

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 WAUSHARA COUNTY HIGHWAY DEPARTMENT : Case 42
 EMPLOYEES, COUNCIL 40, AFSCME, : No. 47317
 AFL-CIO : MA-7230
 :
 and :
 :
 WAUSHARA COUNTY :
 :

Appearances:

Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901, appearing on behalf of Waushara County Highway Department Employees, Council 40, AFSCME, AFL-CIO, referred to below as the Union.
Ms. Renee J. Samuelson, Waushara County Corporation Counsel, Waushara County Courthouse, P.O. Box 300, Wautoma, Wisconsin 54982, appearing on behalf of Waushara County, referred to below as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Mike Gustin, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on June 30, 1992, in Wautoma, Wisconsin. The hearing was not transcribed, and the parties elected to state their positions at the June 30, 1992, hearing rather than filing written briefs.

ISSUES

The parties stipulated the following issues for decision:

Did the County violate the collective bargaining agreement when it denied the Grievant funeral leave on January 2, 1992?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 16 - FUNERAL LEAVE

16.01 - All full-time employees shall be entitled to funeral leave, with pay, consisting of not more than three work (3) days, in order to attend the funeral of a member of his/her immediate family. For the purposes of this article, a member of the immediate family shall be the employee's . . . grandparent . . .

BACKGROUND

The grievance posed here was filed on January 23, 1992. 1/ The County ultimately denied the grievance in a memo dated February 11, which reads thus:

The contract language which states that an employee may take no more than three days to attend the funeral (of a named relation) is interpreted by the County to mean that such time, to a maximum of three work days, as is necessary to prepare for and travel to a funeral will be granted. In (the Grievant's) case, the funeral was local, and it occurred two days before the requested leave. Therefore, his request is denied.

The parties do not dispute the facts surrounding the Grievant's request for funeral leave. The Grievant's grandfather died on Sunday, December 29, 1991. The Grievant called in the next day, prior to the start of his scheduled shift, and informed Joe Boquist, a Patrol Superintendent, that he intended to take three days of funeral leave. Boquist noted the request in his notes, and has no recollection of what, if anything, he said to the Grievant regarding the request.

The funeral for the Grievant's grandfather was held on Tuesday, December 31, 1991, in Wautoma. On Thursday, January 2, the Grievant, together with his uncle, aunt and father, went through his grandfather's personal belongings, and discussed the handling of the estate. His uncle served as the executor of the estate. The Grievant had no direct contact with the attorney who assisted in handling the estate.

The Grievant reported for work on January 3, and modified a sick leave reporting form to reflect his funeral leave request. He left the form at the Highway Department's business office. John Wedell is the Grievant's immediate supervisor. He learned of the Grievant's request for funeral leave from Boquist and referred the Grievant's request to the Highway Commissioner, Robert Bohn. Wedell did not discuss the request with the Grievant until after the funeral, when Wedell informed the Grievant his request for January 2 might not be

1/ References to dates are to 1992, unless otherwise noted.

granted. Bohn ultimately denied the Grievant's request for January 2, because he did not feel the Grievant played a significant role in handling post-funeral business.

The County has no written policies on the approval/disapproval of funeral leave, and the Grievant was unaware that Bohn felt the day after a funeral could be taken as funeral leave only if the employe had a business need to do so.

Bohn has been Highway Commissioner since 1979. He noted that he did not question any employe's request for funeral leave for the period of time from the employe's notice to the County of the death to the time of the funeral. He noted that not all employes took the full three days available for funeral leave, but that he relied on the employe's discretion in requesting leave for the period from the time of death until the funeral. In those cases in which an employe wanted to take funeral leave after the funeral, Bohn noted that the employe would usually ask him to approve the time, and would state a reason for the request. Bohn would examine such requests on a case by case basis, but would grant the request if the employe had a valid personal or business reason supporting the request. He cited, as examples, Les Wetmore and Dale Lind. He noted that Lind specifically asked for approval of two days after a funeral to attend to the processing of the estate. He authorized one day for Wetmore for similar reasons. In neither case did Bohn ask specifically if the employe was the executor of the estate. Rather, he took their word that a valid business reason existed for the request.

Bohn stated that the Grievant never afforded him a business reason for taking January 2 off. Rather, the Grievant requested that day off for grieving. In the absence of a business reason for the leave, Bohn felt he could not authorize payment for January 2 as funeral leave.

Employe use of funeral leave, other than the request at issue here, can be summarized thus:

<u>Employe</u>	<u>Date Of Funeral</u>	<u>2/Date(s) Funeral Leave Granted</u>
V. Eichsteadt		2-5, 2-6 & 2-7-86
M. Gustin		3-19, 3-20 & 3-21-86
A. Wedde		3-31 & 4-1-86
R. Schry		4-15-86
M. Wagner		9-22, 9-23 & 9-24-86
J. Boquist		10-13, 10-14 & 10-15-86
G. Cotanch	11-10-86	11-7, 11-10 & 11-11-86
D. Bray		11-24-86
S. Bray		11-24-86
L. Mankowski		12-2, 12-3 & 12-4-86

2/ The absence of an entry indicates the relevant date cannot be determined from the record.

K. Miller	7-21-87	7-20, 7-21 & 7-22-87
J. Wise	11-21-87	11-19, 11-20 & 11-23-87
R. Gruber		12-11-87
D. Bray		4-14-88
H. Nigh	4-20-88	4-19, 4-20 & 4-21-88
V. Eichsteadt		7-12-88
J. Bleskey		4-10, 4-11 & 4-12-89
T. Dahlke		5-19-89
L. Wetmore		1-25 & 1-26-90
M. Sorenson		4-10, 4-11 & 4-12-90
M. Pomplun		4-18, 4-19 & 4-20-90
M. Pomplun		6-1-90
G. Cotanch	8-7-90	8-6, 8-7 & 8-8-90
B. Caves		11-16 (half day) & 11-19-90
R. Kalata		1-14 & 1-15-91
B. Patterson		4-8, 4-9 & 4-10-91
K. Schwarz		7-8-91
D. Lind	9-3-91	9-3, 9-4 & 9-5-91
L. Wetmore	4-6-92	4-3, 4-6 & 4-7-92

Each of the funerals for which a date is listed was held within Waushara County.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union characterizes the case as "simple and straightforward". The Union notes that Section 16.01 creates an entitlement to funeral leave for not more than three work days. Since the Grievant did not take more than three days, the Union concludes that the entitlement to the leave has been clearly established. Because it is impossible that all of the three day leave can be devoted to attendance at the funeral, the Union asserts that the determination of the amount of leave necessary rests with the employe.

Beyond this, the Union contends that the County's response to the grievance indicates that the County will grant three days of leave only if travel is required. Noting that in seven cases the County has granted the day after a funeral where the funeral was local, the Union concludes that the three day leave is offered to employes for the grieving process, not simply for travel. Nor does the County's practice support any conclusion that the day after a funeral has been granted only where the employe is involved in the administration of the estate. The Union concludes that what evidence exists of past practice supports its position, and asserts that it necessarily follows that the Grievant should be made whole for the County's denial of funeral leave for January 2, 1992.

THE COUNTY'S POSITION

The County stresses that Section 16.01 grants an employe "not more than" three days, and does so for a specific purpose -- "to attend the funeral". This language, according to the County, clearly acts as a limitation on the amount of funeral leave granted and on the purpose for which it can be taken. Whether the limitation is viewed as callous or not, the County notes that the benefit can be no broader than the language permits. Past practice indicates to the County that, if anything, it has been more generous with the leave than is necessary, by granting, on a case by case basis, leave after the funeral. The present grievance seeks, however, to broaden that generous practice, according to the County.

In this case, the County notes that the Grievant had no paperwork duties to attend to on January 2, and that any paperwork he did attend to could have been handled on January 1. Since he was not the executor of the estate, he does not fit within the limited expansion of funeral leave which Bohn has been willing to approve of. It follows, the County concludes, that the Grievant was not entitled to funeral leave on January 2, and that the grievance must, therefore, be denied.

DISCUSSION

The stipulated issue questions whether the County violated the labor agreement by denying the Grievant funeral leave for January 2. There is no dispute that Section 16.01 governs his request.

Section 16.01 provides "full time employees" with "not more than three work (3) days" of "funeral leave, with pay" so that the employe may "attend the funeral of a member of his/her immediate family." There is no dispute that the Grievant is a full time employe whose request falls within the three day cap imposed in the first sentence of Section 16.01, or that his grandfather is a member of his "immediate family", as those terms are defined in the second sentence of Section 16.01. The parties' dispute centers on the fact that the Grievant seeks funeral leave for January 2, two days after a funeral which required no appreciable travel.

The first sentence of Section 16.01 poses the interpretive issue, and cannot be considered clear and unambiguous since both parties have advanced plausible, but conflicting, interpretations of it. The ambiguity flows from the references to "not more than three work (3) days" and to "in order to attend the funeral". Read together, the references limit the three day benefit, but do not specify the scope of the limitations, or who determines them. The three day cap may imply the County must approve leave requests, or that the three days are taken at the employe's discretion. Under the Union's view, each employe has an unrestricted right to three days of leave for grieving purposes. Under the County's view, an employe has a restricted right consisting, at the most, of two days for travel to and from the funeral, and one day for the funeral itself. Beyond this, the reference to funeral attendance limits the purpose for which the leave may be taken. The reference cannot be considered clear, however, for it is undisputed that employes have been granted three days of leave where the funeral required no travel beyond the borders of the County.

Past practice and bargaining history are the most appropriate guides to resolve contractual ambiguity since each focuses on the conduct of the bargaining parties, whose agreement is the source and the goal of contract interpretation. Evidence of bargaining history is, on this record, unhelpful. The language of the first sentence has not been changed in any meaningful

sense since the parties' first contract, and there is no evidence the parties discussed the type of request posed here at any time during the bargaining process from the first contract to that presently in effect.

Evidence of past practice is the most significant guide to resolve the ambiguity posed here. Neither party asserts past practice, in itself, establishes any obligation regarding funeral leave. Rather, each party contends past practice offers insight into how the language of Section 16.01 should be applied. The Union contends that the limitations of Section 16.01 must be read in light of past practice, which establishes that the County denied the Grievant a benefit consistently afforded other employees. The County contends that the practice relevant here establishes that the Commissioner, on a case by case basis, may grant or deny funeral leave for days after a funeral.

The record establishes that the Commissioner grants funeral leave based on an "honor system". He does not question any usage of funeral leave between the date the employe learns of the death and the date of the funeral. Nor does he question employe usage of three days where one or more of the days falls after the funeral, unless the matter is brought to his attention. Thus, an employe seeking funeral leave typically calls in the request, and reports the use of funeral leave to a Patrol Superintendent. The Patrol Superintendent records the requested usage, but does not exercise any discretion to determine whether the requested usage is appropriate or not. The Highway Commissioner does not question the usage unless he learns that the request seeks a day or more after the funeral. Where this is the case, the Commissioner grants the leave if he sees a business reason to do so. This occurred in the cases of Les Wetmore in 1992 and Dale Lind in 1991. In Lind's case, the Commissioner granted two days after the funeral to permit Lind to fulfill his obligations as executor of the estate. In Wetmore's case, the Commissioner approved the use of a day after the funeral to permit Wetmore to handle paperwork. In neither case did the Commissioner specifically ask whether the employe was the executor of the estate. Rather, the Commissioner relied on the employe's statement that business related to the death required their presence.

Against this background, the Union's assertion of disparate treatment is unpersuasive. That other employes have received a day after a locally held funeral establishes no more than that the Commissioner was unaware of the usage. That the Commissioner does not question each employe request establishes only that the Commissioner relies on the representation of the employe. It does not establish that the Commissioner has chosen not to exercise any discretion regarding funeral leave.

In the absence of disparate treatment, the request for leave at issue here unpersuasively reads the limitations stated in the first sentence of Section 16.01 out of existence. The grievance seeks an automatic entitlement to three days of funeral leave. This is inconsistent with the express reference to "not more than three work (3) days". More significantly, this reads the reference to "in order to attend the funeral" out of existence, since there is no question the Grievant did not attend the funeral on January 2.

The County's view of the applicable practice is more compatible with the language of Section 16.01. What the precise extent of the County's discretion to deny funeral leave may be is not posed on these facts. It is, in any event, apparent that the amount of discretion the County asserts here is minimal, and does not conflict with the arguable entitlement of an employee to three full days of leave in appropriate circumstances. More to the point here, the record questions only whether the County has the discretion to deny a request for leave where the day in question falls after a funeral not requiring extensive travel. To deny the County this discretion effectively eliminates the express limitation that funeral leave is granted an employee "in order to attend the funeral of a member of his/her immediate family."

Thus, the contract authorizes the Commissioner to exercise the discretion he did in denying funeral leave for January 2. This does not, however, end the analysis, for his case by case exercise of discretion is a grievable point. Most significantly here, there is no persuasive evidence the Commissioner denied the Grievant a benefit granted other employees. Lind and Wetmore are the only specific instances on point, and each of them afforded the Commissioner a business reason justifying the absence. The Grievant's request was related not to business necessity, but to the grieving process. There is no reason to doubt the sincerity of his testimony on this point, or the extent of the loss he suffered. However, the issue posed here is restricted to how his absence is to be accounted for, and more specifically whether Section 16.01 permits him to account for the January 2 absence with funeral leave. Even if Section 16.01 could persuasively be read as a provision authorizing grieving leave, the record shows no disparate treatment. Of the funeral leave usage summarized above, roughly half of the employees took less than three days. Of those who took the full three days, there is no evidence indicating any of them were granted leave after the funeral for the purpose of grieving.

The most troublesome aspect of the case is the absence of notice to the Grievant regarding how the Commissioner exercised his discretion. The County has no written policies on point, and the Grievant was unaware the Commissioner felt there should be business or travel reasons to support funeral leave after the day of the funeral. If the Grievant had taken January 2 relying on past County action regarding funeral leave or on the absence of any reason to believe the leave would be denied, it would arguably be inappropriate to permit the County to deny the leave in this case. However, past usage of funeral leave has not been uniform, and there is no basis to indicate the Grievant could reasonably have relied on receiving the full three days. There is no evidence the County took any action which misled the Grievant into believing he could take funeral leave on January 2. There is no persuasive evidence that the Grievant took January 2 off in reliance on any County act of commission or omission. What reliance has been proven on this record is less the Grievant's than the County's. The record indicates the approval process employed by the County relies on the representations of the requesting employee. To conclude from this that the County has given up any discretion under Section 16.01 would, in effect, punish the County for relying on its employees in granting funeral leave. The County's denial of January 2 cannot, on the present record, be characterized as unreasonable.

In sum, Section 16.01 authorizes the County to exercise certain

discretion regarding the approval of funeral leave requests. In this case, the discretion exercised cannot be characterized as unreasonable. There has been, then, no violation of Section 16.01.

AWARD

The County did not violate the collective bargaining agreement when it denied the Grievant funeral leave on January 2, 1992.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 9th day of July, 1992.

By _____
Richard B. McLaughlin, Arbitrator