

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between
WINNEBAGO COUNTY DEPUTIES' ASSOCIATION
and
WINNEBAGO COUNTY

Case ID: 528.0004
Case Type: MA

AWARD NO. 7949

Appearances:

Benjamin Barth and Doug Nelson, Labor Consultants, The Labor Association of Wisconsin, Inc., for the Association.

Michael J. Collard, Director of Human Resources, for the County.

ARBITRATION AWARD

The Winnebago County Deputies' Association and Winnebago County jointly requested that the Wisconsin Employment Relations Commission assign me to serve as arbitrator to resolve a sick leave grievance. The Commission honored that joint request. Hearing was held in Oshkosh, Wisconsin on December 20, 2017. The hearing was not transcribed or otherwise recorded. The parties filed written argument by February 22, 2018.

ISSUE

The parties were unable to agree on a statement of the issue to be resolved but did authorize me to frame the issue after giving due consideration to their respective positions. Having done so, I conclude the issue is best stated as:

Did the County violate the 2016-2018 contract by requiring that employees follow a 2017 Directive and, if so, what is the appropriate remedy?

DISCUSSION

The parties' 2016-2018 contract contains a "SICK LEAVE WITH PAY" provision. In January 2017, the County issued an "Attendance and Use of Sick Leave" Directive. This unilaterally imposed Directive replaced a previous unilaterally imposed Directive that had been in place since 2014. The Association, contrary to the County, asserts that portions of the 2017 Directive violate the contract.

Broadly speaking, the Association argument is premised in part on an assumption that the 2014 Directive had become part of the 2016-2018 contract and that any differences between the 2014 and 2017 Directives therefore violate the 2016-2018 contract. I do not find this argument to be persuasive. The 2014 Directive (as does the 2017 Directive) contains specific language indicating that the Association contract governs if there are differences between the contract and the Directive. This language confirms that the unilaterally imposed Directive is separate from the contract. To the extent the Association concludes that a Directive (which is in effect a work rule) is not "reasonable", it has a right under Article 34 and Article 5 of the contract to litigate that type of dispute. However, that is not what is being litigated here.

The Association also broadly asserts the terms of the 2014 Directive constitute a past practice that the County is obligated to follow until the parties bargain otherwise. Assuming for the sake of argument that the Directive is a past practice, its less than three-year duration would fall far short of what is required to create an implied contractual term. More importantly, Article 39 of the 2016-2018 contract specifies:

This Agreement supersedes all previously existing agreements or Employer's policies governing wages, hours and conditions of employment.

Thus, to the extent the 2014 Directive was a policy governing wages, hours and conditions of employment, it was "superseded" by the terms of the 2016-2018 contract.

Consistent with the above analysis, the 2016-2018 contract contains the parties' bargain as to sick leave rights and obligation and it is the 2016-2018 contract language that will be the basis for this Award.

The Association's brief first alleges that the 2017 Directive conflicts with the contractual right of employees to schedule appointments during the workday. The contract allows employees to use sick leave for appointments "which cannot be reasonably scheduled outside of work hours." The Directive states: "Members are expected to schedule appointments outside of the workday." I conclude that the Directive has the same meaning as the contract. Appointments are to be scheduled outside of work hours unless that cannot reasonably be done.

The Association brief next points out that the Directive includes a rating system the County will be using when it evaluates employees based on their use of certain types of sick

leave. The contractual sick leave provision does not address how sick leave use might factor in to an evaluation of an employee's work performance. However, the County persuasively argues, and the Association does not dispute, the County has the management right to evaluate employee performance. Indeed, Article 30 of the contract specifically references evaluations and provides an employee right to respond to an evaluation. To the extent an evaluation impacts an employee's pay, discipline, promotional opportunities or other wage, hour and conditions of employment, the employee has the right to contest the merits of the evaluation thru the contractual grievance procedure. Given the foregoing, I conclude that this portion of the Directive does not violate the contract.

The Association brief then turns to the portion of the Directive that creates a SICK LEAVE USE REPORT which requires the employee to provide certain specific information. The 2016-2018 contract specifies that sick leave absences "shall be reported to the Chief Deputy or other designated employee at least one (1) hour prior to the scheduled starting time for work, except in the case of emergency." Within the scope of this specific contract language, the information the County can require be "reported" includes all matters on the REPORT. As to the "nature of your illness" question, it is noted that an employee may well not have or know a specific diagnosis to report. To the extent the County receives a general response to this question and has a reasonable basis to believe that that an employee's absence does not qualify for sick leave benefits, the County has a management right to investigate.

Lastly, the Association cites the portion of the Directive that requires an employee to provide information from a physician on a Member Status Report if absent due to sick leave for three or more working days. The contract specifies that:

Absences of three (3) successive working days or longer shall require a physician's statement as to the nature of the illness or injury and its probable duration.

The information requested on the Member Status Report does not exceed what is allowable under the above-quoted contract provision.

Given all of the foregoing, the County did not violate the 2016-2018 contract by requiring that employees follow a 2017 Directive.

Dated at Madison, Wisconsin, this 19th day of April, 2018.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Arbitrator