

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

DOUGLAS COUNTY

and

DOUGLAS COUNTY DEPUTY SHERIFF'S  
ASSOCIATION, LOCAL 41, WISCONSIN  
PROFESSIONAL POLICE ASSOCIATION/LEER  
DIVISION

Case 206  
No. 50631  
MA-8322

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Richard Thal, appearing on behalf of the Union.

Mr. John Mulder, Personnel Director, Douglas County, appearing on behalf of the County.

ARBITRATION AWARD

Douglas County Deputy Sheriff's Association, Local 41, Wisconsin Professional Police Association/LEER Division, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. Douglas County, herein the County, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Superior, Wisconsin, on August 2, 1994. There was no transcript made of the hearing. The parties completed the filing of post-hearing arguments on October 28, 1994.

ISSUES:

The parties stipulated to the following issues:

Did the County violate the collective bargaining agreement when it assigned non-bargaining unit employes to fill the vacancy created by jailer Chris Wahner's sick leave? If so, what is the appropriate remedy?

## BACKGROUND:

On December 22, 1993, while Chris Wahner was on vacation and off-duty, he injured his shoulder. Wahner gave the County a doctor's report stating that he would be unfit to work for a few months. Undersheriff Dan Jensen received said report and was aware that Wahner would be on sick leave for an extended period of time. Shortly thereafter, the Local Union President, Gary Gulbrandson, met with Jensen to discuss the filling of the vacancy caused by Wahner's absence. Jensen and Gulbrandson disagree with respect to the contents of that meeting. Gulbrandson recalled telling Jensen that the use of non-bargaining unit employees to replace Wahner would violate the contract. Gulbrandson testified that he never told Jensen that the Union was waiving its position and that, following his meeting with Jensen, he thought the County would post sign-up sheets for the full-time employees to select Wahner's shifts. Jensen testified that he told Gulbrandson he thought temporary employees would be used to replace Wahner, but that he would discuss the matter with the Sheriff. After his meeting with Gulbrandson, Jensen thought that it would be all right with the Union if the County used temporary employees to replace Wahner.

Subsequently, the County assigned two on-call, or temporary, employees, who are not in the bargaining unit, to fill the vacant shifts resulting from Wahner's absence. The parties disagree over the number of shifts which were worked by the two on-call employees when they were replacing Wahner.

Wahner returned to work on light duty on April 8. He used paid sick leave and paid vacation benefits to cover his absences. Wahner never filed a written request for a leave of absence nor did the County ever ask him to fill out a leave of absence form. The County continued to pay its share of Wahner's insurance premiums and he accrued benefits, i.e., vacation, sick leave and personal leave, while he was off work.

In January of 1993, the County utilized a temporary employee to replace a sergeant who was off work on worker's compensation. At the hearing, none of the witnesses were able to identify with certainty the absent employee. The Union filed a grievance over the matter, which grievance was resolved by the parties' agreement to make changes in the then-existing language of Article 17 of their contract. The County proposed the following as the grievance settlement:

1. Add the following phrase to the last sentence of Section 8:  
"except as authorized under Article 17 Section 10."
2. Amend Section 10 to read: "The Sheriff may appoint a qualified temporary employee or jailer as defined in Article 15 Section 2 to fill temporary vacancies expected to exceed 14 continuous calendar days or more for those occasions when a regular full time employee is off on extended leave

of absence, worker's compensation, light duty, and/or compensatory time. Vacation and personal leave time is excluded."

The Union responded with an alternative version of the above language, which version included the proposed change to Section 8, but changed the Section 10 language to read as follows:

The Sheriff may appoint a qualified temporary employee, as defined in Article 15, Section 2, or a patrol qualified jailer to fill temporary vacancies, exceeding 14 continuous calendar days, or more, for those occasions when a regular full-time employee is off, only on those occasions involving vacancies created by leaves of absence, worker's compensation, and light duty. These appointments shall not exceed 180 continuous calendar days.

The settlement reached by the parties contained the following language for Article 17, Section 10:

The Sheriff may appoint a qualified temporary employee as defined in Article 15, Section 2 or a patrol qualified jailer to fill temporary vacancies that are expected to exceed 14 continuous calendar days, or more, for those occasions involving vacancies created by leaves of absence, worker's compensation, and light duty. These appointments shall not exceed 180 continuous calendar days.

During negotiations for a successor to the 1993 contract, the County proposed to modify Section 10 of Article 17 by changing 14 days to 7 days and by deleting the phrase "for those occasions involving vacancies created by leaves of absences, workers' compensation and light duty." The Union did not agree to said changes.

The County has written personnel policies covering, inter alia, leaves of absences. The manual containing the personnel policies specifies that, if a policy conflicts with a contract, then the contract prevails.

POSITION OF THE UNION:

The County violated the contract when it assigned non-bargaining unit employees to fill the vacant shifts created by Wahner's absence. A vacant shift created by an extended sick leave does not fall within one of the three exemptions set forth in Section 17.10. Therefore, the County was obligated to assign bargaining unit employees to fill those vacant shifts.

Construing the contract as a whole makes it clear that an absence due to injury or sickness is not a "leave of absence." The parties defined a leave of absence in Article 10 of the contract. Said language specifies that the employee secure written permission from both the County and the Union, which Wahner did not have to do in this case. Further, while he was absent, Wahner accrued vacation, sick leave, and personal leave benefits, although Section 10.4 specifies that such benefits are not earned during a leave of absence. Moreover, nowhere in Article 30 of the contract is sick leave referred to as a form of a leave of absence. The parties have treated leaves of absence and sick leaves separately.

The intent of the parties in bargaining Section 17.10 was that the provision should be narrowly construed so that the County's right to assign bargaining unit work to non-bargaining unit employees would be strictly limited to filling the three types of vacancies explicitly identified in said section. The present Section 17.10 was created by the parties as a settlement of grievance 93-101. The Union's Business Agent, Gary Gravesen, testified that the parties discussed and agreed that the types of absence would be limited to the three situations specified in that section. During subsequent contract negotiations, the County proposed to delete the phrase identifying the three situations. Said proposal was not agreed to by the Union.

The Union never acquiesced in giving the County permission to fill a vacancy created by an extended sick leave with a non-bargaining unit employee. Such a waiver would require an explicit written agreement, which does not exist in this case. Further, as soon as Gulbrandson learned that the County might fill the vacant shifts created by Wahner's absence with non-bargaining unit employees, he advised the County that such an action would violate Section 17.10 of the contract.

The jailers in the bargaining unit should receive a back-pay remedy which is equal to the earnings they would have received if they had been assigned to work the vacant shifts created by Wahner's absence. The Union requests the Arbitrator to retain jurisdiction of this matter until the County complies with such a remedy.

POSITION OF THE COUNTY:

The County argues that sick leave should be considered a type of a leave of absence, and therefore, the County did not violate the contract by replacing Wahner with non-unit employees.

The contractual definition of a leave of absence is not clear.

In an attempt to resolve grievance 93-101, the County proposed language which explicitly excluded certain types of accrued leave, i.e., vacation and personal leave, but did not explicitly exclude sick leave. The Union's response eliminated the reference to vacation and personal leave and inserted the word "only" in front of the phrase "on those occasions involving vacancies created by leaves of absence, worker's compensation, and light duty." The language agreed to by the parties did not include the word "only." Section 17.10 does not make reference to Article 10 for the purposes of defining a leave of absence. Article 10 identifies a specific type of leave of absence which is unpaid and is not covered by any other type of paid leave. Within the County's personnel policies, there are other types of leaves of absence and the use of extended sick leave is considered a leave of absence. The consideration of sick time as a leave of absence is consistent with state and federal laws relating to family and medical leave.

Jensen testified to an incident where Mark Jacobson, a Deputy in the bargaining unit, injured his hand while off duty in February of 1993. Jacobson took sick time during his absence from work caused by said injury and a temporary employe worked the vacant shifts resulting from Jacobson's absence. That situation is identical to this particular case and happened at approximately the same time when the County and the Union were settling grievance 93-101.

The County believes that the grievance should be denied. If the grievance is sustained, the County contends that the amount of back pay requested by the Union is not accurate. Further, the County asserts that the bargaining unit employes would not have voluntarily filled all of the vacant shifts caused by Wahner's absence.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 10.

GRANTING TIME OFF:

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Section 2. Leave of Absence: Any employee desiring leave of absence from his employment shall secure written permission from both the Local Union and Employer. The maximum leave of absence shall be for thirty (30) days and may be extended for like periods. Permission for extension must be secured from both the Local Union and Employer. During the period of absence, the employee shall not engage in gainful employment. Failure to comply with this provision shall result in the complete loss of

seniority rights. The employee must make suitable arrangements for continuation of Health and Welfare and Pension payments before the leave may be approved by either the Local Union or Employer.

Section 3. Family and Medical Leave: Family leave and medical leave shall be provided pursuant to Section 103.10, Wis. Stats. Pursuant to this statute, for example, employees are eligible for the following:

- (a) Up to six weeks of unpaid family leave over a 12-month period for the care of a newborn or newly-adopted child.
- (b) Up to 2 weeks of unpaid family leave over a 12-month period for the care of a seriously ill child, spouse or parent.
- (c) Continued payment of health insurance premiums by the Employer during leave that exists under this statute.
- (d) Employees must schedule leaves on a reasonable basis.

Section 4. During a leave of absence, seniority shall continue to accrue. The benefits not earned are vacation, sick leave and personal leave days.

...

#### ARTICLE 17.

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Section 8. Regular employees, in the bargaining unit, shall have the option of switching shifts or days off for regular employees who are off one (1) week or more. If no full-time employees selects the above option of switching shifts or days off, all vacancies, if the Employer deems they must be filled, shall be replaced by regular full-time bargaining unit members on a daily basis, with seniority prevailing, except as authorized under Article 17, Section 10.



Section 10. The Sheriff may appoint a qualified temporary employee as defined in Article 15, Section 2 or a patrol qualified jailer to fill temporary vacancies that are expected to exceed 14 continuous calendar days, or more, for those occasions involving vacancies created by leaves of absence, workers' compensation, and light duty. These appointments shall not exceed 180 continuous calendar days.

. . .

ARTICLE 30.

SICK LEAVE. Section 1. Credit accumulates at the rate of one (1) day for each month of employment to a total of one hundred twenty (120) working days. Following the use of such sick leave it may reaccumulate at the above-mentioned rate. An employee is eligible for one (1) day sick leave only after one (1) full month of employment under the following policies:

- (a) There shall be no waiting period.
- (b) The Employer reserves the right to ask for a doctor's statement concerning the nature of the illness or to have a doctor or other person call to find out the nature of the illness, when deemed necessary by the Employer.

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ARTICLE 31.

EMERGENCY LEAVE: Section 1. In the event of a death in the immediate family of a regular, full-time employee who has been employed at least ninety (90) days, such employee may be granted a leave of absence with pay for a period of up to three (3) days. Members of the immediate family shall include wife, husband, child, mother, father, mother-in-law, father-in-law, brother and sister, grandmother, grandfather, step-parents, step-child, aunt and uncle.

. . .



## DISCUSSION:

The Union argues there is no record evidence to show that its offer to settle grievance 93-101, which offer contained the word "only," was rejected by the County. Said argument is not persuasive. The executed settlement of grievance 93-101 did not contain the word "only," as did the Union's settlement offer. Clearly, such an omission evidences the refusal of the County to agree to language containing said word.

The Union's case primarily rests on the premise that Wahner's absence was not a leave of absence and, therefore, the County could not use temporary employes to replace Wahner. The Union accurately asserts that Wahner's absence did not fall within the language of Section 10.2. The Union then attempts to establish that the phrase "leave of absence" in Section 17.10 is limited to those leaves of absence which are taken pursuant to Section 10.2. Application of such an interpretation would mean that extended absences exceeding 14 continuous calendar days for family leave or paid sick leave would not constitute leaves of absence. It was not proven that the parties ever discussed such an interpretation during the settlement of grievance 93-101. The undersigned does not believe it is reasonable for him to apply such a stringent limitation to the phrase "leave of absence" without clear evidence the parties agreed to that precise intent. Further, the parties have not been consistently precise when drafting contractual language. While Article 30 does not use the specific term "leave of absence" in discussing the accrual and use of paid sick leave, Article 31 does use that specific term in discussing emergency leave in the event of the death of certain relatives.

Even the Union appears to find Section 10.2 to be somewhat ambiguous, since it argues that the clear intent of the parties in negotiating Article 10 was to provide bargaining unit employes with an opportunity to request that the County consider requests for leave of absence without pay, although Section 10.2 does not specify that the leaves of absence are without pay.

The indeterminate and confused testimony of both Jensen and Gulbrandson, about prior situations involving the coverage of vacant shifts caused by the extended absences of regular employes, established only that, at the hearing, neither party knew for sure what had occurred or the dates of the incidents. Therefore, those situations did not show the existence of a precedent which would govern the instant dispute.

The undersigned does not agree with the Union's contention that the County's post-hearing brief constituted an improper submission of new evidence. The assertion concerning the settlement of grievance 93-101 was discussed earlier in this award. Both of the other items, which the Union contested, are plausible interpretations of the testimony and exhibits presented at the hearing and constitute argument. The Union then submitted new evidence based on its belief that the County had attempted to do so. Subsequent to the hearing, new evidence can be offered only through a joint submission by the parties, upon a request for information by the arbitrator, or, through additional hearing. Accordingly, the undersigned did not consider the new evidence

which the Union submitted following its receipt of the County's post-hearing brief.

Based on the foregoing, the undersigned enters the following

AWARD

The County did not violate the collective bargaining agreement when it assigned non-bargaining unit employees to fill the vacancy created by jailer Chris Wahner's sick leave; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 24th day of January, 1995.

By Douglas V. Knudson /s/  
Douglas V. Knudson, Arbitrator