses or hospitalizations shall not be included as an illness. Employees shall report all absences under sick leave within one (1) hour prior to the start of the scheduled shift. Abuse of sick leave may be considered cause for discipline. Sick leave payments will be paid at the rate of the employee's regular salary. Up to six (6) days of sick leave per year may be used for the care of ill or injured spouse, child, step child, parent, and parent-in-law of the employee.

a) An employee who has accumulated one hundred twenty (120) days of sick leave shall have a catastrophic sick leave account established. Additional sick leave shall be accredited to the account, up to a maximum of twenty-four (24) days, at the rate of one (1) day for each completed calendar month of compensated service during which the employee has maintained one hundred twenty (120) days of accumulated regular sick leave. The catastrophic sick leave account may only be drawn from to cover eligible absences that are medically documented, where the employee has exhausted all previously accumulated regular sick leave. This account shall not be used in any other manner.

...

11.03 For the purpose of this Agreement, one (1) day sick leave shall be considered to be normal working hours at the time of the illness. Employees shall accumulate sick leave while on payroll, which shall be defined as actually working, or being absent from work because of holiday, vacation or sick leave.

11.04 Payout. Employees who terminate from the service of the Employer through death or layoff shall be entitled to any unused sick leave accumulation and earned vacation to be paid either to the employee or to the employee's estate at the employee's basic wage rate. Employees who retire and are eligible for Wisconsin Retirement Annuity and/or Social Security shall be paid seventy percent (70%) of the accumulated sick leave at their daily hourly rate. This Section does not apply to the catastrophic sick leave account.

11.05 Sick Leave Incentive Day: Each employee who uses no sick days in a calendar year shall receive one (1) additional day off with pay, to be scheduled by mutual agreement between the employee and the employee's supervisor.

...

ARTICLE 14 - MISCELLANEOUS PROVISIONS

...

14.05 Entire Agreement. This Agreement constitutes the entire agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

...

SIDE LETTER AGREEMENT

Re: Donation of Sick Leave

Donation of Sick Leave: In the event extraordinary circumstances arise under which an employee has depleted all of his/her sick leave (including catastrophic account) and is still unable to return to work, individual employees may donate a portion of their accrued sick leave, in increments of one (1) day, not to exceed five (5) days per donator, to the employee. It is understood that the donation will be on a day-for-day basis, without regard to any difference in the hourly rate of pay between the donor and the receiver. No employee may be a recipient of sick leave donation until the employee has depleted all accrued vacation, compensatory time, and all other paid time off available to the employee.

OTHER RELEVANT PROVISIONS

2004-2005 Labor Agreement, Columbia County Health Care Center and Local 2698

Section 10.12 Donation of Sick Leave

In the event extraordinary circumstances arise under which an employee has depleted all of his/her sick leave (including catastrophic account) and is still unable to return to work, individual employees may voluntarily donate a portion of their accrued sick leave, in increments of one (1) day, not to exceed five (5) days per donator, *per year*, to the employee. (*emphasis added*). It is understood that the donation will be on a day-for-day basis, without regard to any difference in the hourly rate of pay between the donor and the receiver.

2004-2005 Labor Agreement, Columbia County and Columbia County Professional Employees Union, Local 2698-A

Section 10.9 Donation of Sick Leave

In the event extraordinary circumstances arise under which an employee has depleted all of his/her sick leave (including catastrophic account) and is still unable to return to work, individual employees may voluntarily donate a portion of their accrued sick leave, in increments of one (1) day, not to exceed five (5) days per donator, to the employee. It is understood that the donation will be on a day-for-day basis, without regard to any difference in the hourly rate of pay between the donor and the receiver. No employee may be a recipient of sick leave donation until the employee has depleted all accrued vacation, compensatory time, and all other paid time off available to the employee.

**2004-2005 Collective Bargaining Agreement, Columbia County and Columbia County
Courthouse and Human Services Employees Union, Local 2698-A**
Section 11.11

In the event extraordinary circumstances arise under which an employee has depleted all of his/her sick leave (including catastrophic account) and is still unable to return to work, individual employees may voluntarily donate a portion of their accrued sick leave, in increments of one (1) day, not to exceed five (5) days per donator, to the employee. It is understood that the donation will be on a day-for-day basis, without regard to any difference in the hourly rate of pay between the donor and the receiver. No employee may be a recipient of sick leave donation until the employee has depleted all accrued vacation, compensatory time, and all other paid time off available to the employee.

**2003-2004 Collective Bargaining Agreement, Columbia County and Columbia County
Sheriff's Department Employees' Union (Non-Sworn Personnel), Local 2698-C**

In the event extraordinary circumstances arise under which an employee has depleted all of his/her sick leave (including catastrophic account) and is still unable to return to work, individual employees may voluntarily donate a portion of their accrued sick leave, in increments of one (1) day, not to exceed five (5) days per donator, to the employee. It is understood that the donation will be on a day-for-day basis, without regard to any difference in the hourly rate of pay between the donor and the receiver. No employee may be a recipient of sick leave donation until the employee has depleted all accrued vacation, compensatory time, and all other paid time off available to the employee.

BACKGROUND

On or about August 16, 2005, highway department employee Tom Borgkvist completed, amended and submitted a form to effectuate his donation of one day sick leave to fellow employee Joe De Boer, as follows:

Employee receiving donated time: Joe DeBoer

Employee donation time: Tom Borgkvist

Your employee number used for payroll in the JDEdwards system: (redacted)

Department you are employed in: Hwy

Days to be donated (not to exceed 5 days): 1 Day

(Time must be donated on a day for day basis in full day increments)

I understand that my donation is voluntary.

I understand my sick leave balance will not be returned to my bank.

I understand my donation cannot exceed five (5) days per employee donation.

~~I understand that after donating a total of five (5) days to this employee I will not be eligible to donate to this employee again.~~

I understand that the donation will be on a day-for-day basis.

On August 23, 2005, County Corporation Counsel and Human Resources Director Joseph Ruf, III, wrote to Borgkvist as follows:

The above request is denied based on the fact that you previously donated the maximum five (5) days of sick leave to Joseph DeBoer. As you will recall, this same issue is the subject of Highway Grievance No. 04-04.

AFSCME's position in grievance 04-04 is that annual donation of five (5) days is provided in the collective bargaining agreement. The County's position continues to be that the Side Letter Agreement to the collective bargaining agreement governing donation of sick leave provides for a one time donation of a maximum of five (5) days.

David White, AFSCME staff representative, testified that the proposal to create the process for donating sick leave came from the Union, and that the proposal to limit the donation to five days came from the County, and was never expressed as being limited either to the donor's lifetime or the duration of the collective bargaining agreement. White, who also represents the other county AFSCME units, also testified that it was the County which proposed to amend the sick-leave donation provision in the collective bargaining agreement for the Healthcare Center by adding, "per year," to the phrase, "not to exceed five days per donator to the employee," and that this was mutually understood as limiting, not expanding, the benefit. White's testimony was neither supported by any contemporaneous documentation nor rebutted by the County.

Highway commissioner Kurt Dey testified that, but for an occasional inadvertent occurrence, he had always administered the provision to limit donors to a lifetime maximum of five days of sick leave given to any one recipient. Dey produced a document, prepared for the hearing, which showed several instances of employees donating 40 hours to another employee, and no employee donating more than that. The document only reflected current employees, and thus did not address Borgkvist's testimony that he had donated more than 40 hours to an employee who had since retired.

The grievant, who is also a long-time Union official, testified without rebuttal that he drafted the form which was originally used by employees seeking to donate sick leave, and that it did not reflect the five-day lifetime limit. Borgkvist further testified, again without rebuttal, that the Union did not participate in any way in the drafting of the new form, or agree to its establishment.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

The side letter agreement sets four specific conditions that must be met for there to be a donation of sick leave from one employee to another: an “extraordinary circumstance” must exist; the employee must have depleted all his/her sick leave; the employee must have depleted all other paid time off available; there must be an employee with available sick leave who wishes to make a donation.

Once those conditions are met, sick leave donations are subject to only one limitation – the donation is limited to five days per “donator” to the employee.

The language in dispute is identical to language in four other collective bargaining agreements between AFSCME locals and the County, with one notable exception. As proposed by the County, effective 2002-03, the collective bargaining agreement at the county home adds the phrase “per year” after the “one day, not to exceed five days per donator” clause. If the standard language as in the highway contract established a lifetime limitation, then the addition of the words “per year” would constitute an expansion of the benefit. Yet the change was understood by the parties as a limitation of the benefit.

The highway Union president who participated in the negotiations which led to this language testified that the County never claimed during negotiations that there was a lifetime limitation of five days, and that when he produced the form employees submitted to activate the benefit, it did not contain any reference to a five day lifetime limit.

The County submitted an exhibit purporting to show support for its position. However, since the Highway Commissioner could vouch for neither its accuracy nor completeness, it is difficult to give the document much weight. Moreover, the County’s interpretation is inconsistent with the common understanding of other similar benefits, and is absurd.

The County is seeking to obtain through grievance arbitration what it has not been able to achieve through collective bargaining.

As remedy, the County should be ordered to stop applying the “lifetime limitation” rule, and make the affected employees whole. Borgkvist should be allowed to donate sick leave to DeBoer, with their leave balances adjusted accordingly. Borgkvist’s balance should also be adjusted if this deduction would have enabled him to earn additional days because he no longer would have been at the maximum accumulation of days if permitted to donate.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The County properly applied the unambiguous contract language that limits sick leave donation between any two employees to a total of five days to deny Borgkvist's request to donate a sixth day to another employee. The language of the collective bargaining agreement means what it says in expressly limiting the total amount of sick leave donation between any two employees to five days during the duration of those employees' careers with the County. The Union advocates for an interpretation that renders the five day limitation meaningless, an unreasonable result it seeks to obtain by proposing the addition of language to the collective bargaining agreement defining the benefit as "per year," "per occurrence," or unlimited.

It is well-settled that where the collective bargaining agreement uses language which is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used. Here, the phrase, "five days" is obviously unambiguous.

Further, the County has consistently applied this provision as a benefit limited to a total of five days between employees. The highway commissioner testified based on his personal knowledge that since 1998 he has always administered this provision to limit the amount of donated sick leave between two employees to a total of five days. That past oversight, inadvertence or simple error may have occurred to enable an employee to donate beyond the five day limit does not constitute evidence of a policy on which the arbitrator should rely.

The Union's attempt to look to bargaining proposals and bargaining history for this and other AFSCME contracts does not alter the plain language of the current collective bargaining agreement. This contract constitutes the entire agreement between the parties and no verbal provisions may supersede any of its provisions; it means what it plainly says, not what any party wanted or meant to say. The Union proposed the concept, with a much more expansive benefit; the parties ultimately agreed to a benefit of five days. No discussion of bargaining history or reference to other contracts, however, overcomes the plain language of the agreement.

Finally, there is no rational basis for Borgkvist's grievance since he received exactly the benefit provided in the collective bargaining agreement. The Union is seeking an expansion of the benefit, which is should pursue through negotiation rather than arbitration.

Because the County scrupulously followed the agreement, the grievance should be denied.

In its reply, the Union posits further as follows:

The County's arguments in its initial brief must fail as they are not supported by the evidence in the record.

It is well-settled that a phrase may be considered ambiguous if it is susceptible of more than one meaning. Because the Union's interpretation of the provision cannot be said to be implausible.

The County's assertion about the consistency of its application is an assertion without foundation in the record; the exhibit on which the County relies was completely discredited as being inaccurate and incomplete. Further, the "rule" of a five-day lifetime maximum did not appear on the forms used for the first several years of the benefit; there are employees who received more than five days from a particular donor, and the limitation the County now claims as plainly part of the record was never discussed during negotiations.

It is completely self-serving for the County to claim that a few exceptions to the rule were the result of oversight, inadvertence or simple error, and should thus be discounted. In fact, the benefit has been invoked so few times that there is no consistent application that swamps the occasional so-called oversight.

The County further errs in seeking to discount bargaining history and the county's proposal to add the phrase "per year" to the language in the Health Care Center agreement. There is no doubt that the County's intent was to limit the benefit; but if the benefit already had a lifetime limitation of five days, why would the County seek this modification?

Finally, the County errs in asserting that the grievant received the benefit to which he was entitled; if the five-day lifetime limitation is not valid, then the grievant did not receive the proper benefit.

In its reply brief, the County posits further as follows:

While the Union brief clearly restates the Union's desires to expand the sick leave provision, it provides little insight into how the language in the current collective bargaining agreement could reasonably be applied to allow the grievant to donate more than five days. But the Union's wish for an expanded benefit cannot empower the arbitrator to add new language to the existing contract.

For the Union's interpretation to take effect, either the arbitrator would have to add entirely new language affecting the frequency, or the arbitrator would have to accept the Union's argument that the existing language is meaningless and should be ignored. But to do so would require the arbitrator to ignore both the actual language of the current contract as well as the vast body of arbitral

authority. The arbitrator must decide what the contract says, not what the Union wants the contract to say.

The Union further errs in seeking to find support for its argument in other provisions of the contract; to the extent that comparing this benefit with other contractual benefits is helpful, the comparison shows both the need and validity of the five-day lifetime limitation on donated sick leave between two employees.

Finally, the Union's grievance has grown; first it sought to have Borgkvist donate a sixth day to DeBoer; then it sought to extend that grievance to make donated sick leave available on a "per occurrence" basis, which could make it available on a monthly or even weekly basis; in its brief, the Union sought to have the arbitrator not only rewrite the collective bargaining agreement, but require the County to retroactively apply the new language department-wide, affecting 78 employees. The Union's requested remedy is as unreasonable as its continuing efforts to rewrite the contract language and obtain the unlimited donated sick leave benefit through arbitration that it failed to achieve or abandoned in negotiations. Accordingly, the grievance should be denied.

DISCUSSION

This grievance concerns language that is clearly ambiguous, in that the time-frame for the limitation of "five days per donator" is neither expressed nor implied. I turn therefore to parol evidence, in hopes of determining the parties' intent in agreeing to this provision.

The bargaining history of this provision offers little insight. According to the un rebutted testimony of the Union staff representative and the grievant, a 20-year employee of the County and Union president for twelve, it was the union which proposed the program, and the County which proposed the "extraordinary circumstances" clause and the five-day limitation – without putting the five-day concept in a broader temporal framework. This bargaining history does not provide support for either party, and suggests that each party is attempting to obtain through the grievance process something it failed to achieve – possibly, even failed to seek – in collective bargaining.

The operational practice is equally inconclusive. The Union cites the initial years of the program, in which the form used – prepared by Union president and grievant Borgkvist – did not refer to a five-day lifetime limit on donations. The County cites more recent experience, wherein the form has included such a reference. Again, a draw.

The employer's witness, Highway Commissioner Dey, testified credibly that he believed the lifetime limit was five days per employee to a particular recipient, and, allowing for an occasional inadvertent error, had so administered the benefit. That the commissioner believed that this was the limit, however, does not establish that the parties had in fact reached a meeting of the minds on that point, especially given the absence of comprehensive and verified data establishing past experience.

The strongest external evidence is the similar provision contained in the collective bargaining agreement for the employees of the Health Care Center, identical but for the inclusion of the phrase “per year.” AFSCME representative White’s un rebutted testimony at hearing established that the county proposed this amendment as a way to limit the benefit’s application. Clearly, if the existing language provided a *life-time* limit of five days per employee to a particular co-worker, adding the phrase, “per year” would amount to an extensive *expansion* of the benefit. Since the County sought to limit, not expand, the benefit, the language prior to the inclusion of the phrase “per year” must not have been a life-time limit.

Having determined that the language does not limit an employee to a life-time maximum of five days per recipient, I must address whether there is any limit at all. Here, I find great significance in the fact that, unlike the similar provisions affecting the other AFSCME units, the language at issue is not contained in the body of the collective bargaining agreement, but rather in a side letter which, unless renewed, lapses with the expiration of the collective bargaining agreement (subject to concepts of dynamic *status quo*).

I conclude, therefore, that the collective bargaining agreement before me, in its totality, provides that the “five-day limitation” applies during the term of this contract. Because the grievant had not donated any time to Joe DeBoer since 2000, he was entitled to make the donation he sought to make on August 16, 2005.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is sustained. The County shall adjust the sick leave and related records of Tom Borgkvist and Joe DeBoer to reflect their respective situations had the county processed the grievant’s proposed donation of sick leave on August 16, 2005.

Dated at Madison, Wisconsin, this 28th day of July, 2006.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

