

BEFORE ARBITRATOR STANLEY H. MICHELSTETTER

In the Matter of the Arbitration of a Dispute Between

BROWN COUNTY

And

WERC Case ID 115.0018

BROWN COUNTY SHERIFF'S DEPARTMENT
NON-SUPERVISORY LABOR ASSOCIATION

Decision #: 39793-B

Appearances:

Von Briessen & Roper, S.C., Attorneys at Law, by James Macy, appeared on behalf of the County.

Cermele Law Firm, Attorneys at Law, by Jonathan Cermele, appeared on behalf of the Association.

INTEREST ARBITRATION AWARD

Brown County (herein "County") and the Brown County Sheriff's Department Non-Supervisory Labor Association (herein "Association") jointly selected the Undersigned from a panel of arbitrators provided by the Wisconsin Employment Relations Commission (herein "WERC") on March 3, 2023, which appointed the arbitrator to issue a final and binding award in the matter, pursuant to §111.77(4)(b), Wis. Stats. I held a hearing in Green Bay, Wisconsin, on May 24, 2023. The parties each filed post-hearing briefs, the last of which was received on July 26, 2023. The parties each filed reply briefs, the last of which was received on August 18, 2023. The record was closed then.

ISSUES

Pursuant to §111.77(b), Wis Stats., the arbitrator is to determine which of the parties' final offers is to be incorporated into their collective bargaining agreement from January 1, 2022, to December 31, 2023.

One provision in the final offers is the same, increasing the annual clothing allowance specified in Article 26 from \$480 to \$600. The provisions which are in dispute are:

1. The County proposes to amend Article 37 Sick Leave as follows. The Association opposes any change in the current provision.

Article 37 — Sick Leave — Modify Short Term Disability paragraph. (For clarification purposes only — to the extent any practice exists, without admission of any, the County is hereby giving notice to delete such practice)

The short term disability leave shall be administered consistent with the plan provided to all other County employees.

Employees who have completed six (6) months of service shall be eligible for disability leave pay as follows:

- On the job accidents or injuries of the employee - first day coverage at 75% of regular pay until the start of long-term disability coverage (doctor certificate required).
- Sickness meeting short-term disability criteria or an off the job accident or injury of the employee - coverage after three (3) work days at 75% of regular pay until the start of long-term disability coverage (doctor certificate required).

All claims for disability benefits must be submitted to the County's third-party benefit administrator ~~Human Resource's Department~~. Claims arising out of sickness or an off the job accident or injury must be submitted within four (4) workdays of the initial absence. Claims must include a statement indicating the day the employee first became disabled, the nature of the disability, and the employee's anticipated date return. The Human Resources Department, within its discretion, may request from the employee's physician, a written certificate indicating the first day of disability, the reason for the employee's disability, and the anticipated length of such disability in the event the employee is absent for a period of more than three (3) work days. The County agrees to waive the foregoing requirement under extraordinary circumstances (e.g. hospitalization). Upon returning to work from disability, employees will fill out any required forms, furnished by the County, for proper recording of disability leave.

In order to qualify for disability benefits, an employee must report to the immediate supervisor or other management designated employee at least one (1) hour prior to the employee's normal start time, except in the case of an emergency. All illness or injury must be reported every day unless the definite absence time is reported on the first day of occurrence. It is understood by both parties that employees are expected to notify the County at the earliest practicable time but no less than one (1) hour prior to the employee's normal start time, if they should be absent from work due to sickness or emergency.

Employees absent for sickness in excess of three (3) consecutive work days who return to work but return to sickness leave status again within five (5) work days will immediately return to 75% of regular pay without any waiting period as long as they meet STD criteria.

Employees shall be eligible for an additional 26 weeks of coverage in the event the subsequent absence is for purposes unrelated to the initial absence.

An employee shall be eligible to use ~~accrued~~ disability benefits with pay for a period of absence from employment, which is due to his/her personal injury or

illness or in his/her ~~immediate family or required dental care.~~ consistent with the application of short term disability applied county-wide. ~~Immediate family is defined as an employee's child, spouse or parent as those terms are defined under section 103.10 Wis. Stats. Employees have the duty to attempt to make other arrangements within a reasonable period of time (defined as up to two calendar weeks) for the attendance of immediate family in their care or to be with an immediate family member who is ill. 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 disability benefits. The employee shall make herself available for return to work 60 days from delivery and/or such time that the physician documents that the individual is medically able to return to duty. A written physician's certificate stating the employee is medically able to return to work will terminate the disability benefits with pay.~~

Each employee claiming disability benefits is subject to check to verify the alleged sickness by a County representative as may be directed by the Human Resources Director or designee.

Employees will continue to receive health and welfare benefits while on disability leave at the level commensurate with their employment status prior to the disability leave. Employees will continue to accrue vacation benefits and receive holiday pay at the level commensurate with their employment status prior to the disability leave until the employee goes to the long-term disability plan.

An employee shall endorse and turn over to the County all payments made to the employee for temporary disability under the Wisconsin Worker's Compensation Act. Nothing in this contract will disallow any employee any benefits under the Workers Compensation Act.

Employees may use banked sick days to supplement the above coverage and such days may be used while casual days are still available.

The intent of this section is to administer Short Term Disability in the same manner that Short Term Disability is administered by the General Municipal Employees of the County.

2. Article 45, Grievance Procedure (Relating to Selection of Arbitrators. Article 45 requires that the parties select an arbitrator from a list of five arbitrators provided by the WERC. The operative paragraph of Article 45 provides:
"The parties shall request that the Wisconsin Employment Relations Commission provide the names of five (5) arbitrators. The parties shall then proceed to alternatively strike names for the panel until the arbitrator is selected. The striking order shall be determined by a coin toss. The decision of the arbitrator shall be final and binding on all parties except for judicial review. The cost of the arbitration will be borne equally by the County and the bargaining unit."

The County proposes that the list of five will include three WERC staff members and two members of the WERC's non-staff (ad hoc) arbitrator list.

The Union proposes that the list be four WERC staff members and one non-staff (ad hoc) arbitrator.

3. Wages

a. Association

2.70% Eff 1/1/22 ATB

2.0% paid as a one-time lump sum payment ASAP in 2023. Payable on yearly earnings, including overtime.

3.0% Eff 1/1/23 ATB

2.0% paid as a one-time lump sum payment ASAP in 2024. Payable on yearly earnings, including overtime.

[Payments adjusted as necessary to replicate supervisors' wage package]

b. County

\$.98/hr. Eff. 1/1/22

2.0% One-time bonus to persons on active payroll 12/1/22 payable ASAP at the end of the year. Payable on "regular annual wage"

\$1.12/hr. Eff. 1/1/23

2.0% paid as a one-time lump sum payment to persons on active payroll on December 1, 2022, ASAP 2024. Payable on "regular annual wage."

STANDARDS

Arbitrators are to select the final offer of one party or the other without change based upon the factors outlined in Section 111.77(6) as follows:

(am) In reaching a decision, the arbitrator shall give greater weight to the economic conditions in the jurisdiction of the municipal County than the arbitrator gives to the factors under par. (bm). The arbitrator shall give an accounting of the consideration of this factor in the arbitrator's decision.

(bm) In reaching a decision, in addition to the factors under par. (am), the arbitrator shall give weight to the following factors:

1. The lawful authority of the County.
2. Stipulations of the parties.
3. The interests and welfare of the public and the financial ability of the unit of government to meet these costs.
4. Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

- a. In public employment in comparable communities.
 - b. In private employment in comparable communities.
5. The average consumer prices for goods and services, commonly known as the cost of living.
 6. The overall compensation presently received by the employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
 7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
 8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration, or otherwise between the parties, in the public service or in private employment.

Except as specified in 111.77(6)(am), Stats., the arbitrator has the discretion to determine which factors apply and the weight to be given to each factor. The economics are in dispute in most cases. This case is unusual because the parties have agreed on the main economic terms. The most significant economic dispute is how the general wage increase is allocated.

Arbitrators generally require that a party seeking to make a change in a collective bargaining agreement show that circumstances have changed such that there is a need to change an existing provision and that their proposal is best suited to deal with the changed circumstances. Arbitrators vary somewhat as to the extent to which they also require that a party proposing a change also provide an equivalent *quid pro quo* for the proposed change.

DISCUSSION

WAGES

Positions of the Parties

County:¹

The County alleges its wage offer is higher than any of the external comparables, maintains its wage leadership position, and is consistent with the wage increase provided to the Supervisory Officer's bargaining unit. The parties' proposals have the same percentage increases, but the County applies its offer as an across-the-board \$.98 per hour for the first year and \$1.12 per hour in the second year. The County's offer calculated as a percentage increase taken with the bonus is 4.7%. This is greater than any of the comparables for 2022. The same is true for 2023. Winnebago County was the highest.

¹ The parties disagreed about the appropriate set of external comparator counties. The Association agreed to use the County's pool in its reply brief. The set is Fond du Lac, Manitowoc, Outagamie, Sheboygan and Winnebago Counties. The parties' arguments on this point are omitted.

It granted a 4% increase. By contrast, the Association focuses its argument only on the percentage increases while disregarding the bonus. That should be costed in at 2% each year. The Association's claim that its offer is supported by the CPI is incorrect. The Association's comparison data has an error in it and relies upon the December to December CPI rates, upon which it concludes that the 2021 CPI increase was 7%. The County relies upon the average of monthly increase and thus correctly concludes that it is 4.7%. In any event, arbitrators have historically held that comparable settlements generally are the best indicator of how comparable parties have dealt with inflation. On either basis, the inflation criterion favors the County's position. The County's wage rates are significantly higher than those of comparable counties. Its offer maintains that position. This is true even though the County has offered flat increases. The Association is correct that the flat increase results in beginning employees receiving greater percentage increases than employees at the top of the salary schedule. The County formulated its wage offer because those employees are among the lowest-paid beginning employees among the comparables. Flat increases are an accepted way of dealing with the spread of wage rates created by regular percentage increases. The County has not experienced any difficulty in hiring yet. However, Corporation Counsel Hemery testified that the County does not want to allow itself to get into that position. The Association's argument that it is "losing ground" to the next highest-paying comparable county is without merit. There is no evidence that either wage offer will affect hiring or retention. The County's offer is consistent with that granted the law enforcement supervisors unit. The consistency between these units is long-standing. The flat nature of the County's offer is not relevant. Many arbitrators have recognized that.

Association:

The Association asserts that its offer is supported by the primary statutory factor, local economic conditions because Brown County can afford the Association's offer without any adverse effects on its fiscal condition. The interests and welfare of the public criterion also supports the Association's offer because it will not result in any tax increase, will ensure that deputies are adequately compensated, and will support the County's effort to deal with increasing serious crime.

The parties agreed to wage increases identical to the law enforcement supervisors unit in 11 of the last thirteen years. They were similar when the years of 2013 and 2014 are considered together. The parties have never agreed to a fixed increase rather than a percentage increase. The one-time bonuses are significantly less advantageous than those provided to the supervisors. The County's offer pits senior officers against junior officers as senior officers receive much lower percentage increases. There is no reason for the County's approach. For example, there is no evidence of a hiring problem or other reasons to increase lower-wage positions. The parties addressed the lower wage positions in 2017. The County's offer has a negligible impact on starting wages and keeps them among the lowest in the comparables. The 2% bonuses are significantly less than that of the supervisors because it does not include overtime earnings. The County also applies its bonus only to those actively employed as of a specific date, thus excluding 13 employees who retired or resigned. Comparison to the external

comparables supports the Association's position because even with the Association's proposal, the wage lift by the end of the two-year period is lower than the average lift among the comparables by .16%. While both proposals maintain the Association's wage leadership position, the County's proposal would reduce the percentage gap between the next highest comparable more than the Association's. The consumer price factor also favors the Association's offer.

The Association believes that the County's method of calculating the bonus payments would result in unit employees not getting the same bonus as the supervisors. The County excludes overtime by using the term "regular annual wage." The supervisors did get overtime included in the 2%. Further, the County excludes those who left employment in December of each year from the bonus which it did not do for the supervisors.

Comparison to the wage lift among the comparables also supports the Association's position. The Association's proposal shows a wage lift over the two years of 5.7% while the average is 5.86%. The Association's position is closer to that than the County's. Similarly, the Association is the wage leader among the comparables. The Association's proposal for senior patrol officers and sergeants, measured by the 72-month service benchmark, maintains the gap. The County's offer reduces the gap. The County has not offered a reasonable explanation for its proposal.

County Reply:

The County made the following important points in its reply brief. The short-term disability is the primary issue. The Association's argument that the 2% bonuses are paid differently than the supervisors violates their stipulation to the contrary at the outset of the hearing. The supervisors settled earlier than the Association. There was no difficulty in paying the bonuses then. The delay in settlement makes it onerous for the County to find and pay bonuses to those who left this bargaining unit. Its offer will give all the unit employees the highest increase of all the comparable counties. The purpose of the flat increase is to focus the allocation of the wage increase on those who need it the most, those at the beginning levels of the salary schedule. It also avoids potential hiring issues even though none exist now. The County's offer also maintains the favorable wage gap rate for the supervisors over the senior sergeants.

Association Reply:

The Association made the following additional points. The only way the County can assert that its wage proposal is more than any of the comparables is to include the one-time bonuses. Bonuses are not added to the base. The County's fixed rate wage proposals are less than 3 of the 5 comparables. The County asserts that its fixed rate increases is the same as the Association's percentage increase on a "weighted average basis." It offered no documentation as to how it arrived at that. The County's offer does not meet the statutory obligation to consider the cost of living. Using comparison to other counties is not practical. Inflationary trends over the last five years have been dramatically different than usual. All unit employees lost buying power. The County's offer falls far short of addressing senior employees' needs.

The County argues its fixed rate wage increase will narrow the gap between this unit and the next higher-paying comparable county. What it ignores is that the gap has been narrowing since 2018. The Association's offer only tends to get back to that difference. The County knows how important it is to maintain the wage gap between supervisors and sergeants. It expressly agreed to maintain that gap for the supervisors on a "me-to" basis in 2023.

The County's one-time bonuses are not the same as the supervisors'. The bonuses it offers the Association do not include overtime. It also excludes employees who have left employment in this unit, while it did not do so for the supervisors.

Discussion

Section 111.70(6)(am), Stats, does not affect this case. The County provided the costing of the parties' offers. The parties' total package final offers are relatively close. They are:

	2022	2023
County	6.69%	5.24%
Association	6.83%	5.46%

The parties' final wage offers are essentially the same for this criterion. [The main difference between the parties is the allocation of the wage increase.] The County asserts it determined its flat wage increases on a weighted average, but its costing shows that the Association's wage increase will generate \$51,033 more than the County's. Part of this is attributable to the issues as to whether to pay the bonuses by including the overtime. The County's costing method is a roll forward of the unit employees in 2021 based on their straight-time hours. This is about \$177 per employee per year. The evidence is limited about when turnover has occurred in the bargaining unit. There have been many employees who have left or retired. The actual cost of both offers is likely very close. The likely economic impact of the parties' offers on the public is essentially the same for both offers.

The usual issues this criterion typically applies to are absent in this case. The County is not asserting inability or difficulty to pay for the Association's offer. The Association is not alleging its offer is justified by any inability or difficulty the County may have had to make economic adjustments in the past. Accordingly, this criterion does not apply.

The cost of living criterion is better viewed under the increased inflation during the pendency of this agreement as supporting the Association's allocation of the wage package (Sec. 111.77(6)(bm), 4, 5, and 7). The cost of living criterion primarily focuses on overall economic increases. The parties' overall economic increase is essentially the same. When negotiations are viewed as making up for increases in the cost of living, the criterion can be applied directly to the prior year's increase in inflation. The CPI-U shows:

	December 2021	7.04%	December 2022	6.45%
County		6.69%		5.24%
Union		6.83%		5.46%

That the 2% bonus each year is one-time only is irrelevant in this comparison because the offers are the same.

The better way to evaluate this criterion is to look at how other parties have dealt with the inflation factor in their agreements. The average of the external comparisons is:

2021	3.25%	2.69%
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The parties' offers are both adequate to deal with inflation generally. However, the better view is that the County's allocation of its offer significantly disadvantages experienced employees while compensating inexperienced employees beyond the inflation rate. The inflation factor favors the Association's offer in that regard. That is particularly true because of the persistent inflation during the pendency of this dispute.

The comparison criterion in the light of the other factors criterion (Sec. 111.77(6)(bm)4 and 8 requires the consideration of comparison to the supervisory unit as is relevant here. That comparison favors the Association's position. The parties have had the same wage increases in this unit as granted in the supervisors' unit for 10 of the last thirteen years. In 2013 and 2014, they varied, but when the two years are combined, the total percentage increase is the same. The parties have consistently implemented percentage general wage increases in the same manner in both units.

The Association's offer is also supported by that criterion when looking at the parties' past practice of allocating wage increases. Those increases have been applied as percentage across-the-board increases. There is no evidence that these parties have ever used flat increases.

The external comparison criterion of Sec. 111.77(6)(bm)4, Stats., supports the County's overall wage increase, although this issue is minor. It supports the Association's allocation of the increase as to more senior positions and the County's for the junior positions.

The comparison of wage increases among the comparables slightly favors the County's overall cost. Brown County is a wage leader in this group. The County costs its fixed-rate increase at 2.7% for 2022 and 3% for 2023, but it might be slightly less. This is below average for the first year (3.25%) and above for the second year (2.69%).² It is comparable when considered as a total wage increase with the bonus cost as 2% the first year and ignored in the second. When cost that way, it is appropriate that the County's offer is unique among the comparables because it represents a 2% wage reduction effective 1/1/2024.

The external comparisons support the County's allocation of the general wage increase to the lower-wage employees. The County is the lowest paying at the beginning wage levels of all the comparables. The County has made no effort to increase starting wages recently. The County pays lateral transfers with experience as a law enforcement officer at the 42-month step.³ The County proposed the \$15 per hour academy wage rate in the 2020-1 agreement negotiations. That rate has remained unchanged. The County is not having any difficulty in hiring new patrol deputies. The public interest criterion Sec. 111.77(6)(bm) 3 supports the County efforts to increase the minimum wages

The external comparison criterion supports the Association's offer for senior employees directly and is closer to appropriate to deal with the issues of expanding its wage leadership position. The County has not shown any particular need to deal with that issue. It has not alleged any issue as to the difference between sergeant pay and lieutenant pay. Its concern is that regular percentage increases increase the wage

² Based on the available settlement information

³ Tr. p. 100

“spread” between senior patrol officers here and those in the next highest paying comparables. It hasn’t shown any ill effect from this, nor has it shown that this has been a concern before. The following comparison using one of the higher wage payors, Fond du Lac, shows the following:

Fond du Lac and Brown increase effect	2021 ⁴	2022	2023	2024
Brown Association	\$38.54	\$40.39	\$41.60	\$40.78
Fond du Lac	\$34.12	\$35.14	\$36.20	\$36.20
Difference	\$4.42	\$5.25	\$5.40	\$4.58
Brown County	\$38.54	\$40.31	\$41.52	\$40.64
Difference	\$4.42	\$5.17	\$5.32	\$4.44

The relevant reference point is the beginning of 2024. The County’s position holds the Association to the same dollar difference. Without efforts to compress the difference between Fond du Lac, the difference would likely have grown to \$4.69.⁴ Using the 2% bonuses alone reflects an incremental approach to narrowing the wage spread that is more appropriate in these circumstances. There are ways to address the beginning wage difference for junior employees with less impact on senior employees. Thus, the Association’s wage position is closer to an appropriate approach under all of the circumstances here.

ARTICLE 45

Positions of the Parties

Association:

The Association’s position regarding the grievance arbitrator selection process is that its offer as to this issue is preferable because it is best designed to address the underlying change of circumstances, the lack of WERC staff. Its chief objective in bargaining was to have arbitration by a member of the staff of the WERC or, at least, not bear the more significant costs of arbitration should it be conducted by an ad hoc arbitrator. In that regard, it allowed the County to have a five-person panel by adding two ad hoc arbitrators but to make the County bear the additional cost should an ad hoc arbitrator be selected. The County rejected that approach. The Association’s final offer is therefore appropriate.

County:

The WERC has only four agency arbitrators to submit. Most are very inexperienced. There are only a few grievances that go to arbitration in this unit. They are essential when they do. *Ad hoc* arbitrators are more experienced. The Association’s

⁴ 3% increase in each year based on Fond du Lac’s settlement.

claim it is concerned about cost is belied by the expense they have gone to in this case.

Discussion

This is a non-economic issue relating to the administration of the collective bargaining agreement. The applicable decisional factor is Sec. 111.77(6)(bm)8, "other factors." The WERC provides a low-cost arbitration service at a fixed one-time fee and also offers to provide a panel of outside (ad hoc) arbitrators who charge per diem fees. The *ad hoc* costs are higher than the WERC service. Article 45 does not specify from which source the WERC was to provide the panel. It is undisputed that the parties have historically used the WERC staff for arbitration services. The WERC no longer has five staff members. It has four if the WERC Chair is included. The Chair's term expired this year. The WERC has experienced turnover in its other staff during the pendency of this case. The parties' offers differ on whether one or two *ad hoc* arbitrators should be on future panels provided by the WERC. The County's proposal is closest to appropriate to address the current circumstances of the WERC's ability to provide staff arbitrators.

ARTICLE 37

Background

I conclude that this is the primary issue. The parties had a traditional sick leave provision until 1999. Employees earned one day of sick leave per month with a maximum accumulation of up to 135 days. Sick leave could be used for an employee's illness or accident or for "necessary" attendance of the immediate family." The banked sick leave could also be used to pay for health insurance for retiring employees. The County proposed to change that system to an insurance-based system. It successfully negotiated or implemented it with all or almost all of its other employees except this bargaining unit. The system replaced traditional sick leave with short-term and long-term disability insurance. New employees qualified for the insurance after their first six months of employment. Under some circumstances, the short-term disability policy had a waiting period. The County provided five personal days to be used for any purpose to offset this.⁵

The relevant portions of the sick leave provision from the 1998 agreement read as follows:

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. Sick leave shall accumulate but shall not exceed 120 working days. 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 exceed 135 days. The employee may convert earned/unused vacation days to sick leave days during the employee's last three years of employment.

⁵ The County provided three personal days under the sick leave system.

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 County 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.

All employees reaching normal retirement or disability prior to attaining such age shall be eligible to continue in the County's health insurance plan until the age of sixty-five (65). The County shall pay all of the monthly premium payable, provided that the total amount for such insurance for each retired employee 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, effective January 1, 1988, standing to the credit of that employee as of that employee's date of retirement:

...

That agreement also had a memorandum of understanding as follows:

MEMORANDUM OF UNDERSTANDING
(Insurance)

"The County and the Union agree to discuss County wide insurance. Due to the ongoing change in health care which will impact all Brown County employees, a representative from each of the bargaining units will agree to meet, discuss and evaluate options as it relates to health, dental, life and long term disability. The parties agree that any changes made with the exiting plans must be agreed to by the County and the union."

The current provisions were adopted and have remained unchanged through the expiring agreement. The relevant portions of the current agreement are repeated for convenience as follows:

Article 37. SICK LEAVE

Officers shall be granted sick leave with pay at the rate of one working day of each full month of service. 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 95 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).

Retired members of the Association will no longer be limited in utilizing banked sick leave to purchase healthcare coverage under the County's healthcare plan;

Retired members of the Association will have the value of their banked sick leave as of December 2, 2016, up to 135 days, placed in a Retiree Funded Plan, qualified under I.R.C. Section 213(d), for the purposes of purchasing qualified medical expenses under I-R.C. 213(d), including retiree healthcare premiums under either the County's healthcare plan or any other healthcare plan available to the public, plus allowances under the Retiree Funded HRA Plan;

Active members of the Association with accumulated and/or Banked Sick Leave shall be able to continue to utilize their sick leave as identified under the Agreement and will have their accumulated and/or Banked Sick Leave, up to 135 days, valued as of the date of termination of employment, retirement, death, and placed in the Retiree Funded ERA Plan, in their name and for their benefit at that time for the purposes of purchasing qualified medical expenses under I.R.C. 213(d), including retiree healthcare premiums under either the County's healthcare plan or any other healthcare plan available to the public, plus allowances under the Retiree Funded HRA Plan;

Those active members of the Association who presently accrue Sick Leave, shall continue to accrue and utilize Sick Leave as identified under the Agreement going forward, until the earlier of their termination, retirement, or death;

An association member who departs from the Association and who remains an employee of the county will not be subject to Chapter 4 of the Brown County Ordinances with respect to accumulated/banked sick leave and shall receive the value of their accumulated/banked sick leave, valued at their current level of compensation up to a maximum of 135 days, at the time of their termination, retirement or death.

A copy of the following documents has been furnished to the Labor Association and is controlling as it relates to this article:

- A. The Trust Fund IR-A Administrative Agreement.
- B. The Genesis Employee Benefits Integrated Funded HRA Basic Plan Document Adoption Agreement
- C. The Genesis Employee Benefits Retiree Funded HRA Basic Plan Document Adoption Agreement

BANKED SICK LEAVE

Employees employed by the County before the date of the ratification of the 1999, 2000, 2001 1002 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; there are vacation days earned but unused during the final three (3) years of their employment with the County. All sick leave shall be subject to administrative control by the department heads. In the event of the death of an employee, said employee's 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 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 County. 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 (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 (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 half (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.

...

Casual days may be taken in fifteen (15) minute increments for purposes of required dental and medical care. Doctor and dentist appointments should be limited to a reasonable number of hours from work.

Casual days and banked sick leave may be used by an employee who is injured on the job to supplement his/her disability benefits in an amount, which will equal regular pay. Such days may be used only after casual days are exhausted.

SHORT-TERM DISABILITY LEAVE

Employees who have completed six (6) months of service shall be eligible for disability leave pay as

follows:

- On the job accidents or injuries of the employee - first day coverage at 75% of regular pay until the start of long-term disability coverage (doctor certificate required).
- Sickness or an off the job accident or injury of the employee - coverage after three (3) work days at 75% of regular pay until the start of long-term disability coverage (doctor certificate required).

All claims for disability benefits must be submitted to the County Human Resources Department. Claims arising out of sickness or an off the job accident or injury must be submitted within four (4) workdays of the initial absence. Claims must include a statement indicating the day the employee first became disabled, the nature of the disability, and the employee's anticipated date of return. The Human Resources Department, within its discretion, may request from the employee's physician, a written certificate indicating the first day of disability, the reason for the employee's disability, and the anticipated length of such disability in the event the employee is absent for a period of more than three (3) work days. The County agrees to waive the foregoing requirement under extraordinary circumstances (e.g., hospitalization). Upon returning to work from disability, employees will fill out any required forms, furnished by the County, for proper recording of disability leave.

In order to qualify for disability benefits, an employee must report to the immediate supervisor or other management designated employee at least one (1) hour prior to the employee's normal start time, except in the case of an emergency. All illness or injury must be reported every day unless the definite absence time is reported on the first day of occurrence. It is understood by both parties that employees are expected to notify the County at the earliest practicable time but no less than one (1) hour prior to the employee's normal start time if they should be absent from work due to sickness or emergency.

Employees absent for sickness in excess of three (3) consecutive work days who return to work but return to sickness leave status again within five (5) work days will immediately return to 75% of regular pay without any waiting period. Employees shall be eligible for an additional 26 weeks of coverage in the event the subsequent absence is for purposes unrelated to the initial absence.

An employee shall be to use accrued disability benefits with pay for a period of absence from employment, which is due to his/her personal injury or illness or in his/her immediate family or required, dental care. Immediate family is defined as an employee's child, spouse or parent as those terms are defined under section 103.10 Wis. Stats. Employees have the duty to attempt to make other arrangements within a reasonable period of time (defined as up to two calendar weeks) for the attendance of immediate family in their care or to be with an immediate family member

who is ill. 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 disability benefits. The employee shall make herself available for return to work 60 days from delivery and/or such time that the physician documents that the individual is medically able to return to duty. A written physician's certificate stating the employee is medically able to return to work will terminate the disability benefits with pay.

Each employee claiming disability benefits is subject to check to verify the alleged sickness by a County 26 representative as may be directed by the Human Resources Director or designee.

Employees will continue to receive health and welfare benefits while on disability leave at the level commensurate with their employment status prior to the disability leave. Employees will continue to accrue vacation benefits and receive holiday pay at the level commensurate with their employment status prior to the disability leave until the employee goes to the long-term disability plan.

An employee shall endorse and turn over to the County all payments made to the employee for temporary disability under the Wisconsin Workers Compensation Act. Nothing in this contract will disallow any employee any benefits under the Workers Compensation Act.

Employees may use banked sick days to supplement the above coverage and such days may be used while casual days are still available.

LONG-TERM DISABILITY

....

Employees could opt into the new system but could not opt out once they opted in. Those who opted in retained their accumulated bank of sick leave but could not accumulate more sick leave. New hires were required to use the new system. The County contends that from the beginning, the insurance policies applied only to individual employees and not absences for other family members. The policies did not expressly apply to dental treatment and would not apply as a practical matter because of the waiting period.

The policies are administered by a third-party administrator for all employees of the County. The County human resources office receives notices of the third-party administrator's decisions regularly. Except as noted below, the policies have always been administered as applying only to the illness or injury of individual employees.

The first exception occurred in September 2008. Others rarely occurred until 2020, when there were five. There were 12 total. One of those made in 2020 was denied. The County alleges that this is the first time it realized that any employees sought to apply the STD to family illnesses. The County denied that request on the basis that the

benefit did not apply to family illnesses or dental treatment. Its position has been consistent thereafter. The Association filed four grievances between December 6, 2021, and February 1, 2022, which were denied. Two protested the denial of short-term disability for the care of a family member. All were correctly processed to the arbitration step. The disputes were not arbitrated because of the procedural issue about the arbitrator's selection.

The specific dispute is that the County contends that the bullet points in the first paragraph after the "Short-Term Disability Leave" title and policies provide that the STD policy applies only to illness or injury of the employee. The Association contends that the sentence starting with "An employee shall be eligible to use accrued disability benefits with pay..." expands that definition to include family illness and dental. It alleges that "accrued disability benefits" include the STD as an "accrued disability benefit."

Positions of the Parties

County:

The County's view is that it is clarifying the existing long-term disability to reflect its original intent and to end the Association's efforts to expand the provision to provide the benefit for family medical needs. The County essentially "bought out" the continuation of its long-standing sick leave plan for existing and new employees in the 1999-2001 agreement for this bargaining unit and all others. Existing employees could continue in the existing sick leave plan or opt into the new plan. It "grandfathered" the banked sick leave for existing employees opting in but ended further accrual. Greg Rabas was a member of the Association bargaining team at that time and corroborated the County's position. The County's short-term and long-term disability policies have always applied solely to the injury or illness of the individual employee but not that of the family. It has always been administered in the same way for all employees until the recent "mistakes" as to this bargaining unit. The relevant agreement language has remained unchanged since its adoption.

The Association is attempting to use litigation to expand the STD language to apply to leave for family medical needs. When the new provision was adopted, the parties retained agreement language to cover the administration of banked sick leave. This included the "accrued benefits" provision. The County admits that starting ten years after the adoption of the STD system, there were some instances when its third-party administrator paid benefits for absences due to a family member's medical condition. There were six instances before 2020. There were four requests in 2020, of which three were paid and one denied. The County asserts the payments were all inadvertent. However, the Association has grieved the failure to pay and is seeking to misconstrue the word "accrued" in the above provision to mean that it applies to the short-term disability policy. It argues that "accrued" relates to sick leave and nothing else. Thus, it argues that its proposal is necessary to clarify the existing language to its originally intended meaning.

Association:

The Association bases the grievances and its position here on its position that “accrued disability benefits” include the STD itself. It argues that the provision’s bargaining history and the County’s “past practice” of paying for short-term disability for family illness supports its interpretation. It, therefore, takes the position that the County’s offer is taking away an established benefit.

The County has failed to show that the circumstances have changed or necessitate change. The County has offered no *quid pro quo* for taking away this benefit. The language of the disputed provision is clear. The supporting context of the language also demonstrates that it was intended to apply to the STD benefit. The supporting context details how employees qualify for the STD benefit and how it is administered. The bargaining history supports the Association’s view. Al Phillips, who represented the Association in negotiations in which the STD benefit was first adopted, testified the Association intended to include coverage for family and dental visits by incorporating the disputed language from the prior agreement. The County’s assertion that STD is not an “accrued benefit” is incorrect. The agreement requires that an employee have six months of service to be covered by the STD benefit. That makes it an “accrued benefit.” The County’s argument that its history of paying STD benefits for family illnesses is only a mistake is without merit. Four different Human Resource Directors allowed the granting of STD benefits for family illness.

The County’s proposal is also too broad. It would give the County the unfettered right to modify or change the existing terms without bargaining with the Association by changing the standards to “qualify” for the plan, the terms of the plan, or how it is administered. The County’s proposal could result in removing the right of employees with accumulated sick leave to use it for family illnesses or dental treatment. The County has failed to show that its proposal is necessary to “rectify” its alleged problem. Association members have only requested STD for the care of the immediate family 11 times since 2008. The County has failed to offer a *quid pro quo* for taking away this benefit.

County Reply:

The County’s proposal does not seek to change the STD benefits. The opposite is true. It seeks to preserve them. The Association claims that the County’s proposal seeks to eliminate STD coverage for dental is incorrect. The policy never applied to dental treatment, nor is it likely that dental treatment would meet the three-day waiting period anyway. The County’s proposal does not seek to provide the County with unfettered control over whether to provide STD benefits. The first full paragraph of the STD provision will continue to specify that employees “shall be eligible for disability leave pay as follows.” The County has no intention of changing the benefit it has provided for the last twenty years. The proposal that sickness meets “short-term disability criteria” is not intended to give the County unfettered control to change those criteria, as the Association asserts. It is intended to follow the long-standing criteria. The Association has made numerous misstatements. It uses the term “accrued” in an inappropriate way. There is no provision in the agreement that uses it in the way they are. The County has met its burden to prove that a change in the existing provision is necessary because this

dispute has arisen. The County's proposal is necessary to clarify it to its original intent.

Association Reply:

The Association further argued that the County had relied upon the testimony of Greg Rabas for the proposition that when the language of the entire STD disability provision was adopted, it was meant to exclude the illness of family members and needed dental treatment. This testimony was contradicted by the testimony of Al Phillips, who was an Association representative at those negotiations. The County has provided no evidence that the eleven instances of paying the STD benefit for family illness were just a mistake. It did not provide any e-mails or other documentary evidence that it told the third-party STD administrator to stop paying those claims or evidence from the third-party administrator that they viewed the payments as a mistake. The County also relied on the testimony of Jill Bomkamp, claiming that STD for family illness has never been paid in the five years of her tenure. This is contradicted by the Association's evidence that they were paid.

The County's argument from exhibit 24 that the third-party administrator recognizes that STD is only for the employee's illness and not a family member's illness does little to answer the issue.

The County, and not the Union, has the burden to prove there was a mutual agreement between the parties that the STD only applied to the employee's illness. The fact that the parties incorporated the clear language of the prior agreement into the STD provision when it was adopted demonstrates that there was no agreement. Clear language is appropriately construed as written without reference to subjective intent outside the agreement.

The County's argument that "accrued" relates to banked sick and other leave is without merit. The full phrase is "accrued disability benefits with pay for a period of absence from employment, which is due to his/her personal injury or in his/ her immediate family or required dental care." Nothing about other leave benefits makes them "disability benefits." The provision can only refer to STD. The County's position violates the rules of contract construction by leaving the other terms as mere surplusage.

Similarly, the County's position is contradicted by the fact that the leave provisions it alleges the term applies to are not explicitly limited to supplementing the STD and LTD to get full pay.

The County cannot explain why this language was incorporated into the agreement if the parties intended to administer this benefit like it was administering the STD for other employees. The parties could have just said that.

This is interest arbitration. The party seeking to change an existing provision has the burden to show: 1. That circumstances have changed, 2. That party's proposal is reasonably necessary to accomplish the change, or 3. That party has offered an equivalent *quid pro quo*. The County has failed to show any need, nor has it offered an equivalent *quid pro quo*. The County has also failed to show that payments of the STD for family illness were simply a mistake. It provided no actual evidence that they were. It relied upon the testimony of Jill Bomkamp, but she did not know anything that occurred before she was employed 5.5 years ago. Her testimony is mere opinion as to how the County could have made the "mistake" and to the potential costs if the use for family illness were

to continue. The County has failed to show any significant adverse effects from using STD for family illness. Its argument that it has a “need” merely because grievances were filed about this issue is not a “need” but a desire. Arbitrators have held that a *quid pro quo* is required for desired changes.

The County’s claim that it has already provided a *quid pro quo* in the 2% lump sum bonuses and the clothing allowance is incorrect. Neither qualifies. The uniform allowance is minimal. Both are the same benefits that it provides to the supervisors. The County’s claim that the Association has no explanation for why it would have proposed the STD language that it did is incorrect. The provision specifically referenced the Wisconsin Family Medical Leave Act. That provision referenced a family medical condition that was “disabling.” The language supplements and expands the benefits of the Wisconsin Family Medical Leave Act.

Discussion

This issue is governed primarily by factor 111.77(6)(bm)8, Stats. The County has established that it first recognized the underlying issue in 2020. The only evidence is that the first time anyone claimed benefits for family illness was in 2008 and rarely thereafter. The County first realized that the third-party administrator paid STD benefits for family illness when the administrator rejected a claim, and the Association filed a grievance. It is not believable that the County reviews each claim the third-party administrator processes. The County has a total of 1,767 employees. There are 144 members in this bargaining unit. If the County reviewed each processed claim, it would be cost-prohibitive. That would tend to defeat the reason for having a third-party administrator.

The County has demonstrated that the STD benefit was meant to apply to the employee’s own illness and that the Association is seeking to expand its application. The bargaining history demonstrates this. The County had successfully established the substitution of the insurance benefit for sick leave in most other bargaining units before the negotiations for the disputed provision. The parties’ prior agreement’s Memorandum of Agreement provided that they would seek to study making these benefits uniform with all other employees. Greg Rabbas was a member of the Association’s bargaining team for the successor agreement. He testified that he understood that the STD benefit was only for the employee’s illness at that time and that it was being administered that way. He also explained the Association’s intent behind proposing the “accrued disability benefits” provision. In short, the STD benefit had a waiting period and paid only 75% of a day’s pay. Using accumulated sick leave or other accrued benefits allowed the employee to get paid for the waiting days, supplement the STD to 100% pay, and, most importantly, allowed employees to get paid leave beyond that required by the state’s two-week Medical Leave Act for family illness. While the provision was somewhat duplicative of similar provisions elsewhere in Article 37, its inclusion under the STD portion eliminated ambiguities. Mr. Rabbas’ testimony is consistent with the County’s likely reasons for moving to end sick leave: 1. To eliminate the unfunded liability for accumulated sick leave; 2. To reduce the County’s costs for sick leave; and 3. To eliminate leave for family illness. The latter reason was a common concern after the adoption of the Family Medical Leave Act that paid or unpaid leave for family illness would be added to existing generous leave benefits by legislation. Eliminating paid or

unpaid leave for family illness is consistent with the latter purpose.

Al Phillips was also on that bargaining team. He testified that the Association proposed the disputed language. He understood the term "accrued disability benefits" to include the STD benefit. He acknowledged that there was no discussion of the Association's subjective intent. I don't find this persuasive. It is inconsistent with how the County administered the benefit at the time. It isn't believable that the County would have accepted treating this unit differently than others.

A primary function of collective bargaining is to clarify existing provisions to avoid continuing or future disputes. The County has established changed circumstances that are properly addressed by changing the agreement.

The Association expressed legitimate concerns about the wording of the County's proposal with respect to the standards to qualify provision and the uniform administration provision. The County has represented that those provisions were not intended to change its administration of the STD benefit. I have relied upon that representation. This agreement will expire soon. Those issues may be adequately addressed in the negotiations for the successor. Accordingly, the County's proposal is appropriate to address the changed circumstances.

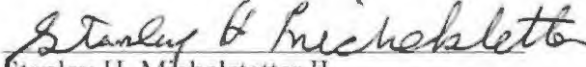
SUMMARY AND CONCLUSIONS

Article 37 is the most important issue. Accordingly, the final offer of the County is adopted.

AWARD

The parties shall include the County's final offer in their January 1, 2022, to December 31, 2023, agreement.

Dated this 13th day of Sept, 2023.


Stanley H. Michelstetter II
Arbitrator