OPINION

IN

ARBITRATION

COUNTY OF KENOSHA (Wisconsin)	)	WISCONSIN EMPLOYMENT RELATIONS COMMISSION
-vs-	)	Case XX 16036 - MIA-15
KENOSHA COUNTY DEPUTY SHERIFFS' ASSOCIATION	)	Decision No. 11632-A

ISSUE IN DISPUTE: Whether the "final offer" of Kenosha County or the "final offer" of the Kenosha County Deputy Sheriffs' Association shall become the successor to the collective bargaining Agreement which expired at the end of 1972.

ARBITRATION PROCEEDINGS

By "Order" of the Wisconsin Employment Relations Commission dated May 15, 1973, the undersigned was chosen to hear and decide the cited issue. That "Order" provided as follows:

> "Kenosha County Deputy Sheriffs' Association having filed a petition with the Wisconsin Employment Relations Commission requesting that the Commission initiate compulsory final and binding arbitration pursuant to Section 111.77(3)(b) of the Municipal Employment Relations Act for the purpose of resolving an impasse arising in collective bargaining between the Petitioner and the County of Kenosha on matters affecting wages, hours and conditions of employment of law enforcement personnel in the employ of said Municipal Employer; and the Commission having, on February 22, 1973, issued Findings of Fact, Conclusion of Law, Certification of Results of Investigation and Order Requiring Arbitration in the matter; and the parties having been furnished a panel of arbitrators from which they might select a sole arbitrator to issue a final and binding award in the matter; and Counsel for the Municipal Employer having, in writing, on May 14, 1973, advised the Commission that Mr. H. Herman Rauch, Milwaukee, Wisconsin, has been chosen as the arbitrator;
>
> "NOW, THEREFORE, it is ORDERED
>
> "That H. Herman Rauch, Milwaukee, Wisconsin, is hereby appointed as the impartial arbitrator to issue a final and binding award in the matter."

By agreement of all concerned the hearing was held in the Kenosha County Court House on July 19, 1973. The arbitrator made a record of the proceedings by means of his tape-recorder. At the County Counsel's request--made at the conclusion of the hearing and with the knowledge of the Deputy Sheriff's Association representatives--a copy of the tape so produced was furnished to the County. All testimony was taken under oath.

The post-hearing Briefs of the parties were in the hands of the arbitrator on August 11, 1973 and were exchanged by him through the mail on that date.

PRESENT FOR THE PARTIES

For the County of Kenosha:

James F. Honzik [Peck, Brigden, Petajan, Lindner, Honzik & Peck, S.C., Milwaukee] Attorney, Spokesman and Witness
Peter R. Marshall, Chairman, Kenosha County Board of Supervisors
Eric H. Olson, Vice-Chairman, Kenosha County Board of Supervisors and Chairman, Personnel Committee Witness

For Kenosha County Deputy Sheriffs' Association:

Jay Schwartz [Schwartz, Schwartz, Roberts & Cairo; Racine] Attorney, Spokesman and Witness
John Tenuta, President, Wisconsin Deputy Sheriffs' Association Witness
Lee Ormson, President, Kenosha County Deputy Sheriffs' Association
Allan K. Kehl, Secretary, " " " " " Witness
Gerald S. Hanson, Chairman, Bargaining Committee Witness
Fred R. Ekornass, Member, " " Witness
Irmengaard Miller, President, Local #990, Kenosha County Welfare Department, Professional Employees, AFSCME, AFL-CIO Witness
Marjorie McCarthy, Chairman, Bargaining Committee, Local #990 Kenosha County Welfare Department Professional Employees, AFSCME, AFL-CIO Witness

BACKGROUND TO ISSUE

Kenosha County has in its employ about 700 persons in all phases of its work. Of these, roughly 550 are engaged in a "full time" basis.

The Kenosha County Deputy Sheriff's Association, which represents about 86 persons, is one of a number of agencies which bargain collectively with the County. This Association has so bargained for 15 or more years. It is the bargaining agency for "all regular employees of the Kenosha County Sheriff's Department, excluding the Sheriff..." and certain other named classifications of employees in that Department. The most recent Agreement established a wage schedule for the classifications of "Deputies," "Detectives" and "Sergeants." Presumably, therefore, these are the persons represented.

The Agreement which governed the relationship between the parties for the year of 1972 contained the following provision:

> "Not later than the 1st. of the seventh (7th.) month following the commencement date of this agreement between the parties hereto, the Association shall give to the Kenosha Personnel Committee, Court House, Kenosha, Wisconsin, written notice of its requests to be negotiated by and between the Association and the County for the succeeding agreement.
>
> "Not later than the 1st. of the eighth (8th.) month following the commencement date of this agreement between the parties hereto, the County agrees to meet with the Association and discuss the Association's requests as hereinbefore mentioned." [Article XIX, Negotiations, p. 9.]

Under date of June 27, 1972, the Association addressed to the "Personnel Committee, Kenosha County Board" a 2-page letter which states the "amendments to be negotiated for our new contract." It also referred to a "previous letter [which] requested the re-opening of our present agreement." The date and content of that letter are not otherwise established.

On September 20, 1972, the Wisconsin Employment Relations Commission received a formal petition from the Association which alleged, among other things,

> "That the employer refuses and has refused to meet with petitioner, thus creating an impasse."

and that: "Petitioner prays for arbitration of the 1973 Agreement..."

On October 17 or 18, 1972, the parties met, in the presence of a State mediator, to commence negotiations for the 1973 Agreement. At this meeting the parties discussed the amendments proposed by the Association. At the next meeting, in early November, the County introduced its proposals respecting the terms of the 1973 Agreement. The discussion at this meeting was centered on those proposals. Among those proposals was the following pertinent to "sick leave:" [Article XII, Section 1]

> "Amend Section 1 to read that 'in order to qualify for such sick leave, an employee must report to his department that he is sick not later than two hours (2) before the earliest time for which he is scheduled to report for work.'" [Emphasis added by arbitrator.]

This proposal was intended to replace the provision in the then prevailing 1972 Agreement which stated that sickness had to be reported

> "not later than one-half (1/2) hour after the earliest time... scheduled..." [Emphasis added.]

Thereafter, negotiation meetings took place on November 22, 1972, and on January 10, 1973. At the earlier of these meetings (November 22), the County took the position that only the proposed changes then before the parties should be given consideration. During the last of these meetings (January 10, 1973), the County proposed a "sick leave" clause amendment -- [the substance of which is contained in the first half of "alternative Proposal 2" of the County's July 16, 1973 letter, quoted below on Page 5.] It provides, in effect, that, unless he provides a medical certificate, the employee will receive no sick leave pay for the first day off due to illness, unless, at that time, he has accumulated to his credit a "bank" of 60 days or more of sick leave.

Under date of February 20, 1973, the County Board's Personnel Committee made the following recommendation to the County Board of Supervisors:

> "The Personnel Committee, wishing to establish a uniform sick leave policy for Kenosha County, recommends that all employees of Kenosha County who accumulate sick leave and are under the sick leave provisions, and who are not covered by employee contracts or agreements, be governed by the following provision:
>
> > "'Except for the first two occasions without proof in any calendar year, an employee shall not be entitled to sick leave pay for the first day off unless he has furnished his supervisor proof of illness from a licensed physician or has been hospitalized. If sick for more than three (3) days, the employee shall furnish his supervisor with a certification of illness signed by a licensed phusician. All sick leave forms shall be furnished by the county and must be executed and returned by the employee upon return to work.'"

That recommendation was approved on the cited date in the form proposed. [This language became alternative "Proposal 1" of the two alternative proposals of the County's July 16, 1973 "amended final offer", quoted below on Page 5.]

In a jointly signed letter to the Wisconsin Employment Relations Commission, dated March 2, 1973, the parties stated that

> "... the only issue remaining open in their negotiations [is] the following County proposal:
>
> "6. Article XII, Section 2, shall be amended to read as follows:
> "'Section 2. Except for the first two occasions without proof in any calendar year, an employee shall not be entitled to sick leave pay for the first day off unless he has furnished his supervisor proof of illness from a licensed physician or has been hospitalized. If sick for more than three (3) days, the employee shall furnish his supervisor with a certificate of illness signed by a licensed physician. All sick leave forms shall be furnished by the county and must be executed and returned by the employee upon return to work.'"

Attached to this letter was "a copy of the Final Contract Settlement Offer by Kenosha County to Kenosha County Deputy Sheriff's Association. In respect to that document, the letter stated that:

> "All items other than that cited above have been agreed to."

This letter also requested "a panel of five neutral arbitrators from whom [the parties could] select the neutral arbitrator to resolve the dispute."

Under date of March 15, 1973, Counsel for the County sent to the Wisconsin Employment Relations Commission a document entitled: "Final Contract Settlement Offer by Kenosha County to Kenosha County Deputy Sheriffs' Association." The transmittal letter states, among other things, that

> "...to the best of the county's knowledge, [that document] represents the final settlement of all issues...[except] Item 6...which was not agreed to."

The cited Item 6 in that document reads as follows:

> "6. Article XII, Section 2, shall be amended to read as follows:
> "'Section 2. Except for the first two occasions without proof in any calendar year, an employee shall not be entitled to sick leave pay for the first day off unless he has furnished his supervisor proof of illness from a licensed physician or has been hospitalized. If sick for more than three (3) days, the employee shall furnish his supervisor with a certificate of illness signed by a licensed physician. All sick leave forms shall be furnished by the county and must be executed and returned by the employee upon return to work.'"

"...the employer's submission of last offer and position of the parties on both sides was accurate in every respect."

That letter then went on to say the following:

"Please be further advised that the Union now modifies the position as set forth by the employer in terms of a change of position under the statute to indicate that Items numbered 3, 4, 6, 7, 8 and 12 are opposed by the Union. These articles primarily represent an offered improvement in the sick leave which the Association feels are tied to the Items that were mentioned as being in dispute, and the Association does not wish to accede to such changes at all in the sick leave, feeling it unfair to object to the employer's detrimental acts while taking the benefit of the bargain.

"With reference to Article 12 it would be the Association's position that the contract should only run for one year.

"The Association's position with reference to Number 9 in the statement, which is labeled Article XII, is that the right to a statement from a physician should only be available to the employer when there is adequate reason to believe that the person from whom the doctor's statement is sought suffers from a disabling injury which would make him unfit for work."

Under date of July 16, 1973, Counsel for the County addressed a letter to Counsel for the Association (with copies to the arbitrator and to the Wisconsin Employment Relations Commission, among others), which stated the following:

"This is to notify you that pursuant to Section 111.77(4)(b) the County is modifying its final offer in the above-entitled case to provide for an alternative proposal as it involves Article XII, Section 2. as follows. Pursuant to the offers made to all other County employees, the Deputies may select either of the two following proposals. The one selected shall go into effect:

"Proposal 1:

"'6. Article XII, Section 2, shall be amended to read as follows:

"'Section 2. Except for the first two occasions without proof in any calendar year, an employee shall not be entitled to sick leave pay for the first day off unless he has furnished his supervisor proof of illness from a licensed physician or has been hospitalized. If sick for more than three (3) days, the employee shall furnish his supervisor with a certificate of illness signed by a licensed physician. All sick leave forms shall be furnished by the county and must be executed and returned by the employee upon return to work.'

"Proposal 2:

"'6. Article XII, Section 2, shall be amended to read as follows:

"'Section 2. Employees shall not be entitled to sick leave pay for the first day off due to illness or injury unless he has furnished his supervisor a certification of illness signed by a licensed physician or has been hospitalized. (This requirement is waived for any employee who has at any time accumulated sixty (60) days of sick leave during his employment with the county.) If sick more than three (3) days, the employee shall furnish his supervisor with a certificate of illness signed by a licensed physician. All sick leave forms shall be furnished by the County and must be executed and returned by the employee upon returning to work.'"

The arbitration hearing followed, on July 19, 1973.

CONTENTIONS OF THE PARTIES

In his preliminary statement, Counsel for the Deputy Sheriffs' Association cited the following reasons why it objects to the County's "sickness" reporting proposal,--the proposal which provides as follows:

"Except for the first two occasions without proof in any calendar year, an employee shall not be entitled to sick leave pay for the first day off unless he has furnished his supervisor proof of illness from a licensed physician or has been hospitalized. If sick for more than three (3) days, the employee shall furnish his supervisor with a certificate of illness signed by a licensed physician. All sick leave forms whall be furnished by the county and must be executed and returned by the employee upon return to work."

The objections were stated to be the following:

1) The proposed provision implies a distrust of the word of these law enforcement agents when they report "illness" as the reason for one or two days of absence from work. Counsel and several of the witnesses for the Association suggested that a provision implying such distrust could have an adverse affect on the credibility of those deputy sheriffs when they testify in Court on law enforcement matters.

2) No law enforcement personnel elsewhere is subject to such a provision.

3) The old provision, which has been in successive agreements for many years, would be less costly than would be the proposed clause plus the fringe benefit considerations which the County attached to its acceptance.

4) At the time the proposal was presented to the Association, the other employee units who bargain with the County had not accepted this clause.

5) Doctors' certificates are costly--(and one of the witnesses added that doctors are generally not accessible on short notice.)

6) Because of the way pensions are figured, there is no advantage in the fringe benefit improvement which the County attached to the proposal.

7) The inclusion of the sickness proposal now being sought by the County would take away the considerations which were traded off when the current provision was incorporated into successive prior agreements.

8) During negotiations, the Association's Bargaining Committee was told that the Deputy Sheriffs were not a problem in respect to absences on the ground of alleged sickness.

Counsel for the Association also stated that the proposal was not among the changes originally proposed by the County and that, therefore, it should not now be given consideration.

The basic position of the County in this case is that, in respect to "fringe benefits," its aim, as far as possible, is to treat all of its employees alike; that--

1) The alternative offers relative to sick leave which were made in the July 16, 1973 letter to Counsel for the Association were made because,--except for those in the bargaining unit here involved,-- "Every County Employee who earns sick leave...[is] now covered by either alternative one or...two..." set forth in that letter. [County's Post-Hearing Brief, p. 5.]

2) "There is little logic in treating the deputies in a different fashion." [County's Post-Hearing Brief, p. 9.]

3) The monthly reports, made by the various departments of the County, caused the members of the County Board of Supervisors to conclude that "the number of one and two day absences was too high." [County's Post-Hearing Brief, p. 8.]

4) Either of the County's alternative proposals is "less restricted than those of all other major private employers in Kenosha." [County's Post-Hearing Brief, p. 10.]

5) The Items numbered 3, 4, 6, 7, 8 and 12, to which the Association's letter of April 21, 1973 to the Wisconsin Employment Relations Commission expressed opposition were designed to achieve the following:

> "Item 3 of the County's proposal added a provision granting five days of emergency or necessary leave. A proposal easily calculated to eliminate any 'so-called need' to use sick leave for such purposes. Sick leave is intended to protect an employee's earning capability when absent due to illness.
>
> "Item 4 of the County's proposal eliminated the limit of sick leave accumulation which was 120 days. Thus, employees under the proposed provision have an unlimited right to sick leave accumulation.
>
> "Item 7 permits payment of unused sick leave upon retirement without any day limitation.
>
> "Item 8 permits employees to be paid in cash for unused sick leave in excess of 120 days or to retain it for subsequent use as sick leave or until retirement when it would be paid.
>
> "These proposals make it clear that the County's objective is not monetary. An employee who loses a day of pay because he does not have a Doctor's excuse still has the sick leave day to his credit. The County's monetary obligation is not eliminated but is merely delayed until a subsequent illness, until an employee's accumulation exceeds 120 days or until he retires. This, in fact, will cost the County more money because any delayed payment will be made at a rate higher than that now in effect." [County's Post-Hearing Brief, pp. 12-13.]

In explanation of its stated objections, the Association says:

> "...it no longer wants the benefits and improvements in the contract involving sick leave and emergency leaves because, in effect, these are quid pro quos for the sick leave medical requirements which they do not want... It is thus clear that these items...are ones that would benefit their membership." [County's Post-Hearing Brief, p. 22.]

6) The Association gives no reason for rejecting, on April 21, 1973, a two-year agreement,--the term of all the agreements with the other bargaining units. In respect to those other agreements, they are subject only to a wage re-opener for the second year; in respect to the Deputy Sheriffs' Association, the re-opener may also include the incorporation of the "education incentive program for the year 1974." [County's Post-Hearing Brief, p. 23.]

7) The Association has given no reason to justify its objection to permitting the County "to send ill employees to a Doctor at the County's expense,"--a permission which was incorporated into the agreements with all of the other bargaining units. [County's Post-Hearing Brief, p. 23.]

PRELIMINARY COMMENTS BY THE ARBITRATOR

The action and discretion of the arbitrator is, in this case, governed by Section 111.77(4)(b) of the Wisconsin Statutes. That portion of the Statutes states, among other things, that:

> "... The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification."

The "final offer" is the offer which the parties had to submit to the Wisconsin Employment Relations Commission as

> "...their final offer in effect at the time that the petition for final and binding arbitration was filed."

However, the statutory provision also states that

> "... Either party may amend its final offer within 5 days of the date of the hearing."

In the light of the statutory requirements and the applicable Rule of the Commission [Wis. Adm. Code section ERB 30.15(3)] respecting the final offers of the parties, the arbitrator concludes as follows:

1) The "final offer" of the County of Kenosha is the document entitled, "Final Contract Settmement Offer by Kenosha County to Kenosha County Deputy Sheriffs' Association," (sent to the Wisconsin Employment Relations Commission under date of March 15, 1973,) as that document was modified by the letter from its Counsel dated July 16, 1973 to the Counsel for the Association.

2) The "final offer" of the Kenosha County Deputy Sheriffs' Association is the same March 15, 1973 document (submitted by Kenosha County to the WERC) as that document was modified by the April 21, 1973 letter of Counsel for the Association to the cited administrative Commission.

   [NOTE: The arbitrator did not have submitted to him a copy of the document which the parties jointly sent to the WERC with their letter dated March 2, 1973 and referred to as "Final Contract Settlement Offer by Kenosha County to Kenosha County Deputy

Sheriffs' Association." However, Counsel for the Association stated (letter of April 21, 1973) that "the employer's submission of last offer [letter of March 15, 1973] and position of the parties on both sides was accurate in every respect." Therefore, the arbitrator assumes that the document which was attached to the County Counsel's letter to the WERC dated March 15, 1973, is the same document, bearing the same title, as was attached to the letter of March 2, 1973, signed jointly by the parties.]

The arbitrator notes, also, certain provisions of the Statutes [Section 111.77(6)] which establish the criteria designed to guide the arbitrator's judgment. The following are selected from among those criteria because they appear to be relevant to this case:

1) Section 111.77(6)(c):

> "The interests and welfare of the public..."

2) Section 111.77(6)(d):

> "Comparison of the...conditions of employment of the employes involved...with the...conditions of employment of other employes performing similar services and with other employes generally:
>
> 1. In "public employment" and in "private employment in comparable communities." [Sub-sections 1. and 2.] [Emphasis added.]
> 2. "...Other factors...which are normally or traditionally taken into consideration in the determination of...conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment." [Sub-section 2.(h).]

ARBITRATOR'S FINDINGS AND COMMENTS

The material encompassed by the "Background to Issue" portion of this "Opinion" constitutes "findings" for purposes of this case.

In respect to the Association's contention that the County's proposal respecting sick leave was not timely, when it was introduced in the January 10, 1973 meeting, the arbitrator notes the following:

1) Under the law and the administrative rules which govern this arbitration procedure, either party may amend, in part or in its entirety, its final offer "within 5 days of the date of the hearing." [Section 111.77(4)(b)]. Therefore, even if the cited proposal should be thought to have been not "timely" under the negotiating policy established by the parties in early November 1972 [that--as the Association contends--no other changes would be considered], there is nothing in the law or in the rules of the Commission which gives negotiating procedures established by the parties precedence over the rights of the parties established by law in respect to arbitration proceedings of the kind here involved.

2) In this case, the Association itself elected to modify its original "final offer" by returning to disputed status, items which had previously been certified to the WERC as not in dispute. This suggests that the Association also is persuaded that the rights established by law pertinent to this arbitration supersede any negotiating or negotiated commitments by the parties.

The evidence in this case establishes that 3 of the "Locals" which represent segments in 5 areas of the County's employees--[Kenosha County Court House Local #990, AFSCME, AFL-CIO; Kenosha County Welfare Department Clerical Employees Local #990, AFSCME, AFL-CIO; Kenosha County Welfare Department Professional Employees, Local #990, AFSCME, AFL-CIO; Kenosha County Institutions Employees Local #1392, AFSCME, AFL-CIO; and Service Employees Local Union #168, AFL-CIO]--negotiated the County's alternate Proposal 1. (respecting sick leave) into their Agreements; and that Local #70, Kenosha County Employees, AFSCME, AFL-CIO, which represents Highway Department employees, accepted the County's alternate Proposal 2. (both Proposals as set forth in the County's July 16, 1973 letter to the Association.)

The number of job classifications covered by the Agreement with Local #70, AFSCME, applicable to the Highway Department, is not shown by the copy of that contract which was presented into evidence. However, the other Agreements, previously identified, cover a total of 63 classifications (including some professional employees) in the County's service. The evidence also shows that the six Agreements which have already been consummated for the 1973-1974 period cover in the neighborhood of 460 employees. This means that about 84% of the Kenosha County employees who have Union representation are in the cited bargaining units, and that the remaining almost 16% are represented by the Deputy Sheriffs' Association involved in this case.

The Association presented into evidence its analysis of the records in the Sheriff's Department which shows that, when the serious illnesses are discounted, the average number of days of sick leave taken by people in its bargaining unit (whose number had increased from 80 to 87) has declined. Those figures show the following:

YEAR	AVERAGE DAYS OF SICK LEAVE PER EMPLOYEE
1970	3.32
1971	2.90
1972	2.90

At the arbitrator's request, the County submitted to him, subsequent to the hearing, the details pertinent to the sick leaves taken by the employees in the unit for the year 1972, as those details are recorded in the monthly reports made to the County Board of Supervisors by the Sheriff's Department. The arbitrator's analysis of those details produce the following facts:

1) Nine employees had sick leave some time during 1972 which continued for more than 3 days and who, therefore, were required to furnish a medical certificate upon return. The total number of days of sick leave taken by those 9 employees (including occasions on which such leave was for 3 days or less) was 209 days. Based on the Association's count of the total number of days of sick leave taken by all of the employees in the unit during 1972,--i.e., 456 days,-- the total amount of the sick leave taken by the cited 9 employees represents almost 46% of that total.

2) The data supplied to the arbitrator by the County shows that 22 employees (25+ % of total) took no sick leave during 1972. It also shows the following:

a) 17 employees took one day (or fraction of 1 day) of sick leave on one occasion.

b) 6 " " one day - - - - - on each of two occasions.

c) 8 " " one day - - - - - on " " three "

d) 3 " " one day - - - - - on " " four "

e) 3 " " one day - - - on each of from five to nine "

f) 13 other " " 1/2 to 2 days - - - - - on a total of fifty "

g) 4 " " " one to 3 days - - - - - on a total of twenty-two "

h) 1 " " " one day on eighteen occasions; 2 days on 3 occasions, and 3 days on one occasion, for a total of twenty-two occasions.

The above data establishes, for example, that the 8 employees in e), g) and h) above, took sick leave for periods of not more than 3 days on about 66 occasions. Under the terms of the sick leave provision in the 1972 Agreement (the terms of which the Association proposes be continued in the new agreement), the employees involved could collect sick leave pay for every day of those absences without producing a medical justification for those absences. Under "Proposal 1." of the alternative proposals offered by the County (July 16, 1973 letter), those 8 employees--having the sick leave record for 1972 as shown by the evidence--would have had to produce at least 3 or as many as 20 medical certificates in order not to lose pay for the first day of sick leave after the first 2 occasions in 1972 without proof.

3) The following tabulation, produced from the arbitrator's analysis of the evidence, indicates the proportion of the employees in the bargaining unit who, as of January 1, 1973, had in excess of 60 days of sick leave available to them:

a) 28 employees out of 45 -- (approximately 62% of them, and approximately 32% of the total number of employees in the unit) -- who had either no sick leave in 1972 (22 of them) or who had not more than one day on one occasion or on each of 2 occasions (23 of them) had such a sick leave "bank".

b) 13 other employees out of 32 -- (approx. 40% of them, and approx. 15% of the total number in the unit) -- who had sick leave on 3 or more occasions (but not exceeding 3 days on any occasion) had such a reserve.

c) 4 of the 9 employees who had a sick leave for a period in excess of 3 days some time during 1972 had such a reserve -- (approx 44% of them, and approx. 4.6% of the total number of employees in the unit).

This data has significance because it shows that, if the County's alternative sick leave "Proposal 2." had applied in 1972, a little over half (approx. 52% of the employees could have taken from one to 3 days of sick leave on some occasions during the year without being obligated to furnish a medical certificate in order not to lose pay for the first day of each such leave. The data also means, of course, that nearly half (approx. 48%) of the employees would have had to furnish a medical certificate following each such leave (up to 3 days) in order not to lose one day's pay.

In his Post-Hearing Brief, Counsel for the Association says the following in explanation of the amended final offer the Association made in its letter dated April 21, 1973:

"Items 3, 7 and 8 [of the County's final offer dated March 15, 1973] are basically items favorable to the Association and are rejected by it, solely because they were not bargained for by the Association but [are County proposals as] a response for [Item] 6 of the letter of March 2, 1973." [Association's Brief, p. 1.]

The Brief then proceeds as follows:

[Item] 6..."is substantially different by its terms than agreements made with other units, and answers no pressing need in the department." [Brief, p. 2.]

The "difference" (as stated by the Brief) is that:

"...other units would be allowed to rid themselves of the clause if their experience rating improved over a year's period. This important incentive feature is lacking from the offer to the Association." [Brief, p. 2.]

In respect to the above stated objections to the sick leave provisions proposed by the County, the arbitrator notes the following evidence:

1) As stated earlier, the Agreements for the years 1973-1974 which govern the employees in the bargaining units represented by the 4 other labor organizations who bargain collectively with the County, all contain one of the 2 alternative sick leave proposals which the County is offering to the Association in this case. As a result, about 84% of the employees who have collective bargaining representation are now governed by one or the other of those proposals.

   By action of the County Board, all employees who are not covered by a labor agreement, but have sick leave rights, are now governed by the terms of alternative Proposal 1.--the terms of which are incorporated in all of the current labor Agreements except that of Local #70. That Local, representing the Highway Department, negotiated into its Agreement the terms of what is the County's alternative Proposal 2. in this case.

   This means that the Association is free to choose to have its members be governed by identical terms which apply to most of the County employees with sick leave privileges (alternative Proposal 1.) or by the terms which apply to the Local #70 unit (alternative Proposal 2.)

2) As to whether or not there is a "pressing need" [Association Brief, p. 1.] for greater control over the absences on account of illness for periods up to 3 days by Association members, it depends upon how one views that past record of those members in respect to the frequency of such short period leaves. That record, as it was developed by the Association members in 1972, was presented in detail earlier in this "Opinion". This arbitrator concludes that, based on that record, a reasonable person looking at it would not be inclined to suggest that the employer--who pays the salary and absorbs whatever other operating costs result from such absences--is unreasonable when (in respect to the employees with frequent, such absences) he would like to know, from a qualified source, the health related cause, if any, which justifies those absences.

3) The following facts are relevant as to whether or not the 1973-1974 Agreements with other Unions are subject to re-opening for consideration of the sick leave clause:

a) There is nothing in any of the language of any of those Agreements which either says or implies that the terms of the sick leave clause they contain is conditioned, in some way, on the type of clause which other collective bargaining agencies may negotiate with the County.

b) There was no showing that such an agreement was concluded outside the contract.

c) The testimony of 2 representatives of one of the Locals in respect to this matter does not, in the arbitrator's opinion, warrant the conclusion that the County negotiators made such a commitment, orally. They testified that the County's negotiators said that, in respect to "fringe benefits", the County "wants a uniform policy;" that all employees "will be treated equally." From this, those 2 witnesses concluded that all of the 1973-1974 Agreements were subject to re-opening of the sick leave clause.

The testimony by the County's witness agreed that those statements reflect the County's bargaining policy with all of the Unions.

This arbitrator knows--and he assumes the representatives of parties in the collective bargaining process know--that the extent to which the bargaining policy (or hopes) are fulfilled depends on the extent to which the parties finally mutually agree to put them into their contract.

It is reasonable to assume, therefore, that, if the parties to any of the Agreements which have already been concluded with the County had intended to make their sick leave clause contingent, in some way, upon the sick leave clause negotiated by one or more other collective bargaining agencies, the contracts of such bargaining units would so state.

The testimony given during the hearing and the argument in the Association's Post-Hearing Brief indicate that the objection to the County's proposed change in the prevailing sick leave clause is based on the following contentions, -- namely, that the change

1) Constitutes "a challenge to the integrity of the sworn personnel" of the Deputy Sheriffs' unit. [Brief, p. 2.]

2) Constitutes a "direct affront to the integrity of these employees,"--"the essence [of whose work is] police work, [requiring] not only integrity but demonstratable integrity." [Brief, p. 2.]

3) Constitutes a "humiliation" to which "no other police unit in the State" is subject." [Brief, p. 2.]

4) Constitutes an "affront" and an "undermining of the very service the officer is to render to the community," differing "in kind and degree from the effect" it would produce "in other fields of endeavor." [Brief, p. 3.]

5) Constitutes a control over sick leave which is not needed, because the Department has the supervisory means--not available to other Departments--to investigate such absences.

The above contentions were presented as arguments. The Association presented little evidence designed to establish their validity. However, in respect to those contentions, the arbitrator notes the following:

1) Successive agreements between the parties have contained a requirement that the employees here involved furnish "a certificate of illness [from] a licensed physician" when the absence caused by the illness continued for "more than three (3) days." It also contained the provision that "each employee is subject to check [by a County representative] to verify the alleged sickness." The Association proposes that those requirements be continued in the new Agreement here involved. There was no showing why the County's proposals can reasonably be construed as an "affront to the integrity of these employees" and "a humiliation", etc., in a way that the prevailing acceptable provisions are not.

2) There was no showing, beyond allegation, that rules which govern the employer-employee relationship of the Association members involved--by the mere fact of their existence--undermine their vital functions as law enforcement officers. There is also no evidence that the testimony of a law enforcement officer, given under oath in any Court of law, was ever impeached or was sought to be impeached on the ground that, under the labor agreement (or under the rules) which governed his relationship to the governmental agency for which he worked, he was required to produce substantiating evidence for the personal benefits he claimed.

There is, in the arbitrator's opinion, an important distinction between the situation in which a law enforcement agent acts in his official capacity, and one in which his personal interest as an employee is involved. Among the more readily recognizable differences this arbitrator thinks exist, are the following:

a) Testimony by a law enforcement officer, under oath in a Court of law, is normally related to persons or situations where the outcome does not affect the officer personally in any significant way. Furthermore, lying in such testimony can result in a jail sentence. On the other hand, the making of a false claim for benefits in the employer-employee relationship, under the labor Agreement, makes the officer subject to "disciplinary action", the ultimate of which might be "discharge", but not a possible jail sentence.

b) The evidence in this case establishes that the assumption by a person of the responsibilities of a law enforcement officer does not necessarily immunize him against the temptation to stretch the truth, for personal advantage, in respect to employer-employee related matters. The testimony shows that, in the past, two officers were charged with abusing the sick leave benefits of the Agreement and that one of them was known to have received a punitive layoff for so doing. There is no evidence that even the officer who was expected to be honest in respect to sick claims, but who was actually found guilty of dishonesty in respect to his claim for sick leave benefits, has, since that time, had his credibility as a law enforcement officer challenged in Court.

3) As to whether or not a more stringent regulation of claims for sick leave is warranted, in respect to the members of the Association, the record of such absences in 1972 (presented earlier) is persuasive. That record establishes, for example, that 1 Association member was absent for one day on each of 18 occasions and for 2 or 3 days on 4 other occasions, for a total of 27 days. It also shows that 17 other employees in the unit were absent on account of illness for periods ranging from 1/2 to 3 days for a total of 96 days on 72 occasions.

Since the Association had made a study of the absentee record of its members for recent years, it had reason to be aware of the records cited. It did not, however produce any evidence designed to show that the frequent absences of some of its members, as revealed by the record, were in fact justified.

In respect to the statutory criteria which arbitrators are to pursue in performing their function in cases of this type, to the extent that they have relevance to this case, the arbitrator finds the following:

1) There is no evidence in this case (not even an estimate) respecting the net cost of the County's proposals. The arbitrator assumes, therefore, that whatever number of dollars is committed by the County as an incentive to the Association members to reduce, where possible, the number of absences due to illness--and thereby save the County both sick pay "and the administrative cost involved in adjusting the Department's operation to such absences"--the County is persuaded that the cost involved in offering that incentive is justified as being in the public interest.

The arbitrator finds nothing in the evidence, beyond allegation, which suggests that the public interest would best be served by retaining the current sick leave provision and save the cost of the incentives offered by the County to encourage the Association members to accept one of the County's alternative sick leave proposals.

2) The uncontested testimony of a witness for the County establishes that the most liberal "plans", in effect in the major industries in the area, pay sick leave only from the 4th day onward, while the County's alternative proposals would never make sick payments later than the 2nd day onward and--under prescribed conditions--from the 1st day onward.

3) The arbitrator is persuaded that the sick leave "plans" which are currently in effect for all of the other County employees, who are subject to sick leave benefits, are a more important factor of consideration as to what is equitable in this case, than is the absence of plans, like those alternative ones proposed by the County, among law enforcement people in other communities. There is no evidence that, in respect to sick leave in the other areas which the parties deem comparable, the law enforcement personnel is treated differently (precisely because it is law enforcement personnel) than are the other employees in the same governmental agency.

In respect to the duration of the Agreement, the Association gave no reason why it should terminate after one year. At this point in time, about two-thirds of 1973 has already passed. A one-year term, therefore, would mean that negotiations for the 1974 Agreement would have to begin about the time the 1973 Agreement is completed. And, as noted earlier, all of the other labor Agreements with the County which are currently in effect continue through 1974. Therefore, it would seem reasonable to have the Association's Agreement extend for two years, also.

Among the Association's objections to the County's sick leave alternative proposals--(which, under defined conditions would require a medical certificate for absences due to illness of 3 days or less, the same as is now required for sick leave for more than 3 days)--was the contention that appointments for medical attention are hard to get on short notice, and are expensive. It would seem that one of the provisions which is included among the amendments proposed by the County would, in many cases, help the Association members solve that problem. The clause in question reads as follows:

Item 9. "Article XII shall be amended by adding a new Section 7 to read as follows:

'Section 7. If any employee appears to be injured or ill while on the job or there is reason to believe that an employee needs medical attention, his supervisor shall have the right to require the employee to furnish a statement from a licensed physician before returning to work that the employee is capable of performing the work required by his job. The County shall send such employee to the doctor at its expense on working time.'"

As the arbitrator understands the terms of that proposed clause: when an employee reports for work in a condition which suggests that he may need medical attention, his supervisor is authorized to send him to a doctor at the County's expense for a determination as to whether or not his condition warrants letting him perform his work. This provision would appear to be useful to those employees who do not need medical attention in their home, but are able to--and would normally prefer to go to a doctor's office for such help.

CONCLUSION

In the light of the evidence presented to him by the parties, and in view of his obligation under the law "to select the final offer of one of the parties...without modification," [Section 111.77(4)(b) of the Municipal Employment Relations Act], the arbitrator concludes that the final offer of the County of Kenosha is the most advantageous and appropriate for all concerned, of the final offers of the parties, to become the terms of the collective bargaining Agreement between the parties here involved.

The terms of the applicable "final offer" are those contained in the document entitled, "Final Contract Settlement Offer by Kenosha County to Kenosha County Deputy Sheriffs' Association," which Counsel submitted to the Wisconsin Employment Relations Commission by letter dated March 15, 1973, as that document was modified by the County's final offer dated July 16, 1973.

AWARD: The above "Conclusion" constitutes the award of the undersigned arbitrator.

August 29, 1973
Date

H. Herman Rauch /s/
H. Herman Rauch, Impartial Arbitrator
(by WERC Appointment)