BEFORE THE ARBITRATOR

.

In the Matter of the Arbitration of a Dispute Between

VILLAGE OF ELLSWORTH

and

LABOR ASSOCIATION OF WISCONSIN, INC.

Case 8
No. 69854
MA-14771

Appearances:

Ben Barth, Labor Consultant, Labor Association of Wisconsin, Inc., N16 W16033 Main Street, Germantown, Wisconsin, appeared on behalf of the Union

Andrea M. Voelker, Weld, Riley, Prenn & Ricci, S.C, 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Labor Association of Wisconsin, Inc., herein referred to as the "Union," and Village of Ellsworth, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Ellsworth, Wisconsin, on October 11, 2010. The parties agreed to file post-hearing briefs, the last of which was received January 10, 2011.

ISSUES

The parties were unable to agree to a statement of the issues. They agreed that I might state them. I state them as follows:

1. Did the Employer violate Article 11, Section 1.1 or any other provision of the collective bargaining agreement when it calculated the Grievant's annual sick leave payout for 2009?

2. If so, what is the appropriate remedy?[1]

RELEVANT AGREEMENT PROVISIONS

. . .

ARTICLE 11 – ILLNESS TIME (SICK LEAVE)

11.1 Each employee shall accrue one (1) day of illness time for each month of employment. However, at the end of each year, each employee is entitled to either collect any and all of that year's unused illness time at his or her base wage rate, or accrue any amount up to two hundred forty (240) days. December 1st of each year will be the date for the option to collect or bank illness pay.

. . .

ARTICLE 18 – ENTIRE MEMORANDUM OF AGREEMENT

18.1 – Amendments. This Agreement constitutes the entire Agreement between the parties, and no verbal statements shall supersede any of its provisions. An amendment or agreement supplemental hereto shall not be binding on either party, unless executed in writing by the parties hereto.

. . .

FACTS

The Employer is Wisconsin village. It employs various sworn police officers. The Union is the collective bargaining representative of the four rank and file sworn police officers of the Employer. The parties have had successive collective bargaining agreements containing the disputed language since 1998. Employees in this unit work ten hour days. They accrue sick leave at the rate of 8.5 hours per month. The accrual is posted at various times in one monthly amount sometime between the middle of the month to near the end of the month.

Grievant Darren Ekhold is a sworn police officer employed by the Employer and has been since 2000. He is in the bargaining unit represented by the Union. Prior the facts in this dispute he had a total of 307.50 hours of accrued sick leave. In January and February, 2009, he took a total of 90 hours of sick leave as follows:

[1] The parties stipulated that my recordings of the hearing were for my own notes and would not be available to either party. They also stipulated that I might reserve jurisdiction over the specification of remedy if either party requested in writing that I do so, copy to opposing party, within sixty (60) calendar days of the date of this award.

Date	*amount used*	*amount accrued*
1/14/09		8.5 (December accrual)
1/23/09	10	
2/4/09	10	
2/5/09	10	
2/6/09	10	
2/11/09		8.5 (January accrual)
2/11/09	10	
2/12/09	10	
2/13/09	10	
2/14/09	10	
2/15/09	10	
Totals	90	17

He accrued sick leave under the agreement of 8.5 hours per month for December, 2008, and January, 2009, for a total 17 hours of sick leave. The accrual of 8.5 hours for February was posted March 11, 2009, after he took the 90 hours in dispute. As to the rest of the year, he took 33 hours of sick leave between February and December, 2010 and accrued 85 hours of sick leave for the months February through November total.

The Employer administers Section 11.1 by distributing a form to each employee near the end of November showing the sick leave accrual and usage of each employee in the preceding twelve months. The employee completes the form indicating how much of the excess unused sick leave for the year he or she wishes to be paid out and how much he or she wishes to have added to his or her accrued sick leave "bank."

The Employer presented Grievant Ekhold with this form showing that he had allegedly used 123 hours or more than the 102 hours of sick leave accrued that year and that he was only entitled to take cash or bank up to 12 hours of sick leave. Grievant Ekhold sought to have 73 hours of used time deducted from his sick leave bank and the other 85 hours paid out under Section 11.1. He filed the instant grievance when the Employer refused his request to pay our sick leave for 2009, and the grievance was properly processed to arbitration.

POSITIONS OF THE PARTIES

Union

The Employer violated the plain and unambiguous terms of Section 11, Section 11.1 of the agreement when it calculated sick as it did. The employee used 90 hours of sick leave in January and February of 2009. This was before he accrued the sick leave time for the rest of the year. Thus, it is not possible that he used the sick leave he accrued in the 2009 year after

February. The remainder should have been deducted from his sick leave bank. The language of the agreement is that the employee earns one day of sick leave per month (eight hours).

The Employer is relying upon an alleged past practice. However, the issue of past practice was not raised prior to hearing and, therefore, should not be considered. The Employer's alleged past practice is not supported by reason and logic. Employees who have a sick leave bank built up are penalized by having the sick leave deducted twice. This alleged practice also violates the express terms of the agreement. There is no evidence that the Union was ever aware of the alleged practice. The "sick leave payout procedure" identified by the Employer references only the department of public works. It also applies to non-union employees. It does not reference the police department. The document itself is suspicious. It has a date of 1/1/98. However, the three paragraphs are all in different fonts.

Chief Place testified that he was on the bargaining team when the language of Section 11.1 was added to the agreement in 1998. He testified that the purpose was to pay a "bonus" to employees who don't use their sick. There is no language to that effect in the agreement. Chief Place could not produce any written agreement or bargaining notes to that effect. His testimony should not be given weight.

The Employer has not shown the existence of a *bona fide* past practice. It is clear from the evidence that the Association never was aware of the alleged past practice and, therefore, could not have "agreed" to it. Section 18.1 prohibits the use of alleged past practices to vary the terms of the agreement. The Union asks that the arbitrator sustain the grievance and order that the Employer ceases and desist from violating the agreement as well as compensate the grievant for the sick leave he was denied in the amount of 53.5 hours ($1,172.60).

Employer

The Employer did not violate the collective bargaining agreement by calculating the sick leave payout in the manner it did. Employees complete a form electing how much sick leave they wish to cash out for the year and how much they want to keep. The Employer has historically calculated the sick leave payout in December of each year. It calculated the sick leave payout under Section 11.1 by taking the total accrued sick leave for the calendar year to date and deducting the amount of sick leave used in the calendar year to that date. As explained by the Chief of Police, Greg Place, and the Village Clerk, Peggy Nelson, it was simply a one-time annual calculation to recognize an employee's attendance for that year. The Village has been calculating the sick leave payout in the same manner since it was adopted in 1998. The Grievant acknowledged that he had authorized past payouts determined in this manner. The language of Section 11.1 is clear. It states if an employee may collect ". . . all of that year's illness time . . . ." and it uses the term "remaining" for the sick leave to be paid out. The Union claims that the Grievant is entitled to sick leave payout for 2009 because he had not yet accrued the amount of sick leave he used for January and February, 2009 so that sick leave should have been taken out of his bank of accrued sick leave. However, the bank of sick leave has nothing to do with the payout. Even if this language were viewed as ambiguous,

the evidence of past practice strongly supports the Employer's position. The Village has regularly and consistently calculated the sick leave payout in the manner it has ever since the benefit was adopted (about 25 years). The Union has offered no evidence that it every objected to this procedure. The Grievant has acknowledged that he has annually signed off on calculations made in this manner for the past several years. It is not believable that he did not look at them in prior years. The Village routinely listed the hours accrued and used per year. The Employer asks that the grievance be denied.

DISCUSSION

It is the responsibility of the arbitrator to apply the agreement of the parties as it is written. If a provision is ambiguous, the arbitrator has to determine what the parties intended when they wrote that provision. A provision in a collective bargaining agreement is ambiguous if it is fairly susceptible to more than one interpretation. An ambiguity can be patent: that is, it is obvious from the language itself. An ambiguity can also be latent; that is: it becomes only apparent when it is applied to a set of facts. If the agreement is ambiguous it is the responsibility of the arbitrator to determine the correct interpretation and apply it. To do this, the arbitrator looks to the bargaining history of the provision, the scheme of regulation of the agreement as a whole, the specific context of the terms used, the parties "past practice" and also may apply the time honored principles of contract interpretation. Section 18.1 of the agreement does not prevent the consideration of past practice to explain ambiguous language. It prohibits the use of past practice to change the agreement.

The Union has argued that the disputed provision is clear and unambiguous. It is not. It is ambiguous as to the way the concept of "that year's unused illness time" is managed. It is possible that the Union is correct, that the unused time must be accounted for by the way it is accrued and disbursed from accumulated sick leave. However, the Employer's interpretation is also plausible, that there is a separate annual accounting in which the sick leave use in the prior December 1 to November 30 period is deducted from the annual accumulation to determine the annual allowable payout. The language is, therefore ambiguous.

One of the main issues underlying this dispute is "the" purpose of the provision. The Union contends that it exists solely to permit employees the cash benefit. The Employer contends that the primary purpose of the annual cash out is to encourage accumulation of sick leave and discourage abuse. This provision is unusual. It does allow employees to take sick leave as additional cash even when the maximum sick leave is not accumulated. Further, the cash out is allowed near the holiday season when employees are more likely to need cash. Nonetheless, the purpose of the sick leave provision is to provide paid time off for employees when they are sick. The banking function permits longer periods of paid leave. The structure of the language makes it clear that encouraging employees to bank sick leave and to not use sick leave during the immediate prior year are also significant purposes. Thus, it permits employees to make only a one-time election at the end of a year period. Once sick leave is banked, it cannot be withdrawn. It tends to favor retention of accumulated sick leave over one-time payments. It is likely to take more than twenty years to fill the bank of sick leave.

Once the bank is full, employees have no incentive left to accumulate sick leave. From the Employer's view point, it is easier and less expensive to let employees take the cash than it is to pay overtime for a replacement for misused sick leave. Thus, the better view of this language is that a substantial part of its purpose is both to encourage employees to bank sick leave and to discourage sick leave abuse. This tends to support the Employer's construction of the language.

I also note that the Union's approach is somewhat strained. The right to receive reimbursement might well be determined by the time of year the sick leave use occurs rather than the amount of sick leave used.

The concept of "past practice" is defined and its application discussed in NAA, *The Common Law of the Workplace: The Views of the Arbitrators* Sec. 2.20 (BNA, 2d. Ed); see, also, Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements" 1961 Proceedings of the National Academy of Arbitrators, page 31 (BNA, 1961). In essence, a "past practice" is a pattern consistently undertaken in recurring situations so as to evolve into an understanding of the parties. As Arbitrator Mittenthal recently reiterated at the 2010 meeting of the National Academy of Arbitrators, the purpose of this important concept is to take the arbitrator out of the parties' own relationship and let that relationship be its own guide.

The frequently stated elements of a "past practice" are:

1. The clarity and consistency of the pattern of conduct,
2. Longevity and repetition of the activity,
3. Acceptability of the pattern, and
4. Mutual acknowledgement of the pattern by the parties.

Peggy Nelson is the Employer's Clerk-Treasurer. She was employed in the same position at the time the provision in dispute was adopted in about 1998. She developed the written procedure for administering the provision and administered it until Dawn Schulte was hired. Although the Union raised questions about the fact that various parts of the document had different type faces, Ms. Nelson is credible that the written procedure is the one that she and other employees have used since about 1998 to administer this benefit for all employees of the Employer.

Dawn Schulte testified that she started employment with the Employer eight years ago and has been administering the sick leave payout ever since she was hired. She has consistently used the following method. Approximately December 1 of each year, she runs a payroll report for each employee showing the employee's individual use of sick leave for the past year since December 1 the prior year and the employee's accumulation of sick leave for that period. If the employee has not used all of the sick leave accumulated for the year, she shows the excess and prepares the form showing the difference available to be banked or paid out. The employee reviews the form and makes his or her choice. Unit employees including

Grievant have consistently received this form and made the choice. No one has ever grieved the way the sick leave has been calculated prior to this grievance.

The evidence of past practice is very strong evidence establishing that the parties delegated to the Employer the responsibility to figure out how this benefit should be administered from its beginning. The Employer developed and consistently administered that system. It is consistent with the language of the agreement. It is also consistent with the purpose of sick leave, which is to provide paid absence due to illness whereas the approach of the Union is less consistent with that purpose. Accordingly, I conclude that the Employer did not violate the collective bargaining agreement in the way it administered this benefit.

AWARD

That since the Employer did not violate the collective bargaining agreement in the way it administered Section 11.1, the grievance is denied.

Dated at Madison, Wisconsin, this 4th day of May, 2011.

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

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