

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**MANITOWOC COUNTY SHERIFF'S DEPARTMENT EMPLOYEES,  
LOCAL 986-B, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

and

**MANITOWOC COUNTY (SHERIFF'S DEPARTMENT)**

Case 424

No. 67459

MA-13906

(Denial of Funeral Leave)

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**Appearances:**

**Mr. Neil Rainford**, Staff Representative, Wisconsin Council 40, AFSCME, 8033 Excelsior Drive, Suite B, Madison, Wisconsin appearing at the hearing, and **Mr. Joseph Guzynski**, Staff Representative, 2602 College Street, Manitowoc, Wisconsin 54220, appearing on the brief, on behalf of the Manitowoc County Sheriff Department Employees.

**Mr. Steven J. Rollins**, Corporation Counsel, Manitowoc County, 111 South Eighth Street, Manitowoc, Wisconsin 54220 appearing on behalf of the County of Manitowoc.

**ARBITRATION AWARD**

Pursuant to the provisions of the collective bargaining agreement between the parties, Manitowoc County Sheriff Department Employees, Local 986-B, AFSCME (hereinafter referred to as the Union) and Manitowoc County (hereinafter referred to as the County) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator of a dispute regarding the County's denial of a request for funeral leave. The undersigned was so assigned. A hearing was held on January 17, 2008, at the Manitowoc County Administration Building in Manitowoc, Wisconsin, at which time the parties were afforded the full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted briefs which were exchanged through the undersigned on February 8, 2008, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

### **ISSUES**

The parties agreed that the Arbitrator should frame the issue in his Award. The issues may be fairly stated as:

1. Did the employer violate the Collective Bargaining Agreement when it denied the Grievant, Deb Cook, leave without pay to attend a friend's funeral?
2. If so, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

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#### **ARTICLE 16 - FUNERAL LEAVE**

When there is a death in the immediate family, up to three (3) working days with pay shall be allowed, depending upon travel and other extenuating circumstances. Immediate family being defined as spouse, children, brothers, sisters, and parents of the employee or spouse. In the event of the death of a brother-in-law or sister-in-law, up to two (2) work days with pay shall be allowed, depending upon travel and other extenuating circumstances. In the event of death of grandparents of the employee or spouse, grandchildren, aunts or uncles, one (1) day with pay shall be allowed. Employees may be off of work without pay to attend the funeral of friends, nieces and nephews, grandparents-in-law and spouse's sibling's spouse. Employees may substitute one day of sick leave to attend the funeral of a son-in-law and daughter-in-law.

Employees required to be absent beyond the three (3), two (2) or one (1) days, such days will be deducted from the employee's sick leave time.

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### **BACKGROUND**

The Employer provides general governmental services to the people of Manitowoc County, Wisconsin. Among these services is the operation of a jail. The Manitowoc County Sheriff's Department principally staffs the jail with employees in the classification of Corrections Officer. The Union is the exclusive bargaining representative for the County's Corrections Officers, including the Grievant, Deb Cook.

The collective bargaining agreement provides paid time off for funerals of close relations. It also provides that: "Employees may be off of work without pay to attend the funeral of friends, nieces and nephews, grandparents-in-law and spouse's sibling's spouse." In May of 2006, Cook requested time off without pay to attend the funeral of a friend. Her request was granted. In December, her cousin passed away and she again sought time off without pay to attend the funeral. The Department denied that request, on the grounds that it would create overtime. Cook was, however, permitted to trade work days with another Corrections Officer, which allowed her to take the time off without generating overtime. The instant grievance was filed on her behalf on January 9<sup>th</sup>, contending that the Department did not have the right to deny requests for unpaid funeral leave. The Department denied the request, asserting that the use of the word "may" in reference to unpaid leave, while "shall" was used in reference to paid leave, indicated that the Department had discretion in approving or denying requests for unpaid funeral leave. The matter was not resolved in the lower stages of the grievance procedure and was referred to arbitration.

Additional facts, as necessary, are set forth below.

### **THE POSITION OF THE UNION**

The Union submits that the County does not have the discretion to deny unpaid funeral leave. The contract's plain language states that "Employees may be off work without pay to attend the funeral..." This is a clear and simple grant of permission, and it is not reasonable to read it as some sort of contingent promise. There is nothing in this language that suggests that employees may off work unless the Department incurs a cost or finds it inconvenient. While the Union agrees with the County that the term "may" is permissive rather than mandatory, the discretion that that suggests rests with the employee, not the Department. That is, the employee *may* take the day without pay, or *may* seek to use accumulated leave time, or *may* seek to switch work days with another employee.

The Union points out that the County's attempt to strictly define "shall" as absolute and mandatory and "may" as permissive and discretionary leads to absurd results. If "shall" is read as mandatory in the sentence reading "When there is a death in the immediate family, up to three (3) working days with pay shall be allowed..." the employee would be required to take the time off whether they wished to or not. Moreover, the contract already contains a leave of absence provision, in Article 24, under which the Department has the discretion to grant to unpaid leaves to employees. If the arbitrator reads Article 16 as also providing discretionary unpaid leaves, it becomes mere surplusage. The parties are presumed to have intended that all provisions have independent meaning, and the arbitrator should not allow an interpretation which runs counter to that basic precept of interpretation.

The bargaining history of Article 16 supports the Union's view. The day of unpaid time was added in the 1992 negotiations. The parties elected to copy a provision directly from the Health Care Center contract, and the County provided a summary of their agreement which stated "The County is agreeable to the expansion of categories of people for whose funeral employees may take time off without any discipline, but declines to pay employees for absences involving funeral of these new categories." Nowhere is there any evidence that the County sought or asserted a right to deny unpaid funeral leave. The County admits that it is *expanding* the existing funeral leave benefit, and that benefit in every other instance includes the right to miss work for a funeral. The only difference is that for these categories of funerals, no pay is provided.

The arbitrator should disregard the strained interpretation urged by the County, and should give Article 16 its plain and intended meaning. He must conclude that the contract gives employees, and not the Department, the right to decide whether to take a day of unpaid leave for the funeral of a friend.

### **THE POSITION OF THE COUNTY**

The County takes the position that it has fully complied with the contract, and that the grievance must be denied. The Union's claim for a day of unpaid funeral leave as a matter of right ignores the specific language used in the contract. When referring to paid days of funeral leave, the negotiators used the phrase "up to [3, 2 or 1] working days with pay shall be allowed." When referring to unpaid funeral leave, the bargainers stated that "Employees may be off of work without pay to attend the funeral." The word "shall" is mandatory, while the word "may" is permissive. Giving these terms their ordinary meaning, it is clear that unpaid leave is a possibility, but not an absolute right. Moreover, there is no dispute that the phrase "shall be allowed" does confer an absolute right. It is a fundamental principle of contract interpretation that when parties use different words and different phrases, they mean different things. If the parties here had intended that the right to use the unpaid funeral leave be co-extensive with the right to use paid funeral leave, they could simply have used the same language. The fact that they used different language shows that they intended different treatment for requests for unpaid leave.

In an effort to persuade the arbitrator that "may" really means "shall", the Union appeals to bargaining history. However, the evidence shows little if anything of the discussions over this issue in the Sheriff's Department. Rather the parties merely borrowed a provision that had been negotiated in another contract. There is no evidence that the parties had direct discussions about whether unpaid leave would be a matter of right. There are only two things that are completely clear about those negotiations. First, the language the parties chose uses the permissive word "may" whereas the preceding three sentences all use the mandatory word "shall". Second, the Employer was agreeable to allowing time off for the funerals of friends, only if it did not incur any costs. Thus, a fair reading of bargaining history

supports the Department's position that it can deny time off that leads to overtime, since that is an additional cost. The County notes that this is consistent with its treatment of Holiday and Vacation requests, which are subject to minimum staffing requirements, and can be denied if they create overtime.

The burden rests with the Union to prove that the County has violated the contract. Here there is no proof to support the Union's position. The language used in the contract, given its plain meaning, gives the County the discretion to deny requests for funeral leave that lead to overtime costs. Likewise the bargaining history shows that the use of such time was acceptable only if there was not additional cost to the County. The Grievant's request for time off would have led to overtime costs for the Department, and granting the request would have run counter to the parties' intent when Article 16 was expanded. For these reasons, the arbitrator must conclude that the grievance lacks merit, and should deny it.

### **DISCUSSION**

Article 16 of the collective bargaining agreement provides access to time for employees' travel and attendance at funerals. Paid time is provided in increments of between 1 and 3 days, depending upon how close the employee's relationship was with the deceased. For more distant relations and friends, the contract provides unpaid time: "Employees may be off of work without pay to attend the funeral of friends, nieces and nephews, grandparents-in-law and spouse's sibling's spouse." The issue in this case is whether the Department has the discretion to deny a request for unpaid time, when granting the request would require the payment of overtime to cover the shift. For the following reasons, I conclude that the Department does have that discretion, and therefore did not violate the contract when it denied the Grievant's request for unpaid time in December of 2006.

The central argument of each party is that the plain language of the contract mandates an award in its favor. From the Union's point of view, the contract says that employees may have time off without pay for a friend's funeral, and this is a grant of permission. That is not an unreasonable reading of the language, but it is outweighed by the comparison of the words used to describe the right to unpaid time with those used to describe the right to paid time. Where paid time off is granted for closer relations, the contract states that the "days ... shall be allowed." This is absolutely clear language, and it provides no discretion to the Department. This phrasing is used three times in the sentences immediately preceding the sentence about unpaid time. The unpaid time provision is notable for both its permissive phrasing and its relative lack of clarity as to the amount of time the employee may be off. That imprecision as to the amount of time makes sense if the Department has the opportunity to assess the impact of the requested absence on its staffing levels and make a decision on approving or denying the request. Putting that to one side, it is clear that the parties knew how to express the thought that the granting of time off was mandatory, and chose to use starkly different language to describe the granting of unpaid funeral leave. The choice of different language strongly suggests that the parties intended a different meaning.

The Union's two primary arguments about the rules of construction are both unpersuasive. The Union asserts that reading "may" as permissive and "shall" as mandatory leads to the absurd result that an employee must take time off for funerals of close relatives, even if he or she does not wish to take that time. That argument ignores the actual use of the word "shall" in Article 16, which is that paid time "shall be allowed." To say that time "shall be allowed" is to say that the employee has the discretion to ask for that time and if it is requested, the request must be approved. There is nothing absurd about that reading – it is what both parties agree the provision says. The Union also argues that right to request unpaid leaves already exists in the contract, and that if the funeral leave is discretionary, it is surplusage. This argument ignores the testimony of Sharon Cornils that generic unpaid leaves under Article 24 are only granted if all paid leave time has been exhausted. Unpaid leave under Article 16 does not require exhaustion of paid leave time. That is a material difference, and thus the unpaid funeral leave is not simply duplicative of the unpaid leave provision elsewhere in the contract.

I find the evidence of bargaining history is, at best, mixed. I agree with the Union that the County's summary of the tentative agreement, stating that it is "agreeable to the expansion of categories of people for whose funeral employees may take time off without any discipline" lends itself to an interpretation that the new categories would be treated exactly the same as the old, save for the withholding of pay. That tends to support the Union's reading of the language. However, the summary also makes the point that the County was not willing to have the expansion of the benefit cost any money, and that tends to support the County's reading of the language. In the end, the only thing that is fairly certain from the bargaining history is that the parties agreed to copy language from another contract, apparently without any direct discussion of how that language would be applied in the event that approving a request for unpaid leave would lead to payment of overtime. Measured against the strong inferences drawn from comparing the use of permissive and somewhat vague language in the sentence on unpaid leave with the mandatory and absolutely clear language in the three sentences on paid leave, the conflicting and very indirect evidence of bargaining history cannot be given much weight.

The Union bears the burden of proving that the parties intended unpaid funeral leave to be a matter of right, in the same way that paid funeral leave is. The evidence is not sufficient for that purpose. I therefore conclude that the Department does have the right to deny a request for unpaid funeral leave where approving the request would compel the payment of overtime to replace the absent employee.

On the basis of the foregoing, and the record as a whole, I have made the following

### **AWARD**

The County did not violate the Collective Bargaining Agreement when it denied the Grievant, Deb Cook, leave without pay to attend a friend's funeral. The grievance is denied.

Dated at Racine, Wisconsin, this 14<sup>th</sup> day of February, 2008.

Daniel Nielsen /s/

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Daniel Nielsen, Arbitrator