

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

IRON COUNTY

and

IRON COUNTY PUBLIC EMPLOYEES LOCAL 728-B AFSCME, AFL-CIO

Case 64

No. 65105

MA-13123

(Sick Leave Bank Grievance)

Appearances:

Jodie Bednar-Clemens, Corporation Counsel, Iron County, 300 Taconite Street, Hurley, Wisconsin 54534, for Iron County.

John Spiegelhoff, Staff Representative, AFSCME Council 40, AFL-CIO, 1105 East 9th Street, Merrill, Wisconsin 54452, on behalf of Local 728-B.

ARBITRATION AWARD

The County and the Union are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. On August 31, 2005, the Union filed with the Wisconsin Employment Relations Commission a Request to Initiate Grievance Arbitration alleging that the County violated the agreement. The Commission designated Paul Gordon, Commissioner, to serve as the arbitrator. A hearing date was scheduled, then rescheduled and held in Hurley, Wisconsin, on March 7, 2006. The Parties filed written briefs and arguments and the record was closed on April 11, 2006.

ISSUES

The Parties did not stipulate to the issues. The Union states the issues as:

Did the County violate the collective bargaining agreement when the County unilaterally withdrew accumulated sick leave bank hours already existing or otherwise deposited in the sick leave bank? If so, what is the appropriate remedy?

The County states the issues as:

Did the County violate the collective bargaining agreement by withdrawing hours that were earned by management employees from the Union sick leave bank to establish a management and non-union employee sick leave bank? If so, what is the appropriate remedy?

The issue as stated by the County is selected as that which more closely reflects the record in the case as will be detailed in the discussion section, below.

RELEVANT CONTRACT PROVISIONS

WORKING AGREEMENT

The Iron County Board of Supervisors, referred to hereinafter as the “Employer”, and Iron County Public Employees, Local 728, Chapter D, of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to hereinafter as the “Union”, do hereby reach agreement for the purpose of enhancing the general efficiency of all departments in Iron County and to promote the morale, well-being and security of employees.

ARTICLE 1 – RECOGNITION

Section 1. The Employer recognizes the Union as the exclusive representative of all its regular full-time employees and regular part-time employees in the Courthouse, Department of Human Services and Health Department, pursuant to Wisconsin Employment Relations Commission, Case V, No 23832, ME-1613, Decision No. 16821, but excluding elected or appointed officials, supervisors and confidential employees for purposes of collective bargaining with respect to wages, hours and working conditions and other conditions of employment which are mandatory subjects of bargaining.

. . .

ARTICLE 11 – SICK LEAVE

Section 1. All employees covered by this agreement shall receive sick leave as follows. Sick leave as used herein shall be defined as absence from duty because of illness, bodily injury otherwise than in the line of duty or exposure to a contagious disease. Sick leave credits shall be accrued as follows:

- A. After satisfactorily completing their probationary period, said employees shall be entitled to a grant of six (6) days sick leave beginning with their seventh (7th) month of employment.

- B. Thereafter, they shall begin accumulating sick leave at the rate of one (1) day for each month of employment up to twelve (12) days each year. Part-time employees' sick leave will be prorated.
- C. Unused sick leave at the end of each year shall be credited to the next year's accumulation until a maximum of one hundred twenty (120) days of sick leave have been accumulated.

Section 2. Upon termination of employment, employees shall receive pay on the three-fifths (3/5) of their unused sick leave as a separation benefit. Termination pay received by an employee as a separation benefit shall not exceed seventy-two (72) days of their unused sick leave. In order to be eligible for this separation pay, the employee must have been employed by Iron County for a minimum of five (5) years.

Section 3. Each full-time employee who retires from active service with the Employer may convert his separation benefit, computed pursuant to Section 2 above, into paid-up health insurance similar to that which the employee has in effect on the date of retirement, i.e., single or family/dependent coverage.

. . .

Section 7 – Sick Leave Bank. Employees who accumulate in excess of one hundred twenty (120) days of sick leave shall have such excess sick leave placed in a sick leave bank to be used as directed by the board of the bank. Sick leave payments are to be used as directed by the sick leave board in the event of a serious illness of a participating employee who has exhausted accumulated sick leave. The sick leave accumulated in the bank shall not be used for termination pay purposes.

A. Any participating employee shall be allowed to draw from the bank if the employee is a regular bargaining unit employee of Iron County having at least twelve (12) months or more of service for the Employer.

B. Sick leave bank shall be administered by a Sick Leave Bank Board. This board shall be selected as follows:

1. Union select one (1) person for said board;
2. County board select one (1) person for said board;
3. The above two (2) units to select one (1) person from the County and he or she shall act as chairperson of said board.

C. All days drawn from the bank must be approved by board of the bank. A doctor's certification may be required prior to granting sick leave from the bank to an employee. Sick leave shall be drawn from the bank only after all sick leave benefits accrued by an employee have been exhausted and only in cases of extended illness that would impose a hardship on the employee. An employee wishing to draw sick leave from the bank must apply to the Sick Leave Bank Board.

D. Bargaining unit employees who have not become participating members of the sick leave bank may apply to the sick leave bank board for sick leave from the bank. If approved by the board, sick leave may be drawn from the bank in an amount equal to eighty percent (80%) of the non-participating employee's accumulated sick leave at the onset of the non-participating employee's extended illness, up to a maximum of sixty (60) days per year. Any fractional days will be rounded to the nearest whole day.

E. Participants in the sick leave bank shall be eligible to draw an amount of sick leave as determined by the board. Once an employee has become a member of the sick leave bank, the employee will remain a member.

BACKGROUND AND FACTS

This case developed as a result of a situation in 2005 where a non-bargaining unit employee of the County was pregnant and whose husband was dying from cancer at the same time. The employee had not worked for the County long enough to have accumulated more than 120 days of sick leave, and she had accessed and used all her available sick leave and other paid benefits during this tragic time. She sought to access some additional paid sick leave from what is known as the Union sick leave bank, as described in the contract provisions above. Because she was not a bargaining unit member she was not able to access the sick leave bank. This was the understanding of both the County and the Union. However, the County authorized County employees to voluntarily and at their own choice contribute vacation days and comp time to this employee if they wished to do so. A sufficient number of these days were contributed to the employee to meet her needs during this time. The search for ways to help this employee with paid hours led to the County looking closer at the status of the sick leave bank and the way excess sick days over 120 for both bargaining unit members and management were handled.

At some time prior to 1995 the County and the Union established a sick leave bank whereby employee accumulated sick leave in excess of 120 days went into the sick leave bank. Under the collective bargaining agreement employees may accumulate up to 120 days of sick leave. Any days earned over that are put into the sick leave bank as set out in the collective bargaining agreement.

The records of the bank consist of one or more lists of names and the number of days in excess of 120 for 1995 and prior, as well as for each year thereafter. The original list of names and hours was kept only by the Union until 2000. In 2000 an employee asked for the first time for some time from the bank. A Union member then gave the County a list consisting of totals

for 1995 and prior, and then totals for 1997, 1998 and 1999 (typed portion of page 2 of Exhibit 1). A deputy in the County Clerk's office started taking care of the list in 2000 and continued the same format. (Pages 2 and 3 of Exhibit 1). She did not bring to the County's attention that days of non-union personnel were being added to the list. Then, after the tragic employee circumstance, in July of 2005 the County prepared a list of names and hours of management personnel reflecting only management sick leave bank days. (Exhibit 2) Earlier that month the County Board had determined to remove unused management sick leave days from the Union sick leave bank so that the bank would then reflect 100% of the contributions made only by members of the bargaining unit. Prior to then the County had not realized it did not have a separate sick leave bank or sick leave bank account for management employees. Any governance provision for a management sick leave bank is not of record. The July 2005 County list at first did not include the name of Morzenti. His name was written in some time later by the County with his excess days. There are a few small, unexplained discrepancies in the yearly recordings of some of the days. According to the County July 2005 list, the total number of days of management or non-bargaining unit employees is 243 days as of the end of 2004. There is an additional 14.5 management days for 2005. The cumulative total of management sick leave days are the days at issue.¹

Most of the names on the Exhibit 1 list are bargaining unit employees. Two of the names, Traczyk and Kolson-Janov, used to be in the bargaining unit and had their excess days go into the bank as reflected on the list. They each became management or non-bargaining unit employees, Traczyk in 2002 and Kolson-Janov in about 1996, and their sick leave accumulated days over 120 continued to be recorded on the list each year. Another name, Samardich, is on the list. Samardich is now retired from the County. He was at one time a social worker and prior to 1995 had become the Director in the Human Services Department. The 106 days reflected on the list accumulated while he was the Director and a non-bargaining unit employee. He knew his excess hours were being recorded in the bank, that there was no separate management sick leave bank, and he thought that he would be entitled to withdraw days from the bank. However, he never requested a withdrawal from the sick leave bank. The name of Abelson is on the list with 10 days in the 1995 and prior column.² Abelson was a management employee who was not in the bargaining unit. Another management or non-bargaining unit employee, Morzenti, is on the list and his accumulated sick days over 120 are

¹ There are an additional 10 days in the 1995 and prior column on the original Union list from Abelson who apparently was, at least at some point, a non-bargaining unit zoning administrator, but whose excess days as a management employee were not included in the County Management sick leave bank list of 2005. The record does not establish whether those days were accumulated while he was a non-bargaining unit member or if he had been in the bargaining unit at some point and accumulated those days in that status.

² See foot note 1.

recorded for 2004 and 2005. Morzenti has never been in the bargaining unit. Morzenti's name was not on the original list kept by the Union or the County. Morzenti did not know until recently that his days over 120 were recorded. He thought those days were lost under the "use it or lose it" concept and that he had nothing to decide as to excess sick leave days. There are other names with excess days and years who have been members of the bargaining unit at all relevant times.

All four of the names and days on the July 2005 list represent excess days of persons who were non-bargaining unit members or management during the years reflecting excess days accumulated while they were management or non-bargaining unit employees.

There is no record of any days ever having been withdrawn from any sick leave bank.

In July of 2005 the County directed its Corporation Counsel to coordinate with the bargaining unit to remove unused management sick days contributed to the unit's sick leave bank. The County did not bargain or negotiate this removal with the Union. Instead, the County prepared its management sick leave bank list and provided that to the Union as the Union had requested. When the County separated the bargaining unit member sick leave hours from the Management sick leave hours and created the separate sick leave bank list for management, the Union filed a grievance which led to this arbitration.

POSITIONS OF THE PARTIES

Union

In summary, the Union argues that the County unilaterally removed sick leave bank days in July 2005 without repudiating or bargaining an established past practice. The contract language is ambiguous and past practice has an important role in this dispute. Citing Richard Mithenthal on past practice, the Union argues that a County Board member who was on the bargaining committee was of the opinion the County had always had a sick leave bank for represented and non-represented employees, and that the County selects one person for the sick leave bank board. The County should have been aware that non-represented employees were contributing to the sick leave bank. There is no separate account for Union and non-union members. The Union further argues that a binding past practice also requires the elements of long-standing, mutuality, and consistency of the practice. The practice of allowing both represented and non-represented employees to contribute to the sick leave bank appears through testimony a practice that had been occurring at least since 1995 (long-standing). The County was the official bookkeeper of the sick leave bank account since 2000 and raised no objection to a combined sick leave bank. The County felt compelled to separate Union and non-union donated sick leave days in July 2005 giving rise to this dispute. The County was aware of such a practice (mutuality). Although few days were ever taken out, both parties seemed to agree that equal access would be granted to both represented and non-represented employees to the sick leave bank hours (consistency, Jt. Exhibit 1).

The Union additionally argues that the contract language supports the Union's position of definition of a participating member of the sick leave bank. The County is likely to argue the recognition clause supports its' position. However, the sick leave bank article states any participating employee shall be allowed to draw from the bank if the employee is a regular bargaining unit employee of Iron County having at least twelve (12) months or more of service to the employer. (emphasizing participating). Kolson-Janov and Traczyk had been in the bargaining unit and contributed days to the bank before becoming non-union employees. As participating employees who had contributed days to the bank the Union had no issue with them accessing the bank despite their supervisory status. The Union did take issue with non-union employees accessing the sick leave bank if they did not contribute. The County can maintain a separate sick leave bank for non-union personnel. It is not within the County's right to remove sick leave bank days by participating members. The testimony of Samardich supports the consistency in practice. He was a participating member as he contributed days. The Union also argues that Article 11(7)(e) states "[P]articipants in the sick leave bank shall be eligible to draw an amount of sick leave as determined by the board. Once a member has become a member of the sick leave bank, the employee will remain a member." Most of the disputed hours removed from the sick leave bank entail members who had contributed sick leave days while Union members and also as non-union members. However, the contractual language states that they will remain a member once they become a member. With the County removing days do they become non-members or loose all accumulated sick days? Kolson and Traczyk would be rather upset if they had a serious illness and could not access those days. The County fails to realize their actions could have far reaching ramifications.

The Union also contends the County failed to repudiate the past practice and bargain this issue. The County never kept track of the sick leave bank days until 2000 and even then never repudiated the practice or attempted to bargain the issue. The County failed to recognize that some of the management employees were participating members as outlined in the sick leave bank contractual language. Reliance on the recognition clause is misplaced. The County is simply upset the Union was not in agreement with a non-participating, non-represented employee gaining access to donated days.

The County

In summary, the County argues that it did not contribute the disputed days as the Union argues. The bargaining agreement clearly indicates that only bargaining unit employees may contribute to the bank, and only "regular bargaining unit employee(s)" may withdraw from the bank, irrespective of whether or not they have contributed to the bank. Management employees are therefore prohibited from withdrawing days. If the days were not lawfully contributed to the bank by the County under some lawful provision of the contract or other rule of law then their existence is a fiction and void. Their existence depends on operation of law and principles of contract. The Union's claim rests on a false premise. The evidence is clear that no such contractual right to these days was given to the Union, nor did the County ratify or

consent to this mistaken belief. Management employees do not possess the authority to abrogate the terms of the Union contract and could not contribute hours to the bank without action of the County and a modification of the bank's formation.

The County also argues the claim of the Union must find its foundation within the four corners of the contract and such foundation does not exist. The benefit the Union claims does not exist since it was neither bargained for nor granted in the contract. No withdrawal took place, but merely a correction of the record reflecting the benefit bargained for. The bargained for benefit was not disturbed. This is akin to the correction of a scrivener's error.

The County further argues that the parties never reached an agreement regarding this subject and inference and implication cannot substitute. Only if a provision is vague or can't be reconciled with other provisions can we look outside for the intent of the parties. The Union seeks a benefit without a quid pro quo – they seek a windfall. The Union may not modify the benefit by enlarging the group of “participating employees” who have access to and/or may contribute to the benefit. No reasonable interpretation of the contract provisions would allow Management to contribute or withdraw from the Union's sick leave bank.

DISCUSSION

At its core, the issue in this case concerns the County separating out the number of excess sick leave days accumulated by employees in management status from days accumulated by employees in bargaining-unit status. These excess days are sick leave days accumulated in excess of 120 per employee. Article 11, Section 7 of the collective bargaining agreement governs the disposition of excess sick leave days for bargaining unit employees through the establishment of a sick leave bank. The agreement established the bank. There are records kept for the bank. The records themselves are not the bank, but only records. The bank itself is what is established by the terms of the agreement.

Similarly, the case involves the contractually mandated placement of excess sick days into the bank. Both parties have referred, incorrectly, to employees donating or contributing excess sick leave days into the bank. Article 11, Section 7 states in pertinent part:

Employees who accumulate in excess of one hundred twenty (120) days of sick leave shall have such sick leave placed in a sick leave bank to be used as directed by the board of the bank.

The provision used the word “shall”. There is nothing discretionary for any employee as to donating or contributing excess days to the bank. Hours go to the bank only by virtue of this provision of the agreement.

The agreement is between the County and the Union as representative of the employees. The employees in the agreement are the bargaining unit employees, as opposed to non-bargaining unit or management employees. When Article 11 and Section 7 therein refer to employees, this is in reference to bargaining unit employees only. Thus, the mandatory placement of excess sick leave hours (hours provided for as a bargained for benefit under Article 11, Section 1) applies only to the excess sick leave days of bargaining unit employees. The sick leave days that go into the bank are from the accumulated excess sick days of bargaining unit employees. Conversely, there is no provision in the agreement whereby a management employee can donate or contribute days to the union sick leave bank. Samardich's intentions as to putting excess days into the Union sick leave bank do not control, nor would those of Traczayk or Kolson-Janov while in management status if those intentions had been make part of the record. The same is true for any person in management or non-bargaining unit status.

There is no mention or provision in the agreement requiring excess sick days of non-bargaining unit employees go into the sick leave bank. Up until 2005 there was no establishment by the County of a separate management sick leave bank. Thus, up to 2005 there was no other bank, entity or arrangement established by the County or through agreement between the County and the Union which would otherwise be the repository for excess sick leave days – be they from bargaining unit employees or management employees. There was only one bank and it contained only bargaining unit employee excess days. There is nothing that prevents the County from establishing in 2005 a separate bank for management and crediting that bank with management days retroactively to the time such employees have been in management status.

The provisions of Article 11 Section 7 A limits who can draw from the bank.

Any participating employee shall be allowed to draw from the bank if the employee is a regular bargaining unit employee of Iron County having at least twelve (12) months or more of service for the Employer.

Although there is no definition of a participating employee, it is reasonable for that phrase to mean those employees who have had excess days go into the bank. Subsection A by its very terms then limits withdraws to regular bargaining unit employees. This was the basis that both the Union and the County recognized as one of the reasons the 2005 inquiry of the pregnant employee with the dying husband was not allowed to draw. If an employee did not participate as a bargaining unit employee they may not access the Union sick leave bank. It would not be a reasonable interpretation of the agreement to have a sick leave bank where non-bargaining unit members' days went in but days could not be drawn by such an employee because of Section 7 A. Just as only bargaining-unit employee excess hours go into the bank, only participating bargaining unit employees can draw. To allow otherwise would be to render Section 7 A meaningless or superfluous. This cannot be done in interpreting and applying a collective bargaining agreement.

A question reasonably follows as to the status of Traczyk and Kolson-Janov, who had days go into the bank when they were in the bargaining unit but who are now management. This question is specifically not determinative in this case because this grievance concerns the number and nature of days in the bank, not who can access them. However, there is the provision in Article 11 Section 7 E whereby once an employee has become a member of the sick leave bank, the employee will remain a member. This clause can be reconciled with Section 7 A in that the former bargaining unit members were participants while in the bargaining unit and remain bank members for the excess days accumulated during that time. This would present a further issue as to how a management employee can claim a benefit of a collective bargaining agreement while not in the unit. Alternatively, they may simply have lost access to the bank with the respective days remaining in the bank for other participating bargaining unit members to draw from. Once one leaves a bargaining unit they can and do lose the benefits of the collective bargaining agreement, such as discipline only for just cause. There may be other potential resolutions to such an issue. But again, the issue of these two employees now accessing the Union sick leave bank is not the issue in this grievance and need not be decided here. The issue here is the treatment of excess days accumulated while employees were in management status.

Limitation of sick leave bank hours to only bargaining unit members is also reflected in Article 11, Section 7 D, which provides that bargaining unit employees who have not become participating members of the sick leave bank may apply and, if approved, draw a reduced percentage and capped number of days. There is nothing in the agreement which extends such a right or opportunity to non-bargaining unit or management employees.

The issue developed because excess hours of management or non-bargaining unit employees were kept on the same records of the bank as bargaining unit members. This apparently started with Samardich and possibly Abelson. As mentioned above, the sick leave bank is an entity created by contract and it is not an entity created by intention of any employee or placing a name on a list or record of the bank. The placement of a name and hours on the list or record does not override or supersede the provisions of the collective bargaining agreement. Prior to 2000 the placement of management status employee days on the list does not make them Union sick leave bank days. The continuation of that format by a Deputy County Clerk does not change that. The record shows that no one else for the County realized that management days were being recorded on the list. The Union argues that a past practice developed whereby management days went into the Union sick leave bank. The Union correctly notes that a past practice must be mutual, among other things. In this case, although after 2000 the record or list was kept by the Deputy Clerk, it is clear that no one else for the County actually realized that management days were being kept on the same list and record as bargaining unit members. Neither the County Administrator nor the County Board was aware of the status of the lists. Without such knowledge this cannot be mutuality. A binding past practice has not been established whereby management days were put into the Union sick leave bank.

Moreover, resort to past practice is generally used when contract language is ambiguous. Given the clear contract language in Article 11 and the recognition clause, there is no ambiguity as to what employee hours go into the bank. Nor is there ambiguity as to whether there is one bank for both bargaining unit members and management. The agreement language sets up one bank for the bargaining unit members to hold bargaining unit member excess hours.

There being no past practice, there need be no renunciation or repudiation.

The County separated bargaining unit days from management days in July 2005 by making a new list that reflected management days only, and thus leaving the bargaining unit sick leave bank with the number of hours called for in the collective bargaining agreement – excess days of bargaining unit employees. No days put into the Union bank that were accumulated by a bargaining unit employee were removed. Participating bargaining unit members still have access to all the days put into the bank from excess bargaining unit employees. The Union has not lost anything without bargaining. No days at all were actually removed, despite the verbiage in the e-mail from the Administrator to the Clerk. The lists were changed to accurately reflect bargaining unit employee days separately from management days. The County is correct in that this is like the correction of a scrivener's error. The County's unilateral action in separating out the names and days on the list did not remove days from the Union sick leave bank in violation of the collective bargaining agreement.

Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The County did not violate the collective bargaining agreement by withdrawing hours that were earned by management employees from the Union sick leave bank to establish a management and non-union employee sick leave bank. The grievance is denied and the matter is dismissed.

Dated at Madison, Wisconsin this 8th day of August, 2006.

Paul Gordon /s/

Paul Gordon, Arbitrator

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