

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**PORTAGE COUNTY DEPUTY SHERIFF'S ASSOCIATION
WISCONSIN PROFESSIONAL POLICE ASSOCIATION
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

and

COUNTY OF PORTAGE

Case 208
No. 68680
MA-14311

Appearances:

Andrew D. Schauer, Staff Attorney, The Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin 53713, appearing on behalf of Portage County Deputy Sheriff's Association, Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, which is referred to below as the Association.

J. Blair Ward, Portage County Deputy Corporation Counsel, 1516 Church Street, Stevens Point, Wisconsin 54481, appearing on behalf of the County of Portage, which is referred to below as the County, or as the Employer.

ARBITRATION AWARD

The County and the Association are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve Grievance No. 08-283, filed on behalf of Wayne Kropidlowksi, who is referred to below as the Grievant. Hearing on the matter was conducted on May 12, 2009, in Stevens Point, Wisconsin. Karla Sommer filed a transcript of the hearing with the Commission on May 29, 2009, and the parties filed briefs and reply briefs by The hearing was not transcribed, and the parties filed briefs by July 31, 2009.

ISSUES

The parties stipulated the following issues for decision:

Did Portage County violate Section X-B of the 2006-07 labor agreement when it denied the grievance request for funeral leave for September 15th, 16th, and 17th, 2008?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

SECTION X - FUNERAL LEAVE

- A. General: Funeral leave shall be administered by the department head.
- B. Immediate Family: When there is a death in the immediate family of an employee, leave of up to three (3) days of pay shall be granted to allow the employee to make necessary arrangements and attend the funeral. Immediate family shall mean spouse, mother, father, mother-in-law, father-in-law, children, brother, sister, step parents or member of employee's household.
- C. Other: Funeral leave of up to one (1) day without loss of pay shall be granted to attend the funeral of a relative not a member of the immediate family. Included would be a grandparent, aunt, uncle, nephew, niece, brother-in-law or sister-in-law of the employee.
- D. Employees: An employee may receive up to one-half (1/2) day off with pay to attend the funeral of a fellow employee, subject to the discretion of the department head.
- E. Emergency Circumstances: In the event of an emergency, the aforesaid leaves may be denied by the Sheriff.

BACKGROUND

The grievance form requests that the County, "reimburse (the Grievant) 30 hours of compensatory time that he used to take for the three days for his funeral leave." The form alleges that Section X, "continues to be applied inappropriately and funeral leave is denied in violation of this section".

The Grievant is a Deputy Sheriff who has worked for the County for roughly twelve years. On September 9, 2008 (references to dates are to 2008, unless otherwise noted), the Grievant's father-in-law died after a several month long battle with cancer. The family held a wake on Friday, September 12, and a funeral service on the following morning. At the time of the death, the Grievant worked a rotating shift, consisting of a day shift from 6:00 a.m. through 4:00 p.m.; a second shift from 4:00 p.m. through 3:00 a.m. and a third shift from 8:00 p.m. through 6:00 a.m. His work hours rotated these three shifts on a one-week on, one-week off basis. The week of the death, wake and funeral service was his scheduled off week.

The Grievant lives next door to his wife's parents' residence. He reported to the Sheriff's Department probably on September 12, and advised Lieutenant Jim Grubba of the death and requested funeral leave for the day shifts that he was scheduled to work on September 15, 16 and 17. Grubba approved the request.

John Keener was, at the time of this request, the Captain of Operations and Communications. On September 16, during his routine review of work logs, he noted that the Grievant had taken funeral leave. Keener knew of the Grievant's father-in-law's death and knew that the services had taken place the week prior, during the Grievant's scheduled week off. Keener viewed the granting of funeral leave for a period of time after the completion of funeral services to be a policy violation. Sometime on September 16, Sergeant Beaudoin phoned the Grievant to inform him that Keener had denied his use of funeral leave, and that the Grievant would have to use another type of leave to cover those dates. The Grievant requested and was granted comp time off for September 15, 16 and 17.

On September 18, Keener issued an e-mail to departmental command staff, to "find out which Lieutenant or Sergeant approved (the Grievant) taking funeral leave on Monday, September 15th." The e-mail sought "who granted the leave, when it was granted, and by what means (telephone, in person, etc.)." Grubba responded, and summarized his action in a memo to Keener dated September 18, which states:

. . . I was the one who granted Wayne's time off. I believe he gave me note on Friday Sept.12, 2008 of his intentions to take the time. I interpret the language in the contract to *make arrangements* is not limited to the time immediately preceding the funeral and therefore meet the criteria of the PCSDA contract. I am also aware that in the past, time has been granted days after the formal funeral.

The Grievant informed Kevin Sorenson, the Association's President, on September 21 that he wished to grieve the matter. The Association responded by filing Grievance 08-283, which is dated September 23.

Keener issued a memo to the Grievant, dated September 29, which states,

. . . please inform me what necessary arrangements you needed to make with your immediate family on 9/15, 9/16, and 9/17/08 in regards to the death of your father-in-law. I am requesting this information to ensure that we are administering the benefit correctly. Please respond in writing to me by 8:00 a.m. on September 30, 2008. If you are unable to meet this deadline, please respond in writing as to why you cannot meet the deadline and when you will be able to respond.

The Grievant responded in a memo dated September 29, which states:

. . . During these three days I assisted my mother-in-law and family with inventorying property, relocating my father-in-laws hunting dog, making repairs to her home, going through sympathy cards so that thank you's could be made, purchased needed items, and general support of my grieving family, including my five (now six) and seven year old sons who don't fully understand what happened to their grandfather. There were also discussions/arrangements made for the future of my in-law's business and farm, as well as discussions/arrangements for a head stone to be purchased.

Keener denied the grievance in a memo dated October 1, which states:

. . . I deny your grievance for reasons based on past practice in which three days of funeral leave have been granted to make arrangements for the funeral and to attend the funeral when the funeral took place when the employee was scheduled to work.

Sheriff John Charewicz denied the grievance at Step 2, in a memo dated October 14, which states:

. . . The language detailing how Funeral Leave shall be taken has not changed in over 30 years.. "Make necessary arrangements and attend the funeral" has always been interpreted as arrangements prior to the funeral and the event itself, not things that may need to be accomplished days later.

Funeral leave has only been granted if the funeral takes place on days the deputy is working. While there may be a new interpretation of what the language in the contract means by the union, I do not feel comfortable in arbitrarily changing a practice that has been in place for over thirty years without direction and guidelines as to when it is appropriate to grant funeral leave. The union's current interpretation would leave the door open to grant the three days any time during the year. This was addressed in bargaining this year with nothing in the language being changed. . . .

The parties were unable to resolve the grievance through the steps preceding arbitration.

Past Practice Evidence

The bulk of past practice evidence is best left to the overview of witness testimony set forth below. However, there is no dispute that the language of Section X-B, set forth in the **RELEVANT CONTRACT PROVISIONS** section, is from the parties' 2006-07 labor agreement, and has not been changed since at least 1978. Keener authored a Memorandum, dated December 13, 2006, headed "Funeral Leave", which states:

When you receive a request for funeral leave from an officer within the patrol division, please make certain that you ask the requestor what day the funeral is going to be held. The current 2006-2007 contract language surrounding Section X - Funeral Leave found on page 11 of the contract clearly states that the employee is allowed leave, depending on the relationship of the employee/deceased person, to "attend the funeral". In the event of the death of an "Immediate Family" member, provisions allow for the employee to "make necessary arrangements and attend the funeral". This leave is approved if the employee is scheduled to work during the time of the funeral; not if the employee is scheduled off at the time of the funeral. If the funeral of a family member or relative falls on the officers scheduled time off, they are not allowed to carry the funeral leave over to a time when they are scheduled to work. Please familiarize yourselves with this section of the contract.

The memo was issued to "Patrol Division Lieutenants and Sergeants". There is no dispute the County did not distribute this memo to Association leadership.

Bargaining History Evidence

As with the evidence of Past Practice, the Bargaining History includes significant areas of dispute, which are best left to the overview of witness testimony. However, much of the bargaining history reflects the exchange of undisputed proposals over an undisputed sequence of events, and that chronology will be set forth here.

The bargaining history surrounds the negotiation for a successor to the 2006-07 labor agreement. For the face-to-face bargaining, the Laura Belanger Tess, the Human Resource Director, served as the County's spokesperson and Gary Anderson, a WPPA Business Agent, served as the Association's. The County's initial proposal, dated October 24, 2007, proposed the following regarding Section X:

- 4) Section X - Funeral Leave - change title of article to Bereavement Leave.

The Association's initial formal proposal was not dated, but reads thus:

*(current language proposed to delete; **proposed new language**)*

...

3. Section X - ~~Funeral Leave~~ **Bereavement Leave**
 - A. General: ~~Funeral~~ **Bereavement** leave shall be administered by the department head.
 - B. Immediate Family: When there is a death in the immediate family of an employee, leave of ~~up to~~ three (3) days without loss of pay

shall be granted to allow the employee to make necessary arrangements, ~~and~~ attend the funeral **and attend to the needs of the family**. Immediate family shall mean spouse, mother, father, mother-in-law, father-in-law, children, brother, sister, step parent or member of employee's household.

- C. Other: *Funeral Bereavement* leave up to one (1) day without loss of pay shall be granted to attend the funeral, **wake, memorial service or other gathering** of a relative not a member of the immediate family.
- ~~D. *Emergency Circumstances: In the event of an emergency, the aforesaid leaves maybe denied by the Sheriff.*~~

The County's next formal response is dated January 10, and restates the County's initial proposal. Anderson responded in a proposal dated January 24, which did not change the Association's initial offer.

With a proposal dated March 12, Belanger Tess made a counter proposal on Section X, which reads thus:

~~Overstricken and bold~~ language is proposed to be deleted.

Bold language is proposed to be added.

. . .

3. Section X - ~~*Funeral Leave*~~ **Bereavement Leave (as agreed to in January 10th document).**
- A. General: *Funeral Bereavement* leave shall be administered by the department head.
- B. Immediate Family: When there is a death in the immediate family of an employee, **such employee will be paid for time lost from scheduled work leave** of up to three (3) days, **between the date of death and the date of funeral, without loss of pay shall be granted** to allow the employee to make necessary arrangements, ~~and~~ attend the funeral, **and attend to the needs of the family**. Immediate family shall mean spouse, mother, father, mother-in-law, father-in-law, children, brother, sister, step parent or member of employee's household.
- C. Other: *Funeral Bereavement* leave up to one (1) day without loss of pay shall be granted to attend the funeral, **wake, or memorial service** of a relative not a member of the immediate family. Included would be a grandparent, aunt, uncle, nephew, niece, brother-in-law or sister-in-law of the employee.

- D. Employees: An employee may receive up to one-half (1/2) day off with pay to attend the funeral of a fellow employee, subject to the discretion of the department head.
- E. Emergency Circumstances: In the event of an emergency, the aforesaid leaves may be denied by the Sheriff.

Anderson responded with an offer dated April 8, with a cover paragraph noting, "If the offer is unacceptable, it appears we're at impasse." The proposal regarding Section X is the same as the Association's initial proposal with the exception of one sentence added to the end of Section B, which states, "**The three days will be contiguous with the Funeral.**" Belanger Tess responded in an e-mail dated April 15, which notes, "the County's counter will remain the same as the March 12, 2008 County's response." Anderson made another proposal to the County dated May 7, but the Section X-B proposal did not change. Belanger Tess and Anderson spoke by phone regarding the May 7 proposal.

Belanger Tess reported the May 7 proposal and her discussion with Anderson in an e-mail to the members of the County's bargaining team dated May 28. In a cover memo to the e-mail, she noted her understanding of her discussion with Anderson on funeral leave thus:

It seems to boil down to two things from what I could gather. They want to have 3 days for funeral leave for immediate family, not up to 3 days. They indicated the Sheriff has denied individuals 3 days. I asked who and he said Kevin Sorenson. I asked if it was denied because he was asking for funeral time in the week he wasn't scheduled to work and Gary said he didn't know those details.

After review by the bargaining team, the County made a proposal on Section X to the Association. The proposal is dated June 3, and states the following regarding Section B:

~~Overstricken and bold~~ language is proposed to be deleted.

Bold language is proposed to be added.

HIGHLIGHTED language is language added or changed since last draft of proposals. . . .

B. Immediate Family: When there is a death in the immediate family of an employee, **such employee will be paid for time lost from scheduled work leave TO ATTEND THE FUNERAL AND EITHER (A) TWO (2) DAYS BEFORE THE FUNERAL; OR (B) ONE (1) DAY BEFORE THE FUNERAL AND ONE (1) DAY AFTER THE FUNERAL OF UP TO THREE (3) DAYS, without loss of pay shall be granted** to allow the employee to make necessary arrangements, ~~and attend the funeral,~~ **and attend to the needs of the family.** Immediate family shall mean spouse, mother, father, mother-in-law, father-in-law, children, brother, sister, step parent or member of employee's household.

The Association did not accept the County's proposal and the parties proceeded to mediation.

Because the negotiations appeared to pose a significant chance of moving to interest arbitration, the Association brought Richard Terry, a WPPA consultant, into the bargaining. He and Belanger discussed the remaining issues a number of times through phone conversations and e-mail. They discussed a number of options regarding funeral leave, including the following submitted by Terry in an e-mail dated July 23:

While this is not exactly a proposal (more of a supposal), as promised here is a review of the matters discussed relative to possible terms for a one year agreement:

1. Bereavement Leave paragraph C – adding *wake or memorial service*.
2. Side letter relative to use of Bereavement leave – something like this.

...

Notwithstanding the provisions of Article X Bereavement Leave, the use of bereavement leave may not be used outside a two week (14 day) window beginning the first day following the death of a member of the immediate family (para. B) and not a member of the immediate family (para. C). Such leave is for regularly scheduled work days. In the event that the days are utilized when the employee is scheduled off, no additional day or compensation shall be allowed.

Belanger Tess discussed the proposal with the County bargaining team, which did not accept the suggestion regarding Funeral Leave. The County made a counter proposal in an e-mail dated July 23. The proposal dropped all changes to Section X, other than the proposed change from "Funeral" to "Bereavement" Leave.

Terry made a counter offer to the County through an e-mail dated July 29. In it, the Association dropped all the proposed changes to Section X, other than to change from "Funeral" to "Bereavement" Leave, and to add "wake or memorial service" to Section X-C. This ultimately paved the way to a tentative agreement on a labor agreement covering 2008. The parties executed a 2008 labor agreement, which contained no change in the language of Section X-B other than to the substitution of "Bereavement" for "Funeral".

The balance of the **BACKGROUND** is best set forth as an overview of witness testimony.

The Grievant

The Grievant noted that his father-in-law's death, though it resulted from an extended illness, came as a shock to the family. The funeral arrangements were a part of an extended

process by which the family adjusted to the death. His father-in-law was a carpenter and a Ginseng farmer. Each aspect of the business, including equipment inventory and maintenance had to be attended to in order to permit its distribution or sale. His father-in-law was an avid hunter and owned a number of guns. The Grievant had to inventory and value the weapons. His father-in-law had a trained hunting dog and wanted the dog to go to someone who could appreciate its training. His mother-in-law wanted him to oversee the process by which the dog, its papers and all of the property associated with it was transferred to another family. The Grievant did so, including overseeing how the dog interacted with its new owners. He also assisted his mother-in-law in maintaining her house, including keeping it supplied so that she could open it to visitors. His assistance made it possible for her to attend to the inevitable business of death arrangements, including the obtaining of death certificates; making and paying for funeral arrangements; and other similar duties. He did not use his time off for any purpose that did not relate directly to assisting in his family's adjustment to the death.

During the week of the funeral services, he assisted as he could in the arrangements. He did not participate in direct meetings involving the funeral home. The week following demanded considerable attention to the activities noted above and set forth in his memo to Keener. That memo was the first time the Grievant was aware that the County had inquired into what activities a Deputy undertook while on funeral leave. The activities continued well beyond the three days he took comp time for. His brother-in-law, who married his wife's sister, also works for the Sheriff's Department, as a Property Sergeant. He asked for and received three days of funeral leave for his father-in-law's death. The two of them assisted each other in the same types of duties noted above. His brother-in-law took the three days in the week of the funeral.

The Grievant asked for three days of funeral leave because he believed Section X-B supported the request. He was a member of the bargaining team that negotiated the 2006-07 labor agreement and continued on the bargaining team for the negotiations for a 2008 labor agreement. In his view, the County's proposed change of the title to Section X afforded the opportunity for the Association to "clarify the language that was currently being used, 'make necessary arrangements.'" (Transcript [Tr.] at 53). At one of the face-to-face bargaining sessions, Belanger Tess questioned why the Association was proposing a time limit on the use of funeral leave, since "those days right now, as it's worded, can be used at anytime." (Tr. at 53). He believed the entire bargaining committee, which consisted of "Travis Morgan, Lieutenant Kontos, Sergeant Lukas, Deputy Sorenson" (Tr. at 55) shared this view of the dialogue.

Michael Lukas

Lukas is a Sergeant, and has served as a Deputy Sheriff for roughly fifteen years. He is the Chair of the Association's bargaining team. He has served in that role for twelve years. He shared the Grievant's understanding of Belanger Tess' comments regarding funeral leave during the bargaining for a 2008 agreement. He did not believe Sorenson attended the session at which the remark occurred, but Anderson did. The change in title for Section X was a

County proposal, which he understood to be rooted in the County's desire to have all of its labor agreements share a common reference for the leave. In his view, Association counter proposals sought to "clean the language up that was already in the contract." (Tr. at 63) County proposals to put a time limit on the funeral leave benefit were the first attempt to impose a time limit on the operation of Section X-B. He was not aware of any Association member who received funeral leave for a period of time following the funeral.

Lukas did not believe the 2008 bargaining altered the operation of Section X-B, putting the point thus:

Deaths in the family don't occur every day, and you deal with this in regards to each individual and making their arrangements. Everything is different for individuals. (Tr. at 69)

Some Association proposals included time limits "so there wouldn't be an abuse." (Tr. at 70).

Kevin Sorenson

Sorenson has served as a Deputy for nine years, and has served as Association President since May of 2006. He was a member of the Association bargaining team that negotiated the 2006-07 and the 2008 labor agreements. He was not present for the bargaining session that addressed the parties' initial exchange of proposals.

Travis Morgan

Morgan has served as a Deputy for six years; serves as the Association's Treasurer; and is a member of the bargaining team. In October of 2005, his father-in-law died in Edgerton, Wisconsin, which is roughly two and one-half hours from his home. The death occurred while he was scheduled to work, but the funeral and visitation took place during his off week, possibly on October 5 and 6. A separate burial service took place a week or two after the funeral and visitation. He recalled that Keener approved his request for two days off to attend the funeral and visitation. During those two days, he attended the funeral and helped his mother-in-law inventory property and prepare it for sale or distribution. He asked for and received funeral leave to attend the burial ceremony, which took place during a scheduled week on.

Richard Terry

Terry has served the WPPA as a Consultant for roughly two and one-half years and has spent thirty-six years in positions directly involved in collective bargaining. He came into the bargaining for a 2008 agreement sometime in June or July. He was called into the process when it was unclear whether the bargaining was pointing toward settlement or litigation. His discussion with the Association bargaining team led him to conclude that it wanted the language of Section X-B clarified. These discussions, including his own discussions with

Belanger Tess, indicated to him that the County wanted a time limit placed on the use of funeral leave due to the absence of any such limit in the language of the expired agreement. These considerations prompted his submission of the July 23 “supposal” set forth above.

In his view, the unmodified language of Section X-B established a broad entitlement to take leave for any “necessary arrangements”. The use of “shall be granted” in his view made the leave a three-day entitlement subject only to employee request and reasonable limits regarding its usage for activities traceable to the funeral or death. The breadth of the language underscored the basis for Belanger Tess’ desire to limit it. He was not involved in any face-to-face bargaining, and spoke with Belanger Tess’ via phone and e-mail.

John Charewicz

Charewicz has served as Sheriff since January of 2003, and served as a Deputy from 1975 through 2001. While a Deputy, he served as the Association’s President for six years and as a member of the bargaining committee for roughly twenty-one years. The language of Section X-B was in place prior to his first service with the bargaining committee in 1979.

While Sheriff, he refused a request of Sorenson to use funeral leave to attend to family business following the death of his father. His father died and was buried on Sorenson’s week off, and the request sought three days off in the week following the funeral. For that reason, Charewicz denied it. He could not recall a grievance challenging the denial.

Keener contacted Charewicz during the first day of the Grievant’s funeral leave, to discuss whether the approval had been proper. Keener believed the request should not have been approved, and after discussing the matter, Charewicz directed Keener to,

find out exactly what type of arrangements (the Grievant) was going to take care of. I know that’s a little bit out of the ordinary. I know that’s never been done before, but we were trying to see if there was a reason that it was absolutely positive for a funeral leave to be taken after the fact. (Tr. at 118)

Keener reported that Grubba approved the request initially. Charewicz did not think the approval had been proper, since “. . . Grubba did not have the authority to grant him funeral leave when our policy had always been that if it was for days prior to the funeral and the date of the funeral itself (Tr. at 119).” Charewicz viewed the policy as established practice, with exceptions made only for the observance of some type of post-funeral ceremony, such as Morgan’s.

Charewicz viewed the County’s desire to change the title of Section X to make no substantive change in its administration. He could not recall any instance of Belanger Tess indicating to the Association that funeral leave could be taken at any time before or after a funeral. Keener’s 2006 Memo accurately conveyed the practice on which Charewicz rested the denial of the Grievant’s request for funeral leave. That memo was issued to command staff,

some of whom are Association members, but no copy of the memo was issued to Association leadership. Lieutenant Kontos, who would have been a sergeant when Keener issued 2006 Memo, was a member of the Association's bargaining team at that time.

Loretta Tuszka

Tuszka is an Administrative Assistant in the Sheriff's Department, and has worked for the County since May of 1971. She is responsible for maintaining Sheriff's Department payroll records. Those records state that in October of 2005, Morgan was scheduled off from October 3 through October 9. He took a single day off on Monday, October 10, noted as "Funeral Day Taken" because "Father in Law Passed Away." He was scheduled for the week of October 10 to work the shift from 4:00 p.m. through 3:00 a.m. He worked the shift starting at 4:00 p.m. on Tuesday, October 11.

Tuszka understood funeral leave to be available to Association members in increments of one, two or three days, depending on the relationship of the deceased to the employee. In her view, County administration of the benefit has been uniform, as demonstrated by the frequency of employee use of increments of less than three days for funeral leave. For example, May 11, 1998, Deputy James Lamar took one day of funeral leave for the death of his father-in-law; on August 18, Deputy Dale Boettcher took one day of funeral leave for the death of his mother-in-law; on May 5 and 6, 2005, Deputy Dale O'Kray took two days of funeral leave for the death of his mother; and on October 12, 2006 Boettcher took one day of funeral leave for the death of his father-in-law. Payroll records do not reveal the date of the funeral observance prompting these leaves.

John Keener

Keener retired from the Sheriff's Department on December 26. The County hired him in March of 1977. When he found that Grubba had approved the leave, he discussed the matter with him, summarizing the discussion thus:

. . . I also . . . personally asked him why he did that, and he indicated that basically in his opinion the contract was vague. It was his interpretation that you could take funeral leave after the fact, and so he pretty much indicated that he was part of the process in determining that it should be granted and hopefully grieved. Tr. at 153.

After discussing the matter with Charewicz, Keener took action to determine what the Grievant was going to do that warranted funeral leave. He did not find the response sufficient.

Keener authored the 2006 Memo because, "it . . . seemed to me that the shift commanders were having trouble determining when they could issue, or grant funeral leave." (Tr. at 159) In Keener's view, the 2006 Memo reflected consistent County administration of the benefit since his date of hire. He could recall two requests granted for leave after a

funeral. One was Morgan's, and Keener understood the later service to be held to permit family to attend who could not make it to the funeral. The other involved an officer whose father-in-law died in winter when frost prevented interment. Keener approved one day of funeral leave to attend the Spring burial service. He acknowledged that, "there may be others I don't recall off the top of my head, but only for circumstances like that."

Jim Zdroik

Zdroik is an elected member of the County Board of Supervisors. He has served in that capacity for over ten years, and has served on the County's bargaining team for four contracts with the Sheriff's Department, including that governing 2008. He understood the County's proposal to change the title of Section X to "Bereavement Leave" was to reflect a more "politically correct" means of connoting the wide variety of services that commemorate a death. He did not believe the 2008 negotiations changed Section X in any substantive way.

Laura Belanger Tess

Belanger Tess has served as Human Resource Director for roughly seven years and as the Assistant Director since 1998. She was present for all of the bargaining sessions that produced the 2008 labor agreement. The County's initial proposal to change the title of Section X reflected its desire to bring uniformity to County contracts and to express the purpose of the leave in a more "politically correct" manner. Her bargaining notes show that during a face-to-face session on November 14, 2007, she voiced to the Association that if it maintained its initial proposal regarding Section X, the County "would want to place time limits on when (an employee) can use days like other collective bargaining agreements" (Tr. at 170). This reflected, in part, discussion on other County labor agreements, which did not contain an "up to" reference, but specified a specific number of days of leave appropriate to a specific relationship of the employee to a deceased. Her response reflected that if the Association wanted to remove discretion from Section X-B or to expand "necessary arrangements" to include "attend to the needs of the family", then the County would have to agree to the limitations of the other labor agreements that avoided abuse of the benefit.

By January of 2008, the bargaining was narrowing in scope and the bargaining teams sensed a tentative agreement might be possible. The County had not been willing, to that point, to move toward the Association's view of Section X. With its March 12 counter-offer, however, the County changed its proposal to insert an express limitation on the time period for which funeral leave could be authorized. In her view, this reflected that the Association's proposal sought to expand the benefit by deleting the Sheriff's discretion. Her discussions with Anderson convinced her that the parties did not share a common understanding regarding the basis for Charewicz' denial of Sorenson's leave request. Her discussions with Anderson and with her own team led to the County's May 28 proposal, which altered Section X-B to reflect the language of a County agreement with a different bargaining unit. Terry entered the process after the submission of this proposal. The County continued to note to him that it viewed the Association's proposal on Section X-B to expand the provision, and that it needed limiting

language to narrow its scope. She perceived her discussions with Terry to indicate that he did not realize that the Association was not countering County proposals to change Section X-B, but original Association proposals to expand it.

Ultimately, the parties resolved their dispute by the Association agreeing to drop any proposed change to Section X-B; by the Association agreeing to change “funeral” to “bereavement” leave; and by the County agreeing to proposed changes to Section X-C. At no point in the bargaining did she indicate to the Association that she thought that Section X-B had no time limit on the use of funeral leave. She thought the Association may have misinterpreted her statements on why the County needed to express time limits in Section X-B if the Association’s proposals to change it were accepted.

She detailed her understanding of the scope of the entitlement embodied in Section X-B of the 2006-07 labor agreement thus:

My understanding is that . . . in the ’06-’07 labor agreement, to allow the employee to make necessary arrangements and attend the funeral, and that the way that the Sheriff’s Department has administered that is to be prior to the funeral, and then in some – or in other circumstances, to attend the funeral if there was a funeral or actual service later as was indicated like Travis Morgan had attended. (Tr. at 193)

In her view, the County’s proposals to change Section X-B during the bargaining for a 2008 labor agreement did not alter the benefit provided under 2006-07 labor agreement.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES’ POSITIONS

The Association’s Brief

A review of the record establishes that the grievance “centers on the proper reading of one provision of the Contract, Section X-B”. The language of that provision is “uncontested and clear”. Because the governing language is “clear and unambiguous, the Arbitrator must follow the language.” More specifically, the disputed provision grants time off, “with one condition precedent, and one condition governing the purpose of the benefited time off”. The condition precedent is not in dispute, since Section X-B defines “immediate family of an employee” to include “father-in-law.” The grant of the time off is mandatory, given the reference to “shall be granted.” Thus, whatever dispute there is on Section X-B must turn “on the timing of the days off” since the “County admits that (the Grievant) was engaging in necessary arrangements.”

The clear language “does not support such a result.” The parties would have to have agreed to other language to grant the result the County seeks. Even if Section X-B is ambiguous, “the Arbitrator must look to see whether a past practice has clarified the language.” While it is

undisputed that the language of Section X-B has been in effect over a considerable period of time, there is no persuasive evidence that the parties shared an understanding that County policy regarding funeral leave was binding.

The evidence falls short of establishing that asserted practice is “unequivocal.” Keener’s testimony acknowledges “at least two” instances of “funeral leave being granted after the funeral.” He also acknowledged that other circumstances might support a similar result. Nor will the evidence establish that the alleged practice was “clearly enunciated.” The 2006 Memorandum was issued to command staff, and “was never sent to the Association.” County denial of Sorenson’s request cannot overcome this. Sorenson chose not to grieve the denial, and a “singular failure to file a grievance cannot constitute the Association’s acquiescence with the County’s position.” Nor will the evidence establish the alleged practice is “readily ascertainable.” The issuance of the 2006 Memorandum establishes that “the County’s own shift commanders . . . (had) trouble enforcing (the policy).” That the Grievant initially received approval to take the leave confirms this.

Evidence of bargaining history establishes that the County has not secured through negotiations what it seeks in grievance arbitration. The bargaining history involves the negotiation for a successor to the 2006-07 labor agreement, and is thus “of limited usefulness.” However, the bargaining does show “the County’s view of what the immediate Contract language meant” and is relevant since, “One bargains with a sense of what the status quo is when it suggests changes which either clarify or further their position.” More specifically, the Association sought to clarify the “necessary arrangements” reference to link it to “the needs of the family.” The County countered with a proposal to insert, “for the first time, a time restriction on the use of funeral/bereavement leave.” The County’s proposal, on its face, establishes that it did not view Section X-B to “provide for a timeframe for use of Funeral Leave.” Belanger-Tess’ comments to Association representatives confirm this.

Against this background, accepting the County’s view would “result in it gaining an advantage it failed to gain during bargaining.” The Sheriff’s response to the grievance establishes that the timeframe for the leave was the sole reason for its denial. Affirming this view “should be avoided at all costs.”

The Association concludes that the grievance should be sustained, and that the Grievant should be made whole, through an order requiring the County “to give back to the Grievant the three days of compensatory time . . . and (clarifying) the rule going forward.”

The County’s Brief

Examination of the record establishes that Section X-B cannot be read as the Union asserts. The County, “does not dispute that (the Grievant) did everything that he claimed to have done in assisting his in-laws in preparation for the funeral nor does the county dispute that he actually attended the wake and the funeral.” However, the events critical to the operation of Section X-B took place during the Grievant’s off week, and thus, “his request for an additional three days leave was beyond the scope of the Collective Bargaining Agreement.”

The Grievant's testimony asserts that the labor agreement does not limit when funeral leave can be taken so long as the employee is "making necessary arrangements following the death of a family member." He asserted this is consistent with statements made by Belanger Tess during bargaining for a 2008 labor agreement. The assertion is, however, directly disputed by Belanger Tess and, more significantly, is inconsistent with Lukas' testimony. Lukas was unaware of any Association member being given time off "after the funeral", but nevertheless believed that the labor agreement did not restrict funeral leave to the funeral. That testimony, however, cannot be reconciled to the Association's attempt in the 2008 bargaining to "add language which in part required that three days of funeral leave be continuous with the funeral."

Morgan's testimony fails to establish the entitlement the grievance seeks. Keener's testimony establishes that Morgan was granted funeral leave to attend "a burial service with his family members out of town." Unlike the Grievant, Morgan sought leave to attend a funeral service. Tuszka's testimony definitively establishes that Morgan received a single day to attend this service and thus that the denial of the Grievant's request is consistent with the granting of Morgan's, since the two requests "were clearly different."

Examination of the evidence of bargaining history establishes no reason to believe Belanger Tess ever indicated to the Association that Section X-B granted an unrestricted right to take funeral leave at any time. At most, the evidence establishes that Belanger Tess sought to underscore to the Association that the proposed inclusion of "the needs of the family" would demand some limiting language from the County to underscore that funeral leave could not be taken at any time.

A review of the County's evidence establishes that its denial of funeral leave is consistent with long practice. Charewicz' County experience includes his tenure as Sheriff as well as a Deputy. While a Deputy, he served as Association President and as a member of the Association's bargaining team. His experience over thirty years establishes a consistent understanding that "funeral leave was to be granted prior to the funeral and for the funeral itself." As Sheriff, Charewicz denied Sorenson's request, which is essentially identical to the Grievant's. His extensive involvement in bargaining confirms that Belanger-Tess never indicated to the Association "that there was no limitation on the use of funeral leave."

Tuszka's testimony underscores that the County does not as, "a common occurrence", approve three days of funeral leave. Her testimony establishes that "union members are not automatically entitled to three days of funeral leave when a family member dies."

Keener's testimony establishes that the practice, clarified through the issuance of the 2006 Memorandum, has been consistent. His review of the Grievant's request prompted him to question both Grubba and the Grievant concerning the circumstances, and the denial resulting from that review is consistent with long practice. Belanger Tess' testimony confirms that the County never informed the Association that funeral leave under Section X-B could extend to periods of time beyond a funeral service.

Viewing the record as a whole, the County concludes that the grievance should be denied.

The Association's Reply Brief

The Association contends that, "Left glaringly missing from the County's brief was any discussion of the standard of proof necessary to establish an actionable past practice." The absence of any case law points to the weakness of the evidence of an asserted practice. More specifically, Belanger Tess acknowledged in testimony that "some . . . other circumstances" could permit funeral leave to be take after the funeral. This establishes the asserted practice is "not unequivocal." Other County testimony confirms this.

Similarly, County testimony establishes that there is no written County policy documenting the alleged practice. Keener's internal memo fails to establish a "readily ascertainable" course of conduct. No documentation highlights the circumstances that permit funeral leave to follow a funeral, and there is no definable basis to distinguish why Keener granted Morgan's leaves but not the Grievant's.

County attempts to undermine the understanding of Association witnesses regarding Belanger Tess' comments during the 2008 bargaining "is a weak attempt to rewrite history." Association witnesses did not misunderstand her, and her testimony undercuts the County's view of Section X-B. This is a significant point. If the Association understood that the County believed Section X-B did not permit funeral leave to be taken after the funeral, the 2008 bargaining was its opportunity "to change this language." It passed on the opportunity "only after it was assured that there was no such time limit in the first place."

Funeral leave is a benefit "used very rarely" and in the most dire of circumstances. In the absence of empathy from the Employer, the Association should be able to rely on the labor agreement, which must be read "using case law and precedent, and some common sense." Granting the grievance will "stand up for the principles of common sense, empathy, and fair bargaining."

The County's Reply Brief

The language governing the grievance is "make necessary arrangements and attend the funeral." The reference to "necessary arrangements" is tied to "attend the funeral" and, for that reason, the County has consistently "required deputies to take time off to make necessary arrangements before the funeral." The alternative offered by the Association is that "the necessary arrangements could be made regarding anything at anytime." Neither the "language or intent of the labor agreement" contemplate this result. Nor does the parties' consistent practice. Accepting the Association's view makes the title of Article X inexplicable, since it specifically links "funeral" with "leave."

The County's position is thus more than the timing of the leave. The Grievant's activities bore no relationship to the "funeral of his father-in-law because the funeral had been held one week prior to the requested funeral leave." Thirty years of consistent practice link the granting of leave to the funeral observance. That the practice was never reduced to writing is irrelevant. There was no need to reduce what was commonly understood to writing. That

the 2006 Memorandum was not issued to the Association is irrelevant, because it was “not an attempt to change or implement policy, but rather to remind shift commanders how the policy was to be implemented.” The “inconsistency” asserted by the Association turns on two instances in which funeral leave was extended to include post funeral observances. There is no instance of funeral leave existing independent of “a second ceremony for the deceased.” There was no ceremony for the Grievant to attend.

The Association’s assertion of “undisputed fact” cannot obscure the fundamental differences between the parties’ view of the labor agreement. Stripped to its essence, the record highlights that the parties fundamentally disagree on the linkage of the language of Section X-B to a funeral ceremony and on the binding force of consistent past practice.

The language of Section X-B is unambiguous and does permit the County to grant funeral leave after a funeral. However, “this is only under certain circumstances . . . in which the later ceremonies fit within the definition of funeral.” The Association’s attempt to render the unambiguous language ambiguous by positing terms better suited to the County’s view of Section X-B cannot be considered persuasive. Similar arguments could be made regarding the fit of Section X-B to the Association’s view. More significant is the absence of any Association grievance to the County’s consistent implementation of Section X-B. Association attempts to decouple “necessary arrangements” from “attend the funeral” ignore thirty years of unchallenged practice.

Association attempts to undercut the strength of the past practice evidence ignore the absence of specific examples of County approval of leave not tied to the funeral observance. The denial of Sorenson’s request underscores the weakness of the Association’s position. The assertion that Grubba’s “misunderstanding” of the policy makes the asserted practice not “readily ascertainable” is unpersuasive. Nor can the Association’s view of bargaining history be accepted. The consistency of County practice was understood by Charewicz, not just as a Sheriff, but as a member of the Association. The assertion Belanger Tess caused the Association to believe “necessary arrangements” had no limit is “not a reasonable interpretation of the discussions that took place during the bargaining sessions.” That each party attempted to clarify its view of Section X-B during the 2008 bargaining is unremarkable. The assertion that the County is seeking to achieve in bargaining what it failed to secure in bargaining is more accurately applied to the Association. Against this background, the grievance should be denied.

DISCUSSION

The issue is stipulated, but its unique circumstances make it intractable. The Grievant and Sergeant Retzki married sisters, whose father died on September 9, during the Grievant’s off week but during Retzki’s work week. The funeral took place on September 13. Retzki received funeral leave for September 10, 11 and 12, while the Grievant took comp time for September 15, 16 and 17. The evidence indicates Retzki and the Grievant shared the same type of duties surrounding the funeral. Against this background, Retzki got three days of funeral leave for doing the same activities for which the County denied leave to the Grievant, with the funeral falling outside each employee’s work time. This starkly poses the interpretive dilemma.

Each party's view of Section X-B is plausible. This precludes considering the language unambiguous. The Association asserts the clarity of Section X-B more than the County, but its ambiguity is evident. "(T)o make necessary arrangements", without regard to its linkage to "attend the funeral" is ambiguous. The parties do not dispute that the Grievant's attention to the inventory and care of his father-in-law's property, including his hunting dog, can constitute "necessary arrangements". It would not follow from this that taking the dog hunting on the day of the funeral is "necessary." The ambiguity of the term is not a flaw. Rather, it is a broad reference, pointing to an act of discretion.

Beyond this, the ambiguity of "up to three (3) days of pay" is evident. The Association urges that this, combined with "shall be granted" state an unambiguous mandate. This view is plausible, but no more than that. It reads "shall be granted up to three days" identically with "shall be granted three days." There is no evidence that any employee has claimed a mandated three day leave. Rather, each instance of Section X-B funeral leave discussed at hearing was preceded by an employee request for leave, with many of the requests seeking less than three days. In any event, reading Section X-B as an unambiguous grant of an employee right to take three days of leave reads "necessary" as "considered by the employee as necessary." This ignores that Section X-B does not specify who determines the "necessary" of "necessary arrangements". In sum, the language of Section X-B is ambiguous.

The parties argue past practice and bargaining history at length. This is appropriate since evidence of bargaining history and past practice are, in my view, the most persuasive guides to the resolution of ambiguous language, since each focuses on the conduct of the bargaining parties, whose intent is the source and the goal of contract interpretation. However, despite the force of the arguments, neither provides binding guidance.

Past practice is the core of the County's position. Arbitrators have stated what constitutes evidence sufficient to establish a binding practice in varying ways. At root, the evidence must be sufficient to justify inferring agreement, since the binding force of past practice is the agreement manifested by the parties' conduct, see generally "Past Practice And The Administration Of Collective Bargaining Agreements", by Richard Mitterthal in *Arbitration and Public Policy, Proceedings of the Fourteenth Annual Meeting National Academy of Arbitrators*, (BNA, 1961). As the Association points out, Jules Justin stated the appropriate standard of proof to establish a binding practice thus:

In the absence of a written agreement, 'past practice,' to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." CELANESE CORP. OF AMERICA, 24 LA 168, 172 (Justin, 1954).

This statement appropriately cautions against inferring agreement lightly, since granting practice binding force gives it contractual significance. The statement cannot, however, be applied literally since the third criterion demands evidence of conduct of an "established practice accepted by both parties." County assertion of a binding practice seeks

an arbitrator's inference that runs contrary to the Association's argument that it never accepted a practice linking "necessary arrangements" for funeral leave to the funeral ceremony. The inference the County seeks must rest on evidence stronger than the force of the Association's position.

The Association understates the force of the County's evidence, but persuasively argues that it falls short of demonstrating Association agreement that funeral leave can only be taken for the day of, or the days preceding, a funeral service. What the County asserts as evidence of a binding practice is a course of administrative implementation of Section X-B which it argues is consistent with the 2006 Memo.

Funeral leave requests are infrequent and the evidence cautions against inferring Association agreement to the practice. The practice is an administrative policy, as established in Charewicz', Keener's and Belanger Tess' testimony. The policy was not written, nor generally distributed. How widely it was known is debatable, since the lieutenants the Grievant secured approval from were unaware of it. The County persuasively points to the 2006 Memo, which was distributed to shift supervisors, including one member of the Association's bargaining team, as evidence of mutuality. However, the 2006 Memo is not a distillation of the practice the County asserts. The 2006 Memo permits approval "if the employee is scheduled to work during the time of the funeral". Its language is more restrictive than Charewicz' October 14 denial of the grievance, which permits leave for time not including the funeral. Thus, Charewicz' denial can account for the approval of Retzki's leave, but the 2006 Memo cannot. More significantly, the 2006 Memo is not consistent with the post funeral "exceptions" which County witnesses view as part of the practice. Grubba's September 18 memo confirms his own awareness of exceptions to the purported policy, thus underscoring the difficulty of concluding County administration of its policy over time establishes mutuality.

Against this background, it is unpersuasive to treat County policy as a binding past practice. Rather, the policy reflects its view of the appropriate administration of Section X-B. County handling of the Grievant's request demonstrates this. If there was a clearly understood practice, it is impossible to understand what Charewicz or Keener expected from the Grievant when they sought an explanation of what he was doing during the period of funeral leave. If there was a commonly understood practice as they describe, the only question the Grievant should have been asked is whether there was a funeral ceremony observed during the period of his leave. The more generalized inquiry undertaken by Keener for Charewicz is consistent with their seeking facts upon which they could exercise discretion to grant leave, but is not consistent with their confirming a commonly understood practice limiting leave to pre-funeral activity or to a funeral ceremony.

Examination of the testimony confirms that Charewicz, Keener and Belanger Tess understood Section X-B involves an act of discretion. None viewed post-funeral leave as beyond Section X-B. Rather, each understood that compelling facts, such as the two post-funeral burial services noted in testimony, could justify leave. Tuszka's testimony confirms this. County payroll records document that funeral leave is discretionary, both as to its approval and as to its length. Neither the records nor Tuszka's recall can account for when a funeral occurred, which

is the precise point the County seeks to establish as the limit of its discretion. Rather, the records speak only to the duration of the leave and the relationship of the employee to the deceased. Without regard to Association objections, the evidence of the asserted practice falls short of establishing that County policy establishes a mutually understood practice.

Association recourse to bargaining history rests on a weaker footing than County assertion of past practice. Association arguments on the significance of granting a benefit in grievance arbitration not secured in collective bargaining are well-stated. However, they are stronger than their factual base. Association assertion that Terry and its bargaining team commonly understood Belanger Tess to have indicated Section X-B is administered without regard to the funeral date obscures whatever statement prompted the unanimity. Terry was not involved in face-to-face bargaining and understandably took the unanimity of the team as proof of her position. There is no dispute that Belanger Tess wanted a time limit on a funeral leave provision, but the provision at issue during her discussions with Terry was a proposal to change Section X-B rather than what its unchanged language stood for. Viewed from the bargaining table, Lukas' and the Grievant's testimony indicate that the comment prompting their understanding came in a single session at which the parties discussed the Association's initial proposal. Sorenson was not present at the session. Without regard to the testimony of any County witness, it is difficult to erect the bargaining history conclusion the Association builds on this single exchange.

More significantly, the statement is difficult to reconcile to the record. County bargainers unanimously denied she made the statement, but this is no more remarkable than the unanimity of the Association's bargaining team. Teams work for consensus, but the issue here is proven fact, not a consensus view of it. More significantly, placing the statement in the bargaining context does not support the Association's view. There is no persuasive evidence of an Association member receiving funeral leave during a scheduled week off, or to attend to family needs after a funeral service. Morgan's recall of the circumstances regarding the initial funeral service in October of 2005 was limited. County records show only a single day of funeral leave pay traceable to that month. Sorenson, the Association's President, was denied a request to take leave, during a week off, for his father's death. Charewicz, a former Association President, was aware of no grants of leave for time following a funeral. The 2006 Memo, even if not definitive proof of a binding practice, was distributed to a member of the Association's bargaining team. Against this background, it is difficult to understand what would prompt Belanger Tess to make the representation the Association attributes to her. Her testimony linking the misunderstanding to discussion of Association proposals on Section X-B is easier to reconcile to the record than the Association's view. Even if she made the statement the Association attributes to her, it is difficult to understand how this can make reasonable a conclusion that Section X-B secured the Association a benefit none of its members had ever received.

In sum, evidence of bargaining history affords little support for either party's view of Section X-B. Rather, it demonstrates that each party went into and left the 2008 bargaining with conflicting understandings on what Section X-B provided. Bargaining history evidence thus highlights the parties' conflicting views of Section X-B rather than reconciling them.

This means the interpretation of Section X-B must turn on the language of Section X, read in light of what evidence of agreement there is. The ambiguity of Section X-B is not a flaw which can be corrected by arbitral construction of the governing terms. This is not, for example, analogous to a dispute over whether “days”, as used in a grievance procedure, refers to “calendar” or to “work” days. A single arbitration resolves that dispute. Here, the language does not permit a single, definitive resolution. The “up to” reference, read with the “necessary arrangements” reference clearly enough denote acts of discretion regarding the amount and the timing of the leave. The contractual difficulty with the parties’ positions is common, in the sense that both attempt to restrict broadly discretionary terms. The ambiguity of the provision does not trace to the governing language but to its application. The terms are broad, to permit flexibility of application. To give effect to the terms of Section X-B, it is not possible to “tighten” what “up to” means or what “necessary” means. Rather, their breadth must be respected. This means that under Section X-B, arbitral review turns on the reasonableness of the required exercise of discretion. The determination is, then, whether or not the discretion exercised reasonably applies the governing terms to the facts posed by a specific request.

Charewicz deferred to Keener’s view of the Grievant’s request. Under Section X-A, this makes the denial Charewicz’. If this denial stood alone, there is little basis to question its reasonableness. As the County fears, approving his request, without a demonstrated relationship to a funeral observance, could expand the benefit to the breaking point. There is no doubt the Grievant’s consolation of his sons was necessary in the week following the funeral, but the issue here is whether it warrants paid leave under Section X-B. Assuming it is “necessary” in that sense, it is not apparent how it would be less necessary on the one-year, two-year or three-year anniversary of the funeral. If any conduct necessitated by a death constitutes “necessary arrangements”, then Section X-B becomes a mandate of three days pay for any relationship covered by Section X-B. As noted above, this is an unpersuasive reading of its terms.

Charewicz’ denial of the Grievant’s request does not, however, stand alone, and the governing circumstances preclude deferring to it as a reasonable exercise of discretion. Strictly speaking, Charewicz did not deny the Grievant’s request. Rather, he overruled Grubba’s approval and then denied the Grievant’s request. Section X-A grants Charewicz the authority to do either. However, deferring to his conduct demands concluding the Grievant’s request and Grubba’s action to approve it are unreasonable. This is not possible without concluding that the parties have a binding practice that funeral leave must take place on or before the date of the funeral. As concluded above, no such binding practice exists.

Against this background, concluding the denial is reasonable rewrites Section X-B. As noted above, the “up to” and “necessary” references of Section X-B grant discretion to approve the timing and the time of funeral leave. On the broadest level, Charewicz’ denial is not a reasonable act of discretion because no discretion was exercised. Rather, he cited a past practice that permits discretion to grant leave for work days on or prior to the funeral, but precludes discretion to do so for days following the funeral. No such past practice was proven, and, in any event, the assertion of the practice undermines the governing language of Section X-B. The contractual dilemma can be illustrated by introducing travel time into a leave request. Assuming

a funeral covered by Section X-B occurs on an employee's normal work week, and demands travel of a full day to reach the site of the ceremony, strictly honoring the "on or before the funeral" version of the practice asserted by the County would not permit granting the employee one day to travel to the site, one day to attend the funeral and one day to return from the site. The 2006 Memo version of the practice similarly cuts off the day of return. The "two exceptions" version of the practice is irrelevant because a second ceremony is not involved. Arguably, the practice can be reconciled to Section X-B if the two exceptions are taken to establish a level of discretion to permit Charewicz to approve the leave. The difficulty with this is that such discretion is present in Section X-B without reference to the practice. Finding the practice binding creates an unwarranted restriction of discretion granted by the governing language standing alone.

County treatment of Retzki's and the Grievant's requests crystallizes the interpretive issue as a matter of fact. County approval of Retzki's three days of leave grants the maximum number of days permitted, reflecting that they preceded the September 13 funeral. However, deferring to its approval of Retzki's leave and its denial of the Grievant's honors the alleged practice at the cost of the language of Section X-B. Both Retzki and the Grievant attended the funeral, and there is no evidence that either was scheduled to work on September 13. Thus, neither leave turns on the "attend the funeral" reference. This leaves only the "necessary arrangements" reference to distinguish the two, yet there is no dispute that each employee performed the same type of duties during their three days off from work. The sole distinguishing fact between them is the fortuity of their on/off workweek schedules. This cannot be reconciled to Section X-B. Whatever is said of Grubba's approval, it would have squared Retzki's request with the Grievant's and is reconcilable to Section X-B.

In sum, although the denial of the Grievant's request cannot be dismissed as unreasonable standing alone, the request does not stand alone. Sections X-A and X-B grant Charewicz sufficient discretion to permit him to reasonably deny a request for funeral leave for time following a funeral, if he reasonably concludes the request is not "to make necessary arrangements and attend the funeral". His overturning of Grubba's exercise of discretion to approve the Grievant's leave request is not, however, reasonable. It does not reflect an act of discretion and cannot be justified, as a binding past practice, by recourse to a policy which limits funeral leave to the date of the funeral or the days preceding it. Because the Grievant and Retzki made the same "necessary arrangements" for the same funeral and because neither required leave to "attend the funeral", County approval of one request and denial of the other cannot be considered a reasonable exercise of discretion as required by Section X-B.

As the remedy appropriate to this violation, the Award entered below makes the Grievant whole by requiring the County to restore his compensatory time balance in the amount of leave required of him to take September 15, 16 and 17 off from work.

The Association requests that the award "clarify the rule going forward" as part of its remedial request. Because Section X-B demands the exercise of discretion, any clarification of its language is debatable. In any event, as noted above, the language of Section X-B is a flexible

grant of discretion to the “department head”, under Section X-A, to administer the benefit. Against this background, it is impossible to tighten up what “up to three days” or “necessary arrangements” means. Arbitral review cannot usurp the discretion of a department head. Rather, it serves as a case-by-case check on the reasonableness of a specific act of discretion.

Here, the denial of the Grievant’s request is not inherently unreasonable. The County appropriately fears that granting the request implies that any employee request for three days of funeral leave, made at any time, but traceable to “necessary arrangements” flowing from the death of a family member covered by Section X-B is reasonable. Charewicz’ overturning of Grubba’s approval and denial of the Grievant’s request rests solely on a policy that limits supervisory discretion to the day of the funeral or the days preceding it. The desire to limit supervisory discretion over a funeral leave request is understandable. No employee or supervisor welcomes an opportunity to discuss what occurs during the grieving process. The 2006 Memo has the virtue of making such inquiry irrelevant. However, that virtue cannot be reconciled to the terms of Section X-B, and is not enforceable as a matter of grievance arbitration, which demands that the limiting of discretion be secured in negotiation before being enforced in arbitration.

The impossibility of reconciling the approval of Retzki’s request with the denial of the Grievant’s under Section X-B precludes finding it a reasonable exercise of discretion. As a matter of contract, this risks opening Pandora’s box. However little the Association thinks of the 2006 Memo or the policy asserted by the County, they clarified the approval process and limited the exercise of supervisory discretion. That clarification simplified, but did not clarify, the application of Section X-B, which turns on the exercise of discretion. County fear that it will be exposed to requests for funeral leave at any time, with no evident means to restrict it is understandable but not well founded under Section X-B. Nothing said above can undercut the link between “to make necessary arrangements” with “and attend the funeral.” Denying the purported practice does not erode this link. Sustaining it, on these facts, would have. To exemplify this, the practice, as viewed by the County, implies that Retzki could receive leave to purchase “thank you” notes prior to the funeral that the Grievant could not receive for filling out immediately after it. To further exemplify the point, the practice would permit Retzki to receive leave for being one of several concerned relatives who made arrangements with the funeral home for services to be rendered, but would deny leave to the Grievant, even if he acted with legal status as personal representative, to make payment for services rendered. This stretches “to make necessary arrangements and attend the funeral” beyond its breaking point. The link of the leave to a funeral service can reasonably be maintained under Section X-B without creating an unnecessary distinction between arrangements before or preceding a funeral.

The conclusions reached above highlight that Charewicz, as a matter of contract has the discretion to limit both the time and the timing of funeral leave. In the absence of limits agreed-upon by the parties, review of his exercise of discretion must proceed on a case-by-case review of individual requests. That the County has consistently limited the grant of funeral leave to the observance of a funeral ceremony is not inherently unreasonable and nothing said above limits its ability to do so. It cannot, however, unilaterally set the date of the funeral as the sole criterion

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defining what constitutes “to make necessary arrangements and attend the funeral.” This means

that employees who seek leave for a day or days other than the funeral, whether before or after a service, must be prepared to explain what qualifies as conduct “to make necessary arrangements and attend the funeral.”

AWARD

Portage County did violate Section X-B of the 2006-07 labor agreement when it denied the grievance request for funeral leave for September 15th, 16th, and 17th, 2008.

As the remedy appropriate to the violation of Section X-B, the County shall make the Grievant whole by replenishing his comp time balance by the amount of comp time it required of him to take off September 15, 16 and 17, 2008.

Dated at Madison, Wisconsin, this 4th day of September, 2009.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc

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