

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, :
 :
Complainant, :
 :
vs. : Case 19
 : No. 37424 MP-1876
 : Decision No. 24842-A
AMERY SCHOOL DISTRICT :
 :
Respondent. :
 :

Appearances:
Mulcahy & Wherry, S.C., P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by
Mr. Stephen L. Weld, Attorney at Law, appearing on behalf of the
Respondent.
Mr. Alan D. Manson, Executive Director, Northwest United Educators, 16 West
John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the
Complainant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

On August 12, 1986, the above named Complainant, Northwest United Educators, filed a complaint with the Wisconsin Employment Relations Commission, wherein Complainant alleged that Respondent, Amery School District, had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA) by failing to pay sick leave in accordance with the terms of the parties' collective bargaining agreement. The Complainant and Respondent agreed to postpone scheduling of the hearing on the complaint of prohibited practices pending an informal attempt to resolve the dispute. On August 4, 1987, Complainant advised the Commission that Complainant and Respondent were unable to resolve the issue in dispute and requested that the matter be scheduled for hearing. On September 24, 1987, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5) of the Wisconsin Statutes. A hearing on the complaint was held at Amery, Wisconsin on October 14, 1987. The parties filed post-hearing briefs by January 11, 1988.

Having considered the evidence and arguments of the parties and being fully advised in the premises, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Amery School District, hereinafter District or Respondent, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., with offices located at Amery, Wisconsin, 54001.
2. Northwest United Educators, hereinafter Complainant or NUE, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., with offices located at 16 West John Street, Rice Lake, Wisconsin, 54868; and that at all times material hereto, Complainant has represented teachers employed by the District.
3. On August 12, 1986, the Complainant filed a complaint with the Wisconsin Employment Relations Commission, hereinafter Commission, wherein Complainant alleges that Respondent has violated Sec. 111.70(3)(a)5, Stats., by failing to pay sick leave in accordance with the provisions of Article VIII of the parties' collective bargaining agreement; and that Respondent denies that it has violated Sec. 111.70(3)(a)5, or any other provision of the Municipal Employment Relations Act.
4. Respondent and Complainant are parties to a 1985-86 collective bargaining agreement which does not contain a grievance arbitration provision, but which does contain, inter alia, the following provision:

ARTICLE VIII

LEAVES OF ABSENCE

- A. Sick Leave - Ten (10) days sick leave shall be granted annually cumulative to one hundred (100) days.

- B. Emergency Leave - All professional personnel of the school district shall be allowed up to three (3) days leave per year with pay (not accumulative and not deducted from sick leave in case of death, serious illness, major surgery, or serious accident involving a member of the immediate family). The term "immediate family" shall be construed to mean spouse, children, parents, grandparents, grandchildren, mother-in-law, father-in-law, brothers, sisters, or others living in the home with the employee. Requests for leave where individuals other than those members described shall be at the discretion of each principal.

- C. Personal Leave - Professional personnel of the school district shall be allowed two (2) days of personal leave each year on a non-cumulative basis. The employee taking personal leave time will pay the substitute teacher's salary required to cover the assignment of the absent instructor. Not more than five (5) teachers shall take personal leave on any one (1) day. In the event that more than five (5) teachers with personal leave on the same day, it shall be permitted on a seniority basis.

. . .

5. At all times material hereto, Ione Gjerde has been employed by the District as a teacher; Ms. Gjerde was absent from work on Tuesday, September 24, 1985, Wednesday, September 25, 1985, and Thursday, September 26, 1985 for the purpose of attending to her sick father; Ms. Gjerde's father died on Thursday, September 26, 1985 at Pelican Rapids, Minnesota, which is two-hundred and forty miles from Amery, Wisconsin; the drive from Pelican Rapids, Minnesota to Amery, Wisconsin takes approximately five and one-half hours; while it was possible for Ms. Gjerde to return to Amery in time to teach school on Friday, September 27, 1985, Ms. Gjerde, considering herself to be too emotionally upset to teach on Friday, September 27, 1985, did not return to work until Monday, September 30, 1985; and that the funeral for Ms. Gjerde's father took place on Saturday, September 28, 1985.

6. When Ms. Gjerde returned to work on Monday, September 30, 1985, she was informed that she would be paid three emergency leave days, i.e., Tuesday, Wednesday and Thursday, and that she would be paid one day of personal leave for Friday, September 27, 1985; Ms. Gjerde then requested that Friday, September 27, 1985, be compensated as a sick day; Ms. Gjerde's request to have September 27, 1985 compensated as a sick day was denied; the District charged September 27, 1985 as a personal leave day; at the time of Ms. Gjerde's absence from work, the District was aware that Ms. Gjerde was attending her sick father and, further, the District was notified of her father's death; the District does not dispute Ms. Gjerde's decision to be absent from work from September 24 through September 27, 1985; and that the District was not aware of Ms. Gjerde's desire to have Friday, September 27, 1985 compensated as sick leave until Ms. Gjerde returned to work on Monday, September 30, 1985.

7. On or about January 6, 1986, Ms. Gjerde sent the following letter to Dr. David E. Clausen, President of Respondent's School Board:

In September of 1985 my father died. I was called home on a Monday and he passed away that Thursday. The funeral was on Saturday so I was able to be back in school the following Monday. I missed four days of school (Tuesday thru Friday). Three of those days were given to me as emergency leave days, the fourth day was used as a personal leave day.

When I returned, I requested that the fourth day be taken from my sick leave. This was denied and I was charged a personal leave day.

I am requesting that the board reconsider charging the fourth day as personal leave. I was emotionally unable to be in school on that Friday and therefore it should be considered as a sick day. The Friday under consideration was the day following father's death.

In many cases three days of emergency leave is not adequate to take care of a death in the family, and it seems appropriate to be able to use at least two sick days if needed. Because I had already requested a personal leave day in October for family reasons, I have been working since then with no emergency or personal days available to me. This doesn't seem quite fair in that I have over eighty-five sick days built up.

Please consider this matter and I look forward to a response from you.

8. On or about February 3, 1986, Ms. Gjerde received the following letter from Mr. R. B. Norsted, District Administrator:

In response to your letter written to Dr. David Clausen on January 6, 1986, I would like to state the following:

In thoroughly reviewing the Master Contract, I cannot find any clause or area that would lead me to believe that we have deviated from exactly what should have been done. You are right, you missed four days. Three days were allowed for emergency leave and the fourth day is a personal leave day. That is exactly what the Master Contract calls for and that is what we followed through on.

If circumstances somehow or other had been different, maybe something else could have been done. However, in this particular instance, I think we have followed the letter of the contract and I see no need or necessity for a deviation from that particular policy.

I'm sorry, I'm sure this is not the answer you wanted to hear, but we have done our part in living up to a negotiated agreement and I'm sure you will do your part to honor that also.

9. Allen Stoddard is a District Principal; Principal Stoddard, who supervised Ms. Gjerde in 1985-86, has been a principal in the District for twenty-three years; that during Stoddard's tenure as a principal, there has been only one other instance in which an employe exhausted emergency leave in connection with the illness and death of a family member; that this instance occurred in the 1976-77 school year and involved Patricia La Rue, a teacher in the District; that Ms. La Rue, who was supervised by Principal Stoddard, was paid an emergency leave day on April 26, 1977 and then again on April 29, 1977, which payments exhausted her emergency leave; Ms. La Rue's next absences were on May 4, 1977, May 13, 1977, May 31, 1977, June 1, 1977, June 2, 1977 and June 3, 1977, for which absences she was given leave without pay; all of these absences were in connection with the illness and death of Ms. La Rue's husband; and that the record fails to establish that Ms. La Rue made any claim that any of these absences were due to the fact that emotional distress rendered her incapable of performing her work duties.

10. During the negotiation of the parties' 1978-80 contract, NUE Representative Alan Manson first learned of the fact that Ms. LaRue suffered a loss of pay for absences from work stemming from the illness and death of her husband; at the time that Mr. Manson learned of Ms. La Rue's loss of pay, the timelines for filing a grievance or complaint of prohibited practice protesting the loss of pay had passed; during the 1978-80 contract negotiations, the parties

discussed the payment of emergency leave, sick leave and personal leave; during the 1978-80 contract negotiations, District representatives advised Mr. Manson that the District interpreted the available use of sick leave in connection with the emergency leave to be limited; throughout the 1978-80 contract negotiations, NUE maintained the position that sick leave was available whenever an employe is physically or emotionally unable to work, regardless of whether or not they have used emergency and/or personal leave in connection with any illness or death or injury to an immediate family member; and that during the 1978-80 contact negotiations, the parties agreed to increase emergency leave from two to three days and to add death of an immediate family member to the list of conditions under which an employe could take emergency leave.

11. Roy Norsted, Respondent's District Administrator, acknowledges that sick leave may be used for emotional disability, but denies that sick leave may be used for an emotional disability in connection with the death of a family member for which the employe has exhausted emergency leave; Superintendent Norsted was present at the negotiation sessions on the 1978-80 collective bargaining agreement and recalls that the La Rue situation was discussed at that time; Superintendent Norsted recalls that, as a solution to the La Rue situation, emergency leave days were increased from two to three days; Superintendent Norsted does not recall that that the District agreed that sick leave was available if an employe exhausted emergency leave, nor does Superintendent Norsted recall any discussion regarding NUE's assertion that sick leave was available if an employe exhausted his or her emergency leave.

12. That the 1975-77 and 1977-78 collective bargaining agreements between Complainant and Respondent contain inter alia, the following language:

ARTICLE X

LEAVES OF ABSENCE

1. Sick Leave - Ten days sick leave shall be granted annually cumulative to one hundred (100) days.
2. Emergency Leave - All professional personnel of the school district shall be allowed up to two (2) days leave per year with pay (not accumulative and not deducted from sick leave in case of serious illness, major surgery, or serious accident involving a member of the immediate family). The term "immediate family" shall be construed to mean spouse, children, parents, grandparents, grandchildren, mother-in-law, father-in-law, brothers, sisters, or others living in the home with the employee. Requests for leave where individuals other than those members described shall be at the discretion of each principal.
3. Personal Leave - Professional personnel of the school district shall be allowed two (2) days of personal leave each year on a non-cumulative basis. The employee taking personal leave time will pay the substitute teacher's salary required to cover the assignment of the absent instructor. Not more than five (5) teachers shall take personal leave on any one (1) day. In the event that more than five (5) teachers wish personal leave on the same day, it shall be permitted on a seniority basis.

. . .

13. That the 1978-80 collective bargaining agreement between Complainant and Respondent contains inter alia, the following language:

ARTICLE VIII

LEAVES OF ABSENCE

- A. Sick Leave - Ten days sick leave shall be granted annually cumulative to one hundred (100) days.

- B. Emergency Leave - All professional personnel of the school district shall be allowed up to three (3) days leave per year with pay (not accumulative and not deducted from sick leave in case of death, serious illness, major surgery, or serious accident involving a member of the immediate family). The term "immediate family" shall be construed to mean spouse, children, parents, grandparents, grandchildren, mother-in-law, father-in-law, brothers, sisters, or others living in the home with the employee. Requests for leave where individuals other than those members described shall be at the discretion of each principal.
- C. Personal Leave - Professional personnel of the school district shall be allowed two (2) days of personal leave each year on a non-cumulative basis. The employee taking personal leave time will pay the substitute teacher's salary required to cover the assignment of the absent instructor. Not more than five (5) teachers shall take personal leave on any one (1) day. In the event that more than five (5) teachers wish personal leave on the same day, it shall be permitted on a seniority basis.

14. The sick leave and emergency leave provisions contained in Article VIII of the parties' 1985-86 collective bargaining agreement do not contain any language which expressly prohibits the use of sick leave for an emotional disability in connection with the death of a family member for which the employee has exhausted emergency leave, nor is such a prohibition expressed in any other provision of the parties' 1985-86 collective bargaining agreement; neither Article VIII, nor any other provision in the parties' 1985-86 collective bargaining agreement expresses a standard for determining when an employee is sick; emotional distress occasioned by the death of her father rendered Ms. Gjerde unable to perform her work duties on Friday, September 27, 1985; on Friday, September 27, 1985, Ms. Gjerde was sick within the meaning of Article VIII, A, of the parties' 1985-86 collective bargaining agreement; and that Ms. Gjerde was contractually entitled to have her absence of Friday, September 27, 1985 charged as a sick leave day.

CONCLUSIONS OF LAW

1. Amery School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.
2. NUE is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.
3. Amery School District violated Article VIII (A) of the 1985-86 collective bargaining agreement between the District and NUE when the District refused to charge the Friday, September 27, 1985 absence of Ione Gjerde as a sick leave day.
4. By violating a provision of the 1985-86 collective bargaining agreement between the District and NUE, Amery School District has violated Sec. 111.70(3)(a)5, Stats.

Based upon the above and foregoing Findings of Fact, and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

IT IS HEREBY ORDERED that Amery School District, its officers and agents, shall immediately

1. Cease and desist from violating Article VIII (A) of the 1985-86 collective bargaining agreement by refusing to charge the Friday, September 27, 1985 absence of Ione Gjerde as a sick leave day.

(Footnote one on page 6)

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

- A. Charge Ione Gjerde's absence on Friday, September 27, 1985 as a sick leave day.
- B. Restore to Ione Gjerde, for use during the 1987-88 school year, the one day of personal leave which the District unlawfully charged to Ione Gjerde on Friday, September 27, 1985.
- C. Reimburse Ms. Gjerde for any substitute teachers' salary which may have been deducted from her wages for Friday, September 27, 1985, together with interest at the statutory rate of 12% (twelve per-cent) per annum on said amount from the date that the amount was deducted from Ms. Gjerde's wages. 2/
- D. Notify the Wisconsin Employment Relations Commission within 20 (twenty) days of this decision what action the District has taken to comply with this order.

Dated at Madison, Wisconsin this 27th day of January, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns
Coleen A. Burns, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

2/ The rate set forth in Sec. 814.04(4), Stats., at the time the instant complaint was filed.

AMERY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The parties' agreement does not provide for the final and binding arbitration of contractual disputes. Complainant, Northwest United Educators, filed a complaint of prohibited practices against the Amery School District alleging that the District violated the parties' agreement and, consequently, Sec. 111.70(3)(a)5 of MERA, when the District failed to grant and pay Ione Gjerde's sick leave request. The District raised no issue with regard to the jurisdiction of the Commission to determine the matter. The District denies that it has breached the parties' agreement or violated MERA.

POSITION OF THE PARTIES

Complainant

The provisions in dispute are Sections A, B, and C of Article VIII. These provisions do not contain any language which prohibits the use of sick leave in cases of emotional disability, or limits the use of sick leave in connection with emergency leave. No where does it say that a teacher must exhaust personal leave to extend a paid leave which began with the use and exhaustion of the emergency leave days.

Contrary to the assertion of the District, there is no binding past practice. As evidenced by the testimony of Principal Allen Stoddard, there has been only one case in twenty-three years which dealt with the instant issue. In this case, involving Pat La Rue, the timelines for filing a grievance had expired prior to NUE representatives learning of the facts of the case. As soon as NUE became aware of the facts, NUE objected to the District's position that it had the right, upon expiration of La Rue's two emergency days, to require La Rue to use personal leave and to deny La Rue the use of sick leave. For a past practice to be binding, it is necessary that there be mutuality of agreement. The La Rue case is an isolated incident, lacking the requisite mutuality of agreement, and does not rise to the level of a binding past practice.

Nor does the evidence of bargaining history support the District's position. In the contract negotiated after the La Rue incident, the parties increased the number of emergency days from two to three; the word "death" was added to the phrase "of serious illness, major surgery, or serious incident," and the maternity leave language was revised. As the testimony of NUE representative Manson establishes, NUE did not agree to the District's position on the issue in dispute herein, nor does the evidence demonstrate a quid pro quo for the change in the leave provisions.

While the District denies that grief is a physical disability, Superintendent Norsted acknowledged at hearing that emotional disability may serve as a legitimate basis for the use of sick leave. The principle of equity and the principles of contract construction support Complainant's position herein.

Respondent

One state court has defined sick leave as being a "leave of absence from duty granted on account of sickness, injury, or disability." (See, Nelson v. Dean, 168 P.2d 16 (1946).) Webster's New Collegiate Dictionary defines sick leave as, "1: an absence from work permitted because of illness. 2: the number of days per year for which an employer agrees to pay employees who are sick." (See also, Vindicator Printing Co., 72 LA 229, 233.) These definitions, the District believes, outline the concept of and philosophy for sick leave benefits, i.e., that sick leave benefits are intended to provide employes with a source of income due to temporary disability due to physical incapacitation.

The District does not deny that a death, serious illness, injury, or accident involving an immediate family member will be accompanied by an emotional reaction. Recognizing this fact, the parties negotiated specific language for such absences, i.e., the emergency leave provision, which leave is expressly capped at three days.

In this case, the Examiner is faced with deciding whether the District has committed a prohibited practice because Ms. Gjerde was denied her request for one sick leave day due to an alleged emotional inability to teach on a particular day. To decide whether management has abused its discretion in this regard, close attention should be given to all of the relevant facts.

The geographic distance from Amery and the factors surrounding her father's death understandably prevented Ms. Gjerde from returning to Amery until Monday. In her letter of January 6, 1986, Ms. Gjerde wrote as follows:

In many cases three days of emergency leave is not adequate to take care of a death in the family, and it seems appropriate to be able to use at least two sick days if needed. Because I had already requested a personal leave day in October for family reasons, I have been working since then with no emergency or personal days available to me. This doesn't seem quite fair in that I have over eight-five sick days built up. (Emphasis supplied).

This paragraph suggests a different reason than "emotional inability" for the treatment of Friday, September 27. If, in fact, the sole reason for Ms. Gjerde's absence from work on September 27, 1985, is because she was emotionally upset, there would be no reason for her to say anything about the adequacy of three days emergency leave in the event of a death in the family. The District contends that the clear and satisfactory preponderance of the evidence in this case can only support the conclusion that the real reason for the prohibited practices complaint is the perceived inadequacy by the employe, and the Union, of the number of emergency leave days in the master contract. To corroborate the District's contention, the Examiner need go no further than Alan Manson's testimony on the bargaining history of the emergency leave language in the collective bargaining agreement.

In 1977, the contract provided for two days of emergency leave. NUE argued that two days was inadequate and the parties bargained an additional emergency leave day in the successor contract. At that time, the parties could have bargained language allowing employes to pick and chose whether sick leave or emergency leave days should be charged to their record. However, they did not.

The significance to be attached to the evidence of past practice is that the District has been consistent in its application of leave provisions. Ms. Gjerde and La Rue both utilized the emergency leave provision in the contract when there was a serious illness and subsequent death in the family. After each had exhausted their emergency leave, they sought to use sick leave. In each case, the District was compelled by the labor agreement to deny these requests.

NUE's position herein is flawed and inconsistent. Certainly, Ms. Gjerde would admit that she would have been no less "emotionally unable" to teach on the date of her father's death than on the following date. Yet, there is no objection to September 27th being charged as an emergency leave day. Complainant's logic in this case is governed by simple economics, i.e., emergency leave days are non-cumulative and not deducted from sick leave accumulation and, thus, if emergency leave days are not used during the school year the economic benefit is lost forever. If September 27 should be treated as sick leave, then all four days should be treated as sick leave days and there would be no reason to have emergency leave language in the contract.

NUE suggests that the Examiner interpret the agreement according to what it does not say rather than by what it does say. By asserting that a negative should be construed to prove a positive, NUE is admitting that it cannot meet its burden of proof by showing through a clear and satisfactory preponderance of the evidence that the District violated the terms of the agreement. The Commission must base its decision upon what the contract says, not what it does not say.

NUE must show by a clear and satisfactory preponderance of the evidence that the District violated the 1985-86 contract by charging Ms. Gjerde's September 27, 1985 absence as a personal day. NUE has failed to meet this burden.

The evidence, by a clear and satisfactory preponderance, proves that the unambiguous contract language, the bargaining history, and the past practice

supports the District's action. Accordingly, NUE's complaint should be dismissed with prejudice in all respects.

DISCUSSION

Complainant alleges that Respondent has committed a prohibited practice by violating Sec. 111.70(3)(a)5, Stats. Section 111.70(3)(a)5, Stats., provides that it is a prohibited practice for a municipal employer, such as Respondent, to:

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning and application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

According to Complainant, Respondent violated the parties' 1985-86 collective bargaining agreement when it denied Ione Gjerde's request to have Friday, September 27, 1985, compensated as a sick day.

There is little dispute as to the factual circumstance giving rise to the grievance. Ms. Gjerde was absent from work on four days, September 24 through September 27, 1985. The absences of September 24, 25 and 26 were for the purpose of attending her father at the time of his illness and death. It is undisputed that these three days were appropriately charged as emergency leave days. At issue, is whether Ms. Gjerde is contractually entitled to have her absence on Friday, September 27, 1985 compensated as a sick leave day, rather than as a personal leave day.

According to Ms. Gjerde, her absence on Friday, September 27, 1985 was due to the fact that the emotional distress occasioned by the death of her father rendered her unfit to perform her work duties. While Respondent does not contest Ms. Gjerde's determination to be absent on Friday, September 27, 1985, Respondent does question whether Friday's absence was due entirely to emotional distress.

Respondent notes that, in order to teach on Friday and return for the funeral on Saturday, Ms. Gjerde would have to travel a round trip distance of some four hundred and eighty miles. At hearing, Ms. Gjerde acknowledged that the trip from Pelican Rapids to Amery would have taken approximately five and one-half hours. According to Ms. Gjerde, however, following her father's death on Thursday, it would have been possible for her to return to Amery in time to teach on Friday, September 27, 1985. The record does not demonstrate otherwise. Contrary to the argument of Respondent, it is not evident that the distance from Pelican Rapids to Amery was a factor in Ms. Gjerde's decision to be absent on Friday, September 27, 1985.

It is true that Ms. Gjerde's January 6, 1986 letter to Dr. Clausen contains a protestation that three days of emergency leave is insufficient and a pronouncement that an employe ought to be able to use at least two sick leave days if needed to take care of a death in the family. However, in the third paragraph of the January 6, 1986 letter, Ms. Gjerde makes it clear that the reason for her request for sick leave on Friday, September 27, 1985, is that she "was emotionally unable to be in school on that Friday," 3/ which position Ms. Gjerde has consistently maintained throughout this proceeding. Contrary to the argument of Respondent, the record does not demonstrate that the reason for Ms. Gjerde's sick leave request is disgruntlement due to a perceived inadequacy in the emergency leave provision.

Given the record evidence presented herein, the Examiner is persuaded that the reason for Ms. Gjerde's absence from work on Friday, September 27, 1985 was that emotional distress occasioned by the death of her father rendered Ms. Gjerde incapable of performing her work duties. The question then becomes whether such an absence is compensable as sick leave.

3/ Joint Exhibit #2.

At hearing, Roy Norsted, Respondent's District Administrator, acknowledged that it was possible to use sick leave for emotional disability. 4/ According to Norsted, however, sick leave cannot be used for an emotional disability in connection with the death of a family member for which the employe has exhausted emergency leave. The contract language, however, does not contain such a distinction.

In the parties' 1985-86 contract, the sick leave and emergency leave provisions are contained in Article VIII, Leaves of Absence. The sick leave provision is as follows:

- A. Sick Leave - Ten (10) days sick leave shall be granted annually cumulative to one hundred (100) days.

The emergency leave provision contains the following language:

- B. Emergency Leave - All professional personnel of the school district shall be allowed up to three (3) days leave per year with pay (not accumulative and not deducted from sick leave in case of death, serious illness, major surgery, or serious accident involving a member of the immediate family). The term "immediate family" shall be construed to mean spouse, children, parents, grandparents, grandchildren, mother-in-law, father-in-law, brothers, sisters, or others living in the home with the employee. Requests for leave where individuals other than those members described shall be at the discretion of each principal.

As a review of the above language discloses, neither provision contains any language which expressly prohibits the use of sick leave in cases involving emotional disability in connection with the death of a family member for which an employe has exhausted emergency leave. Nor is such a prohibition expressed in any other provision of the 1985-86 collective bargaining agreement.

The 1985-86 collective bargaining agreement does not define the word "sick," nor does it set forth a standard for determining when an employe is contractually entitled to sick leave. Where, as here, a term is not defined in the collective bargaining agreement, it is generally recognized that the term is to be given its ordinary and commonly accepted meaning. Roberts' Dictionary of Industrial Relations (Third Edition), which dictionary is generally recognized and accepted in the field of labor relations, defines "sick leave" as "Time allowed off from work to an employe because of illness, accident, or some other incapacity." In the Roberts' definition, sick leave is not limited to instances of physical illness. Rather, the definition recognizes that sick leave may be allowed for incapacities other than physical illness.

The Roberts' definition is consistent with District Administrator Norsted's testimony, i.e., that emotional disability may serve as a legitimate basis for the use of sick leave. In the present case, Ms. Gjerde claims that emotional distress rendered her incapable of teaching. The record does not demonstrate otherwise. Thus, construing the sick leave provision in accordance with the Roberts' definition, Ms. Gjerde was entitled to the use of sick leave on Friday, September 27, 1985.

According to Respondent, the evidence of past practice and negotiations history supports Respondent's construction of Article VIII, i.e., that sick leave is not available for emotional disability in connection with the death of a family member for which the employe has exhausted emergency leave. In the present case, however, such evidence does not contradict the Examiner's conclusion that Ms. Gjerde is contractually entitled to sick leave.

According to Respondent, the denial of Ms. Gjerde's sick leave request was consistent with the parties past practice, i.e., the treatment of Patricia La Rue. In the twenty-three years prior to hearing, there has been one

4/ T. p. 43.

instance where an employe exhausted emergency leave in connection with the death of a family member, which incident occurred during the 1976-77 school year and involved a teacher named Patricia La Rue.

According to Principal Stoddard, who supervised Ms. La Rue in 1976-77, Ms. La Rue exhausted emergency leave in connection with the illness of her husband. Principal Stoddard further recalls that, upon exhaustion of her emergency leave, Ms. La Rue was granted several days absence without pay in connection with the illness and subsequent death of her husband.

As Complainant argues, one instance does not make a past practice. Moreover, neither the testimony of Principal Stoddard, nor any other record evidence, demonstrates that Ms. La Rue made any claim that emotional distress rendered her incapable of performing her work duties. The La Rue case fails to establish a past practice of denying sick leave in the circumstances presented herein. Nor is there any other evidence which demonstrates such a past practice.

According to the uncontradicted testimony of NUE Representative Alan Manson, NUE first learned of Ms. La Rue's loss of pay when the parties met to negotiate the 1978-80 contract, 5/ at which time it was too late to protest Ms. La Rue's loss of pay by filing either a grievance or a complaint of prohibited practices. Mr. Manson recalls that, during these negotiations, the District advised Mr. Manson that it "interpreted the available use of sick leave in connection with the emergency leave to be limited." 6/

According to Mr. Manson, NUE maintained the same position throughout the negotiations, i.e., "that sick leave should be available whenever an employe is physically or emotionally unable to work regardless of whether they have used emergency and/or personal leave in connection with any illness or death or injury to an immediate family member." 7/ Mr. Manson, recalls that the discussion of the La Rue case produced two changes in the contract language, i.e., (1) emergency leave was increased from two to three days and (2) death of an immediate family member was added to the list of conditions under which an employe could take emergency leave.

Superintendent Norsted, who was present at the negotiations sessions on the 1978-80 contract, recalls that the La Rue situation was discussed at that time. Although Superintendent Norsted did not offer any testimony on the specifics of the discussion, he recalled that as a solution to the problem, the emergency days were changed from two to three. 8/ Superintendent Norsted could not recall any agreement by Respondent that sick leave was available if an employe exhausted emergency leave, nor could Superintendent Norsted recall any discussion regarding NUE's assertion that sick leave was available if an employe exhausted his or her emergency leave.

The evidence of the 1978-80 contract negotiations discussed supra, demonstrates that NUE consistently maintained the position that an employe in Ms. Gjerde's circumstance would be entitled to sick leave. While the record on this point is not entirely clear, it appears that the District took issue with NUE's position and indicated that the use of sick leave was limited when used in connection with emergency leave. While it is evident that, as a result of their discussion on the La Rue case, the parties modified the emergency leave in two respects, i.e., emergency leave was increased from two to three days and the death of a family member was included as a basis for emergency leave, it is not evident that the change was a quid pro quo for NUE's acceptance of the

5/ At hearing, Mr. Manson referred to the contract as the 1977-78 contract. It is evident, however, that Mr. Manson was, in fact, describing the negotiation of the 1978-80 contract.

6/ T. p. 34. Mr. Manson did not elaborate on this remark. Nor is there any other record evidence which establishes the specifics of the Respondent's position on the sick leave issue.

7/ T. p. 35.

8/ T. p. 41.

District's position herein, i.e., that sick leave cannot be used for an emotional disability in connection with the death of a family member for which the employe has exhausted emergency leave.

The record fails to demonstrate that either sick leave or emergency leave was at issue in the negotiation of the collective bargaining agreements which succeeded the parties' 1978-80 agreement. The sick leave and emergency leave language of the 1978-80 agreement is identical to that of the 1985-86 agreement. For the reasons discussed supra, the language of these provisions supports the finding that Ms. Gjerde is contractually entitled to sick leave for her absence on Friday, September 27, 1985.

For the reasons discussed supra, the Examiner concludes that Respondent violated the 1985-86 collective bargaining agreement when it denied Ms. Gjerde's request to have Friday, September 27, 1985 charged as a sick leave day. Respondent's conduct is in violation of Sec. 111.70(3)(a)5, Stats. To remedy this violation, Respondent is hereby ordered to cease and desist from violating Sec. 111.70(3)(a)5 by violating Article VIII of the 1985-86 collective bargaining agreement by refusing to charge Ms. Gjerde's absence on Friday, September 27, 1985, as a sick leave day; to charge Ms. Gjerde's absence on Friday, September 27, 1985 as a sick leave day; to restore to Ms. Gjerde the personal leave day which Respondent incorrectly charged to Ms. Gjerde on September 27, 1985; and to reimburse Ms. Gjerde for any substitute teachers' salary which may have been deducted from the personal leave pay paid to Ms. Gjerde for September 27, 1985, together with interest at the rate set forth in Sec. 814.04(4), Stats.

Dated at Madison, Wisconsin this 27th day of January, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A Burns
Coleen A. Burns, Examiner