

**INTEROFFICE COMMUNICATION  
COUNTY OF MILWAUKEE**

**DATE:** June 18, 2013

**TO:** Marina Dimitrijevic, Chairwoman, County Board of Supervisors

**FROM:** Mark A. Grady, Deputy Corporation Counsel *MAG*  
Colleen Foley, Principal Assistant Corporation Counsel

**SUBJECT:** Appeal of decision related to payment of sick allowance at retirement for employees who change from union to non-union positions  
Judith Pasko v. Milwaukee County, Case No. 11-CV-2577  
Robert Porth v. Milwaukee County, Case No. 11-CV-4908  
Bruce Koehn v. Milwaukee County, Case No. 12-CV-1402  
Marchewka v. Milwaukee County, Case No. 13-CV-969

Pursuant to section 1.28 of the Ordinances, please refer this matter to the Committee on Judiciary, Safety and General Services.

**Summary of Policy Issue**

These cases involve the payment at retirement of unused sick allowance and the appropriate formula that applies to that payment. The circuit court issued a ruling contrary to the County's position. The County Board adopted a resolution at its meeting of September 27, 2012 (File No. 12-645) authorizing an appeal to the Court of Appeals, but declined to pre-authorize the filing of a petition for review with the Wisconsin Supreme Court in the event of an adverse decision in the Court of Appeals. The Court of Appeals has now issued a decision on June 18, 2013 affirming the circuit court decision (copy attached). Our outside counsel requests approval to file a petition for review with the Wisconsin Supreme Court. We join in the request. The petition must be filed within 30 days of the Court of Appeals' decision. The Supreme Court has discretion whether or not to grant the petition and hear the case.

**Fiscal Cost**

The current judgments in the Pasko and Porth cases total approximately \$93,000.00, including attorneys' fees awarded for their attorneys. A review by the Comptroller indicates that the principle of this decision could apply to the advantage of approximately fifty (50) other employees at a potential additional sick allowance payment cost of \$325,000.00. The County's legal fees for outside counsel to continue to handle this case are covered by the County's insurance policy. Interest costs accruing during the appeal are minimal. If a further appeal is unsuccessful, the court may award additional attorneys' fees to the plaintiffs. It is difficult to predict that amount, but it could be an

additional \$10,000.00 – 20,000.00, and a larger amount if the appeal proceeds to the Supreme Court and is unsuccessful.

### **Detailed Issue**

The courts have ruled that two employees (Pasko and Porth) who were promoted from union to non-union positions are entitled to use the union formula for payment of unused sick allowance that existed at the time that the sick allowance accrued rather than use the ordinance formula that applies based on their non-union status at retirement. Thus, according to this decision, these employees, who were originally in FNHP and AFSCME and then were promoted towards the end of their County careers to non-represented positions, are entitled when they retire to utilize the formula in the FNHP and AFSCME agreements for payment at retirement of sick allowance that accrued while they were in FNHP and AFSCME and the formula in the ordinance for non-represented employees for payment at retirement of sick allowance that accrued while they were non-represented. The County's practice and interpretation has been to utilize the formula that applies based solely on the employee's status at retirement. Among other things, the union formula is more favorable than the non-union formula because approximately five (5) more years of unused sick allowance that accrued from 2002 to 2007 is 100% paid at retirement (because the union did not agree to eliminate this benefit until about five years after the County eliminated it for non-represented employees). The courts also applied, to one employee's advantage, the LIFO (last in, first out) formula from the AFSCME union agreement rather than the FIFO (first in, first out) formula that exists in the ordinance. The circuit court awarded attorneys' fees to the plaintiffs under the wage claim statute, Chapter 109, but declined to award any wage claim penalty against the County. The current judgments in the Pasko and Porth cases total approximately \$93,000.00, including attorneys' fees for their attorneys. By agreement, the Koehn and Marchewka cases were held in abeyance while the parties complete the appeal process in the Pasko and Porth case.

Pursuant to §1.31, M.C.G.O., the Judiciary Committee is delegated the responsibility of making a recommendation to the County Board for all appeals.

### Attachments

cc(w/att.): Scott Manske  
Amber Moreen  
Kelly Bablitch  
Alexis Gassenhuber  
Steve Cady  
Raisa Koltun