ARBITRATION AWARD

In the Matter of the Arbitration of a Dispute Between

BROWN COUNTY

and

BROWN COUNTY SHERIFF'S DEPARTMENT NON-SUPERVISORY LABOR ASSOCIATION

Case 778
No. 69624
MA-14680

(Trevor Bilgo Casual Day Grievance)

Appearances:

Frederick J. Mohr, Frederick J. Mohr, LLC, 414 East Walnut Street, Suite 101, P.O. Box 1015, Green Bay, WI 54305-1015, appearing on behalf of Brown County.

Jonathan Cermele, Cermele & Associates, S.C., 6310 W. Bluemound Road, Suite 200, Milwaukee, WI 53213, appearing on behalf of Brown County Sheriff's Department Non-Supervisory Labor Association.

ARBITRATION AWARD

According to the terms of the 2009 Collective Bargaining Agreement between Brown County (County) and Brown County Sheriff's Department Non-Supervisory Labor Association (Association), the parties jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned arbitrator to hear and resolve a dispute between them regarding the interpretation and application of certain provisions of the Agreement as they pertain to the County's denial of a request for a casual day submitted by bargaining unit member Trevor Bilgo on November 6, 2009.

A hearing in the matter took place on June 24, 2010, at the County's Northern Building, 305 E. Walnut Street, Green Bay, Wisconsin. The parties filed written briefs and reply briefs, the last of which was received on July 29, 2010, at which time the record was closed.

ISSUE

At the outset of the hearing, the parties stipulated to the following issue: Did the Employer (County) violate Article 38, "Sick Leave," by denying Deputy Bilgo's request for use of a casual day?

CONTRACT LANGUAGE IN DISPUTE

Article 38. SICK LEAVE.

* * *

CASUAL DAYS

To provide first day coverage for sickness, each employee will receive five (5) casual days each January 1. Casual days may also be used for personal time off with actual days off being subject to mutual agreement between the employee and the employer. Casual days will not be withheld for arbitrary or capricious reasons except during the last two (2) weeks of employment. At the end of each calendar year, employees shall be paid at their existing rate of pay for any casual days not used during the year, to a maximum of five (5) days (payment shall be made automatically prior to the following January 31).

* * *

FINDINGS OF FACT

The above-quoted provision in Article 38 was initially brought into the collective bargaining agreement (CBA) between the County and the Association in the 1999-01 contract. Prior to that, bargaining unit members earned sick leave at the rate of one day for each month of service – 12 days per year – and were permitted to accumulate that leave up to 135 days for payout at retirement or death.[1]

In or about the 1990's, the County became concerned about its unpredictable liability for accumulated sick leave payouts and began proposing an alternative system that combined five non-accumulating "casual days" with non-accumulating short term and long term disability leave. Prior to bargaining the 1999-01 CBA for the Association's unit, the County had succeeded in obtaining the "casual days" contract language in all of its other bargaining agreements. The County's proposal to implement this system in the deputies' contract became a major point of contention during the negotiations for the 1999-01 CBA. The Association was reluctant to surrender the right to 12 days of sick leave for five days of casual leave and the ability to accumulate severance pay for an annual payout of any unused casual days. The Association was particularly concerned about how the County would implement the phrase

[1] In negotiating the casual day provision, the parties agreed that employees who were hired prior to ratification of the 1999-01 agreement were given the option of remaining in the sick leave program (12 days per year, with a right to accumulate and receive as severance pay) instead of entering the casual day program. Employees hired after that date were required to participate in the casual day program.

"with actual days off being subject to mutual agreement between the employee and the employer" that was contained in the County's proposed language. The Association wanted language guaranteeing the right to use the days for any reason and without any question. The County, however, insisted upon the language as proposed, because it was identical to language the County had negotiated with all of its other unions.

Edward Janke was Chief Deputy at the time of the casual day negotiations and was a member of the County's bargaining team at the time. He testified unequivocally, credibly, and without contravention that, in order to obtain Association agreement, he (on behalf of the County) expressly promised the Association that bargaining unit members would be able to use casual days "no questions asked." Janke further testified that he calculated at the time that, even if there were costs associated with an "occasional overtime situation," the County would still save money from the casual day system, because there would be seven fewer days available to employees than under the 12-day sick leave provision, and there would be no large severance payouts. In response to Association demands that the contract include a "guarantee" about employee discretion in using casual days, Janke assured Association representatives that no guarantee language was necessary, because the County in practice would implement the language the same as it did in other units, i.e., at the employee's discretion.[2] At the time, Janke understood that denials occasionally could occur for specific managerial justifications – for example, in a weather emergency – but in his view creating overtime was not such a justification. It does not appear that these potential exceptions, including any impact on overtime, were actually discussed between the parties at the bargaining table. In making assurances to the Association during these negotiations, Janke was acting within the scope of his authority as an agent of the County. These assurances about how casual days would operate in practice were instrumental in persuading the Association to ratify the CBA containing the new provision. Since that time, the language has remained unchanged.

Janke remained in the position of Chief Deputy until some time in 2004 when he left County employment. During that time, Janke implemented the provision in accordance with his assurances to the Association's bargaining team, i.e., he permitted bargaining unit members to use casual days at their discretion. In particular, he did not direct supervisors to deny casual days even if they created overtime.

When Janke left the Sheriff's Department in 2004, he was succeeded as Chief Deputy by John Gossage. In 2004, early in his tenure as Chief Deputy, Gossage informed the Association in conversations that he and Sheriff Kocken viewed the "mutually agreement" phrase in the contract language as clear and unambiguous, and that it permitted the County to refuse to "agree" to an employee's use of a casual day. Hence, Gossage and Kocken's view was that the County could refuse to agree to an employee using a casual day if the employee

[2] Overtime was not a significant issue in other bargaining units, because, unlike the other units, the patrol employees who comprised the bulk of the Association's unit were subject to minimum staffing guidelines or requirements.

was not ill and the casual day would bring manpower levels below minimum and thus create overtime. In those conversations, the Association vigorously disagreed with Gossage's view of the contract language, stating that the parties (County and Association) had already "mutually agreed" that casual days were at the employee's full discretion. The Association referred Gossage to Janke for confirmation of the Association's view of the language. Gossage contacted Janke who confirmed the Association's view that the parties had "mutually agreed" that casual days would be granted, "no questions asked."

Gossage credibly testified that, in or about mid-2004, consistent with the position he had articulated to the Association as described in the preceding paragraph, he had directed shift commanders to implement a policy of denying casual days where the employee was not ill and overtime would result. This policy evidently was not in writing nor is there evidence that the Association was formally notified. There is little evidence as to the frequency or uniformity with which it may have been implemented. The record includes a grievance filed by bargaining unit member Cleven in August, 2004, based upon an incident that occurred on August 13, 2004. According to the grievance document, Cleven telephoned his supervisor to request a casual day; the supervisor asked if he (Cleven) was sick and Cleven said "no;" the supervisor then said he would have to deny the request because it would create overtime, but then asked again whether Cleven was sick; this time Cleven answered "yes" and was granted the casual day. For "relief sought," the grievance stated, "Casual days are at officer's discretion per agreement and past practice." The grievance was denied at Steps 1 and 2. The denial at Step 2, signed by Gossage, notes that "There is no relief sought by the employee, as the employee was afforded the use of a casual day." Gossage's grievance denial also stated, "Regarding the past practice issue, absent any clear language, past practice would take precedence; however clear contract language exists indicating that the casual days will be mutually agreed upon by both the employee and employer." Association officials who testified did not recall the Cleven grievance or why it was not pursued beyond Step 2, but speculated that it may have been because Cleven had not actually been denied the casual day and thus had no remedy.

During bargaining for the 2007-09 CBA, the Association proposed a modification to the casual day provision in Article 38 that would have removed the "mutual agreement" language. The County refused to modify the language on the ground that the County continued to want identical language on the subject in all of its contracts.

In November 2007, four bargaining unit members requested and were granted casual leave on the same shift the evening before Thanksgiving, apparently resulting in an overtime situation. As a result, Gossage conveyed the following memorandum to "All Sworn Employees," dated November 21, 2007:

> With the ratification and execution of the 2007-2009 labor contracts, casual days will be administered, without exception, in accordance with the labor agreement.

> Article 38 of the labor agreement clearly states "To provide first day coverage for sickness, each employee will receive five (5) casual days each January 1. Casual days may be used for personal time off with actual days off being subject to mutual agreement between the employee and the employer".
>
> Supervisors will approve casual days if an employee is sick. Supervisors will also approve other casual days if such approval does not cause overtime.
>
> Please feel free to contact me if you have any questions.

The Association was not directly notified of the above-referenced directive but informally became aware of the change in procedure. No grievance was filed challenging the directive itself.

Although the record does not reflect the frequency or circumstances under which casual days were denied subsequent to Gossage's November 2007 directive, both parties agree that some number of denials occurred and that, prior to the instant Bilgo situation, the Union was not specifically apprised of any such denials and no grievances were filed challenging any such denials. The Association's longstanding view of the contractual grievance procedure is that grievances must be signed by an individual bargaining unit member.[3] Subsequent to Gossage's 2007 directive, no bargaining unit member brought to the Association any issues regarding denial of a casual day until the instant situation.

On November 6, 2009, Deputy Trevor Bilgo, a canine officer, was scheduled to work the 7 p.m. to 5 a.m. shift. That morning Bilgo was returning from a conference in Las Vegas and ticketed for a 7 a.m. flight that would have allowed him to arrive home and have sufficient rest prior to starting his shift at 7 p.m. He arrived at the airport at 5 a.m. and discovered that his flight was already delayed indefinitely for mechanical problems. He attempted to rebook for an earlier flight but was unsuccessful. At about 7 a.m. Pacific Time (9 a.m. Central Time), Bilgo telephoned the shift commander, Lieutenant Deneys, to advise him that he (Bilgo) might miss his connecting flight and if so might not be able to get back to Green Bay in time for some or all of his scheduled shift. Bilgo asked for casual time and, after some discussion, Deneys approved casual time for the first four hours of the shift but denied it for the 11 p.m. to 5 a.m. portion, since Bilgo's absence would create an overtime situation during that period. Bilgo then unsuccessfully attempted to secure coverage from colleagues. At 9 a.m. Pacific Time (11 a.m. Central Time) Bilgo learned that his flight was cancelled and

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[3] Article 46 of the CBA contains the Grievance Procedure. It neither expressly denies nor expressly permits the Association access to the grievance procedure without an individual's signature, but it does speak almost exclusively in terms of "the aggrieved employee" and/or "the employee's grievance." For example, Step 1 states, "The aggrieved employee shall present the grievance orally to his captain either alone or accompanied by a bargaining unit representative." Further, "If the employee's grievance is not settled at Step 4 and if the grieved party desires arbitration, he must notify the Human Resources Director, in writing, of his intention to arbitrate the grievance...."

that he would not reach Green Bay until at least midnight. Given that it would have been unsafe for him to come to work at that point after having had no rest during the day, Bilgo telephoned the shift commander (this time Lieutenant Knurr) to advise him. Knurr sought and obtained shift coverage from two of Bilgo's colleagues, on a non-overtime basis, with the understanding that Bilgo would have to pay them back in kind.

By memorandum dated November 8, 2009 with the subject line, "T. Bilgo AWOL," Deneys and Knurr advised Gossage about the Bilgo absence of November 6-7, as described above. The Memorandum stated in part:

> We as lieutenants knew that Bilgo's failure to show for a shift could result in violations of policies, specifically … [Reporting for Duty and Absent without Leave]
>
> We also know that we are under no obligation to work out coverage for an employee but we made the efforts to do so in the spirit of cooperation and for general morale. It is our understanding (at the time of this memo) that Bilgo will be filing either a grievance or a request card that contests that he should have been granted casual leave for the entirety of his shift. Heitl and Horst and have already submitted overtime request cards for the time period that Knurr had arranged for them to work for Bilgo in a trade capacity. These cards will be forwarded to you with this memo as they are not applicable as Bilgo has not filed any relevant paperwork.
>
> If Bilgo does file a grievance or request card contesting that the efforts that we graciously extended to cover his absence without leave from 11:00 pm – 5:00 am were inappropriate we then are obligated to report his policy violation/s. This reporting is all based on his actions. …"

Bilgo was not disciplined for any putative policy violations.

On or about November 30, 2009, Bilgo filed a grievance alleging a violation of Article 38 and seeking as a remedy six hours of casual pay for the November 6-7 incident. The grievance was denied at the first three steps of the grievance procedure before being submitted to arbitration.

POSITIONS OF THE PARTIES

Association's Initial Brief

The Association argues that the pertinent language in Article 38, "actual days off being subject to mutual agreement between the employee and the employer," is not clear but rather ambiguous, chiefly because adopting the County's literal reading of that language would lead to the "absurd result" that the County could obliterate what was clearly designed to be a

benefit to the employee simply by withholding agreement on every request. The Association further argues that, given the ambiguous language, it is appropriate to look to past practice and bargaining history to interpret the provision. To that end, contends the Association, bargaining history supplied by the County's own negotiator makes plain that the mutual intention was that casual days could be taken at an employee's discretion. Further, according to the Association, past practice was entirely consistent with that mutual intention until Gossage's 2007 directive. Indeed, argues the Association, even if the contract language were clear and unambiguous, the past practice was so unequivocal, clearly enunciated and acted upon, and readily ascertainable over a period of time, that the practice alone would be sufficient to create a binding obligation on the part of the County. In the alternative, the Association contends that the language is clear and unambiguous in requiring "mutual agreement," but the parties had reached a mutual agreement at the bargaining table that casual days would not be denied for any reason.

County's Initial Brief

The County's central argument is that the pertinent language in Article 38, "actual days off being subject to mutual agreement between the employee and the employer," is clear and unambiguous. "The language requires the mutual consent of both County and employee. In this instance, the County did not consent to the use of a casual day and therefore Bilgo's grievance should be denied." (Brief of Respondent at 6). The County contends that this language "cannot be susceptible to more than one meaning," and hence extrinsic evidence (such as bargaining history and past practice) cannot properly be considered in determining the meaning of the language.

As to the Association's claim that the County promised at the bargaining table "a decade ago" that the County would never refuse a casual day, the County points to Article 49 of the contract, which "would prohibit the County from entering into such a verbal agreement."[4] Further, according to the County, Article 48 "would require such alteration to be in writing."[5] As to the Association's claim that a practice had been established, the County argues that past practice evidence is "immaterial when the contract language is plain and unambiguous." Further, the County contends that no such practice of unconditional use of casual days exists; in fact, the evidence shows that, since 2004, Gossage had put in place a "consistent practice" of conditioning approval of casual days on no overtime being created. Further, the Cleven grievance from 2004 shows both that Gossage had in fact implemented the overtime condition as of that time and that the Association "failed to appeal or otherwise dispute Gossage's" view that the contract language authorized him to do so. Finally, in November 2007, the Association was "put on notice" of management's intention to implement

[4] Article 49 is entitled "No Other Agreement," and states: "The Employer agrees not to enter into any other agreement, written or verbally, with the members of the Brown County Sheriff's Department individually or collectively which in any way conflicts with the provisions of this Agreement."

[5] Article 48 is entitled, "Amendment Provisions," and states: "This agreement is subject to amendment alteration or addition only by a subsequent written agreement between and executed by the County and the bargaining unit where mutually agreeable. The waiver of any breach, term or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions."

the overtime condition on casual days and neither filed a grievance nor succeeded in revising the contract language in successor negotiations, thus acquiescing in the County's view of the language..

Association Reply Brief

In its reply brief, the Association further argues that the phrase "subject to mutual agreement" is inherently ambiguous, because it requires, by its very terms, a determination of what had been mutually agreed. Here, looking to bargaining history, what the parties had "mutually agreed" was that employees could have six casual days simply for the asking, and the County's imposition of an overtime exception constituted a unilateral change in that mutual agreement. Moreover, argues the Association, the County should be estopped from restricting the use of casual days, because the County had induced the Association to agree to surrender the more valuable benefit of 12 accumulating annual sick leave days in exchange for the six casual days by promising the Association that the casual days could be taken at the employee's discretion.

Also in its reply brief, in response to the County's argument that the contractual zipper clause in Article 48 precludes the Association from relying on any "mutual agreement" that is outside the contract itself, the Association counters that it is not contending that the agreement was "amended" "altered" or "added to," but "Rather, the parties simply agreed as to how they would 'apply' the language requiring 'mutual agreement' …." In response to the County's argument that Article 49 would also prohibit the "mutual agreement" on which the Association relies, the Association argues that the "principle purpose" of Article 49 is "most reasonably meant to reiterate the County's obligation to *only* contract with the bargaining unit itself, as opposed to individual members, or groups of members, outside the purview of the bargaining unit." Finally, in response to the County's argument that the Association waived its argument about the meaning of Article 38 by failing to appeal the Cleven grievance beyond Step 2 and/or by failing to grieve Gossage's November 2007 memorandum, the Association argues that neither alleged failure constitutes an acquiescence in the County's position regarding the contract language.

County Reply Brief

In its reply to the Association's brief, the County disputed certain of the Association's factual assertions. First, the County challenges the Association's assertion that "the casual day program benefitted only the County," since in the County's view the "actual cost to the County of the new [casual day] program far exceeded its expense under the old sick leave program." Second, in the County's view "Neither Jahnke nor Rabas testified that there was a specific agreement made orally by the parties that officers could use casual days at their sole discretion," but instead such was merely Rabas' "understanding." Third, the County challenges the Association for ostensibly claiming that "it was unaware of any request for a casual day which was refused because of overtime," pointing to the Cleven grievance in 2004.

As to the "absurd result" predicted by the Association if the County's interpretation were to prevail, the County points out that no officer would "lose" a benefit; the days merely would be banked and paid out at the end of the year. To the contrary, it is the Association's interpretation that leads to an absurd result, since theoretically every officer could take a casual day at the same time and leave the County with no manpower. Moreover, the County's states that its interpretation of the casual day language is consistent with the administration of the vacation schedule. The "overriding public policy requires the County to be able to maintain minimum manpower for the safety of the public, [and] the only way to ensure that such occurs is to authorize a limitation of the number of people who can be off at any one time." To the County, this is the purpose of the "mutual agreement" requirement.

The County in its reply continues to emphasize that the contract language is clear and hence practice and bargaining history are irrelevant. Moreover, contrary to the Association's version, the bargaining history shows that Janke (on behalf of the County) expressly preserved the County's right to refuse casual days. Further, contrary to the Association's claim, the evidence shows a prior policy/practice since 2004 of conditioning approval of casual days based upon the effect on overtime. According to the County, there certainly was no "unequivocal," "clearly enunciated," or "readily ascertainable" past practice such that it could have become an enforceable element of the contract.

DISCUSSION

As both parties acknowledge, a contract provision that is clear and unambiguous – i.e., susceptible to only one interpretation on its face – is usually enforceable as written, without resort to other evidence about its meaning, such as bargaining history or the practices of the parties. A principle bone of contention here is whether or not the term "mutual agreement" in the Article 38 casual day provision is clear and unambiguous and if so, what it means. To the County, the term clearly allows the County to deny the use of a casual day simply by disagreeing (withholding mutual agreement) to such use. To the Association, the term is also clear, in that it requires mutual agreement as to whether/when denial is permitted, and here the "mutual agreement" at the negotiating table was that casual days would not be denied.

The "clear and unambiguous language" principle is often invoked in grievance arbitration but seldom controls the outcome in particular cases. Contract language is seldom as "clear and unambiguous" to the arbitrator as it is to the party advancing the argument. This is the case here. The casual day language in Article 38 is susceptible on its face to more than one reasonable interpretation. Contrary to the County's view, "mutual agreement" does not inherently or necessarily imply that one party could impose its will on the other party simply by withholding agreement; as the Association points out, this view could lead to the absurd consequence that the County might never "agree" to let an employee use a casual day. On the other hand, contrary to the Association's view, the language does not on its face require the County to grant casual days whenever they are requested – which, as the County points out, could lead to the absurd situation of all employees taking a casual day at the same time thus preventing the County from providing vital services. Absurd results, as both parties acknowledge, are to be avoided.

Instead, the language on its face implies some kind of acquiescence or accommodation involving the consent of both parties before a casual day may be either taken or withheld. The language is ambiguous as to what that acquiescence or accommodation is. Indeed, it is not even clear who the "parties" are for purposes of this provision: the parties to the contract (Association and County), the individual employee and the supervisor, or some combination of these possibilities?[6]

Since the language is not clear on its face, it is necessary to consider other evidence, in particular bargaining history and past practice, about what the parties intended when they agreed to this provision.

As to bargaining history, it is clear that it was the County that proposed and wrote the provision during negotiations for the 1999 CBA, and that the proposal was drafted to be consistent with casual day language in the County's other bargaining agreements. This circumstance favors the Association, as it is a standard principle of contract interpretation that ambiguities should be construed against the drafter of the language, in order to encourage clear and careful drafting. See Elkouri and Elkouri, How Arbitration Works, 6th Ed. (BNA 2003) at 477.

Also, and more importantly, the record in this case provides unusually ample and emphatic testimony from a prominent member of the *opposing* party's negotiating team that tends to support the Association's view of how both parties intended the language to operate. Faced with the Association's strong reluctance to surrender what it viewed as an important benefit (the right to 12 days of cumulative sick leave and a severance benefit) and the Association's strongly expressed concern that the term "mutual agreement" could be used to deny casual days, the County (through then Chief Deputy Janke) actively and expressly assured the Association at the bargaining table that casual days would be granted at the employee's discretion. This assurance was instrumental in the Association ratifying the new casual day program. The Association is correct that inducing a party to agree to language by assuring the party that it would apply in a certain way operates as a kind of estoppel preventing the inducing party from later claiming a different interpretation of the language. Elkouri and Elkouri, 6th ed. (BNA 2003) at 558-559. The bargaining history revealed in both parties' testimony, carefully reviewed, suggests that this conscious understanding regarding the employee's discretion related to the purpose for which the employee was requesting the casual day. I am convinced that both parties intended the provision to operate such that employees could not be denied leave based upon why they wanted it. Employees were to be permitted the leave "No questions asked."

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[6] Because I conclude that the language is not clear and unambiguous, I need not address the Association's argument that the language has been superseded by a longstanding, clear, and unequivocal past practice, or the County's arguments that Articles 48 and/or 49 would preclude enforcing such a past practice or any other unwritten agreement. I will consider the evidence regarding bargaining history and past practices as they are conventionally treated, i.e., as extrinsic evidence that may assist in interpreting ambiguous contract language.

On the other hand, I am not convinced, based upon the testimony, that the parties reached a conscious understanding about whether/when the County could limit casual leave based upon the County's needs, rather than the employee's reasons for asking. Janke testified to his understanding at the time that there could be "emergency" exceptions, but that he would not view the mere creation of incidental overtime as falling within this exception. However, the testimony does not reflect that this precise issue (the existence or nature of an emergency exception and/or the effect on overtime) was actually discussed between the parties at the time. Accordingly, while bargaining history strongly supports a general entitlement to casual leave "no questions asked," it does not provide a complete answer to the issue presented here: may the County deny a casual leave request based upon managerial concerns and, if so, how substantial would those managerial concerns have to be to warrant a denial?

Past practice is also not dispositive, in part because there are cross-currents. Until 2004, while Janke remained Chief Deputy, casual days were allowed at the employee's discretion without any consideration of the impact upon overtime. This suggests a mutual understanding among the original negotiators that overtime, in and of itself, should not be a basis for denial. However, shortly after Gossage became Chief Deputy in 2004, he engaged Association officials in a conversation in which he articulated his view that Article 38, by virtue of the "mutual agreement" language, permitted him to refuse to "agree" to casual days and that he would so refuse if the casual day created overtime. Although Association officials strongly objected to Gossage's interpretation at the time, Gossage shortly afterwards directed shift commanders to deny casual days if they created overtime. This directive does not appear to have been in writing nor communicated directly to the Association, and it is not clear how consistently it was applied.

The record describes one application of Gossage's directive. In August 2004, bargaining unit member Cleven was denied the use of a casual day because it would cause overtime, although, later in the same conversation with his supervisor, he stated that he was sick whereupon he was granted the casual day. Cleven grieved the County's initial denial of his casual day, and the grievance was denied in the initial steps of the procedure. The Association did not pursue the grievance to arbitration. Gossage credibly testified that his directive restricting casual days to non-overtime situations remained in effect up to and through the instant 2009 Bilgo situation. However, the record contains no evidence of any actual denials or of the circumstances involved in any such denials.

It also appears that, as of the summer of 2007, the parties remained at odds about whether Gossage could deny casual days based upon overtime. During successor contract negotiations, the Association proposed to "clarify" the mutual-agreement language to state that casual days were at the employee's discretion. The Association eventually withdrew that proposal, because, according to the Association's uncontroverted and credible testimony, the County continued to insist upon uniform language throughout County bargaining units, and not because the Association agreed that the County could deny casual days. As such, it is an insufficient basis upon which to conclude the Association knowingly waived its right to have the language enforced as the Association believes it was intended.

Further muddling the evidence is the fact that, if Gossage's directive was still in force and effect in 2007, it apparently had been ignored on at least one particularly egregious occasion, i.e., a November 2007 incident in which four deputies took approved casual days at the same time/shift the evening before Thanksgiving, which must have created overtime. This incident prompted Gossage to issue the November 21 written directive, set forth in the "Facts" section, above, directing supervisors to approve casual days if the employee was sick or if it would not cause overtime. This event indicates that Gossage's earlier directive had either become dormant by late 2007 or was being implemented inconsistently.

Both parties contend that the foregoing evidence supports their respective views of the disputed contract language. According to the County, the Association acquiesced in Gossage's interpretation by (1) failing to file a grievance when Gossage announced his views in the 2004 conversation with Association leaders, (2) failing to pursue the Cleven grievance to arbitration, and (3) failing to file a grievance challenging Gossage's November 21, 2007 written directive restricting casual days to non-overtime situations.

For its part, the Association points to the three or four years in which Janke, as Chief Deputy, directed shift commanders to approve all casual day requests. The Association also notes the lack of specific evidence of casual day denials, other than the Cleven situation. As to Cleven, the Association suggests that, since Cleven actually was granted the casual day, no remedy would have been available and the Association had little reason to undertake the expense of arbitration. The Association also suggests that the Cleven dispute centered more upon whether he and/or his supervisor essentially conspired to obtain the casual day by lying about Cleven being sick. These explanations are sufficiently plausible to render the single Cleven incident an unpersuasive basis for concluding that the Association acquiesced in the County's view of "mutual agreement." As far as its failure to grieve Gossage's directives, the Association supplied persuasive testimony that it has traditionally construed the contractual grievance procedure to require an individual grievant's signature,[7] and that, prior to Bilgo (and apart from Cleven) no bargaining unit member had brought a casual day issue to the Association to grieve.

Both parties have advanced valid arguments about the import of past practice in this case. Nonetheless, because the practice evidence cuts both ways and is based upon few actual incidents, I conclude that it sheds little light on the meaning of the contract provision. What the evidence shows is that, since 2004, both parties have taken firm views of their rights under the language, that the County has acted on its view at least on occasion, but that, apart from the inconclusive Cleven situation, none of those denials triggered what the Association viewed as a viable grievance. I conclude that, after 2004, neither party has acquiesced in the view of the other.

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[7] Given the language in Article 46 (set forth at page 5, n. 3, above), the Association's testimony as to its understanding of the need for an individual grievant is credible and I accept it as the genuine explanation for the lack of any grievances prior to the Bilgo situation, even though it appears that there were some indeterminate number of casual denials subsequent to Gossage's 2007 directive.

With the language itself ambiguous, the bargaining history strong as far as it goes but incomplete, and the practice evidence inconclusive, this award must turn upon a sensible reading of the contract language coupled with a reasonable extrapolation from Janke's promises at the bargaining table.

As noted earlier, the bargaining history makes clear that employees may not be denied casual days based upon their reason for seeking the leave. On the other hand, the term "mutual agreement" implies some kind of accommodation between the employee's use of a casual day and the needs of management. As the November 2007 incident demonstrates, completely unfettered access to casual days can cause significant manpower issues that the County legitimately could insist upon accommodating. The phrase, "actual days off being subject to mutual agreement between the employee and the employer" suggests a case by case discussion between the employee and his/her supervisor. Here, however, the County unilaterally imposed a prior condition upon all requests for casual days regardless of the individual circumstances. Setting such a universal condition is at odds with a case by case determination. It also strikes me as something that the parties would have negotiated into the language itself, if it were truly a mutual understanding. In addition, if the language permitted such universal conditions, the County could impose other conditions, as well, such as "no more than two in a month," or "not on weekends." Although I do not question that the overtime condition and other such universally-applied conditions could be premised upon legitimate managerial concerns (and not designed simply to prevent employees from using the benefit), they do seem inconsistent with the spirit and language of the provision in dispute.

As this case demonstrates, such a universal condition also prevents County shift commanders from evaluating an employee's request in light of the circumstances or exigencies pertaining to a specific situation. Here, for example, Bilgo found himself in a bind that was completely outside of his control. He made all reasonable efforts to avoid requesting a casual day, but was prevented by an airline's mechanical problems from returning in time to work his shift. By the same token, the County has not asserted or established any unusual or acute manpower problem on the night in question. Thus, this was not a situation in which the County could claim substantial countervailing managerial concerns, nor, even if there were such, is it a case in which Bilgo had any means of accommodating those concerns.

I conclude that Bilgo was entitled to use of casual leave to cover the latter part of his shift on November 6-7, 2009.

AWARD

The grievance is upheld. The County violated Article 38 of the CBA by refusing to permit the Grievant to use a casual day to cover the 11 p.m. to 5 a.m. portion of his absence on November 6-7, 2009.

As a remedy for this violation, the County will permit the Grievant to use casual leave to cover the 11 p.m. to 5 a.m. portion of his assigned shift on November 6-7, 2009, and make him and other bargaining unit members, if any, whole for any wages or benefits he/they may have lost in connection with the denial of the use of that leave.

I will retain jurisdiction for sixty days in order to resolve any issues that may arise in connection with implementing the foregoing remedy.

Dated at Madison, Wisconsin, this 27th day of January, 2011.

Judith Neumann /s/
Judith Neumann, Chair

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