

INTEREST ARBITRATION DECISION
ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL, LODGE 78
&
MONROE COUNTY AND MONROE COUNTY SHERIFF'S DEPARTMENT

MARCH 21, 1995

In the Matter of:

Illinois Fraternal Order of Police
Labor Council, Lodge No. 78

&

Monroe County and Monroe County
Sheriff's Department

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By Assignment of the
Illinois State Labor Relations Board
Case No. S-MA-94-36

ISSUES

- A. Holiday Pay
- B. Overtime
- C. Overtime Scheduling
- D. Accrual of Sick Leave
- E. Family Medical Leave
- F. Miscellaneous Leave (treated by the Arbitrator as part of Family Medical Leave)

HEARING & BRIEFING DATE AND SITE

HEARING: December 14, 1994 (Impasse Negotiations, 9:00 a.m. - 4:30 p.m.); and January 6, 1995 (Hearing on Record), Monroe County Courthouse (10:00 a.m. - 9:40 p.m.)

BRIEFS: March 10, 1995

For the Union

Mr. Thomas Sonneborn, Legal Director
Ms. Becky Dragoo, Legal Assistant
974 Clock Tower Drive
Springfield, IL 62704

For the County

Mr. Jay Huetsch, Attorney at Law
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Waterloo, IL 62701

ARBITRATOR

Michael H. LeRoy
2617 Willoughby Rd.
Champaign, IL 61821

I. Pre-Hearing Stipulations

The authorized representatives agreed to the following stipulations:

1. Joints Exhibits: That the parties shall jointly offer and introduce into the record as Joint Exhibits the following:

- a. a copy of the parties' current collective bargaining agreement, and
- b. a copy of this pre-hearing stipulation.

2. Impasse Issues: That the impasse issues which shall be presented to the Arbitrator for decision and award are:

- a. Holiday Pay;
- b. Overtime;
- c. Overtime Scheduling;
- d. Accrual of Sick Leave;
- e. Family Medical Leave;
- f. Leave Provisions.¹

3. Impasse Issues are Economic: The parties further agree that each of the impasse issues are economic in nature, and that the Arbitrator shall select and adopt either the final offer of the Union or the final offer of the Employer as to each.

4. Waiver of Tripartite Panel: The parties agree to waive the provisions of § 14(b) of the Illinois Public Labor Relations Act (IPLRA) regarding a tripartite panel of arbitrators and agree to proceed with a single neutral arbitrator who shall have full authority and jurisdiction to resolve their impasse.

5. Arbitrator's Authority: The Arbitrator shall have the full authority and jurisdiction vested in him pursuant to the IPLRA.

6. Presentations at Hearing: Each party shall be free to present its evidence in either the narrative or witness format. The Union shall proceed first with its case-in-chief. Each party shall have the right to present rebuttal evidence.

7. Post-Hearing Briefs: Post-hearing briefs shall be submitted directly to the Arbitrator, with a copy sent to opposing party's representative by the Arbitrator, within thirty (30) calendar days of the conclusion of the hearing or the receipt of transcripts, if the same are ordered by either party.

¹ This issue is joined by the Arbitrator with the Family Medical Leave issue.

8. Decision and Award: The Arbitrator's decision and award shall be issued directly in writing to each representative within thirty (30) days of the submission of post-hearing briefs, or as soon thereafter as possible.

9. Costs of Hearing: The Employer shall arrange for a mutually agreed court reporting service to record and transcribe the hearings. The costs of the neutral arbitrator, as well as the costs of the reporting service and a copy of the transcript for the arbitrator shall be divided equally by the parties. Each party shall be responsible for purchasing its own copy of the transcript and for compensating its own representatives and witnesses.

10. IPLRA to Govern: Except as may be modified herein, the provisions of the IPLRA and the Rules and Regulations of the Illinois State Labor Relations Board shall govern these arbitration proceedings.

11. Authority for Pre-Hearing Stipulation: The parties agree that the authority for the foregoing pre-hearing stipulations is established in the IPLRA, §§ 14(h)(2) and 14(p).

For the Employer: Jay M. Huetsch, Attorney for the Employer, January 6, 1995.

For the Union: Becky S. Dragoo, Legal Assistant Illinois FOP, January 6, 1995.

II. Comparable Jurisdictions

A. Comparability Discussed at the Hearing: As might be expected, the Union and Employer did not completely agree on comparable jurisdictions. Moreover, their characterizations of Monroe County differed, but these differences were more in degree than in kind. Both agreed that Monroe County is generally prosperous.² The Union emphasized this point by citing statistics showing that the County ranks in the top 10% of Illinois counties for household income and home values.³ The County did not refute these statistics, but emphasized its mostly rural character and

² T. 31 (Union) and T. 121 (County).

³ U. Ex. 1, Section 4 (*Median Household Income, 1992*, showing that Monroe ranked 9th out of 102 Illinois counties, and *Median Home Value, 1990*, also showing that Monroe ranked 9th in Illinois).

the increase in public costs that economic development is certain to bring.⁴ It is accurate to say that the County is in transition, from mostly farms to more suburban residences for people who work in the St. Louis metro area.

The Union and County were also in general agreement that the St. Louis metro area is a primary area for relevant comparisons. Beyond that, the parties had disagreements. The County compared itself to two nearby counties just across the Mississippi River in Missouri.⁵ It made the sensible observation that these counties have similar population densities and scales of government.⁶ The Union found this comparison inapt because these jurisdictions are in Missouri, where public employment laws and public financing are very different from Illinois counties.⁷ So, just as understandably, the Union compared Monroe County to two neighbors immediately to the north on the Illinois side of the river, St. Clair and Madison.⁸ The County, however, found these comparisons inapt because St. Clair and Madison are much larger and have much more diversified tax bases (principally because of large-scale manufacturing).⁹

B. Comparability Discussed in the Briefs: The parties refined their comparability arguments in their briefs. The County also made a slight but potentially important modification of

⁴ T. 122.

⁵ Cty. Ex. 1, using Jefferson and Franklin Counties as comparables.

⁶ T. 151.

⁷ T. 170-171 (Mr. Sonneborn's cross-examination of Judy Nelson).

⁸ U. Ex. 1, Section 4 (*Various Demographic Figures for Union's Comparable Jurisdictions*).

⁹ T. 123.

its comparables at this time. These matters are briefly discussed.

The County now explicitly argues that I should consider internal comparables. It specifically suggests that another bargaining unit in the County's employ, consisting of 17 employees represented by the United Steelworkers of America, be treated as a comparable.¹⁰ The County argues that it should be able "to treat the entire universe of County employees the same in terms of benefits, including wages."¹¹ It also suggests that the Union is seeking "prima donna" treatment for this unit.¹²

The County has slightly modified its comparables by offering two Missouri counties on a contingent basis. Taking strong exception to including much larger neighboring counties, St. Clair and Madison, it argues that if these counties are included, the only basis for doing so would be geographic proximity.¹³ Thus, if I find these two counties are comparable to Monroe County, "the Employer urges the Arbitrator to take the small step of crossing the state line into the adjacent" Missouri counties.¹⁴

The County then proposes this final list of comparables: Clinton, Jersey, Montgomery,

¹⁰ Cty. Br. at 35.

¹¹ *Id.*

¹² *Id.* I realize that some puffery and exaggeration are common in briefs, but I consider this argument unwarranted. *See Management Report, Sheriff's Department Monroe County (1990)*, Un. Ex. 1 at page v. This analysis was commissioned by the County, not the Union, and concluded that "deputy turnover is very high. Seven officers have left the Sheriff's Department in the last eight years. The explanation appears to be salary rather than police 'burn-out.'" Equally unwarranted is the Union characterization of the County's proposals as "ruthless attempts to gut (the) contract." U. Br. at 78.

¹³ *Id.* at 37.

¹⁴ *Id.*

Perry, Randolph, Saline, Washington, Franklin (Missouri), Jefferson (Missouri).¹⁵ This list appears to drop some counties that were offered as comparables at the hearing.¹⁶ Its chief criteria for comparison are population, assessed valuation, and tax revenues.¹⁷

The main thrust of the Union's comparability position is that "the County is shedding its rural roots"¹⁸ and must be considered as "part of the St. Louis metropolitan area in terms of its influence on the economy, the cost of living, and the job market."¹⁹ Thus, it offers the following counties as an appropriate "balance of the rural-metropolitan mix that is occurring in Monroe County"²⁰: Madison, St. Clair, Clinton, Washington, Jersey, Perry, and Randolph.²¹ It basis this group on criteria including "employer similarity, occupational similarity, geographic proximity and the surrounding labor market, prior bargaining history regarding comparability, population, median home value, per capita income and/or median income, and equalized assessed valuation."²²

C. Analysis: Monroe County has very few, if any, perfectly comparable counties because of some unique characteristics. It is small but growing fast. It is mostly rural but increasingly suburban, and lacks a significant industrial base. Because of its proximity to St. Louis, an

¹⁵ *Id.* at 39.

¹⁶ These appear to be Fayette County, Pike County, Shelby County, Calhoun County, and Bond County. *See* T. 60-62.

¹⁷ *Id.*

¹⁸ U. Br. at 19.

¹⁹ *Id.* at 20.

²⁰ *Id.* at 21.

²¹ *Id.* at 19.

²² *Id.* at 15-16.

unusually high proportion of Monroe County residents work in another county.²³ This underscores the "bedroom community" nature of the County, and implies the lack of a diversified tax base. The Great Flood of 1993 adds another distinctive dimension to Monroe County. It devastated entire communities in the County.²⁴ Although the County has received federal aid, it would be naive to think that the County will not continue to incur significant indirect costs from this devastation. In short, Monroe County to an unusual degree lacks many comparisons.

In finding comparable counties, I view the following factors as controlling:

1. Proximity to the St. Louis metro area: I reject any county that is not in the St. Louis metro area because cost-of-living, labor market, and tax-base factors would not likely be comparable.

2. Size of unit of government: I reject any county that is substantially larger or smaller than Monroe County because its management and financing would be inherently different, and therefore not comparable. This factor implicitly takes account of a county's population, but more directly is comprised of number of people employed by the county, assessed valuation, and tax revenues.

3. Illinois county: I reject any comparison to a Missouri county because that state's labor, employment, and public financing laws differ substantially from Illinois'.

4. County wealth: At some level I must also consider a county's wealth because this has critical implications for funding government operations. In the case of Monroe County, with a relatively prosperous population, it would be unreasonable to look only at size and geographic

²³ Cty. Ex. 1 (*Place of Work, St. Louis Region*).

²⁴ T. 127.

factors without also ensuring some rough comparability in the resource base of comparable counties. There are many ways to measure wealth, but I have chosen two simple and effective measures, assessed valuations and median home values, because of their significant relationship to county financing.

5. Occupational identity: I reject the County's effort to broaden the occupational classifications for my consideration. This bargaining unit consists of law enforcement and inmate security employees, who require special training and whose work poses unusual risks and dangers. These employees cannot fairly be compared to secretaries, record-keepers, mechanics who maintain equipment, county nursing home employees, etc.

D. Findings of Comparable Counties: For the foregoing reasons, no Missouri county is comparable to Monroe County. St. Clair and Madison Counties meet my metro-area and Illinois criteria, but are much too large to serve as comparables. Any county whose closest border to downtown St. Louis is more than 45 miles away is, by reasonable judgment, outside the St. Louis metro area.²⁵ The following counties are left as comparables: (1) Jersey, (2) Clinton, (3) Randolph, and (4) Washington.²⁶ In selecting these counties, I compare only sheriff department employees.

²⁵ To determine a county's proximity to St. Louis, I used Road Atlas (Rand McNally, 1991) and measured from each county's closest border to the border of the city of St. Louis.

²⁶ I note that County and Union agree that these counties are comparable to Monroe County.

**Table 1: Monroe and Comparable Counties
(Alphabetical Order)**

| County | Population | Median Home Value (Rank)²⁷ | Equalized Assessed Valuation | Number of Employees |
|---------------|-------------------|--|-------------------------------------|----------------------------|
| Clinton | 34,200 | \$55,000 (19) | \$200,729,639 | 330 |
| Jersey | 21,300 | \$45,400 (38) | \$117,851,886 | 205 |
| Monroe | 22,000 | \$72,100 (9) | \$197,664,117 | 342 |
| Randolph | 36,200 | \$46,000 (40) | \$196,998,558 | 217 |
| Washington | 15,900 | \$46,000 (37) | \$ 96,059,567 | 84 |

III. Final Offers and Rulings

A. Family and Medical Leave Act Policy: The County's final offer would amend Article 22 of the existing CBA to provide: "Employees shall be entitled to family and medical leaves as provided under the Family and Medical Leave Act (FMLA) of 1993. Policies governing leave under this FMLA will be consistent with countywide policies and procedures for non-unit employees."²⁸ This would be embodied in a new section numbered 22.05.

Under the same Article, in the previous section (Section 22.04), the County proposes: "An officer is not entitled to seniority or any other benefit accrual during periods of unpaid leave, unless otherwise provided by law. A fitness-for-duty report may be required by (the) Employer before an officer is allowed to return to duty from any leave provided for in this Agreement. The

²⁷ I am including this statistic because I considered whether my criteria for comparability resulted in inclusion of a poor county. Monroe County has comparatively high home values, but the comparables here, although not nearly as wealthy, all rank in the top 40% of counties in the state in terms of median home values.

²⁸ The proposed policy appears *in toto* in Appendix I.

fitness-for-duty report shall confirm that the officer is fit to return to his/her work and (is) capable of performing of performing the duties of his position." I find that this proposal is part of the County's general FMLA proposal since it all but repeats particular provisions in the final two paragraphs of that proposal.²⁹ In a related vein, the County proposes to amend Article 13, Section 13.02 (personnel files) to add the following: "This Section shall not pertain to files that are required by law to be confidential."³⁰

The Union rejects the County's proposals for Sections 22.04 and 22.05, and instead proposes the following for a new section to be numbered 22.06: "Employees shall be entitled to family and medical leave as provided in the Family and Medical Leave Act, as amended. Employees may elect, but the Employer may not require, to substitute paid leave for unpaid family and medical leave." ³¹ The Union expresses very strong concern about the possible impact of the County's FMLA proposal: "The proposed revisions to the Personnel Records Article of the contract gut the protection of the privacy of the officer and his family. . . (and the FMLA

²⁹ The last sentence in the County's FMLA proposal essentially repeats the fitness-for-duty provision in this separate section when it states: "A fitness-for-duty report may be required by the County before an employee is allowed to return from any leave." See Appendix I. The County's proposal for new Section 22.04 would not permit an employee's seniority or benefits to accrue during any unpaid leave, while its FMLA proposal states at the end of the next-to-last paragraph: "An employee is not entitled to seniority or benefit accrual during periods of unpaid leave but will not lose anything accrued prior to leave." *Id.*

³⁰ T. 135 (Direct Exam of Ms. Nelson by Mr. Huetsch):

Q. "I'd like to direct your attention to the Employer's final offer, Article 13.02. Can you tell the Arbitrator what the purpose of 13.02 is?"

A. "The purpose is to address the need for a confidential file under Family and Medical Leave Act."

³¹Un. Ex. 1 and U. Br. at 56.

proposal) is accompanied by the deletion of more generous medical leave provisions that are currently in the contract . . . (and) does not give the Employee the option of using unpaid leave as opposed to burning up paid accumulated time in connection with a family medical leave."³² The Union concludes that the County "is asking the Arbitrator to relieve it of the obligation to bargain with the Union over the impact of FMLA on these Employees' fundamental rights. The (County) offered very little in the way of testimony or evidence on this issue, let alone comparables."³³

The County's arguments in support of its proposal have considerable merit. Its best argument is that all of its other employees, including apparently those in another bargaining unit, are already covered by this policy.³⁴ A uniform leave policy has obvious and important administrative advantages, and eliminates invidious comparisons between groups of employees. The County also argues that a neighboring county has implemented this policy, but I dismiss this argument because I have already determined St. Clair is not a comparable county.

Recognizing that there are sound administrative reasons for adopting the County's FMLA proposal, I nevertheless find that there are more compelling reasons to reject it. According to County negotiator Judy Nelson, the County's FMLA policy is boilerplate:

Sonneborn: "Who drafted the County's policy on family medical leave?"

³² U. Br. at 58.

³³ *Id.* at 60.

³⁴ T. 161-162. Judy Nelson's testimony indicated, however, that the United Steelworkers of America did not agree to including this policy in their CBA. T. 162. *See* Cty. Br. 64-65, wherein the County states: "Due to the great complexity of this new Federal law and in light of the Employer being such a small entity without a Human Resource or Personnel Supervisor, the Employer has proposed to the use of its countywide policies and procedures for the bargaining unit as well as the non-unit employees."

Nelson: "It was a boilerplate piece from an employers' association, I believe."

Sonneborn: "Now, what does boilerplate mean?"

Nelson: "It means that it was standard language that many employers use."

Sonneborn: "So it was a form?"

Nelson: "Uh-huh."

Sonneborn: "Did you just take that form and plug in the name Monroe County in the appropriate places?"

Nelson: "Essentially so, right."³⁵

Boilerplate is not necessarily bad. Often, it reflects research and planning done by specialists on a complex subject. Negotiators often don't have the luxury of doing this important background work. So it is natural that Nelson would propose boilerplate, because FMLA is a complicated and new law.

I balk, however, at imposing this policy on the parties because I have seen insufficient effort to read past the boilerplate to consider its implications for both the County and its employees. Here is a prime example: The policy requires an employee on leave to make contributory payments toward his or her health insurance, and "(i)f an employee's payment is more than thirty (30) days late, the County may terminate the employee's insurance coverage."³⁶ This provision is of dubious legality. Arguably, this is disability discrimination under the

³⁵ T. 189.

³⁶ Second page of the policy, paragraph 16 in the document.

Americans with Disabilities Act.³⁷ The policy is also harsh and absurd. Occasions that cause employees to invoke a leave policy sometimes involve very serious personal injury, or serious injury or medical condition for a spouse, parent, or child. Personal finances can be strained in these times, and the subject may be so distracted or so incapacitated that paying bills may be the last thing on his or her mind. The County's policy language would, however, permit under these circumstances the forfeiture of a precious benefit, personal health insurance. Often, once a person loses insurance he or she becomes uninsurable, and this probability would greatly increase for someone who is so ill or injured that FMLA leave must be taken.

Under the IPLRA, I have no authority to go through the County's proposal and select portions as I see fit. The law directs me either to accept or reject a proposal *in toto*.³⁸ The

³⁷ A person taking extended personal FMLA leave due to an injury or medical condition would likely be able to show that he or she is a qualified individual with a disability, that is, a person for whom a "major life activity" is "substantially limited." The ADA applies not only to hire and placement decisions, but also employee compensation and benefits. Under the County's proposed policy, termination of health insurance would be closely connected to occurrence of a disability. The County might argue that the predicate for terminating the benefit is not occurrence of a disability, but non-payment of the contributory portion of a premium. A court would then have to consider whether or not the benefit termination was pretextual: that is, whether it is based on the disability or non-payment of one month's premium. If the court found that this action was based on the employee's disability (a reasonably likely outcome in my view), the County would then be under a duty to provide a "reasonable accommodation" to such an employee. In my view, a court would be likely to rule that maintaining an employee's insurance eligibility for at least one month would be a reasonable accommodation. The County could argue that this imposes an "undue hardship", and then a court would take into account the cost of advancing the employee's contribution relative to the employer's financial resources. In my view, this defense would almost certainly fail unless the County was in, or on the brink of, bankruptcy.

³⁸ IPLRA § 14(g), stating that "(a)s to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in subsection (h)."

insurance-forfeiture provision is sufficient by itself to sustain my rejection.³⁹

There is a second compelling reason for my rejection of the County's proposal: the U. S. Department of Labor significantly changed FMLA regulations after this arbitration hearing, and during the pendency of this Award and Decision. The County's proposal correctly defined a "serious health condition" as "an illness, injury, impairment, or a physical or mental condition that involves . . . any period of incapacity requiring absence from work for more than three calendar days. . . ." ⁴⁰ But now the DOL's final regulations have created a significant exception to the "three-day rule." I quote this summary from BNA's January 4 report of this change:

(S)pecial recognition should be given to chronic conditions. Afflictions like asthma and diabetes often continue over an extended period, 'often without affecting day-to-day ability to work or perform other activities but may cause episodic periods of incapacity of less than three days.' Moreover, while those with such conditions generally visit a health care provider periodically, staying home and self-treatment are often more effective than visiting their health care provider when subject to a flare-up or other incapacitating episode, according to the final rules.

The new definition includes such conditions as serious health conditions, even if the individual episodes of incapacity are not of more than three days duration. The revised definition encompasses pregnancy, which according to the rules, may involve periodic visits to a health care provider and episodes of severe morning sickness that may not require an absence from work of more than three days.⁴¹

In short, it is clear that the County's proposal has at least two probable legal defects. I conclude that the interests and welfare of the public in Monroe County would be harmed by

³⁹ The forfeiture right is stated in permissive rather than mandatory terms. This makes it no less objectionable.

⁴⁰ See paragraph 8 of the policy at Appendix I.

⁴¹ *Final FMLA Rules Expand on Coverage of Chronic, Serious Health Conditions*, DAILY LABOR REPORT (BNA), Jan. 4, 1995 (No. 2), at AA-1:AA-2 (quote from right-hand column, lower portion of AA-1)(copy attached to Appendix I).

imposing a policy of such dubious legality.⁴²

I adopt the Union's family medical leave proposal because, unlike the County's, it is entirely consistent with the law, and therefore better serves the interests and welfare of the public in Monroe County.⁴³ Certainly, it has a gloss that favors employees by allowing them to elect whether or not to substitute paid leave for unpaid family medical leave. Be that as it may, the Family and Medical Leave Act permits employers to take away this election,⁴⁴ but also limits this employer right if a collective bargaining agreement provides more generous leave rights.⁴⁵

B. Sick Leave Cap: The County's proposal would amend Section 21.03 by allowing sick leave to accumulate from year to year "up to a maximum of six hundred forty (640) hours at any one time. Any employee with accumulated hours in excess of 640 hours as of January 31, 1995 shall not accumulate any additional sick leave until or unless his/her sick leave falls below 640

⁴² This portion of my Award is not based on comparables, but rather, § 14(h)(3), "(t)he interests and welfare of the public. . . ."

⁴³ I need to clarify that I am rejecting the County's proposal for 13.02 for technical reasons only. Under the IPLRA, I must choose one of two final offers, and here I have combined three separate County offers because they are *inseparably interrelated* as elements of a family and medical leave policy. Technically, I cannot choose two of the County's three offers because I would then be exceeding my authority under the IPLRA. Consequently, the language proposed by the County for Section 13.02 shall not appear in the new Agreement. However, my Award adopting the Union's proposal to incorporate FMLA into the new Agreement effectively accomplishes what the County proposes for Section 13.02.

⁴⁴ Section 102(d)(2)(A), stating that "an eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal lave, or family leave of the employee for leave provided under (the Act)."

⁴⁵ Section 402(a)(effect on existing benefits) of FMLA states: "Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act."

hours, at which time he/she may accrue sick leave. Sick leave that would have accrued to an officer's record, but for the officer having 640 hours accumulation, will be credited to IMRF subject to IMRF rules, policies and restrictions." The County argues that its proposal is "fair and reasonable", is consistent with virtually all comparable jurisdictions, and is necessary to control costs in the Sheriff's department.⁴⁶

The Union "proposes no change be made in the current contract language or benefits." It opposes the County proposal because this cap applies to all other county employees and the Union believes that bargaining unit employees should not be subject to a one-size-fits-all policy.⁴⁷

I examined the CBAs of comparable jurisdictions in Union Exhibit 2 to determine how these bargaining units treat sick leave caps. Notably, all four counties have caps. Sworn employees in the Clinton County Sheriff's office earn one day per month, up to 12 days per year, with "maximum sick leave accrual (at) sixty days, except as provided in Section 4."⁴⁸ That section allows employees an election between accruing sick leave over the 60 day ceiling on a 50% basis to be credited under IMRF or a straight payout. In the Jersey County Sheriff's department, sergeants, deputy sheriffs, jail supervisors, correctional officers, and dispatchers accumulate up to 12 sick days per year, up to "a maximum of 75 working days."⁴⁹ At retirement, an employee may

⁴⁶ Cty. Br. at 55.

⁴⁷ U. Br. at 69-70.

⁴⁸ Agreement between County of Clinton and Clinton County Sheriff and Illinois Fraternal Order of Police Labor Council/ Lodge 236 (Dec. 1, 1991-Nov. 30, 1993), Article 27, Section 2 (Days Earned), at p. 21.

⁴⁹ Collective Bargaining Agreement between County of Jersey and the Sheriff of Jersey County Co-Employers and Illinois Fraternal Order of Police Labor Council, Jersey County Lodge No. 113 (Dec. 1, 1992-Dec. 1, 1995), Article XVII (Sick Leave) at p. 14.

elect to apply unused sick day credits toward the IMRF.⁵⁰ In Randolph County, deputy sheriffs and process servers work under a contract providing accumulation of 8 hours per month up to 320 hours, with any excess amount to be credited to the IMRF.⁵¹ Deputy sheriffs in Washington County earn up to 10 sick leave days per year, "accru(ing) to a maximum of two hundred forty (240)."⁵²

I adopt the County's proposal as my Award. The Union's proposal is wholly inconsistent with sick leave policies in all the comparable counties because it would provide unlimited accumulation of sick leave. Moreover, the County's proposal is generous in light of the comparables, providing a cap at 640 hours, while caps in comparable counties range from 240 to 600 hours (assuming that a day equates to 8 hours of work). Finally, the County's proposal has no extraneous language (e.g., unusual restrictions for using sick leave) that takes it outside the scope of comparable provisions.

C. Holidays: The County proposes a substantial revision of Article 25 (Holidays), Section 25.02. New terms are underlined as follows: "Effective on the 1995 execution date of this Agreement, compensation for designated holidays is granted as follows:

A. An officer who is required to work a regular tour of duty on a holiday, in addition to his/her regular shift's pay, will be credited with a premium of time and one-half for hours worked

⁵⁰ Id., referring to the Illinois Municipal Retirement Fund.

⁵¹ Collective Bargaining Agreement between Randolph County and the Sheriff of Randolph County Co-Employers and AFSCME Council 31, Local Union 2402 (Dec. 1, 1993-Dec. 1, 1995), Article XV (Sick Leave) at pp. 31-32.

⁵² Agreement between County of Washington and Illinois Fraternal Order of Police (Dec. 1, 1991- Nov. 30, 1994), Article 20 (Leaves of Absence) at p. 16.

on the regular tour of duty. Such officer may choose to be paid in cash or compensatory time for the time-and-one-half holiday premium applied to his/her regular tour of duty.

B. Officers whose regular day off coincides with an established holiday will be credited with eight (8) hours of compensatory time for an unworked holiday.

C. An officer whose regular work day off coincides with an established holiday, and who is required to work a regular tour of duty on the holiday, in addition to his/her regular shift's pay, will be credited with a premium of time and one-half for hours worked on the regular tour of duty. Such officer may choose to be paid in cash of compensatory time for the time-and-one-half holiday premium applied to his/her regular tour of duty.

D. All hours worked in excess of a regular tour of duty on a holiday will be compensated in accordance with the provisions of Article 14, Hours and Overtime.

Patrol deputies hired and serving as non-probationary deputies prior to the 1995 signing of this Agreement shall be paid a one-time cash payment of five hundred dollars (\$500) effective on each of the following dates, provided they are still employed on said dates: July 1, 1995 and July 1, 1996. Payment will be made on the payday immediately following said dates."

The Union "proposes no change be made in the current contract language."

This is a very close issue, but on the basis of how comparable counties with 10 hour shifts permit holiday payment to accrue, I adopt the Union's offer. I add that I found both proposals here reasonable and consistent with comparables.

Washington County's holiday pay accrual is very similar to the existing system in Monroe County. Sheriff department employees in Washington County work either 8 or 10 hour shifts.⁵³

⁵³ *Id.*, (Article 14, Section 1, at p. 11).

The CBA provides that "(e)mloyees covered by this Agreement, when their regularly scheduled day off falls on the day of a holiday, shall receive a normal work day's compensation in addition to base pay."⁵⁴ This means that an employee who usually works on a 10 hour shift, and who does not work during a scheduled holiday, has holiday pay accrue on the basis of 10 hours ("normal work day"). His accrual rate is not set at 8 hours, as Monroe County proposes here for its 10 hour shift employees.

Also like some Monroe County Sheriff employees, Randolph County deputies work a 10-hour shift.⁵⁵ The contract then states: "Due to Patrol Deputies being scheduled on ten hour shifts, Patrol deputies may use other accumulated benefit time (except sick time) to extend holidays taken in accordance with this Article for the remainder of any hours, of any shift, not fully compensated by holiday time granted by this Article (i.e., if an employee receives eight (8) hours paid holiday leave, he may use two (2) hours of other benefit time, excluding sick leave)."⁵⁶ I read this as an arrangement that approximates the existing practice and Union proposal in Monroe County.

Clinton County is the only other jurisdiction among the comparables where Employees work 10 hour shifts.⁵⁷ This County appears to have an accrual system that Monroe County proposes at this Arbitration: "All employees covered by this Agreement shall receive either eight

⁵⁴ *Id.* (Article 22, Section 2, at p. 16).

⁵⁵ Contract, *supra* note 52 (Section 12.2 at p. 21).

⁵⁶ *Id.*, (Section 14.1 at p. 28).

⁵⁷ Agreement between County of Clinton and Clinton County Sheriff, and Illinois Fraternal Order of Police (Article 14, Section 3, at p. 27), and contract for deputies, *supra* note 48 (Article 13, Section 3, at p. 12).

(8) hours of pay for each of these holidays whether or not the employee works the holiday or is scheduled off."⁵⁸

This analysis shows two jurisdictions with holiday-pay accrual systems like Monroe County's existing system and the Union's proposal, and one jurisdiction with a system consistent with the County's proposal. Because comparable jurisdictions reflect the existing system by a 2-1 margin, I adopt the Union's proposal. In reaching this decision, I give little or no weight to the conflicting bargaining histories offered by the Union⁵⁹ and the County⁶⁰ because the IPLRA does not expressly authorize me to consider this factor. Also, since I have determined that Monroe County Sheriff employees cannot be compared to other county employees because their work is fundamentally different, I reject the County's effort to equalize this benefit across all occupational classifications. I note, however, that the County made what I consider to be a fair offer to buy-out this holiday accrual system, but under the IPLRA my view of what constitutes a fair offer is irrelevant. The key determinant is what comparable jurisdictions provide.

D. Accrual of Overtime Hours in Article 14: This is a hotly contested issue. It is also complicated because the County appears already to have language addressing this issue, but has consistently continued a past practice to the contrary. The crux of this dispute is the County's desire to control considerable overtime costs by removing unworked hours from the calculation of hours counted toward overtime.

The County's proposal is to amend Section 14.02 (Overtime Payment) by adding: "For the

⁵⁸ This language is in the deputies agreement, *id.* (Article 21, Section 2).

⁵⁹ Un. Br. at 27-33.

⁶⁰ Cty. Br. at 49-50.

purposes of this Agreement, 'work performed' shall mean actual work and shall not include vacation, sick-leave time, holiday time nor any other non-work time, as stated in the Fair Labor Standards Act." The Union counter-proposes "no change in the current contract language" for "overtime accrual."

The County's Brief provides an excellent illustration of how the Sheriff's Department permits overtime to accrue for *unworked* hours. The illustration is hypothetical, but one that surely reflects experiences resulting in the accumulation of large amounts of comp time.⁶¹ It should be noted here that the County does not contend that employees abuse overtime, sick leave, vacations, and the like.

(It is readily apparent that an individual could in fact get overtime for hours the individual never worked. If a 40 hour per week individual is scheduled to work Tuesday through Saturday 8 hours per day, and is brought in on Monday for 8 hours of unscheduled work, that same individual should he or she be unable to work due to illness on Saturday would collect not only 8 hours of paid sick leave for Saturday, but would receive an additional 4 hours since the entire leave day would be treated as overtime.

The practice the Employer seeks to eliminate compensates hours not once but twice or more, in order to create additional compensation-- despite express provisions to the contrary (e.g., Sections 14.01, 14.02, 21.01, 25.02 and finally, 14.08, no pyramiding, which specifically prohibits such practice by stating that compensation shall not be paid more than once for the same hours under any provision of this Agreement).⁶²

The Union correctly explains, however, that the parties have never interpreted this CBA to achieve the result the County is now proposing. It cites testimony from County negotiator, Judy

⁶¹ T: 244 (Mr. Huetsch and Sheriff Kelley, estimating that 2,000 hours of comp time are on the County's books).

⁶² Cty. Br. at 61-62.

Nelson, tending to indicate that the County did not come to this reading of the contract until negotiations for this *new* contract were underway:

Q. What's your understanding of work performed without that language?

A. The same, but we I guess at the last meeting had said that would be changed, the practice would be changed. Again, the contract before this last one, that was one of the changes that was intended to remedy some of the accumulation of comp time that had been an issue.

Q. So that issue had been raised prior to the existing contract?

A. Not really. We had-- I talked among the board rep and the sheriff and told the sheriff, look, you could-- near the end of the contract and when certain changes were negotiated, I said, you can require that time calculated toward overtime as work time. He didn't feel that was the case. The board would have liked to have seen it remedied, but Dan (the Sheriff) is the administrator of that department and has final say. So it operated the same in spite of some changes, including removal of past practice language.⁶³

Here the County's Brief appears to converge with the Union's by suggesting that the Sheriff did not exercise the County's right to calculate overtime so as to deny employees certain forms of overtime pyramiding.⁶⁴ My view of this is that under the current contract (1990-1993), the Sheriff continued a consistent and long-standing practice of pyramiding overtime, notwithstanding express language to the contrary. (Judy Nelson's testimony *supra* appears to support this view.)

To understand this issue as fully as possible, I have examined the record to account for this unusual divergence in practice from clear contract language negotiated in 1990. I found that throughout these proceedings, there has been a visible split between the Board and its lead

⁶³ U. Br. at 42-43, incorrectly citing T. 21-22 (actual at T. 136-137).

⁶⁴ Cty. Br. 57-58, 63.

negotiator, and the Sheriff. Momentarily, I will note evidence of this split. Also, I developed the distinct impression that the Sheriff has been caught between controlling Department costs (the Board appropriates his Department's budget) while providing adequate services to the Monroe County public. As I will note momentarily, the Sheriff has had to work with too small a staff and to contend with a sharply escalating work load. The most rational way to make sense of the divergence between express contract language negotiated in 1990 that would limit overtime pyramiding and the Sheriff's practice of ignoring this language, and calculating overtime based on past practice, is this: If he limited overtime benefits as the CBA provided, he would risk further reducing Department morale and aggravate an already serious staff-turnover problem. I have concluded that the Sheriff viewed continuation of the past practice as an implicit condition for preventing further attrition of bargaining unit employees.

I have come to this view based on the following evidence:

The Sheriff commissioned a management analysis for his Department in 1990 (the year this new language was negotiated). I have excerpted key provisions of this report because I believe it sheds light on why the Sheriff apparently ignored cost-saving language that the Board negotiated in this contract:

Call-outs and overtime, while necessary at current staff levels, are not cost-effective alternatives to hiring additional officers. At overtime rates the County gets only 2/3 of the time that it should for its dollar. The Department has overtime on its books that equal more than two FTE salaries. The money would have been a better investment if spent on additional staff.

NSA recommends that the patrol staff be increased by four officers as soon as possible. . . .

Deputy turnover is very high. Seven officers have left the Sheriff's

Department in the last eight years. The explanation appears to be salary rather than police "burn-out": five of the seven remain in police work, four with municipal police departments and one with a private detective agency (D)epartment salaries . . . consistently run 9% - 16% below Columbia and Waterloo across all officer categories. . . .⁶⁵

The Department's workload has expanded at much higher rates than the population. . . .

The Department's workload has increased 65.7% since 1986. . . . Projections indicate that the total workload will jump at least 7% in 1990⁶⁶

The Department has dealt with the shortfall as best as it can through a combination of damage control methods, none of which offer a long-term solution to the problem of understaffing. Gaps in duty, multiple calls, and emergency situations have been covered through a combination of call-backs and *overtime* (emphasis added).⁶⁷

Evidence that the Sheriff intended to circumvent the newly negotiated language appears throughout these proceedings. Even the County's Brief implies this when it notes that "(o)nly in preparation for the arbitration hearing herein did the Sheriff come to realize the implications of the existing contractual language with regard to calculating overtime. . . ." Turning to Sheriff Kelley's testimony, I note the following evidence of his concern about staffing problems and his independence from the Board's view of how to control costs in his Department:

Q. (Direct examination by Mr. Huetsch): Now, I understand it's your desire to switch the payment of the deputies to eight hours on their days off as opposed to ten hours, just like other FOP members; is that not right?

A. (Sheriff Kelley): That was a proposal put on the table by the board, yes.

⁶⁵ U. Ex. 1, *Management Report, Sheriff's Department, Monroe County Illinois* at p. v.

⁶⁶ *Id.* at 6.

⁶⁷ *Id.* at 7.

Q. And by yourself.

A. Well, the board-- I mean, it initially was a board issue and it was put on the table by them, and that's where it's at.⁶⁸

Then later in the direct examination:

Q. What problems are created for you and the taxpayers to allow that (referring to accumulation of employee sick leave)?

A. Well, it creates a problem with staffing where we're short-staffed to start with-- it compounds that problem--

Q. So that results in overtime for the rest who are there, I presume.

A. Yes.

Q. How else will you address it?

A. Well, the other thing is that along with that kind of overtime is that at what point do you run into a safety issue if these people are having to work day in and day out? When you're talking about dispatchers handling 911 calls, road officers going day in and day out, or jailers, and at a certain point, I don't care how much overtime you pay people, they need a day off. And you know, you've-- we've got to maintain staffing or do everything we can to maintain adequate level of staff in order to allow time off and in order to accommodate those kind of safety issues.⁶⁹

Then in cross examination by Mr. Sonneborn:

Q. Isn't there an 80-hour cap on comp time?

A. Yes, there is.

Q. And for an employee to have more than 80 hours of compensatory time on the books, they have to have your approval?

A. That's correct.

⁶⁸ T. 254-255.

⁶⁹ T. 257-58.

Q. How is it that these people are getting all this compensatory time built up staying on the books? Why aren't they taking it off?

A. . . .(N)umber one, we don't have enough people to give everybody a day off, you know, when they need it or feel they need it, and the other thing is that we don't have the money to buy it out so we're stuck with it. . . .⁷⁰

Q. Now, you indicated earlier in your direct testimony that this was a county board proposal.

A. That's correct.

Q. Is it a fair interpretation of that, that this is not something you were proposing or seeking to change?

A. Now, which issue are you talking about?

Q. Holidays.⁷¹

A. Yes, that was a board issue.

Q. All right. So my question is, by you saying it's a board issue, is it a fair interpretation, a fair understanding of what you mean that this isn't something that you as the Sheriff were seeking to change?

A. The only advantage I see to changing it is to be able to change schedules and float schedules any you want without having to be impacted by the current language. That's my-- That's the only thing I see as a benefit to changing it to hours.⁷²

Ordinarily under the IPLRA I would be inclined simply to compare pyramiding and overtime accumulation provisions in comparable jurisdictions. But to mechanically take that approach here would ignore a well-developed record of problems peculiarly affecting the public

⁷⁰ T. 259.

⁷¹ I note here that the holiday issue is integrally related to the overtime issue because the County's holiday proposal would permit accrual only for hours worked, not hours scheduled.

⁷² T. 263-264.

interest of this jurisdiction. Also, but for the highly unusual circumstances here, I would feel compelled to bring Section 14.02 into conformity with other portions of the CBA that appear to prevent any accumulation of *unworked* overtime. I find myself in agreement with all the contract arguments advanced in the County's brief, but note that the brief glosses over the very serious matter that I now discuss.

The County already has language to limit overtime accumulation; as the County's Brief correctly observes, all that its Section 14.02 proposal does is make explicitly clear that overtime cannot accumulate for unworked hours, just as other parts of the current agreement set forth. But I am strongly convinced that there is an underlying public interest rationale for the Sheriff's apparent failure to effectuate this language. This inability cannot be accounted for by lack of experience; the Sheriff has been in office since 1982 and since at least 1985 he has had to personally approve any excess comp time.⁷³ I find it significant that at any time from the execution date of this contract (June 15, 1992), the Sheriff could have acted in reliance of the no-pyramiding provision this CBA and at a minimum, tested the County's very plausible construction at grievance arbitration by denying *unworked* comp time. But the record is devoid of any attempt by the Sheriff to enforce this part of the contract. In a very real sense, I have come to view this part of the interest arbitration as a negotiation between the Sheriff, the Monroe County Board, and the County's lead negotiator over the entwined issues of adequate staffing and accumulation of overtime. Credible testimony by County negotiator Judy Nelson supports my conclusion:

... (W)hen I first came down here and the Sheriff and the Board were -- didn't look to me like they were speaking at all and they wanted me to negotiate this contract. I had to represent both of them, so from what I saw

⁷³ T. 261.

from the Sheriff's problems, which was a lot of comp time, and the Board's concern about the tiff, I guess, and the budget, it looked like the remedy for my-- for the people I represented was to try and reduce the number of compensated unworked hours and at the same time up the wages, because the Sheriff was concerned that he couldn't attract people and that turnover was too high.⁷⁴

I conclude that the Sheriff allowed a large amount of comp time to accumulate in apparent disregard of the CBA for the simple reason that his Department's work load grew rapidly while it was seriously understaffed. As all of this occurred, his Department was plagued by high attrition, as noted by an independent audit concluding that "in the future, the County cannot afford the financial burden of allowing the Sheriff's Department to become a training school for other law enforcement agencies."⁷⁵ I find ample evidence that the status quo has been arrived at because, notwithstanding its considerable cost to the County, it has been the best way for the Sheriff to deal with this convergence of increasing work and insufficient human resources.⁷⁶

I therefore adopt the Union's proposal of maintaining the status quo. The IPLRA provides support for this ruling in two respects. That portion of Section 14(h)(3) of the IPLRA pertaining to "the interests and welfare of the public" applies to this impasse, and I find ample evidence that the status quo must be maintained to serve that interest. My reasoning here is straightforward: By his actions, an experienced Sheriff with an excellent management record, who also has considerable experience with collective bargaining, has come to the apparent conclusion that in

⁷⁴ T. 133. *Also see* T. 180.

⁷⁵ *See Management Report* at p. 15.

⁷⁶ *Id.* at pp. 16-17.

the absence of significant new hiring,⁷⁷ the public interest is best served by maintaining the status quo on the accumulation of overtime.⁷⁸ I emphasize that this positive view of how the Sheriff has served the public interest in Monroe County is not my judgment, but rather the judgment of presumed law enforcement experts.⁷⁹

Second, Section 14(h)(6) authorizes me to consider "(t)he overall compensation presently received by employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received." The record clearly establishes that "continuity and stability of employment" has been a serious problem in this Department. Again, this is not my subjective judgment, but one reached by sheriff department experts who concluded in the *Management Report* that this Department has become a training ground for other law enforcement agencies.⁸⁰ That same report also concluded unequivocally that the Department is seriously understaffed, pays uncompetitive wages, and gets by with "damage control" consisting,

⁷⁷ The record tends to show that the department has added one full-time person. T. 28 (statement by Mr. Sonneborn, uncontradicted by the County). In contrast, the *Management Report* recommended in 1990 that four additional patrol officers be added to the force (see p. v). Using as a reference Appendix B of the CBA, showing 8 deputies on force, this proposal would amount to an increase in staffing by 50%.

⁷⁸ See *Management Report* at p. 16 concluding: ". . . (A)nother measurement . . . can be used to evaluate the general management quality of the Monroe County Sheriff's Department. It is how successful, in the face of dramatically increasing demands for service, has the administration been in controlling costs and meeting budget.

The Department, using that standard, is managed very well indeed."

⁷⁹ The *Report* was prepared by The National Sheriffs' Association in Alexandria, Virginia. The Introduction to this report states this analysis was performed on an "independent" basis.

⁸⁰ *Supra* notes 12 and 75.

in part, of scheduling excessive overtime.⁸¹

E. Overtime Distribution: In a separate portion of Article 14 (Section 14.06), the Union proposes to add the following: "The opportunity to work overtime due to unscheduled absences shall not be offered to part-time employees unless all full-time employees in the job classification have declined the opportunity." The County does not expressly reject that offer, but such rejection is implicit in its Article 1 proposal. There Section 1.02 provides that "(T)he Employer may continue to use part-time and auxiliary personnel to perform bargaining-unit work in accordance with past practice." The County proposes to delete the underlined language and replace it with this: ". . . except where expressly prohibited by this Agreement."

I begin this discussion by noting that the record reflects in considerable detail the negotiating history and past practice concerning the County's distribution of overtime to part-time employees.⁸² The overtime issue apparently arises only for dispatchers and corrections officers in the bargaining unit.⁸³ The practice in these classifications has been that the County utilizes part-time employees first, unless they have already worked 40 hours for the week.⁸⁴

As I read the record, there is two-fold significance in the County's proposal to delete past

⁸¹ *Supra* note 67.

⁸² T. 234-246 (Direct examination by Mr. Huetsch of Sheriff Kelley).

⁸³ T. 241 (Testimony of Sheriff Kelley, describing a specific proposal during contract negotiations in 1986: "It says, 'clarify employee seniority; i.e., senior employee will be given first option to work an open shift. There's a current practice for deputies; however, communications and corrections personnel must contact a part-time employee first.'")

⁸⁴ T. 238-39. Mr. Huetsch asked Sheriff Kelley: "It's your understanding that a part-timer can fill an unscheduled absence if it does not result in the part-timer getting paid overtime." Sheriff Kelley answered: "That's correct."

practice language and replace it with a clause permitting the Sheriff to utilize part-time employees in any manner not expressly prohibited by the Agreement. First, there appears to be some question about how the practice was established,⁸⁵ and considerable doubt that the Union approved the practice by acquiescing to its administration.⁸⁶ As I read the County's proposal, the intent here is not to change anything in administering its overtime distribution practice, but simply to clarify the Sheriff's right to continue this practice as is.⁸⁷ Second, the significance of this background is that the Union proposal would abolish this practice, and give all full-time employees first right of refusal for overtime.

I adopt the Union's position as my Award because it establishes a practice that more nearly conforms to overtime distribution in comparable jurisdictions than does the County's current practice. A review of contracts in comparable counties supports my ruling.

The Sheriff in Jersey County is permitted to utilize part-time employees, provided that "overtime shall first be offered to full-time employees on a seniority rotation basis"; only when no full-time employee voluntarily accepts an assignment is the Sheriff permitted to schedule a part-time employee.⁸⁸ In distributing overtime to security unit employees (like the employees involved in the instant impasse), the contract in Randolph County provides that "(i)f all full-time employees available to work the overtime hours decline the opportunity, the Employer may assign

⁸⁵ T. 238, T. 265-275 (Cross examination by Mr. Sonneborn of Sheriff Kelley).

⁸⁶ The Union formally grieved the practice in 1992 and has held the matter in abeyance pending the outcome of this arbitration. T. 268.

⁸⁷ Cty. Br. at 69.

⁸⁸ Contract, *supra* note 49 (Article XIV, Section 2(g), at p. 12).

a part-time employee to work the overtime. . . ."⁸⁹

The foregoing are examples that support the Union's position here. Then there are contracts that are so ambiguous as to overtime distribution that they cannot be read to support either the Union's or County's position. The Agreement for Clinton County deputies recognizes only "full-time sworn employees"⁹⁰ and therefore is moot on the issue of distributing overtime between full-time and part-time members of the bargaining unit. The same is true for Clinton County dispatchers⁹¹ and Washington County deputies.⁹² Overtime distribution for Randolph County deputies is unclear on its face because the recognition clause provides for hiring of part-time employees,⁹³ but as to distribution of hours, speaks in terms of equalizing work within classifications on the basis of seniority.⁹⁴ It is not clear, for example, whether some classifications have only full-time employees.

I have carefully reviewed the overtime distribution practices in comparable jurisdictions, and have found two that conform to the Union's proposal. The remainder are moot or ambiguous on assignments to part-time employees. Notably, not one contract provides a Sheriff the right to give part-time dispatchers and corrections officers priority in overtime scheduling over full-time

⁸⁹ Agreement between County of Randolph and AFSCME Council 31, Local Union 2402 (Article 12 at p. 27).

⁹⁰ Contract, *supra* note 48 (Article 2 at p. 1).

⁹¹ Contract, *supra* note 57 (Article 2 at p. 3-4).

⁹² Contract, *supra* note 52 (Article 2 at p. 1).

⁹³ Contract, *supra* note 51 (Article I, Section 1.1 at p. 2).

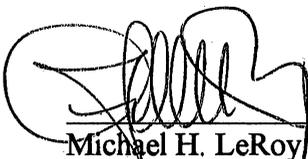
⁹⁴ *Id.* (Article XII, Section 9, p. 24).

employees. I therefore adopt the Union's proposal for Section 14.06⁹⁵ and reject the County's proposal to amend Section 1.02.

⁹⁵ I also take notice of Sheriff Kelley's assessment of how such an Award might affect operations: "It doesn't present a problem from an operational standpoint, because if they use the rotational divisional seniority list, it should be annotated on there, person contacted, no answer, no one home, and should go down if it's overtime. . . . (W)e're not going to go around and try to run employees down in 426 square miles to find out if they might be interested in working an overtime shift. If we call you and you do not answer the phone, you have declined as far as the rotational seniority list goes." T. 276.

Interest Arbitration Award

1. I reject the County's proposals for family and medical leave, embodied in offers to amend Section 13.02, and to add new Sections 22.04 and 22.05. I adopt as my Award the Union's family and medical leave proposal for new Section 22.06, to be numbered as such unless renumbered by mutual agreement by the parties.
2. I adopt as my Award the County's sick-leave proposal to amend Section 21.03, and reject the Union's proposal not to change this Section.
3. I reject the County's holiday proposal to amend Section 25.02, and adopt as my Award the Union's proposal not to change this Section.
4. I reject the County's proposal on overtime accrual, embodied in a proposal to amend Section 14.02, and I adopt as my Award the Union's offer not to change this Section.
5. I adopt as my Award the Union's proposal on distribution of overtime, embodied in a proposal to amend Section 14.06, and I reject the County's counter-proposal to amend Section 1.02.
6. I adopt as my Award agreements concerning retroactivity, wages, health insurance, damage to personal property, seniority list, corrections work schedule, and any other agreements voluntarily entered into by the parties during the pendency of this Arbitration.
7. I retain jurisdiction to effectuate this Award.



Michael H. LeRoy
Arbitrator by Appointment of the ISLRB

This Award Entered Into
this 21st Day of March, 1995,
in Champaign, Illinois.

Appendix I: Monroe County Family and Medical Leave Policy

In accordance with the Family and Medical Leave Act of 1993, Monroe County will grant job-protected leave to eligible employees for up to twelve weeks per twelve-month period for any one or more of the following reasons:

A. The birth of a child and in order to care for such child or the placement of a child with the employee for adoption or foster care (leave for this reason must be taken within the 12-month period following the child's birth or placement with the employee); or

B. In order to care for an immediate family member (defined as spouse, child or parent) of the employee if such immediate family member has a serious health condition; or

C. The employee's own serious health condition that makes the employee unable to perform the functions of his/her position.

"Twelve month period" means a rolling 12-month period measured backward from the date leave is taken and continuous with each additional leave day taken.

"Spouse" is defined as an employee's domestic partner to whom the employee is married. If both an employee and his/her spouse work for Monroe County (whether in the same or different department of the county government), their total leave in any 12-month period may be limited to an aggregate of 12 weeks, in accordance with applicable law.

"Child" means a child either under 18 years of age, or 18 years of age or older who is incapable of self-care because of a mental or physical disability. An employee's "child" is one for whom the employee has actual day-to-day responsibility for care and includes a biological, adopted, foster or step-child.

"Serious health condition" means an illness, injury, impairment, or a physical or mental condition that involves: (1) inpatient care; or (2) any period of incapacity requiring absence from work for more than three calendar days and that involves continuing treatment by a health care provider; or (3) continuing treatment by a health care provider for a chronic or long-term health condition that is incurable or which, if left untreated, would likely result in a period of incapacity of more than three calendar days; or (4) prenatal care by a health provider.

"Continuing treatment" means: (1) two or more visits to a health care provider; or (2) two or more treatments by a health care practitioner or referral from, or under direction of, a health care provider; or (3) a single visit to a health care provider that results in a regimen of continuing treatment; or (4) in the case of a serious, long-term or chronic condition or disability that cannot be cured, being under the continuing supervision of, but not necessarily being actively treated by, a health care provider.

To be eligible for family or medical leave under the Family and Medical Leave Act (FMLA), employees must have worked for Monroe County for at least twelve months of continuous, uninterrupted service and have worked at least 1,250 hours over the previous twelve-month period.

An employee may take leave intermittently under this Policy or on a reduced leave schedule to care for an immediate family member with a serious health condition or because of serious health condition of the employee when medically necessary. "Medically necessary" means that there must be a medical need for the leave and that the leave can best be accomplished through an intermittent or reduced-leave schedule. However, the employee may be required to transfer temporarily to a position of equivalent pay and benefits that better accommodates recurring periods of leave when the leave is planned based on scheduled medical treatment. An employee may take leave intermittently or on a reduced leave schedule for the birth or placement for adoption or foster care of a child only with the County's consent.

An employee will be required to substitute sick leave and any disability leave taken in any 12-month period for any part of a Family and Medical Leave taken for purposes set forth under Paragraphs B and/or C of this Policy. The employee will be required to substitute any accrued vacation leave and any disability leave for any part of a Family and Medical Leave taken for purposes set forth in Paragraph A of this Policy. When an employee has exhausted disability or accrued paid leave for a portion of family or medical leave as provided under the FMLA, he/she may request an additional period of unpaid leave to be granted so that a total of paid and unpaid leave provided (this) equals 12 calendar weeks.

An employee is required to give thirty (30) days notice to the Department Head in the event of a foreseeable leave. In unexpected or unforeseen situations, an employee should provide as much notice as practicable, usually verbal notice within one or two business days of when the need for leave becomes known, followed by a written request on a form provided by the County. If an employee fails to give 30 days notice for a foreseeable leave with no reasonable excuse for the delay, the leave will be denied until 30 days after the employee provides notice.

For leaves taken because of the covered employee's or a covered family member's serious health condition, the employee shall submit a completed "Physician or Practitioner Certification" form provided by the County and return it to the Department Head. Medical certification must be provided by the employee within 15 days after requested, or as soon as is reasonably possible. Monroe County may receive a second or third opinion (at the County's expense), periodic reports on the employee's status and intent to return to work, and a fitness-for-duty report to return to work. All documents related to the employee's or family member's medical condition will be held in strict confidence and maintained in the employee's medical records file.

An employee granted a leave under this Policy will be required to make contribution for his/her share of insurance costs, as provided under the County health insurance plan, either through payroll deduction or by direct payment to the County. The employee will be advised in

writing at the beginning of the leave period as to the amount and method of payment. Employee contributions are subject to any change in rates that occurs while the employee is on leave.

If an employee's payment is more than thirty (30) days late, the County may terminate the employee's insurance coverage. If the County pays the employee contribution missed by the employee while on leave, the employee will be required to reimburse the County for delinquent payments (on a payroll deduction schedule) upon return from leave. The employee will be required to sign a written statement at the beginning of the leave period authorizing the payroll deduction for delinquent payment. If the employee fails to return from unpaid family/medical leave for reasons other than 1) the continuation of a serious health condition of the employee or a covered family member or 2) circumstances beyond the employee's control (certification required within 30 days of failure to return for either reason), the County may seek reimbursement from the employee for the portion of the premiums paid by the County on behalf of that employee of that employee (also known as the employer contribution) during the period of leave. An employee is not entitled to seniority or benefit accrual during periods of unpaid leave but will not lose anything accrued prior to leave.

If the employee returns to work within 12 weeks following a family/medical leave, he/she will be reinstated to his/her former position or an equivalent position with equivalent pay, benefits, status and authority. The employee's restoration rights are the same as they would have been had the employee not been on leave. Thus, if the employee's position would have been or the employee would have been terminated but for the leave, the employee shall not have the right to be reinstated upon return from leave. An employee returning from leave will be reinstated to his/her same or similar position, only if available, in accordance with applicable laws. If the employee's same or similar position is not available, the employee may be terminated. A fitness-for-duty report may be required by the County before an employee is allowed to return to duty from any leave.



Leading the News

Family Leave

FINAL FMLA RULES EXPAND ON COVERAGE OF CHRONIC, SERIOUS HEALTH CONDITIONS

The final version of regulations implementing the Family and Medical Leave Act broadens an earlier definition of a serious health condition to ensure that leave is available for chronic conditions, such as asthma and diabetes.

The Labor Department has always acknowledged that what can be considered a serious health condition for an employee to qualify for leave under the law has been a sticking point throughout the rule-making process. In its final rules, scheduled for publication in the Jan. 6 *Federal Register*, the department's Wage and Hour Division said it has "significantly re-crafted" this portion of the regulation to ensure that "FMLA leave is available in those situations where it is really needed."

The final rules go into effect 30 days after their scheduled publication in the *Federal Register*.

A significant amount of comment the Labor Department received on the interim rules centered on the definition of a serious health condition. Employer groups contended that the definition departed from the law's legislative history by broadening the types of conditions for which FMLA leave can be claimed, while employee groups argued that the rules' treatment of this area was not specific enough.

The law requires employers with 50 or more workers to provide up to 12 weeks unpaid, job-guaranteed leave in a 12-month period for childbirth, adoption, and serious personal illness of employees or their close family members. The law defined a serious health condition as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider.

"This scant statutory definition" is further clarified by the law's legislative history, which shows that the term was not intended to cover short-term conditions for which treatment and recovery are very brief, since Congress expected that such conditions would be covered by "even the most modest of employer sick leave policies," the department said in the final rules.

Three-Day Rule

The Labor Department initially described a serious health condition as a period of incapacity "of more than three days." It also defined continuing treatment as involving one visit to a health care provider that results in a regimen of continued care under the provider's supervision.

Those objecting to the first portion of this definition contended that the "more than three days" test encouraged employees to remain absent from work longer than necessary to qualify for FMLA leave and that its unreasonably low threshold more aptly described a health condition rather than serious health condition. Others, however, pointed out that the duration of an absence is not a "valid indicator of serious health conditions that are very brief (e.g., a severe asthma attack that is disabling but requires fewer than three days for treatment and recovery to permit the employee's return to work)."

The Labor Department decided to stick with the basics of its "more than three days" policy, saying the legislative history of the law "specifically provides that conditions lasting only a few days were not intended to be included as serious health conditions, because such conditions are normally covered by employers' sick leave plans." It also revised the interim rules to clarify that the absence must be a period of incapacity of more than three consecutive calendar days, covering an inability to work, attend school, or perform other regular daily activities due to the serious health condition.

However, it agreed that "special recognition should be given to chronic conditions." Afflictions like asthma and diabetes often continue over an extended period, "often without affecting day-to-day ability to work or perform other activities but may cause episodic periods of incapacity of less than three days." Moreover, while those with such conditions generally visit a health care provider periodically, staying home and self-treatment are often more effective than visiting their health care provider when subject to a flare-up or other incapacitating episode, according to the final rules.

The new definition includes such conditions as serious health conditions, even if the individual episodes of incapacity are not of more than three days duration. The revised definition encompasses pregnancy, which according to the rules, may involve

periodic visits to a health care provider and episodes of severe morning sickness that may not require an absence from work of more than three days.

The new rules also deal with serious health conditions that are not ordinarily incapacitating, but for which multiple treatments are being given because they would likely result in incapacitation for more than three days in the absence of such treatment. The regulations cite as examples patients receiving chemotherapy or radiation for cancer, dialysis for kidney disease, and physical therapy for severe arthritis.

Goodling Voices Concerns

Rep. Bill Goodling (R-Pa), chairman of the House Committee on Economic and Educational Opportunities, told BNA that he remained concerned that the final rules have "done little to ease the confusion and burdens" of the interim regulations. He expressed particular concern over the definition of serious health condition and the treatment of intermittent leave.

The three-day minimum absence requirement of the regulations "is out of sync with the intent of the act," which was intended "to cover long-term, rather than short-term absences," Goodling said.

"For the act to remain true to its original intent, the definition should distinguish between routine illnesses and a serious health condition." The final regulations "fail to maintain this critical distinction," he charged.

The intermittent leave provision "should set some limitation as to how brief intermittent leave can be," Goodling said. "It takes no imagination to realize that such leave taken in blocks of an hour (or even less) here and there will lead to a considerable bookkeeping nightmare in determining when the 12-week total has been met."

Goodling said he was "relieved that employers and employees now face a greater degree of regulatory certainty in living with the act," but remained concerned over "numerous issues" in the regulations. "As Chairman of the Committee on Economic and Educational Opportunities, I will continue to work with the department, employers, and employees to ensure that the act is implemented in a fair and reasonable manner," he said.

Employer, Employee Groups

John Tysse of the Labor Policy Association said a cursory review of the final rules show what the Labor

Department has been "telegraphing" over the last few months—"no major changes." However, he described the final version of the FMLA rules as more complicated than the interim rules, suggesting that they will make it even more difficult for human resource managers to administer the law. While the definition of a serious health condition is more factually specific in terms of making determinations as to what qualifies for FMLA leave, Tysse said it still fails to draw a clear line.

In other areas, Tysse described the rules' treatment of intermittent leave as a "big problem" that was not addressed. However, he said the final rules provide employers with more flexibility to make retroactive determinations as to whether the type of leave an employee took is covered by the FMLA. Generally, Tysse said, an initial review of the rules shows a couple of improvements and a couple more burdensome provisions.

Donna Lenhoff of the Women's Legal Defense Fund agreed that, at first glance, there do not appear to be significant changes between the interim and final rules. While commending the department's effort to provide some greater recognition of the complexities posed by serious health conditions by changing its definition, Lenhoff said the final rules do not go as far as she would have liked in this area.

She also expressed disappointment with the department for continuing to misinterpret the FMLA's statutory provision allowing employees to use paid sick leave to care for family members who have serious health conditions. As with the interim rules, the final rules only allow such substitution when consistent with an employer's existing leave policies, which goes against the grain of the law, she said.

Bernard E. Anderson, assistant secretary of labor for employment standards, pledged that the department will continue the "vigorous education and enforcement efforts" that it has been engaged in since the FMLA interim rules were published in June 1993.

"We take very seriously our responsibility to protect workers and their families," Anderson said in a statement. "We are proud of our record in successfully resolving more than 90 percent of the violations of the FMLA" since the law's Aug. 5, 1993, effective date.

(The final rules appear in a Special Supplement accompanying this issue.)

— By Deborah Billings

End of Section