

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

BROWN COUNTY SHERIFF'S DEPARTMENT
NON-SUPERVISORY LABOR ASSOCIATION

and

BROWN COUNTY

Case 115.0007
Case Type: MA

AWARD NO. 7933

Appearances:

Jonathan Cermele, Attorney, Cermele & Matthews, S.C., 6310 W. Bluemound Road, Suite 200, Milwaukee, Wisconsin, appearing on behalf of the Association.

William Bracken, Research Coordinator, and Daniel Borowski, Attorney, von Briesen & Roper, S.C., 2905 Universal Street, Suite 2, Oshkosh, Wisconsin, appearing on behalf of the County.

ARBITRATION AWARD

Brown County Sheriff's Department Non-Supervisory Labor Association (hereinafter referred to as the Association) and Brown County (hereinafter referred to as the County or Employer) are parties to a collective bargaining agreement that provides for final and binding arbitration of unresolved grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the instant grievance. A hearing on the grievance was held in Green Bay, Wisconsin, on April 27, June 29, and July 27, 2016. On the latter two hearing dates, per the parties' agreement, the undersigned conducted the hearings telephonically from his Madison office while the parties convened in Green Bay, Wisconsin. The hearing was transcribed. Thereafter, the parties filed briefs and reply briefs, whereupon the record was closed on September 30, 2016. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Whether the County has violated the provisions in the Labor Agreement by refusing to pay out sick leave at the time of retirement? If so, what is the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2015-2016 collective bargaining agreement contains the following pertinent provisions:

Article 35. **HEALTH AND DENTAL INSURANCE**

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Retired personnel are to remain in the plan, if they so desire, to age 65, provided they pay the entire costs of all premiums except as may be otherwise specifically provided for in this Agreement.

* * *

Article 38. **SICK LEAVE**

Officers shall be granted sick leave with pay at the rate of one working day of each full month of service. Effective January 1, 1988, sick leave shall accumulate but shall not exceed 135 working days. All sick leave shall be subject to administration by the Sheriff. Maximum payout at retirement or death of the employee is 135 days. The employee may convert earned/unused vacation days to sick leave days during the employee's last three years of employment.

Sick leave may be used for any period of absence from employment which is due to illness, bodily injury, exposure to contagious disease, pregnancy, required dental care, necessary attendance of the immediate family (defined as those persons living within the employee's immediate domicile.) In the case of

pregnancy, a written physician's certificate stating the date the employee is no longer medically able to work due to pregnancy will be required to initiate sick leave and a written physician's certificate stating the employee is medically able to return to work will terminate the sick leave with pay.

The employee has the duty to make other arrangements within a reasonable period of time for the attendance of children or other persons in his/her care.

The procedure for use of sick pay shall follow established administrative policy. Sick leave shall be computed to the nearest quarter hour.

All employees reaching normal retirement or disability shall be eligible to continue in the County's health insurance group plan until the age of sixty-five (65). The County shall pay all of the monthly premium payable, provided that the total amount expended for such insurance for each retired employee shall be limited to the value of any accumulated and unused sick pay not to exceed 135 days, effective January 1, 1988, standing to the credit of that employee as of that employee's date of retirement.

After the amount expended for any employees reaching the limit for such employee, the monthly premiums shall thereafter be paid by the employee.

1. In the event that an employee eligible under the sick leave provision and eligible for retirement under the provisions of the Wisconsin Retirement System dies prior to retirement, the survivor of said employee shall be entitled to 100% of the accumulated sick leave conversion as indicated above. In the event that an employee dies after retirement, the survivor of said employee shall be entitled to continue drawing on such fund as long as the surviving spouse does not remarry or the children of the deceased employee are not dependent as determined by the dependency rules of the Internal Revenue Code.
2. Dependent children, in accordance with regular County policy, will be eligible to apply the

escrowed amount for health insurance premium payment purposes upon the death of the surviving spouse. Remarriage of the surviving spouse will not terminate the eligibility of dependent children for this benefit.

3. Any funds remaining in the escrow account after death of the retiree, death or remarriage of the surviving spouse, or death or ineligibility of dependent children shall revert back to the County.
4. This health insurance premium payment program for protective employees is mandatory for all covered employees upon retirement and supersedes all previous sick leave payment programs upon retirement sponsored by Brown County.
5. If death of a covered protective service employee occurs before eligibility for retirement, 100% of the existing payment of accumulated sick leave will apply to the estate of the deceased employee for purposes of payment of health insurance premiums in accordance with the above policy.

All employees, who commence regular employment on or after the ratification of the 1999, 2000, 2001 agreement, will be automatically enrolled in the Casual Day/Disability Plan. (Ratification by the Brown County Board was May 16, 2001.)

Part-time employees enrolled in the Casual Day/Disability Plan will be subject to proration of benefits based on posted hours.

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).

Employees hired before July 1, will earn prorated casual days at a rate of one-half ($\frac{1}{2}$) day for each full month worked up to six (6) months for a total of three (3) days and then shall receive one-half ($\frac{1}{2}$) day per month for each full month remaining in the calendar year up to a maximum of two (2) additional full days. Employees hired after July 1, will not earn casual days during the initial calendar year in which they were employed. However, upon successful completion of six (6) months of employment, the employee shall receive five (5) casual days for the calendar year following the year of their hire.

Newly hired employees who terminate before the end of the calendar year in which they are hired or during probationary period, shall not receive any compensation for unused or accrued casual days. An employee who terminates employment on or before June 30 of any calendar year, shall receive payment for only one-half ($\frac{1}{2}$) of their accrued but unused casual days for that year. An employee who terminates employment on or following July 1 of any calendar year shall receive payment for any unused casual days.

* * *

BANKED SICK LEAVE

Employees employed by Brown County before the date of the ratification of the 1999, 2000, 2001 agreement, shall have the option, on a one-time basis, to opt into the Casual Day/Disability Plan. When an employee exercises this option, that employee's sick leave accumulation, up to a maximum of 135 days, will be banked in a sick leave accumulation account which may be used by the employee to supplement any 75% of regular pay benefit received for a disability. Banked sick leave may be used to make the employee whole for base pay earnings. However, no additional sick leave benefits will accrue in the banked account unless there are vacation days earned but unused during the final three (3) years of their employment with

Brown County. All sick leave shall be subject to administration by the department heads. In the event of the death of an employee, said employees' beneficiary will receive a payout equal to the sick leave balance in their account. The maximum payout for the death of an employee is 135 days.

All employees, employed before the ratification of the 1999, 2000 and 2001 agreement, upon reaching normal retirement or disability, shall be eligible to continue in the County's health insurance group plan until the age of sixty-five (65). The County shall pay all of the monthly premium payable, provided that the total amount expended for such insurance for each retired employee shall be limited to an amount equal to the value of any accumulated and unused sick pay not to exceed 135 days, effective January 1, 1988, standing to the credit of that employee as of that employee's date of retirement.

After the amount expended for any employees reaching the limit for such employee, the monthly premiums shall thereafter be paid by the employee.

1. In the event that an employee, eligible under the sick leave provision and eligible for retirement under the provision of the Wisconsin Retirement System dies prior to retirement, the survivor of said employee shall be entitled to 100% of the accumulated sick leave conversion as indicated above. In the event that an employee dies after retirement, the survivor of said employee shall be entitled to continue drawing on such fund as long as the surviving spouse does not remarry or the children of the deceased employee are not dependent as determined by the dependency rules of the Internal Revenue Code.
2. Dependent children, in accordance with regular County policy, will be eligible to apply the escrowed amount for health insurance premium payment purposes upon the death of the surviving spouse. Remarriage of the surviving spouse will

not terminate the eligibility of dependent children for this benefit.

3. Any funds remaining in the escrow account after death of the retiree, death or remarriage of the surviving spouse, or death or ineligibility of dependent children shall revert back to the County.
4. This health insurance premium payment program for protective employees is mandatory for all covered employees upon retirement and supersedes all previous sick leave payment programs upon retirement sponsored by Brown County.
5. If death of a covered protective service employee occurs before eligibility for retirement, 100% of the existing payment of accumulated sick leave will apply to the estate of the deceased employee for purposes of payment of health insurance premiums in accordance with above policy.

Part-time employees shall receive disability benefits on a pro rata hourly basis.

* * *

BACKGROUND

Since at least 1975, the County and the Association have been parties to a series of collective bargaining agreements (CBAs). From then until the present, these CBAs have provided an opportunity for employees to receive a benefit from unused sick leave at the time of retirement or disability. The intent of this sick leave escrow benefit has been to allow a deputy to retire at age 55 and remain in the County's health care plan until age 65 when Medicare becomes effective.

Here is the pertinent bargaining history.¹

¹ In this section dealing with bargaining history, I have just included the language that actually made it into the CBA. I did not include those relevant bargaining proposals that did not make it into the CBA. While I certainly could have included those bargaining proposals in this section because they are part of the parties' overall bargaining history, I have decided to instead reference them in the Discussion.

From 1975 until 1979, the CBAs provided that employees could only receive a 25 percent cash payout of unused sick leave, up to 120 days, at retirement or disability. Thus, a maximum of 30 days could be paid out.

In 1980, the parties negotiated a change to that language. The new language increased the payout of accumulated sick leave from 25 percent to 50 percent. Under this language, employees had the option to receive 50 percent of the unused sick leave payout, up to 90 days, as either cash or to pay health insurance premiums at the time of retirement or disability. Thus, a maximum of 45 days could be paid out.

In 1983, the parties negotiated another change to this language. This time, the cash payout option was deleted. The parties also agreed at that time to an arrangement where employees received a sliding scale amount – from 25 percent to 100 percent – of unused sick leave, up to 120 days, to be paid out to cover the health insurance premium in the County's plan at retirement or disability. The sliding scale began at 100 percent of up to 120 days for an employee retiring at age 55 or being disabled, declining to 25 percent after reaching age 62. Sick leave payout at death was also added at this time. Also in 1983, the parties negotiated the addition of five numbered provisions regarding details of surviving spouses and dependents using funds in the retirees' escrow account to pay health insurance premiums.

In 1985, the first provision regarding a retiree's death was clarified and listed benefits to a surviving spouse in the event the employee died prior to or after retirement.

In 1987-88, the parties negotiated several relevant changes: (1) the maximum sick leave accumulation increased from 120 days to 135 days; (2) employees were allowed to convert vacation days to sick days during the employee's last three years of employment; and (3) remarriage of a surviving spouse did not terminate the dependent children's eligibility for coverage.

In 1999-2001, the parties negotiated into the contract the "Casual Days" program which was optional for current employees and mandatory for new hires. Under this program, accumulated sick leave was frozen for current employees electing to participate in the "Casual Days" program. The sick leave payout benefit program was essentially duplicated in the "Banked Sick Leave" section.

In 2007, the parties deleted the sliding scale percentage for sick leave reimbursement that had been negotiated into the 1983 CBA. At the time, the parties agreed that up to 135 days would be available to employees regardless of their age at the time of retirement.

While this bargaining history of the sick leave payout benefit shows that the language has evolved over the last 40 years, it can fairly be summarized thus: from 1975 through 1979, it was a "cash only" sick leave payout benefit. From 1980 through 1982, the parties had a cash or health insurance option plan. Then, in 1983, presumably in exchange for improving the sick

leave payout amount, the parties eliminated the cash payout option; this left only health insurance as the recipient of the sick leave payout funds. Since 1983, it has been a health insurance only benefit plan. The cash option which was expressly deleted from the 1983 CBA has never appeared since.

* * *

When an employee retires, the County compensates them for accrued but unused vacation, casual days, personal days, holidays, and compensatory time. Personal days and holidays are included in the vacation allotment.

Sick leave is treated separately when an employee retires. When an employee retires, the County has an accounting form to track the unused sick leave value to be held in escrow. This form includes the date of retirement, employee wage information, as well as the calculation for the escrow as a result of the employee's sick leave balance at retirement. The County creates an escrow account in the retiree's name for accumulated but unused sick leave. The County's benefits specialist keeps track of the escrow amount using a spreadsheet account. The value of the unused sick pay not to exceed 135 days is credited to the employee's account as of the employee's retirement date.

With the exception noted below, the County has not paid out sick leave in cash to Sheriff's Department bargaining unit members when they retire. Instead, what has happened is that a retiree's unused sick leave has gone into an escrow account which has been used for paying the premium on the County's health insurance plan.

The exception was this. Greg Gallenberger was a deputy who retired in 2001 at age 53. When he retired, an escrow account was established for him and he was credited with his unused sick leave balance of \$25,816. Upon retirement, he switched to his wife's health insurance because she was also a County employee with County health insurance. When Gallenberger retired, he joined a family plan under his wife's name who still was employed by the County and retained coverage under the County's health insurance plan. Twelve years then elapsed and Gallenberger's escrow account remained on the books and was not used. Then, in November 2014, when Gallenberger turned 65 years old, the County paid him his escrowed amount of \$25,816 in cash. The County now characterizes this payment to Gallenberger as a mistake which should not have occurred. According to the County, the amount in Gallenberger's account should have been forfeited, not paid out.

The record also shows that in May 2014, the County paid out escrowed sick leave funds to a deputy's spouse when that employee died prior to retirement. Thus, the deputy was an active employee at the time of his death. In that instance, Lance Catalano's spouse received a cash payout of his sick leave escrowed amount (which was \$37,189).

* * *

For sick leave purposes, bargaining unit employees are in three different categories. The first category covers employees who were hired prior to the ratification date of the 1999-2001 CBA and had the option to select the casual day/disability plan. At that time, an employee's sick leave accumulation was capped if he/she selected this option. The second category covers employees hired after the ratification date of the 1999-2001 CBA. Employees under the casual days/disability plan could use sick leave to supplement the 75 percent of regular pay benefit an employee received for a disability under the short-term disability plan. No additional sick leave benefits would accrue though. Employees were able to convert vacation days earned but unused during the final three years of employment into sick days. Employees electing the casual days plan or any new hires after the 1999-2001 CBA are provided five casual days each January 1st. Employees are paid out casual days on an annual basis depending on when they earned them and if they went unused. They also received short-term disability insurance to supplement the casual days granted. The third category of employees were those that opted to stay under the existing sick leave arrangement where they would accumulate one sick day per month up to 135 days. Those employees do not receive short-term disability insurance. Sick leave continues to operate as it always had for this group of employees.

Currently, there are 15 employees in the bargaining unit who remain on the traditional sick leave program. There are 31 employees in the bargaining unit who elected to participate in the casual day plan. The rest of the employees in the bargaining unit were hired after the effective date of the casual days program which required automatic coverage.

It is set against this factual background that the following occurred.

FACTS

Deputy Mark Keuler retired from the department on May 2, 2016. When he retired, he had about 125 sick leave days accumulated. The value of his unused sick leave amounts to approximately \$33,000. Keuler asked that he be paid out all of his accumulated sick leave upon retirement. As part of his correspondence with the County on the matter, Keuler suggested several examples of payout remedies including: (1) pay him the balance of sick leave upon retirement (presumably in cash); (2) roll it over into a VEBA account; (3) freeze his sick leave escrow account and allow him to purchase the County's health insurance plan at a later date when his wife retires and no longer has health benefits; or (4) allow him to purchase his own health plan. The County denied his request.

Deputy Robert Trich retired from the department on January 8, 2016. When he retired, he had 60 hours of accumulated sick leave in his escrow account. The value of his unused sick leave amounts to approximately \$3,400. Trich asked that the amount be paid out to him upon retirement (presumably in cash). As part of his correspondence with the County on this matter,

Trich said that he did not need the County's health insurance since he retired from the military and was receiving health insurance through Tricare. The County denied his request.

Keuler and Trich are both employees who opted into the casual days/disability insurance program. As a result, both are subject to the "Banked Sick Leave" section of Article 38 of the 2015-16 CBA. The language dealing with the sick leave payout in the "Banked Sick Leave" section of Article 38 is essentially the same as the payout language for those employees who did not opt into the casual day/disability leave that is found in Article 38 "Sick Leave."

* * *

The Association subsequently filed two grievances which sought the payout of the grievants' accumulated sick leave balances at retirement. The grievances were appealed to arbitration.

DISCUSSION

What happened here is that two deputies who retired sought to have their accumulated sick leave balance paid out to them in cash. The County refused to do that. The issue here is whether that action by the County (i.e. not paying them cash for their accrued accumulated sick leave at retirement) violated the CBA. Based on the rationale which follows, I answer that question in the negative, meaning I find no contract violation.

This is a contract interpretation case. That being so, I've decided to begin with the following introductory comments about how I go about interpreting contract language. In a contract interpretation case, my interpretive task is to determine if the meaning of contract language is clear and unambiguous or whether it is ambiguous. Language is considered clear and unambiguous when it is fairly susceptible to but one plausible interpretation/meaning. Conversely, language is considered ambiguous when it is fairly susceptible to more than one interpretation/meaning. If the language is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous though, my job is to then interpret it to discern what the parties intended it to mean and then apply that meaning to the facts.

Before I address the contract language, I'm going to comment on the following for the purpose of context. First, sometimes the contract language being reviewed is short, say just a sentence or two. That's not the case here. In this instance, Article 38 is six single pages long. While not all of that contract language is relevant here, the point is that's still a lot of language to sort through and decide whether it is, or is not, pertinent to this dispute. Second, the record shows that this contract provision has existed – in a variety of forms – for 40 years. It can fairly be surmised that during that time period, many employees have retired from the Sheriff's

Department. However, insofar as the record shows, this contract language has not been the subject of previous grievances or been interpreted by an arbitrator. That being so, the undersigned is tasked with supplying an arbitral interpretation to contract language that has existed a long time and has not required arbitral interpretation until now.

The focus now turns to that task. As just noted, the contract language at issue here is found in Article 38. I'm going to start by reviewing the language found at lines 897 – 900. It provides thus:

All employees reaching normal retirement or disability shall be eligible to continue in the County's health insurance group plan until the age of sixty-five (65). The County shall pay all of the monthly premium payable, provided that the total amount expended for such insurance for each retired employee shall be limited to the value of any accumulated and unused sick pay not to exceed 135 days

Broadly speaking, this language says that employees who retire can remain on the County's health insurance plan if they want; they don't have to though. The County is not forcing anyone to take health insurance. If an employee has unused accumulated sick leave when they retire, they can convert it into escrow funds to pay the premiums. The escrowed funds are not applicable to any other insurance plan other than the County's.

Having given that overview, here's a more detailed review of the language. The first sentence says that employees reaching retirement or disability can continue/remain in the County's health insurance plan until age 65. While the language does not say what happens once an employee reaches age 65, it is implicit that someone older than 65 cannot continue/remain in the County's health insurance plan. At that point, they are Medicare eligible. The next sentence deals with who pays the cost of the insurance premium after the employee retires or goes on disability. It says that the County will pay all the monthly premiums associated with the plan subject to a certain amount of accumulated and unused sick leave. The amount is 135 days. While the language does not explicitly say what happens if there is not enough accumulated sick leave to cover the cost, it is implicit that the employee then pays the cost of the health insurance premium (for as long as they remain in the County's health insurance plan up until age 65). That is all this part of the contract language says.

While this contract language does not say how this benefit program is to be implemented, the record shows that the County has established a mechanism wherein an employee's accumulated sick leave is converted into a value and held in an escrow account. That accumulated sick leave amount is applied to pay the health insurance premium. Said another way, the escrowed unused sick leave funds that have been credited to an employee's account are used to pay the health insurance premium. Once the escrowed amount is exhausted, the employee can continue to participate in the County's health insurance plan at

his/her own cost. Once employees reach age 65 though, they are no longer eligible to remain in the County's health insurance plan.

As already noted, the question to be answered here is whether the payout of the employee's accumulated sick leave at retirement can be in cash or other ways.

In addressing that question, I've decided to note at the outset that sick leave is compensation that vests as it is earned. That said though, it (i.e. sick leave) is still subject to whatever terms, conditions, and restrictions the CBA provides. Once again, in this case, we are looking at whether sick leave can be paid out in cash at retirement.

On its face, there is nothing in the language just quoted from Article 38 that expressly provides for a cash payment option. Additionally, there is nothing in the language just quoted that says there are other ways of "paying out" the employee's escrowed amount of unused sick leave such as having employees defer participation in the County's health insurance plan until a later time, or rolling any proceeds into a VEBA plan or 457 account, or purchasing a non-County health insurance plan.

What I'm going to do next is review the numbered provisions 1 through 5 under the "Banked Sick Leave" section of Article 38 (lines 906 – 929) to see if any of that language provides for a cash payout option.

Provision #1 says that if an employee who is eligible for retirement dies prior to retirement, their survivor is entitled to 100 percent of his/her sick leave conversion. I understand the last word in the previous sentence – "conversion" – to mean converting sick leave into an amount which will be credited to an employee's escrow account to be used to pay the premium for the County's health insurance plan. If the employee dies after retirement, the employee's survivor can continue to draw upon the escrow account as long as the surviving spouse does not remarry or the children of the deceased employee are not "dependent." The focus of this provision is on health insurance, not a cash option.

Provision #2 says that dependent children are eligible to apply the escrowed amount for health insurance premium payment purposes upon the death of the spouse. Additionally, it says that remarriage of the surviving spouse does not terminate the eligibility of the children for the benefit. The focus of this provision is on health insurance, not a cash option.

Provision #3 says that any funds that remain in the escrow account after death of the retiree, death or remarriage of the surviving spouse, or death or ineligibility of dependent children, revert to the County. Additionally, it says that if the escrowed funds are not needed, they are retained by the County.

Provision #4 says that this "health insurance premium payment program for protective employees is mandatory for all covered employees upon retirement" When it says that the

premium program is "mandatory," I understand it to mean that if the deputy elects at retirement to participate in the County's health insurance program, the County will apply their escrowed sick leave funds to pay the employee's premium payment. When it says "covered employees," I understand that to refer to those employees who meet the initial qualifying threshold to receive post-retirement benefits (i.e. employees hired before the 1999 - 2001 CBA). Finally, this provision says that it "supersedes all previous sick leave payment programs" I understand that to refer to the cash payout option that once existed.²

Provision #5 says that if an employee dies before they are eligible for retirement, the escrowed sick leave funds will apply to the estate of the deceased employee for purposes of payment of health insurance premiums. The focus of this provision is on health insurance, not a cash option.

A review of these five provisions shows that there is no express reference in any of them to allowing sick leave funds to be paid out in cash to an employee who does not want to participate in the County's health insurance plan at retirement. Additionally, there is no reference in any of them to allowing sick leave funds to be paid into a VEBA account, a 457 account, or another health insurance plan. There also is no reference to delaying the use of escrowed funds to a later time after an employee retires.

While the County contends that Article 38 - and more specifically Provision #4 - is clear and unambiguous in not allowing sick leave funds to be paid out in cash or other ways to an employee who does not want to participate in the County's health insurance plan in retirement, I've decided that I'm not going to base my ultimate finding herein on just my review of the contract language.

Here's why. At the hearing the parties litigated a bargaining history case. If I were to make my ultimate finding based on just a review of that contract language, I'd be remiss as an arbitrator in doing that. Consequently, I'm going to review the parties' bargaining history and see if it helps me determine the correct interpretation of the contract language noted above.

I've decided to begin my discussion on this topic with a short summary of what the record evidence shows. It shows that from 1975 to 1979, the CBAs said that unused sick leave was paid out in cash. Then from 1980 to 1982, the CBAs said that unused sick leave could be used for either a cash payout or to pay for the health insurance plan in retirement (i.e. both). In 1983, the parties deleted the cash option. That left only health insurance as the recipient of the sick leave payout funds. Since 1983, the only option has been to apply the sick leave escrowed funds to the County's health insurance plan.

² I'll address this in more detail later.

Having given that overview, here's a more detailed review of the parties' bargaining history. From 1975 to 1982, employees could get a cash payout of their sick leave escrowed funds at retirement if they wished. The 1982 CBA provided thus:

It is further provided that the County shall pay 50% of accumulated sick leave carried at the time of retirement or disability to said retiree or person disabled on his retirement or disability up to a maximum of 90 days (maximum payout – forty-five days). The employee has the option to receive the payout as a cash payment or as an amount placed in an escrow account from which health insurance premiums will be paid until the sum is depleted.

(Emphasis added).

In the first line of the emphasized section, the word “payout” is used. The sentence then went on to say that this “payout” could be either in cash or placed in an escrow account to be used to pay health insurance premiums in retirement. The reason the word “payout” is significant here is because it (i.e. the word “payout”) is still contained in Article 38. As the Association sees it, that word (i.e. “payout”) equates with cash. I find that proposed interpretation is erroneous when the word “payout” is viewed in the context of the 1982 language. That's because back then the word “payout” referred to either cash or an amount placed in an escrow account to pay health insurance premiums. The following year (1983), the parties bargained a complete revision to this language. In the context of this case, what is most significant is that the parties made a deliberate decision to eliminate the cash payout option from one of the two choices available to a retiree's use of the sick leave escrowed funds. Thus, the parties deleted the cash payout option in moving from 1982 CBA to the 1983 CBA. While no one who negotiated this change testified at the hearing, it can nonetheless be surmised why the parties agreed to the change. It was this: in 1982, employees only received a payout of 50 percent of accumulated sick leave. In 1983, employees could receive a payout of 100 percent of sick leave upon retiring at age 55 or being disabled. What happened then in 1983 is that the parties voluntarily agreed to delete the cash option. When they did so, they left the word “payout” in the contract language. By doing that, the only “payout” choice left was for the sick leave funds to be used to pay the premiums in the County's health insurance plan.

In my view, this bargaining history clearly shows that when the parties wanted to allow a cash payout of the sick leave escrowed amount to employees at retirement, they knew how to say it and that's exactly what they did in their 1982 CBA. In 1983 though, that changed and the parties voluntarily agreed to remove/eliminate the cash payout option. The obvious inference which can be drawn from that is that the parties no longer wished to provide the cash payout to employees at retirement for their accumulated sick leave. Since 1983, the cash payout option has never returned for the deputies (meaning it has not been re-included in subsequent CBAs). Instead, the record shows that the sick leave post-retirement benefit has

been limited to the ability of a retired or disabled deputy to purchase the County's health insurance by using their accumulated sick leave.

* * *

In 1993, the Association **may** have tried to reintroduce the cash option via a bargaining proposal. The reason why I used the hedge word "may" in the previous sentence is because it's not clear. The following discussion shows why.

That year the Association unsuccessfully proposed that the following language be added to the sick leave article:

All employees upon reaching normal retirement or disability prior to attaining normal retirement age shall have the option to continue in the County's health insurance group plan until the age of 65 or receive a lump sum payout of all earned/unused vacation days. The amount available to such employee for the use toward the payment of a monthly premium or for a cash payout shall be limited to an amount equal to the percentage set forth below of the value of any accumulated and unused sick pay not to exceed 135 days, standing to the credit of that employee's date of retirement....

According to the County, in this proposal the Association sought to reintroduce a cash payout for unused sick leave (in addition to continuing to let employees use their unused sick leave to pay for health insurance under the County's health plan). The Association disputes that contention. As the Association sees it, the first sentence dealt with the payout of vacation days, not sick days. The Association's point seems valid if you just look at the first sentence which ended with the phrase "payout of all earned/unused vacation days." While the last two words in the sentence are "vacation days," that raises the question of why "vacation days" were being referenced in the sick leave article. This uncertainty is not resolved and/or clarified by the next sentence. It again refers to a "cash payout," but this time there is no reference to "vacation days" (like there was in the first sentence). Instead, this time it references "accumulated and unused sick pay not to exceed 135 days" As I read it, the "cash payout" referenced in the second sentence refers to unused sick leave, not unused vacation days. That being so, it is hard to reconcile these two sentences. Because of this confusion on what the proposal actually meant and contemplated, I find it to be unclear whether the Association tried via this proposal to restore the cash option which had been bargained out of the CBA in 1983.

It's much clearer what the Association intended with its proposal in 2000. That year, the Association made the following proposal to change the sick leave language:

(6) A retired employee or surviving spouse or surviving dependent children eligible for the accumulated sick leave conversion as provided above may utilize such escrowed funds for reimbursement for payment of hospitalization and medical insurance premiums other than those of the plan provided by the County.

(7) At the option of the employee, the conversion of unused and accrued sick leave as provided herein may be delayed on a one time basis for a period not to exceed sixty (60) calendar months from the date of retirement. If the employee opts to delay such benefit, the employee may continue enrollment under the hospitalization and medical insurance policy provided by the Employer by making premium payments when due from other funds. If the employee, upon retirement or subsequent thereto, terminates enrollment under the policy provided by the County, the employee shall no longer be eligible to renew the enrollment thereunder. If the employee opts to delay the benefit as provided herein, upon timely written notice of intent to utilize the benefit, the employee may begin drawing on the escrow to pay the premiums on the policy provided by the County (if the employee has remained in such program) or to receive quarterly reimbursement for a plan of the employees own choosing. The County may require evidence of continued enrollment under a plan of the employees own choosing. Failure to submit such proof of enrollment as required by the County within (1) month of written request or failure to require the County to begin to draw on the sick leave conversion funds prior to the sixty (60) month anniversary of that employee's retirement shall result in forfeiture of any entitlement to the sick leave conversion benefit as provided hereunder.

(Emphasis added).

This proposal did not make it into the 2000 CBA or any subsequent agreement.

In this proposal, the Association asked that retirees be allowed to purchase non-County health insurance with their unused accumulated sick leave. It also asked that retirees be allowed to delay participating in the County's health insurance plan immediately upon retiring. Those proposals were significant when one considers the following context. At the time this proposal was made, employees had to utilize the escrowed funds toward the County's health insurance plan immediately upon retirement; they could not delay taking advantage of the County's health insurance plan upon retirement. While an employee could opt onto their

spouse's plan at retirement, there was no guarantee that an employee could use the escrowed amounts at a later time.

The reason these proposals are relevant here is because they mirror in part the remedies sought by grievant Keuler. While the Association contends it is only asking for a cash payout as a remedy, the record shows that Keuler's grievance sought additional options beyond just a cash payout. That's significant, of course, because it's a well-accepted arbitral principle that an arbitrator should not award a party with those remedies that it was unsuccessful in achieving across the bargaining table.

Overall, this bargaining history of the sick leave payout provisions in Article 38 supports the County's interpretation that Article 38 does not allow escrowed accumulated sick leave funds to be paid out to employees in cash or other ways at retirement; instead, those funds can only be used to purchase health insurance if the employee participates in the County's health insurance plan.

* * *

I'm now going to pivot away from the parties' bargaining history and review how the contract language at issue has historically been applied by the County.

The record shows that since 1983 – with the exception noted below – when a deputy retired the County did not pay them for any of their accumulated sick leave balance in cash. Instead, an escrow account was created for the retired deputy who stayed on the County's health insurance plan and their sick leave balance was used to pay the insurance premium of the County's health insurance plan. While it can be surmised that there were deputies in the last 30 plus years who wanted to be paid cash for their unused accumulated sick leave at retirement, that didn't happen and the County's interpretation (that deputies could not be paid in cash for their unused accumulated sick leave) was not challenged.

As just noted, until recently there were no instances where an employee who retired was paid for their sick leave balance in cash. In November 2014 though, that's exactly what happened. Not surprisingly, the Association hangs their proverbial hat on that instance and wants me to use it as the basis for allowing cash payments to each of the grievants.

Here's what happened in that instance. In 2001, Deputy Gallenberger retired. At that time, he had an accumulated sick leave balance of \$25,816. When he retired he remained covered under the County's health insurance plan because his wife was also a County employee with County health insurance. Thus, during retirement, Gallenberger was part of his wife's family plan and retained insurance coverage under the County's health insurance plan. In November 2014, when Gallenberger turned age 65 and became Medicare eligible, the County paid him his unused sick leave balance of \$25,816 in cash.

The County characterizes this payment to Gallenberger as a mistake. The word “mistake” sometimes refers to a situation where someone inadvertently did something they didn’t intend to do. That’s not what happened here. In this instance, the County’s previous human resources director made the conscious and informed decision to pay Gallenberger’s unused accumulated sick leave balance to him in cash. Not surprisingly, in this case the County wants to distance itself from this payment.

Before I go any further in addressing the Gallenberger matter though, I’m going to address another instance where the County recently paid out an employee’s accumulated sick leave funds. In the following paragraph, I’ll explain why.

In May 2014, the County paid out Deputy Catalano’s accumulated sick leave balance of \$37,189 to his spouse after he (Deputy Catalano) died. Deputy Catalano died prior to retirement. As the Association sees it, this payout is indistinguishable from the Gallenberger payout. I disagree. Here’s why. The Gallenberger payout occurred after his retirement while the Catalano payout occurred prior to his retirement (but after Deputy Catalano’s death). While the Association calls this “a distinction without a difference,” I see it as a significant difference. That’s because the payout which the County made to Catalano’s widow had nothing to do with retirement. Instead, it involved a death benefit. While the contract language dealing with death benefits is also found in Article 38 (specifically, Provision #5), we are not dealing with death benefits in this case. Instead, here we are dealing with whether the County is contractually obligated to payout unused sick leave at retirement in cash to those deputies who do not want to continue on the County’s health insurance plan. The question of whether the County is contractually obligated to payout unused sick leave to a deputy’s estate after his/her death is a completely separate issue and one which I’m not going to answer herein. That being so, I find that the payment that the County made to Catalano’s widow (as part of a death benefit) cannot be linked to the payment the County made to Gallenberger for the purpose of trying to prove the existence of a past practice.

Having so found, I’m now going to return to the Gallenberger payout and its impact here. The essential question to be answered is whether the County’s payout of funds to Gallenberger created a past practice that obligates the County to payout unused accumulated sick leave to other deputies at retirement. I find it does not. In order for a practice to be considered indicative of the parties’ mutual intent and be binding, the conduct must be clear and concise, of long-duration, and accepted by both sides as a fixed and established practice. It is a generally accepted arbitral principle that a single instance is insufficient to create a past practice which supplements the CBA. In accordance with that generally accepted view, I find that the Gallenberger cash payout did not create a past practice which obligates the County to payout cash to other deputies at retirement.

* * *

The focus now turns to how other contractual benefits have historically been paid out by the County. The record shows that comp time, personal days, holidays, vacation, and casual days are all paid out to employees in cash when they leave or retire. The Association maintains that since these contractual benefits are paid out to employees at retirement, sick leave should be too. However, insofar as the record shows, those benefits are paid out in cash per language contained in the CBA, or via a mutually accepted past practice, or are required by law. That's not the case with sick leave. As the above discussion shows, this CBA does not expressly say that sick leave can be paid out in cash at retirement. This fact further supports the County's argument that if the parties wanted to payout sick leave escrowed amounts in cash at retirement, they would have expressly provided it.

* * *

Having reviewed the pertinent contract language, the parties' bargaining history regarding same, and how that contract language has historically been applied by the County, I find that all the language allows – at present – is for employees who retire to remain in the County's health insurance plan and apply their escrowed sick leave funds to the payment of those premiums. The CBA does not require the County to payout an employee's unused accumulated sick leave in cash at retirement. When the language in Article 38 says "maximum payout at retirement or death ... is 135 days," it is simply setting the overall cap of how much sick leave can be used to generate funds to apply to health insurance premiums. The word "payout" in Article 38 does not refer to a cash payout.

* * *

The Association's final argument is that the arbitrator should look at Chapter 4 of the County's Code of Ordinances and apply it here. In Chapter 4 of same, the County expressly provides for either a cash payment or a health insurance option to its general municipal employees. With regard to the former option (i.e. cash payment) the ordinance allows a certain amount of sick leave (namely 50 percent of all accumulated sick leave with a maximum payout of 45 days) to be paid out in cash to employees at retirement. However, that section of the Ordinance is inapplicable to the deputies. That's because post-retirement benefits are thoroughly covered in the CBA, and Article 38 provides a higher level of benefits than does the County's Ordinance (i.e. the maximum payout is 45 days under the County's Ordinance versus 135 days in the parties' CBA). Consequently, the CBA is the authoritative document herein – not Chapter 4 of the County's Ordinance. As a result, I'm not going to use Chapter 4 of the Ordinance as a basis upon which to find a contract violation.

* * *

To summarize then, when deputies retire they are able to apply the value of their unused accumulated sick leave to the County's health insurance plan. There is no other option available to them for the application of the escrowed amount. Specifically, there is no express

authority in Article 38 for a cash payout, nor are there any other options such as payment into a 457 account, payment into a VEBA account, allowing employees to defer participation until a later time, or allowing employees to participate in a different plan. I decline to read any of those options into the CBA. Accordingly, the County did not violate the CBA when it did not pay either of the two grievants cash as they requested for their unused accumulated sick leave at retirement.

Those arguments not addressed in my Discussion were considered, but were deemed unnecessary to decide the outcome of this case.

In light of the above, it is my

AWARD

That the County did not violate the CBA when it did not payout (in cash or other ways) the amount escrowed in the two grievants' sick leave accounts to them at retirement. Therefore, the grievances are denied.

Dated at Madison, Wisconsin, this 3rd day of November 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Arbitrator