

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ST. CROIX COUNTY (HEALTH CARE CENTER)

and

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

Case 134
No. 51317
MA-8569

Appearances:

Weld, Riley, Prenz and Ricci, S.C., by Ms. Victoria Seltun, 715 S. Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the County.

Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 364,

ARBITRATION AWARD

St. Croix County (Health Care Center), hereinafter referred to as the County, and Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Mr. Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the deduction of sick leave from an employe's sick leave account. Hearing on the matter was held in Hudson, Wisconsin on January 10, 1995. Post hearing arguments and reply briefs were received by the arbitrator by April 4, 1994. Full consideration has been given to the evidence, arguments, and testimony presented in rendering this award.

ISSUE:

At the hearing the parties were unable to agree on the framing of the issue and agreed to leave framing of the issue to the Arbitrator. The Arbitrator frames the issue as follows:

"Did the County violate the collective bargaining agreement when it charged the grievant sixteen (16) hours PTO time and paid the grievant sixteen (16) hours of pay when the grievant did not work a scheduled shift and a volunteered second shift on March 13, 1994?"

"If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS:

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ARTICLE 13 - PERSONAL TIME OFF (PTO)

Section 13.01 Definition. Personal Time Off (PTO) is a benefit which combines traditional sick leave, vacation time, and a floating holiday into a singular package known as PTO. The employee can use hours from his/her PTO bank at his/her discretion, provided that the Supervisor or Department Head has approved the request. A Supervisor or Department Head may ask for a physician's documentation when PTO is taken due to illness and there has not been prior approval of the time off.

Section 13.02 Multiplier. Each employee earns PTO for every pay period based upon the number of regular hours (not overtime hours) that an employee is paid during the pay period. The payroll hours are tied to a multiplier, based upon years of service, and a new actual amount is added each pay period. For employees working a forty (40) hour/week schedule, the number of hours paid each pay period would be eighty (80). For an employee working a twenty (20) hour/week schedule, the number of hours paid each pay period would be forty (40). The PTO is determined by taking the number of hours paid each pay period, excluding overtime, multiplied by a pre-determined multiplier. The results in the amount of PTO time earned. The multiplier varies with years of service, as noted below:

Years of Service	Multiplier Used
0-4	.0885
5-14	.1077
15+	.1269

Section 13.03 Personal Sick Leave Bank. Prior to entering a PTO program, an employee who has accrued sick leave time places that time in his/her Personal Sick Leave Bank. An employee who is sick uses the PTO account for the missed time. However, an employee can tap into his/her Personal Sick Leave Bank anytime that a single occurrence illness/injury results in the loss of more than three days time. When that option is selected, the deduction reverts back to the first day, so that the first three days are deducted from the Personal Sick Leave Bank, plus the additional sick days used. To utilize the Personal Sick Leave Bank, the employee may be asked to submit documentation from a physician to verify illness or

injury.

Section 13.04 PTO Accumulation. The PTO accumulation of hours cannot exceed 320 hours for a full-time employee and 240 hours for a part-time employee. Full-time employment is defined as working an average of 35 or more hours per week; part-time is defined as working an average of 20 to 34.9 hours per week.

Anytime the total number of accrued PTO hours is in excess of what is permitted, the excess hours are automatically subtracted from the total and the employee remains at 320 hours (full-time) or 240 hours (part-time).

Section 13.05 Personal Sick Leave Bank Accumulation. An employee can add to his/her Personal Sick Leave Bank annually, as defined in 13.06. There is no cap on the accrual of hours into the employee's Personal Sick Leave Bank.

Section 13.06 Annual PTO Options. The Personal Sick Leave Bank can be replenished annually. At the end of each calendar year, the employee has the option of taking up to 96 hours (full-time) or 48 hours (part-time) out of his/her PTO account and placing the hours into his/her Personal Sick Leave Bank.

Also at this time the employee can take up to 48 hours (full-time) or 24 hours (part-time) out of his/her PTO account and convert it into cash, based upon his/her hourly rate of pay on December 31. For Highway Union employees, the rate of pay for PTO and the Personal Sick Leave Bank shall be the employee's regular classified straight time.

The employee also has the option of carrying over all of his/her PTO hours into the new year. If the employee does not choose either of the two options, the PTO hours will automatically be carried forward into the new year.

Section 13.07 Termination in Good Standing. When an employee leaves St. Croix County in good standing, s/he is paid for all PTO hours that remain in his/her account. There is no pay-out for the Personal Sick Leave Bank unless the termination is a retirement.

Retirement is defined as any employee who, upon retirement

from St. Croix County, will immediately receive a pension from the Wisconsin Retirement System. When an employee retires from St. Croix County, s/he has the option of receiving a pay-out of one-half (1/2) of his/her accumulated Personal Sick Leave Bank, to a maximum of 360 hours pay for full-time or 180 hours for part-time OR the employee may elect to convert all of his/her Personal Sick Leave Bank accrued time into a cash-equivalent to be used to pay monthly premiums of health insurance. To be eligible for this, an employee must have been participating in the County's health insurance program for a minimum of twelve (12) full months prior to the retirement date. If an employee elects this option s/he may incur an annual tax liability if IRS deems this health insurance payment to be taxable income.

If health insurance funds remain at the time of death of the former employee, the spouse may continue coverage under the same regulations until the fund is depleted. However, if there is no spouse at the time of the former employee's death, or if the spouse also dies while funds remain, those funds revert to the County. Once the health insurance funds have been depleted, the former employee can continue health insurance coverage providing that s/he pays the appropriate premium to the County in a timely manner.

An employee who chooses the cash pay-out at the time of retirement can also elect to continue the County's health insurance plan provided that s/he begins making the monthly premium payments immediately.

Section 13.08 Restrictions. PTO hours and the Personal Sick Leave Bank are for the personal use of the employee only. PTO hours cannot be "borrowed" or "given away".

Should the PTO balance fall below "0", the employee will immediately receive deductions in his/her pay to compensate for any PTO time taken in excess of the accrued hours. Should this happen, the employee must take action immediately or be subject to the disciplinary procedure.

An employee cannot be paid for time at work and receive PTO pay at the same time.

PTO is designed to provide for effective planning of work hours and time away from work. Although the PTO plan encourages employees to maximize time spent on the job, it should not be construed as serving to limit vacation time or sick leave time. Employees who are ill should not report to work. Department Heads or Supervisors have the right to judiciously assess the health of an employee and, if the employee is deemed to be "too sick" to work, the Department Head or Supervisor can send the employee home.

If the departmental workload makes it necessary to limit the number of employees using PTO at the same time, the employee with the greatest seniority shall be given his/her PTO choice; this is provided that no employee may use seniority to displace another employee from scheduled PTO less than eight (8) weeks before the PTO is scheduled.

An employee asking for Unpaid Leave must use all of the hours s/he has accumulated in his/her PTO account before the request will be considered. An employee asking for Unpaid Leave because of a lengthy illness is required to use the hours in his/her Personal Sick Leave Bank before the request will be considered. Employees are encouraged to utilize PTO hours prior to requesting time off under the Family and Medical Leave Law.

Employees can use PTO in increments of not less than one-half (1/2) hour. Because the nature of the work varies within departments, some Department Heads or Supervisors may stipulate that all PTO must be used in increments that are substantially greater than one-half (1/2) hour. Review the applicable Union Appendix or departmental rules to determine specific restrictions.

Section 13.09 Advance Notice. Employees shall be allowed to use PTO as requested, provided that supervisory approval is received. When an employee is requesting PTO time for a personal illness or injury, the employee must report the need for same at least one (1) hour before the start of the work day/shift, except in case of emergency or development of illness during working hours. Employees designated as providing uninterruptable services -- direct patient care in the Nursing Home and Telecommunicator in the Communications Center -- should report personal illness or injury time off at least two (2) hours before the start of the work day/shift,

except in case of emergency or development of illness during working hours.

As a condition of granting PTO time for a request that was not pre-approved, the Employer reserves the right to require the employee to submit a physician's statement of illness or injury.

In the event that an employee is aware in advance that an illness or injury will result in time away from work, it shall be the duty of the employee to notify his/her supervisor, in writing, as far in advance as possible of the anticipated time and duration of the time away from work. An employee on extended medical leave (i.e. using Personal Sick Leave Bank), may be required to present a physician's statement to return to work.

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ARTICLE 17 - OVERTIME

Section 17.01 Non-Exempt Employees. The County is responsible for determining if an employee is Exempt or Non-Exempt from the provisions of overtime as outlined in the Fair Labor Standards Act. For non-exempt employees, the Employer agrees to pay time and one-half (1-1/2) their hourly rate of pay for all time worked in excess of eight (8) hours per day and/or forty (40) hours per week. All time off with pay shall be considered as time worked for computation purposes. With the approval of the Employer, employees may be credited with compensatory time and one-half (1-1/2) off with pay in lieu of a cash pay-out.

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ARTICLE 23 - DURATION

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Section 23.02 Entire Memorandum of Agreement. This Agreement constitutes the entire Agreement between the Parties. Any amendment or agreement supplemental hereto shall not be binding unless mutually agreed to in writing and signed by the County and the Union.

Mandatory subjects may not be deleted from or added to this Labor Agreement except by mutual agreement.

Any actual or alleged "practices" not incorporated into the specific terms of this Agreement are of no binding force or effect whatsoever. For the purpose of this Labor Agreement, the term "past practice" shall mean practices which are not expressed in the Labor Agreement. "Past practice" shall serve only to interpret the meaning of the express terms incorporated in this Labor Agreement.

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BACKGROUND:

Amongst its various governmental functions the County operates a Health Care Center and employs Marlene Peterson, hereinafter referred to as the grievant, as a certified Nursing Assistant. During the early part of March, 1994 the grievant volunteered to work an eight (8) hour shift in addition to her eight (8) hour shift scheduled for March 13, 1994. However, on March 13, 1994 she called in sick and worked neither shift. Upon her return to work the grievant filled out a "Paid Time Off" (PTO) slip requesting she be paid for eight (8) hours with a eight (8) hour deduction from her PTO account. The County paid the grievant sixteen (16) hours and deducted sixteen (16) hours from her PTO account. Thereafter, on April 1, 1994, the instant grievance was filed. The grievance form the grievant filed contained the following question, "Contention (what did mgt. do wrong?--state contract article, section which was violated)" to which the grievant filed in ... "Not in any part of the contract. Not agreed to in any side letter or brought before the union.". On May 23, 1994 the following response was submitted to the Union:

May 23, 1994

To: Sally Sanchez, Union President
From: Debra Kathan, Personnel Director
Re: Grievance 4,94/D/02

As a follow-up to our telephone conversation today, I am forwarding this information to you regarding the County's position with respect to Grievance 4,94/D/02. When Certified Nursing Assistant Marlene Peterson chose to take an assignment which added an additional shift to her workday, that shift, in essence, became her shift. As such, she is accountable for those hours. When she was unable to fulfill the shift requirements, i.e., work that

shift, she was still accountable for those hours. Since this was a "double shift", she missed 16 hours of work due to illness. These were hours that had been assigned to her and the assignment was with her consent. Subsequently, the 16 hours were deducted from her accrued time bank and she was paid for the time.

If you have questions, please do not hesitate to contact Sue Belisle, Director of Nursing, or give me a call at the office.

Thereafter the matter was processed to the Arbitration step of the grievance procedure.

At the onset of the hearing the parties agreed to the following facts. The instant matter is properly before the Arbitrator, that the instant matter is one of first impression, that the instant matter's scenario was not raised in negotiations, that the grievant is not a sick leave abuser, and, that the second shift was treated as a sick day, not a leave of absence.

UNION'S POSITION:

The Union contends PTO is a merger of traditional sick leave, vacation and a floating holiday. Further, that traditional sick leave is simply a benefit that allows an employee to not suffer a loss of income due to illness. The Union points out that there is no evidence prior to the instant matter where an employee received pay for more than their one regular shift when the employee requested traditional sick leave.

The Union also argues the County's accountability theory has a basic flaw and that is that the language of the agreement states...

"The employee can use hours from his/her PTO bank at his/her discretion, provided that the Supervisor or Department Head has approved the request. (emphasis added)"

The Union asserts given this language the County does not have the ability to simply deduct eight (8) hours of PTO without the employees' consent.

The Union also argues the County's theory the absence on the second shift represented an implicit request for an unpaid leave of absence and that under Article 9, Section 9.02, and Article 13, Section 13.08, paragraphs 6 and 9, the employee must use all time off with pay before an unpaid leave could be granted is without merit. The Union points out Director of Nursing Susan Belisle while testifying that not appearing for the second shift constituted a leave of absence also testified that to the best of her knowledge the County had never considered an absence from a second shift to be a leave of absence.

The Union also argues that Article 23, Section 23.02, allows the Arbitrator to reasonably look to the past to determine what constitutes traditional sick leave and how it was applied especially when as in the instant matter the concept of double sick leave was never raised at the bargaining table and had never been paid before. The Union also points out that there is no evidence that the County has in other bargaining units covered by the Master Agreement between the parties had a result where there was double sick leave when an employe was ill on a scheduled double shift.

The Union argues six (6) points in its reply brief. First, that there was no discussion at the bargaining table on using more than one (1) regular shift when an employe is out ill. Further, being accountable does not mandate use of PTO. Second, under the Master agreement the County could not present one example where an employe was charged double sick leave anywhere in the County. Third, Article 13, Section 13.03, deals with the use of previously accumulated sick leave and the parties agreed at the hearing that double shifts or mandatory overtime were not discussed at the bargaining table. The Union asserts a conclusion that the County can charge PTO for sick leave will have a negative impact on other employes covered by the Master agreement. Four, Article 22, Section 22.02 prohibits the addition of deletion of mandatory subjects of bargaining. Five, there is no language in the PTO provision of the agreement which allows the County to deduct from the grievant's bank for the second shift as a leave of absence. Further, how does an employe get an unpaid leave of absence for a day for which the employe has already received sick leave. Six and lastly, if the County is correct in its actions that a double sick leave deduction is appropriate the second shift should be paid at time and one-half, to make the County correctly accountable.

COUNTY'S POSITION:

The County contends neither the collective bargaining agreement or past practice prohibit the County from deducting PTO from an employe who fails to work a voluntarily assumed second shift. The County acknowledges that prior to January 1, 1994 there was a separate collective bargaining agreement for County Health Care Center employes. The current 1994-96 agreement is a consolidated master agreement for Health Care Center, Human Services, Highway and General Governmental Support Services employes. The County contends that when the parties agreed to the PTO system they agreed to a system which imposes on employes a requirement to be accountable for all hours they are scheduled or assigned. Further, that a leave of absence can only be taken if approved by a supervisor and if PTO has been exhausted.

The County also asserts, relying on Article 23.02, that as this is a new contract absent an express provision in the contract prohibiting the county from designating voluntarily assumed second shifts hours for which the employe is accountable, the County can make a double deduction for the missed regular and the missed second shift. The County also asserts that what occurred prior to January 1, 1994 can not rise to the level of a past practice because the language underwent major changes regarding the treatment of leaves. Further, there has not been an instance prior to

the instant matter where an employe signed up for a double shift and worked neither of them. However, the County does acknowledge there were two (2) instances prior to January 1, 1994 where an employe signed up for a double shift, worked only one shift, and was not charged any vacation or sick leave for not working the second shift. The County argues the two (2) instances do not establish a past practice which is unequivocal, readily ascertainable over a reasonable period of time and clearly enunciated and acted upon.

The County contends that prior to the establishment of PTO the employe could request sick leave, vacation, or an unpaid leave of absence. Kathan testified there was an increase of unpaid leave as employes banked vacation and sick leave. Because the County did not believe this fostered accountability for time off the County agreed to change to the PTO system. The County argues that under the new system an employe no longer has discretion to designate the treatment of missed time, but that all time is charged to PTO unless PTO is exhausted.

The County asserts that in the absence of express language prohibiting it from making a double deduction for a missed double shift, the grievance must be denied.

The County also argues that when the grievant chose to take on an additional shift she became accountable for those hours. The County points out it must staff twenty-four (24) hours a day and meet state mandated staffing requirements. If interested employes may sign up for open shifts. The County first tries to fill these shifts on a strait time basis but if unable to do so, the County will ask for volunteers to work overtime. This the grievant choose to do when she signed up for a double shift on March 13, 1994. The County asserts that once she choose to pick up the second shift those eight (8) hours became hours she was accountable for. The County concluded that when she called in sick for both shifts it was appropriate to pay her for sixteen (16) hours and to deduct sixteen (16) hours from her PTO bank.

DISCUSSION:

As noted above the instant matter is one of first impression. The fundamental issue herein is what occurs when an employe volunteers to work an additional eight (8) hour shift and then calls in sick. Both parties acknowledge this scenario was not raised during the negotiations which culminated into the current collective bargaining agreement. The Union does not dispute that when the grievant called in sick on March 13 she was informing the County she was unable to report for work for either shift. The Arbitrator notes here that when the grievant agreed to work the second shift on March 13 her schedule was altered to reflect this change. Neither side presented any evidence as to how or if an employe could change a voluntary assignment once the employe had applied for the assignment and the assignment had been accepted by the County. Further, there is no evidence that the grievant ever requested to be removed from the voluntary assignment except to assume that when she filled out her PTO form she only requested eight (8) hours of PTO time. The Arbitrator finds that there is nothing in the collective bargaining agreement, including the parties unpaid leave of absence provision, which would prohibit an

employee from requesting to be relieved of an assignment they had volunteered for. However, such a request should be made prior to the assignment. Herein, no such request had been made by the grievant.

The Arbitrator also finds that there is no past practice which either party can point to which could assist the Arbitrator in interpreting the PTO language. Prior to January 1, 1994 employees had three options when they were not able to report to work: appropriate use of sick leave, vacation or an unpaid leave. Clearly, after January 1, unpaid leave is unavailable unless an employee has exhausted their PTO account. Thus the fact the County has never charged in effect a double sick day, or, the fact that on two (2) occasions employees worked the first shift then went home sick and were not charged sick leave for not working the second shift have no bearing on the instant matter.

Therefore, based upon the above and foregoing and the testimony, evidence and arguments presented the Arbitrator finds that once the grievant volunteered to work the sixteen (16) hour work day this became a part of her work schedule. As she did not request to be relieved of the volunteer assignment prior to March 13 and as the agreement clearly prohibits unpaid leaves of absence the County did not violate the collective bargaining agreement when it deducted sixteen (16) hours from her PTO account. However, Article 17, Section 17.01, clearly states the County shall pay time and one-half for all hours in excess of eight (8) in a work day and paid time shall be considered as time worked for computation purposes. Therefore the Arbitrator finds the County violated Article 17, Section 17.01, when it paid the grievant straight time rates for the entire sixteen (16) hours. The County is directed to make the grievant whole and pay her time and one-half rates for the second eight (8) hours on March 13, 1994.

AWARD

The County did not violate the collective bargaining agreement when it deducted sixteen (16) hours from the grievant's PTO account. The County violated the collective bargaining agreement when it only paid the grievant sixteen (16) hours of pay. The County is directed to make the grievant whole by paying her at time and one-half rates for all hours over eight (8) on March 13, 1994.

Dated at Madison, Wisconsin, this 22nd day of November, 1995.

By Edmond J. Bielarczyk, Jr. /s/

