STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL, AFSCME, AFL-CIO and LOCAL 305, Complainants, vs. CITY OF WAUWATOSA, Respondent.	Case 103 No. 52706 MP-3031 Decision No. 28497-A

Appearances:

Mr. David B. Kern, Quarles & Brady, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, on behalf of the City.

Mr. Alvin R. Ugent, Podell, Ugent & Cross, Attorneys at Law, 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202-5004, on behalf of District Council 48 and Local 305.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 22, 1995, Complainants Milwaukee District Council 48, AFSCME, AFL-CIO and its Local Union No. 305 (hereafter Union) filed a complaint of prohibited practices against the City of Wauwatosa (hereafter City) with the Wisconsin Employment Relations Commission alleging violations of Sec. 111.70(3)(a)1 and 4, Stats. On August 23, 1995, the Commission appointed Sharon A. Gallagher, 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 Section 111.07(5), Stats. Hearing on the complaint was originally scheduled for October 9, 1995 but was later postponed and held on January 8, 1996 at Wauwatosa, Wisconsin. A stenographic transcript of the proceedings was made and received by February 13, 1996. The parties submitted their written arguments regarding their respective positions in the case by April 15, 1996. The Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainants, Milwaukee District Council 48, AFSCME, AFL-CIO and Local Union No. 305 (Union) are labor organizations within the meaning of 111.70(1)(j), Stats. and the offices of the Union are located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. Respondent, City of Wauwatosa (City) is a municipal employer within the meaning of Section 111.70(1)(a), Stats., and its principal office is located at 7725 West North Avenue, Wauwatosa, Wisconsin 53213.

3. The Union and the City have had a collective bargaining relationship for many years and they were parties to a collective bargaining agreement in effect for the period 1993-95, covering employes of the City's Department of Public Works. The effective labor agreement contains a grievance procedure culminating in final and binding arbitration, and a provision, "Work Rules and Regulations," including the following:

. . .

> 6. If an employee is going to be absent from work due to illness or injury (work connected or not) or other authorized leave other than vacation or holiday, they shall notify their supervisor or the supervisor's designated representative thirty minutes prior to the start of the employee's next scheduled shift and state the reason for the absence. Employees who are hospitalized or physically incapacitated shall provide their supervisors periodic reports as to recovery and prospects for return to work.
>
> The following notice to be reposted and enforced:
>
> NOTICE TO ALL EMPLOYEES
>
> **********
>
> **IN ACCORDANCE WITH THE WORK RULES EFFECTIVE 1/1/79 -- WORK RULE A-6 -- "NOTIFICATION OF ILLNESS TO SUPERVISOR."**
>
> ALL EMPLOYEES ARE HEREBY NOTIFIED THAT EFFECTIVE IMMEDIATELY, INDIVIDUAL EMPLOYEES **MUST PERSONALLY CALL IN** FOR SICK LEAVE BETWEEN **7:00 A.M.** AND **7:30 A.M.** ON THE DAY SICK LEAVE IS TO BE USED. SUCH REQUESTS WILL ONLY BE ACCEPTED BY AN
>
> AUTHORIZED SUPERVISOR
>
> SICK LEAVE REQUESTS WILL NOT BE GRANTED UNLESS THE PROPER CALL-IN NUMBER RECEIVED FROM THE SUPERVISOR IS PRESENTED BY THE EMPLOYEE UPON HIS RETURN TO WORK AND ENTERED BY THE EMPLOYEE ON THE TIME CARD.

THIS IS THE ONLY METHOD IN WHICH SICK LEAVE
AND SICK LEAVE PAY WILL BE APPROVED.

. . .

4. Since at least 1988, the labor agreement has contained the following language:

> Section 1.
> Eligibility for sick leave allowance shall begin after the completion of 12 months of employment with the City, but accumulations shall begin with the date of regular appointment.
>
> Section 2.
> Employees shall earn 12 working days sick leave with pay during each year of service accumulative in the sick leave account. Maximum allowable accumulation in the sick leave account shall be 156 days.
>
> Section 3.
> Administration and interpretation of this article shall be in accordance with the provisions set forth herein:
>
> > a. After the completion of 12 months of employment with the City, employees on a weekly or a monthly salary, and employees not on a weekly or monthly salary, but who have been employed by the City on a full-time basis for a period of not less than 5 years, may be given leave of absence with pay by the respective department heads.
> >
> > b. Such leave of absence with pay may be given on account of the sickness or the extension of funeral leave for one of the immediate family defined to mean the husband, wife, child, brother, sister, parent or a relative living in the same household of an employee, or on account of absence in compliance with quarantine regulations of the health authorities, when in such case the leave of absence is approved by the department head and the Personnel Department. Such leave of absence with pay may be given on account of other causes of absence if granted or ratified by resolution of the Common Council.
> >
> > c. Such leave for a bona fide illness of 3 consecutive days

may be permitted without requiring the employee to submit a certificate as hereinafter set forth, provided that the department head has other satisfactory evidence warranting the leave. When the officer or employee is absent from duty on account of such illness beyond 3 consecutive days, a statement from a private physician, a dentist, or from an assigned City physician or nurse, certifying the nature and seriousness of the sickness, or the certificate of an authorized Christian Science practitioner certifying that the employee is under Christian Science treatment, shall be furnished to the department head, who shall forward the same to the Health Commissioner for his/her approval, and if so approved such leave of absence with pay may be given.

The Personnel Department shall be promptly advised of such leave. The return to work by an employee after absence from duty on account of illness shall be subject to the approval of the department head or of the City Health Commissioner, except that in the event of approval or disapproval of the employee's physical fitness to return to work by the Health Commissioner his/her determination shall be final.

d. It is intended that such leave of absence shall be figured for a full prior year's service on the basis of the previous calendar year. Where such service has not been rendered, such leave shall be reduced so that the same shall be in proportion to the actual period of service performed. Vacations, leaves of absence with pay, and absence due to injury or illness compensable under the Worker's Compensation law of this state shall be construed as such service for the purpose of computing the maximum leave of absence with pay allowable.

e. Leaves of absence with pay not in excess of four hours and in addition to the maximum leave of absence with pay provided for in paragraph a (sic) above, shall be granted for the purpose of permitting not to exceed 6 employees in the classified service, as designated by the department head or assistant department head, and in their absence, the Mayor, to attend the funeral of a deceased employee from their department, during the normal course of time an employee would be working at his/her job.

> Willful violation of any of the provisions hereof by any employee or the willful making of any false report regarding illness or sick leave, shall subject the employee committing such violation, or making such false report, to disciplinary action and shall be considered a cause for discharge, suspension, demotion, or dismissal, subject to the law and rules regulating such action.
>
> Leaves of absence without pay may be granted for any cause considered by the department head as sufficient upon approval of the Common Council.
>
> f. An employee is first credited with twelve days and he/she can use such sick leave when he/she attains his/her first anniversary date of employment with the City. Thereafter, sick leave is computed and granted on a calendar year basis with an employee receiving twelve days or a prorated amount, depending if an employee has a full or less than a full 2,000 compensated hours, based on the previous calendar year.
>
> g. An employee may utilize unused accumulated sick leave entitlements with respect to disabilities due to pregnancy.
>
> h. Employees should make a good faith effort to schedule non-emergency doctor or dentist appointments after work hours or at the beginning or end of the work day. Employees shall leave and return at a reasonable time if the appointment is during the work day.
>
> i. Employee benefits under the Agreement will count towards benefits required under the Wisconsin Family and Medical Leave Act. . . .

5. Prior to May, 1994 and pursuant to the City's Work Rules and the labor agreement, employes would call in at the stated time (per Article XIV and the Rules and Regulations), request to use leave, stating a reason for their absence; the supervisor then gave the employe a sick leave number and unless the supervisor was aware of other independent evidence to the contrary, the supervisor presumed the employes' sick leave usage was appropriate and if the employe placed his/her sick leave number on his/her timecard, sick leave was granted. Some but not all supervisors required employes to give them specific reasons for sick leave before giving them sick leave numbers. Some supervisors required employes to place the reason for their absence as well as the

sick leave number obtained on their timecard, while other supervisors required only that the sick leave number be placed on timecards by the employes involved. Also prior to May, 1994, supervisors had discussed sick leave usage generally with employes at their annual evaluations. These discussions were not uniform, they did not amount to counseling sessions and they were not considered a step in the disciplinary process. Sick leave usage was not regularly and separately documented with copies sent to the employes' personnel file.

6. The City has attempted to negotiate changes in Article XIV - Sick Leave since at least 1988. During negotiations for the 1990-91 contract, the City proposed the following changes in Article XIV - Sick Leave:

> 14. Amend Article XIV, Section 3 by amending subsection H and by adding new subsections J and K as follows:
>
> H. Employees having non-emergency appointments must notify their supervisor at least forty-eight (48) hours in advance of such an appointment. If a contact with the doctor or dentist reveals that the appointment can be made at a time after or before regular working hours, the supervisor may either deny the use of sick leave or assist the employee in rescheduling the appointment.
>
> I. (as is)
>
> J. Where a pattern of abuse is established by management, management has the right to require a doctor's certificate even if there is an absence of less than three (3) days. Such certificate must contain, at a minimum, the date and time the employee was seen, a diagnosis and a prognosis.
>
> K. The supervisor may verify illness via telephone call or home visit. If the employee does not answer the phone in person or is not at home, the employee must provide verification of his or her visit to the doctor, dentist or a pharmacist which includes the time of such visit. If such verification cannot be provided, sick leave may be denied.

The City did not gain the Union's acceptance of these changes and it dropped the above-quoted proposal prior to agreeing upon a 1990-91 contract with the Union.

7. Work Rule 6 (quoted in Finding No. 3 above) has appeared in the parties' labor agreements since 1979, when the parties negotiated a contract settlement before an interest

arbitration hearing commenced. The above-quoted notice was actually first implemented by the City in 1969 and thereupon became a part of the parties' past practices. Under this rule and the notice, employes would call in at least thirty minutes prior to their starting time to tell their supervisors they wished to use sick leave and the reason therefor. It is undisputed that some supervisors required employes to give specific reasons for their absences, while others did not; that the City's supervisors, so notified, would then give employes sick leave numbers which employes placed on their time cards upon returning to work; and that in some departments of the City, employes were required to also place the reasons for their absences on their time cards upon returning to work. Over the years, some employes gave specific reasons for their absences, while others have stated only that they were sick or ill. Yet all employes were given sick leave numbers by their supervisors. Union Representative Radtke stated that prior to May, 1994, the receipt of a sick leave number constituted supervisory approval of absences pursuant to past practice. Radtke also stated that in the past, when a supervisor has denied an employe a sick leave number, the Union has grieved this action.

8. During the negotiations over the 1993-95 contract, the City proposed the following changes in Article XIV:

. . .

> Section 3.
> Administration and interpretation of this article shall be in accordance with the provisions set forth herein:
>
> > A. After the completion of 12 months of employment with the City, employees on a weekly or a monthly salary, and employees not on a weekly or monthly salary, but who have been employed by the City on a full-time basis for a period of not less than 5 years, may be given ~~leave of absence~~ sick leave with pay by the respective department heads.
> >
> > B. Such leave of absence with pay may be given on account of the sickness or the extension of funeral leave for one of the immediate family defined to mean the husband, wife, child, brother, sister, parent or a relative living in the same household of an employee, or on account of absence in compliance with quarantine regulations of the health authorities, when in such case the leave of absence is approved by the department head and the Personnel Department. Such leave of absence with pay may be given on account of other causes of absence if granted or ratified by resolution of the Common Council.

C. Such leave for bona fide illness of 3 consecutive days may be permitted without requiring the employee to submit a certificate ~~as hereinafter set forth~~, provided that the department head has other satisfactory evidence warranting the leave.

When the ~~officer or~~ employee is absent from duty on account of such illness beyond 3 consecutive days, a statement from a private physician, a dentist, or from an assigned City physician or nurse, certifying the nature and seriousness of the sickness, or the certificate of an authorized Christian Science treatment, shall be furnished to the department head, ~~who shall forward the same to the Health Commissioner for his/her approval, and if so approved such leave of absence with pay may be given.~~

If the supervisor does not have satisfactory evidence that the employee's illness is bona fide, the employee may be required to furnish a (sic) acceptable medical statement for an illness of less than 3 consecutive days.

~~The Personnel Department shall be promptly advised of such leave. The return to work by an employee after absence from duty on account of illness shall be subject to the approval of the department head or of the City Health Commissioner, except that in the event of approval or disapproval of the employee's physical fitness to return to work by the Health Commissioner his/her determination shall be final.~~

D. It is intended that such leave of absence shall be figured for a full prior year's service on the basis of the previous calendar year. Where such service has not been rendered, such leave shall be reduced so that the same shall be in proportion to the actual period of service performed. Vacations, leaves of absence with pay, and absence due to injury or illness compensable under the Worker's Compensation law of this state shall be construed as such service for the purpose of computing the maximum leave of absence with pay allowable.

E. Leaves of absence with pay not in excess of four hours and in addition to the maximum leave of absence with pay provided for in paragraph A above, shall be granted for the purpose of permitting not to exceed 6 employees in the classified service, as designated by the department head or

assistant department head, and in their absence, the Mayor, to attend the funeral of a deceased employee from their department, during the normal course of time an employee would be working at his/her job.

F. Willful violation of any of the provisions ~~hereof~~ of this Article by any employee or the willful making of any false report regarding illness or sick leave, shall subject the employee committing such violation, or making such false report, to disciplinary action and shall be considered a cause for discharge, suspension, demotion, or dismissal, subject to the law and rules regulating such action.

G. Leaves of absence without pay may be granted for any cause considered by the department head as sufficient upon approval of the ~~Common Council~~ City Administrator.

~~F~~H. An employee is first credited with twelve days and he/she can use such sick leave when he/she attains his/her first anniversary date of employment with the City. Thereafter, sick leave is computed and granted on a calendar year basis with an employee receiving twelve days or a prorated amount, depending if an employee has a full or less than a full 2,000 compensated hours, based on the previous calendar year.

~~G~~I. An employee may utilize unused accumulated sick leave entitlements with respect to disabilities due to pregnancy.

~~H~~J. Employees should make a good faith effort to schedule non-emergency doctor or dentist appointments after work hours or at the beginning or end of the work day. An employee who has a non-emergency doctor or dentist appointment shall notify his/her supervisor at least 48 hours in advance of the appointment. The employee's supervisor may verify that the appointment could not be made during non-working hours. Employees shall leave and return at a reasonable time if the appointment is during the work day.

~~I~~K. Employee benefits under the Agreement will count towards benefits required under the Wisconsin family and

Medical Leave Act.

The City dropped this proposal during negotiations and this proposal did not form a part of the 1993-95 contract agreed upon by the parties.

9. Also, during negotiations for the 1993-95 labor agreement, the City proposed the following Sick Leave Incentive Program:

Section 4. Sick Leave Incentive Program

A. Effective _____, 1993, a Sick Leave Incentive Program shall be established. If this program becomes effective during a calendar year, the number of sick leave days for which on (sic) employee may receive pay at the end of the calendar year shall be determined by the number of months remaining in the calendar year when the program starts. For example, if the program is effective July 1, the maximum number of days an employee may request payment for shall be ___ days at half pay.

B. An employee who has accumulated at least 336 hours of total sick leave at the time sick leave is credited in January is eligible to participate in the sick leave buy back. Sick leave hours used by an employee will be taken first from the hours newly credited to the employee in January of the year and, if those are exhausted, from sick leave hours carried from previous years.

1. The eligible employee may chose to receive half pay for any number of unused sick leave days up to _ ____ The only sick leave days considered for this pay out are those newly credited to an employee's account in January of each year.

2. The number of days paid to the employee shall be deleted from the employee's sick leave accumulation. Unused sick leave days that the employee does not request pay for will accumulate in the employee's sick leave account.

3. The eligible employee must provide the Personnel Department with written notification that he/she

wants to be paid for unused sick days by January 15 of each year of the program. The notice must indicate the number of days for which the employee wishes to be paid.

4. Payment will be provided by the end of February to those employees who meet all qualifications.

C. An employee who retires from active service with at least 15 years of service for the City and who is at least 55 years of age shall be paid for _____ of his/her unused sick leave balance at the time of retirement.

D. Effective _____, 1993, any absence of up to 8 consecutive normally scheduled work hours shall not be compensated from the employee's sick leave accumulation. If the absence is before and after a weekend or holiday or a weekend with a contiguous holiday(s), the first 16 consecutive normally scheduled work hours shall not be compensated from the employee's sick leave accumulation.

1. An employee who has accumulated overtime may use such time to receive pay for the day. If the employee has no accumulated overtime, he/she may use accumulated and unused vacation, or a floating holiday to receive pay for the day. An employee may chose not to receive pay for the day. The employee shall not use minus time to be paid for a sick leave day.

2. An employee who intends to be absent due to illness must call in according to the current procedure. The employee shall state that he/she is sick and, if he/she wishes to be paid for the day, that the money should come from his/her overtime account or other account, as described in D.1., above.

E. In order to be eligible for the benefits provided by Sick Leave Extension Policy adopted December 7, 1991, an employee must have at least 600 hours in his/her sick leave account at the beginning of his/her period of illness.

F. This Section shall terminate on December 31, 1995. This

> is a pilot program entered into on the basis that it does not establish a precedent for future negotiations. Nothing in this Agreement shall be construed to mean this program shall continue past December 31, 1995, nor shall this program be deemed to be part of the status quo that continues in effect after December 31, 1995.

Again, the Union rejected the above-quoted sick leave incentive program and the City ultimately dropped it before settling the 1993-95 contract with the Union. In a document describing the 1993-95 tentative agreement, the parties included the following item:

> . . . Carry forward all other provisions and practices of the 1991-92 agreement. . . .

10. After negotiations for the 1993-95 agreement concluded, Engineering and Operations Administrator S. Howard Young (incumbent of the position since 1983) had several conversations with other City department heads and with members of the Union regarding sick leave usage by employes. Young also contacted management officials in the cities of West Allis and Milwaukee (which have very different sick leave provisions in their contracts) regarding sick leave usage by their employes. West Allis and Milwaukee officials indicated that their employes used an average of six to seven sick leave days per year out of approximately twelve accrued days per year. Young also studied Wauwatosa employes' sick leave usage for the calendar year 1992, and found that the employes under his supervision used an (arithmetic) average number of sick leave days per year of 11.75 days out of twelve total days accrued per year. From this, Young concluded that sick leave usage per employe in the City's DPW was far in excess of what was experienced in other City departments and in excess of that experienced by other municipal employers. Young believed he was making a proper comparison because employes accrued twelve sick leave days per year in each of the employing units he had studied. By letter dated July 7, 1993, Young wrote to then-Union President Baumann (copying Union Representative Radtke) regarding sick leave use, in relevant part as follows:

. . .

> I would like to call your attention to a matter of <u>great</u> <u>concern</u> <u>to</u> <u>us</u>. It has become obvious that the use of Sick Leave by Local 305 employees in the Operations Department exceeds that of other City departments, other municipalities in our area, and is higher than the national average.
>
> The attached report shows that approximately 119 days of sick leave

> was (sic) taken during a 2+ month period, or 2.5 employees on an average are absent each work day during the review period. this represents over 6% of the entire work force. This fact, in addition to the other absences experienced, for example Worker's Compensation injuries and other permitted leaves, has directly impacted the department's abilities to maintain various construction/repair functions on a program basis. I cannot overstress the importance of meeting program schedules needed to maintain the City's infrastructure and services.
>
> For example, in the Operations Section, the normal staff level of 39 employees is necessary, on a daily basis (see attached "crew staff" level). There are 48 (40 full-time and 8 part-time) employees during this period. The result is that if more than nine (9) employees are excused or absent, crew sizes must be reduced, or crews eliminated and reassigned to other duties. This is a loss of efficiency which cannot be allowed to routinely occur.
>
> The vacation allowance in this Section now stands at seven (7) employees permitted to be on leave at the same time. If additional employees are injured, sick or just otherwise gone, the City is almost guaranteed that there will be fewer employees than needed on any given day with regularity.
>
> We have, in the past, permitted vacation to be scheduled as liberally as possible. I am very disappointed at the sick leave average presently experienced and will continue to monitor this problem for the remainder of the year.
>
> Should no improvement in sick leave use occur, we will have no other alternative but to alter next year's policy for vacation, permitting only about half the number of employees to be absent at any one time.
>
> We would appreciate your review and discussion of this with Local 305 officers and members. If you have any comments, suggestions or questions on this matter, we will be happy to discuss the matter further.

At the time Young wrote this letter, the 1993-95 agreement had been executed and was fully effective. Baumann never responded to Young's letter and Young did not pursue the matter further.

11. In 1994, a grievance arose regarding whether and under what circumstances a doctor's certificate could be required for an absence of less than three days. Forestry Department employe Hans Koch properly called in sick on Friday, March 11, 1994 and Monday, March 14, 1994. Koch had been scheduled to take an examination for certification in pesticide application on March 11, 1994. Prior to March 11th, Koch had stated that he was afraid he would fail this exam. City Managers were aware of Koch's exam anxiety and when he called in sick on March 11th and 14th, they became suspicious. However, Koch's supervisor gave him sick leave numbers for both days. When Koch returned to work on March 15, 1994, his supervisor asked him for a doctor's certificate for his two-day absence. Koch produced these documents, but grieved the City's actions as being a violation of Article XIV, Section 3. Koch's grievance was brought before the Board of Public Works, a body made up exclusively of management representatives, which issued formal findings of fact and a decision on May 16, 1994. The Board found in favor of Koch, upholding the grievance, and it ordered that Koch's reasonable medical expenses should be reimbursed. At its June 20, 1994 meeting, Administrator Young requested that the Board of Public Works "reconsider its decision" in the Koch case. The minutes of this meeting read in relevant part as follows:

. . .

> Chief Steward Baseler for Union Local #305 had indicated via phone that the Union does not intend to contest this matter at present, as it is satisfied with the Board's decision.
>
> . . .
>
> Mr. Young reiterated that the reason for the requested reconsideration is because management feels that the Board's decision appears to be inconsistent with the specific language of Article XIV, Section 3 (c). The Board may not have considered the entire language of Section 3(c). Article XIV Section 3(c) states in part that "...Such leave for bona fide illness of three consecutive days may be permitted without requiring the employee to submit a certificate as hereinafter set forth, provided that the department head has other satisfactory evidence warranting the leave...". In this instance, the supervisor suspected that the illness may not have been bona fide.
>
> Considerable discussion ensued over whether satisfactory evidence existed to warrant requiring the excuse in this instance. It was the Board's position that sufficient evidence did not exist. Comments were also made about management's unsuccessful attempts to have the contract wording amended during negotiations so as to allow for the request for medical excuses for period (sic) of less than three

days.

> The Board clarified that the decision in this case pertained to this case only. It was in no way intended to strip management (nor does the Board have the authority to strip management) of this tool (requiring medical excuses) to control sick leave abuse. Management retains the right to request excuses as set forth in the contract.
>
> The Board further clarified that the grievance was sustained so that reasonable medical expenses would be reimbursed.
>
> Mr. Young stated that management would not contest the decision after hearing these clarifications.

. . .

12. Beginning in the Spring of 1994 (after the parties had settled the 1993-95 labor agreement), under the direction of Employe Relations Manager Thomas, Administrator Young and his management staff began to develop the Attendance Improvement Program (AIP). Young reviewed the bargaining agreement during the development of the AIP, but he sought no input from the Union and did not notify the Union of the City's intent to develop the AIP. Neither Young nor any other City official sought to bargain with the Union regarding the AIP before or after it implemented the AIP in or around early May, 1994.

13. The original AIP was not introduced into the record in this case because it was revised on June 21, 1994 in response to a class grievance filed by the Union on May 24, 1994. This class grievance arose because on May 5, 1994 approximately twelve unit employes were sent letters regarding their sick leave usage, pursuant to the original AIP. On May 12, 1994 Union Representative Radtke wrote the following letter to Employee Relations Manager Thomas:

. . .

> It has been brought to my attention that there have been letters sent to employees about sick leave usage and, subsequently, employees have been denied Union representation at meetings regarding this matter.
>
> If there are any meetings scheduled with employees about this matter, I would ask that you not meet with them until such time that I can be present.

> I would also like a copy of any and all letters that have been sent to employees about the usage of sick leave.
>
> . . .

On May 24, 1994, the Union filed a class grievance alleging that "(b)argaining unit members were sent letters concerning sick leave usage which were put in their files without the copies sent to the proper Union officials." The grievance sought future compliance with Article V, Section 11 which requires that the Union be sent "copies of all correspondence" sent to "bargaining unit members concerning wages, hours or conditions of employment." This grievance was settled at Step 2 by Operations Superintendent Janicek, who answered the grievance as follows:

> As a result of a procedural error in the notification process, the letters dated May 5, 1995 will be removed from the employee's personnel file. The meetings will be re-scheduled during June 1995 and be conducted in compliance with the disciplinary procedure as stated in the labor agreement. Copies of all notice (sic) will be provided. Grievance is allowed.

14. Thereafter, the City revised the AIP, effective June 21, 1994. The revised AIP contains the following provisions which were still in effect as of the date of the hearing herein:

> . . .
>
> I. PURPOSE
>
> To identify and eliminate sick leave abuse to help assure benefits are utilized as intended, thereby promoting judicious use of employee benefits so they are available when needed.
>
> II. EMPLOYEE TIME CARD
>
> Each use of sick leave shall, on a day by day basis, be documented by the employee as to the nature of the illness by a written description on the reverse side of the weekly time card in the space provided.
>
> III. TAKING SICK LEAVE CALLS
>
> 1. First line supervisors or their designees shall be contacted directly and in person by those employees

reporting to be ill. Such employees shall notify their supervisor at least 30 minutes prior to the employee's next scheduled shift and shall state the reason for the absence as further documented below. Hospitalized employees or other employees who have long-term physical incapacity shall provide their immediate supervisor with periodic status reports on the prospects for returning to work.

Sick leave will not be authorized unless the proper call-in number received from the supervisor is presented by the employee upon return to work and entry on the time card by the employee.

When taking such calls, supervisors should ascertain:

A. Specific nature of the illness.

B. How long employee expected (sic) to be on sick leave for the illness.

C. If appropriate, has the person seen a doctor?

2. It is the responsibility of the supervisor to decide whether or not to initially grant sick leave; even a medical excuse does not relieve a supervisor ultimately of this authority. In some cases, it may be appropriate to make a "light duty" assignment rather than approve of sick leave usage.

3. If there is any suspicion or evidence of sick leave abuse, the next level supervisor should be contacted and an appropriate response or action plan developed to deal with the matter, including the possibility of progressive discipline.

IV. USING THE SICK LEAVE EXCEPTION REPORT

1. Each month, supervisors will receive a report that will list information regarding sick leave usage of

employees in the work unit. This data shall be evaluated carefully to identify unusual circumstances or patterns. Where these exist, a discussion with the employee must be held to consider any relevant factors, impress upon the employee the need for good attendance, counsel if necessary, and if applicable, provide information about the Employee Assistance Plan.

2. In addition to the above, where such circumstances exist, the supervisor will need to:

   A. Begin tracking sick leave usage in more detail using a calendar, or form for each employee.

   B. Begin meeting with the employee after each absence to further clarify the circumstances, extent of recovery and prospect of future absences.

   C. If the illness appears suspect, initiate a practice of calling the employee's home during the absence to inquire about their improvement and prospect of returning to work in a timely fashion. Drive by the home, if convenient, during the day.

   D. The Collective Bargaining Agreement permits supervisors to require a medical certificate for absences of 3 days or less if the supervisor suspects the illness is not "bone fide" and needs further substantiation.

3. After utilizing all the above practices and no improvement is realized, the prospect of taking further action should be discussed with the next level supervisor, including the possibility of disciplinary action if appropriate. The City has the right to expect regular attendance even where a sick leave benefit is

provided.

V. RECOGNITION FOR GOOD ATTENDANCE

Post a monthly list of those employees who do not appear on the sick leave exception report, under the heading:

WAUWATOSA'S HEALTHY ONES

CONGRATULATIONS FOR YOUR GOOD SICK LEAVE RECORD"

and give them a bright, shiny apple (provided by the City).

15. In applying the revised AIP to its employes, the City has used five "triggers" to determine which employes should receive counseling and letters regarding their sick leave usage. These "triggers" can be described as follows:

. . .

Month End Accumulation	Hours Used This Month	Average Hr. Per Month Previous 12 Mos.	Occurrences This Month and Occurrences in 2 Mos.
Accumulation is less than 2/3 of possible accumulation	Employee used more than 16 hours.	Average is greater than 6 hours.	Record eliminated is (sic) both columns are zero; also if last column is 0 or 1.

The monthly statistics generated by the City show each employe's sick leave by department, listing data for each of the five trigger categories as well as the following additional categories: Years of service, maximum possible sick leave accumulation, sick leave hours used in the past month, average sick leave hours used per month across each employe's career.

16. Current Union President Art Baseler took sick leave in September and October, 1994 due to the final illness of his mother, his wife's hospitalization, and the funeral of his brother-in-law. Each time Baseler took sick leave, he timely called his supervisor and gave him specific reasons for his absences. In each instance, Baseler's supervisor gave Baseler sick leave numbers for each absence and never stated that he (the supervisor) disputed Baseler's use of sick leave for the purposes Baseler had indicated. As a result of Baseler's use of sick leave, Baseler received the following notice (containing statistics on his sick leave usage) from Operations Superintendent Janicek:

. . .

YRS OF SVC.	MAXIMUM POSSIBLE ACCUM.	MONTH END ACCUM.	HOURS THIS MONTH	HOURS PAST MONTH	AVG.HRS. PER MONTH PREV.	AVG.HRS. PER MONTH CAREER	OCCUR-RENCES THIS MONTH	OCCUR-RENCES IN 2 MOS.
21.3	1248.0	526.3	48.0	8.0	7.9	4.6	3	4

ATTENDANCE REVIEW

NOTIFICATION #1 Employee Art Baseler
Date 11-11-94 Position Eq. Op. II

Your attendance record has been reviewed, and it indicates that you have taken a substantial amount of time off from your duties previous to the report date.

> I would like to meet with you to discuss this matter with your supervisor, and a Union Representative, if you so desire. A meeting has been scheduled for 3:00 P.M. on Nov. 21, 1994 at my office.
>
> The purpose of this meeting will be to discuss your particular attendance record, the reporting method used, and any special circumstances which may have contributed to your record.
>
> Thank you for your cooperation in this matter of mutual concern.

. . .

Copies of this notice were sent to two supervisors, the Union and to Baseler's personnel file.

17. At the November 21, 1994 meeting, Baseler chose not to have another Union representative present, as he was then president of the Union. At the meeting, Janicek reviewed Baseler's sick leave record, asked Baseler for the reasons for his absences and told Baseler that under the AIP if employes use sick leave for any reason that is covered by the computer program trigger points, employes will receive a written attendance review and will be counselled by their supervisor regarding their sick leave usage.

18. Janicek stated that at this November, 1994 meeting, he was satisfied with Baseler's reasons for his absences. Nonetheless, Baseler received another written notice (like the one quoted above) to attend a counseling session with Janicek sometime in December, 1994. Baseler attended this session, even though Baseler had not used any sick leave in November, 1994. Baseler stated that at this December, 1994 meeting, Janicek asked him the same questions and made essentially the same statements regarding sick leave usage as he (Janicek) made in November, Baseler stated he felt this second meeting constituted harassment because he had satisfactorily explained his absences in November, 1994. Janicek did not issue Baseler a written warning regarding his absences at this or any time. Later, in his capacity as a Union representative, Baseler attended AIP counseling sessions with other employes, at which their supervisors told the employes they could be subject to further discipline if their attendance did not improve. In addition, in 1995, supervisors began issuing letters to employes whose excuses for their absences the supervisors deemed unacceptable. These letters contained the following language:

> Our records indicate your sick leave usage is at an unacceptable level and their (sic) do not appear to be extenuating circumstances justifying such use. The attached report summarizes your use of sick leave since January 1, 1995. Work attendance is very important to the City in maintaining productive and efficient operations. Your cooperation in minimizing sick leave is needed. We will continue to monitor future sick leave usage and if improvement is not made,

further action may be necessary. (emphasis in original)

. . .

Baseler stated that one employe received a copy of the above-quoted letter after a counseling session in which the employe had given his supervisor no explanation for his absences when asked by the supervisor at the session.

19. Union Representative Radtke was present at all employe attendance counseling sessions which occurred after May 24, 1994. At each session, Radtke stated, the supervisor issued each employe a letter stating that the counseling session was the first step of the disciplinary process and any further use of sick leave by the employe would result in further discipline in the future. Both Baseler and Administrator Young corroborated Radtke on this point. Radtke stated and Superintendent Janicek admitted that he (Janicek) had these letters typed up in advance, before the counseling sessions began with employes and before the employes had had an opportunity to explain their absences. However, Janicek stated that he decided whether or not to give each employe a copy of his standard form warning letter based upon the employe's explanation of his/her absences at the counseling sessions conducted.

20. Employes can get off the AIP list (which lists those who have allegedly used too much sick leave) avoid receiving attendance review letters, avoid counseling sessions and the possible issuance of letters thereafter, by not using any sick leave for two consecutive months. Thereafter, if the number of sick leave hours used by an employe is less than six hours per day and sixteen hours per month and the total sick leave accumulation has remains at more than two thirds of the total possible accumulation, then the trigger points will not be hit and the employe will not fall into the AIP. On these points, Superintendent Janicek stated at the instant hearing:

> (By Mr. Janicek)
> A: And employes asked what they had to do. In fact, I believe the Union staff rep and employes asked what do employes have to do not to show up on the report?
>
> (By Mr. Kern)
> Q: Not to show up on this list, this computer list?
>
> A: The monthly report.
>
> Q: Okay.
>
> A: And I said that if you take one -- if you take no more than one day every two-month interval that they would not appear on the report. . . .

Janicek also stated herein that employes who have extenuating circumstances may nonetheless be called in for attendance review counseling sessions although their excuse was previously accepted by the City previously:

> (By Mr. Janicek)
> A: . . . People have personal medical reasons, family reasons. There's a health problem in the family, and -- or they have long-term conditions. One gentleman had a -- I guess an advanced stage of arthritis that affected him. And those people, although I meet with them, they are exempt from receiving the verbal first -- first letter which is a verbal warning.

21. Since the establishment of the AIP, the reasons given by employes to their supervisors at the time they call in and request sick leave are not entered on the computer. Therefore, bona fide excuses given at the time of call-in have no impact on whether or not employes will receive a notice, have a counseling session and/or receive a letter regarding their attendance. In addition, the fact that an employe is given a sick leave number also has no impact upon whether an employe will be included in the AIP, receive notice of a counseling session, be counseled and/or receive a letter regarding their attendance: If an employe meets one of the "triggers", the employe will receive a notice of counseling and counseling session. Under the AIP, the City has taken the position that if an employe merely states he/she is sick, this is deemed an insufficient reason by the City for the approval of sick leave, despite the fact that in the past, some City supervisors issued employes sick leave numbers if employes merely stated that they were sick or wished to use sick leave.

22. Sometime in the Summer of 1995, the City changed the form of its attendance review document issued to employes so as to include additional data. That additional data included the date of each absence, the time of day the employe called the supervisor to request sick leave, the reason for the employe's absence given to the supervisor at the time the employe called in, the sick leave number granted the employe by the supervisor and the name of the day of the week (i.e. Monday, etc.) of the employe's absence. The new attendance review documents also included the information that had been included on the previous forms: Data relating to years of employment, the total balance in the employe's sick leave bank, the average number of sick leave hours per month the employe had used over his career, and the average of such usage by the employe in the past twelve months.

23. The City's establishment of the AIP in May, 1994, involved changing the way the City had formerly treated sick leave requests and the manner in which the City evaluated and tracked sick leave. After the AIP was implemented, sick leave statistics were regularly entered and kept on the City's computer. Computer trigger points were used to identify employes who had a

pattern of sick leave usage and who used sick leave more than once every other month, and a list of suspected abusers of sick leave ("Exception Reports") was generated every month. A list of "Healthy Ones," employes who did not use sick leave, was kept and posted in praise of these employes. Employes whose sick leave usage activated the computer "triggers" received notices of counseling sessions which were used to investigate sick leave use/abuse. Employes were paid to attend these mandatory counseling sessions and they were afforded Union representation at these sessions. The City managers present told employes at counseling sessions that the first counseling sessions could constitute the first step in the disciplinary process. The City placed counseling notice letters as well as letters issued after counseling sessions (if any) in employe personnel files. Under the AIP, employes have been listed on the AIP Exception Reports whether or not they had given bona fide reasons for their absences to their supervisors at the time they called in to request sick leave. At counseling sessions, employes who gave no explanation for their absences or who failed to explain their absences to the satisfaction of their supervisor were given letters (with copies placed in their personnel files), stating that further disciplinary action could be taken if their attendance did not improve. Employes who satisfactorily explained their absences at their first counseling session, nonetheless received notices of counseling sessions (placed in their personnel files) and were required to attend counseling if they continued to use sick leave such that the computer "trigger" points were activated. City managers have stated herein that they believe that employes who remain on the AIP Exception Reports after a first counseling session, who fail to give any reasons or acceptable reasons for their absences at counseling sessions or whose sick leave falls into a pattern (Friday usage and/or Monday usage) can be required to submit a doctor's certificate for any subsequent absences before the employe could receive a sick leave number; and that employes who show no improvement in attendance after a second counseling session would receive a written warning and further disciplinary actions could be taken thereafter.

24. Prior to May, 1994 the parties had fully discussed sick leave usage and Article XIV, Section 3 during contract negotiations and they specifically decided not to require employes to submit doctor's certificates for absences of less than three consecutive days, which decision constitutes a waiver of the right to bargain on this subject during the term of the 1993-95 contract.

25. Before the establishment of the AIP, the City had not required employes to submit doctor's certificates for sick leave absences of less than three days; and for other absences the City followed the procedures described in Article XIV of the labor agreement and Work Rule 6. The establishment and application of the AIP to unit employes did not constitute a unilateral change of the contract, Work Rules, or of the City's practice with regard to absences of less than three days.

26. Respondent City, by implementing the AIP, has not altered the manner in which it administers the parties' labor agreement or the Work Rules regarding sick leave. Prior to the implementation of the AIP employes were expected to use sick leave for the reasons listed in Article XIV and they were expected to avoid abusing sick leave under Article XIV, Section 3(e). The AIP does not constitute a new work rule.

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

CONCLUSIONS OF LAW

1. Because the parties' 1993-95 collective bargaining agreement addresses the issues of sick leave usage, discipline for sick leave abuse and the establishment of reasonable work rules, and because the parties previously fully negotiated and discussed their intent not to require a doctor's excuse for sick leave absences of less than three consecutive days, the Union and the City did not have a statutory or contractual duty to bargain regarding the AIP during the term of the 1993-95 agreement and were entitled to rely upon the contract, the Work Rule 6, their bargaining history and their past practice with regard to absences of less than three days.

2. The City of Wauwatosa, by its implementation and application of the AIP, by requiring counseling sessions where some employes have been asked more than once to give reasons for their absences, by sending letters before counseling sessions and to some employes after counseling session and placing those letters in employe personnel files, did not commit prohibited practices within the meaning of Secs. 111.70(3)(a)4 and 1, Stats.

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

ORDER 1/

IT IS ORDERED that the complaint be, and the same hereby is dismissed in its entirety.

Dated at Oshkosh, Wisconsin this ___ day of August, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Sharon A. Gallagher, Examiner

1/ Footnote found on page 26.

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

City of Wauwatosa

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant Union has charged that the Respondent City, by creating and applying the Attendance Improvement Program (AIP) made an unlawful, mid-term unilateral change of existing working conditions in violation of the Municipal Employment Relations Act. The City defended on the ground that the Commission lacked jurisdiction to consider the Union's claim as the Union had failed to file a grievance regarding the AIP under the effective collective bargaining agreement. Secondly, the City urged that if jurisdiction were found, the City was privileged to create and apply the AIP pursuant to its management rights, as the AIP merely constituted a method more formally interpreting and applying existing City Work Rules regarding sick leave use.

POSITIONS OF THE PARTIES:

Union:

The Union asserted that the City had no right to unilaterally change existing working conditions regarding the use of sick leave. Here, the Union noted the City has unsuccessfully attempted, over along period of time, to negotiate changes in the way that sick leave would be handled under the contract. Each time, the City dropped its proposals prior to contract settlement and the contract language remained unchanged in the area of sick leave. The Union observed that although the City attempted to mask its contract proposals as "clarifications", in each City proposal, substantive changes involving when employes could be required to produce doctor's certificates were proposed. The parties' collective bargaining history and the consistent past practice regarding the handling of sick leave requests, as well as the Union's consistent refusal to change the contractual sick leave language and the contract's provision for discipline and discharge of employes for sick leave abuse, demonstrate inter alia that over time, the parties have fully addressed sick leave and have chosen not to change Article XIV, Section 3.

The Union urged that as a result of the City's implementation of the AIP, the City no longer attempts (as it had done in the past) to determine if sick leave usage is bona fide. Rather, under the AIP, the City's computer counts all sick leave requests and management then presumes that sick leave abuse has occurred based solely upon the number of sick leave days each employe has used over a period of time. All employes whose sick leave usage is at or above the computer trigger levels are called in for counseling, which the Union asserted constitutes harassment. Warning letters may then issue and doctor's certificates can be required for absences of three days or less, contrary to the labor agreement and past practice. The Union asserted that the warning letters and the counseling sessions as well as the actions that management may take thereafter amount to discipline and are contrary to the explicit terms of Article XIV, Section 3 and the Work Rules. The Union concluded that by imposing such new forms of discipline, mid-term of the contract, the City,

without gaining the Union's agreement thereto, has unilaterally changed the clear terms of the collective bargaining agreement and violated Sec. 111.70(3)(a)4, and derivatively Sec. 111.70(3)(a)1, Stats.

Therefore, the Union sought an Order stating that the City had engaged in prohibited practices in violation of the Municipal Employment Relations Act, that the City be ordered to rescind the AIP and the procedures thereunder to post notices regarding its violations of the Act and to make employes "whole for any losses of money or damages they have sustained because of the employer's prohibited practices." 2/

City:

Initially, the City argued that the Wisconsin Employment Relations Commission lacked jurisdiction over the complaint and that the Examiner must dismiss the complaint because the Union had failed to grieve the establishment or promulgation of the AIP. In the alternative, the City urged that it did not violate the law or the labor agreement by promulgating the AIP.

The City asserted that the AIP was developed and implemented in full consideration of and within the confines of the provisions of the parties' labor agreement. In this regard, the City contended that neither the bargaining history nor the past practices of the parties are inconsistent with its position. The City urged that its 1993-95 contract proposal regarding sick leave was not intended to substantively change Article XIV, Section 3, but only to clarify the agreement, to cover the circumstance when a supervisor lacks satisfactory evidence that an employe's illness of less than three consecutive days is bona fide. This clarification, in the City's view, was immaterial because the City already had the right under the agreement to request a doctor's certificate for absences of more than three consecutive days and if no satisfactory evidence of a bona fide illness existed, to require a medical excuse for absences of three consecutive days. In addition, the City contended that the outcome of the Koch grievance did not diminish the City's authority to create and implement the AIP. The City pointed out that it had additional support in the contract for its actions regarding the AIP: Article VI, Sections 1 and 2, reserve to management its rights to operate and manage City affairs and to establish reasonable work rules (subject to the Union's right to grieve same); Article VI, Sec. 4 also reserves to the City the right to discipline employes for cause.

The City argued that the only change occasioned by the implementation of the AIP is the monthly generation of the computerized "Exception Report" and the City's system of talking to employes, as needed, about their sick leave usage. This, the City urged, merely amounted to a sick leave monitoring system. The City noted that such monitoring systems, have been sanctioned by

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2/ The Union did not present any evidence regarding employes having lost any money or having sustained any damages in connection with the Employer's actions alleged to be prohibited practices in this case.

the caselaw where the collective bargaining agreement has made provision for both discipline and the monitoring of particular employe activities. The City further observed that the Union has conceded herein that monitoring sick leave is within the City's contractual and statutory powers. Also, in the City's view, any formal discipline an employe might receive due to the AIP would be fully grievable under the contract. Thus, the City urged that its actions in creating and implementing the AIP neither violated the contract nor the statute and the complaint should therefore be dismissed in its entirety.

Discussion:

Jurisdictional Issue:

Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act provides, in relevant part, that it is a prohibited practice for a municipal employer

> 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. . . .

MERA, at Sec. 111.70(1)(a), Stats., defines "collective bargaining", in relevant part as follows:

> "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representatives of its employes, to meet and confer at reasonable times, in good faith, with the intention of reaching an agreement . . . with respect to wages, hours and conditions of employment. . . . The employer shall not be required to bargain on subjects reserved to management and direction of the governmental unit except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of employes. . . .

In the instant case, the City has defended, in part, by asserting that the Commission lacks jurisdiction to hear and resolve this complaint because the Union has failed to file a grievance and to exhaust the contractual grievance arbitration procedure regarding the AIP. Article VI, Sec. 2 of the labor contract provides:

> The Union recognizes the exclusive rights of the City to establish reasonable work rules. The Union shall have the right to grieve on work rules.

The Commission has made it clear that it will defer Sec. 111.70(3)(a)4 unilateral change

allegations to grievance arbitration where the parties have agreed to arbitrate the merits of the dispute, waiving all procedural objections they may have, and where the contract clearly addresses the dispute, the dispute does not involve important issues of law or policy, one party has objected to the Commission's exercise of its jurisdiction, (seeking deferral) and a substantial probability exists that the submission of the merits of the dispute to arbitration will resolve the statutory claims in a manner not repugnant to MERA. 3/

In the circumstances of this case, I do not believe deferral would be appropriate. As no grievance had been filed regarding the AIP as of the date of the instant hearing and the Union has disputed the City's deferral arguments, no agreement to arbitrate can be presumed or found herein. Nor has the City clearly agreed to waive all procedural defenses it may have to a grievance were it filed. In addition, I note that the language of Article VI, Section 2 appears to limit the Arbitrator's consideration of work rules to the issue whether they are reasonable. In my mind, the issues raised in the instant case are distinguishable from whether the AIP constitutes a reasonable work rule.

It is vitally important to both the development of the law and Commission policy that the Commission continue to determine whether municipal employers have made unilateral changes in violation of Sec. 111.70(3)(a)4, Stats., and to order appropriate statutory remedies (which are distinctly different from grievance remedies), in cases where employers have violated the law. The Commission has also repeatedly held that it will decide Sec. 111.70(3)(a)4, Stats., unilateral change complaint allegations on a case-by-case basis. 4/ Based upon the facts of this case, I believe that important issues of law and policy are involved herein making deferral inappropriate.

In the instant case, the City has argued that it had the right to establish the AIP despite relevant contract language and/or past practices to the contrary, because the City had the management right to do so and because its actions merely constituted stricter enforcement of the existing contract and work rules, not violations of Sec. 111.70(3)(a)4, Stats. In my opinion, the City's substantive arguments herein are more closely related to the legal arguments that would be made in defense of a Sec. 111.70(3)(a)4, Stats., complaint than they are to the defenses that would sound in a grievance arbitration case. I therefore conclude that this case does not meet the criteria for deferral to arbitration on several grounds and that dismissal of this case on that basis would be inappropriate.

The Sec. 111.70(3)(a)4 Allegations:

The allegations on the merits of this case involve unilateral changes during the term of

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3/ See, e.g. Cadott School District, Dec. No. 27775-C (WERC, 6/94); Brown County, Dec. No. 19314-B (WERC, 6/83).

4/ Cadott School District, supra, and cases cited therein.

1993-95 labor agreement regarding sick leave usage. Sick leave usage is primarily related to wages, hours and conditions of employment and is a mandatory subjects of bargaining. In this regard, the Commission has held that:

> A municipal employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining except those which are covered by the contract or as to which the union has waived its right to bargain through bargaining history or specific contract language. Where the contract addresses the subject of bargaining, the contract determines the parties' respective rights and the parties are entitled to rely on whatever bargain they have struck. 5/

Determinations as to whether or not a waiver exists are to be made by the Commission on a case-by-case basis. 6/

Article XIV, Section 3 and Work Rule 6 have been part of the parties' collective bargaining agreements for many years. The parties have also engaged in bargaining over sick leave usage during negotiations for the 1990-91 and 1993-95 contracts. Specifically, in these negotiations, the City made written proposals to add language to the contract which would allow supervisors to require that employes bring in doctor's certificates for sick leave absences of less than three consecutive days. The Union rejected these proposals and they were ultimately dropped prior to agreement upon an entire contract in each relevant year. Also, in the tentative agreements regarding the parties' 1993-95 contract, the parties expressly agreed that they should carry forward "all other provisions and practices of the 1991-92 agreement" into the new contract. Furthermore, this record shows that the City has never required employes to submit a doctor's certificate for an absence of less than three consecutive days except in the Koch case. In that situation, the Board of Public Works resolved a grievance in favor of employe Koch who had contested the City's requirement that Koch present a doctor's certificate for a sick leave absence of two days (a Friday and the following Monday) based upon management's suspicion that Koch was not ill but rather suffering from exam anxiety. The Board found in Koch's favor in the circumstances and it reimbursed him for his expenses in obtaining a doctor's certificate. All of these facts support a conclusion that the parties have fully discussed sick leave and that the Union had no duty to bargain regarding the matter, mid-term of the contract, as the City has claimed.

5/ City of Madison (Fire Department), Dec. No. 27757-B (WERC, 10/94), citing, School District of Cadott, supra; City of Richland Center, Dec. No. 22912-B (WERC, 8/86); Brown County, Dec. No. 20623 (WERC, 5/83); Racine Unified School District, Dec. No. 18848-A (WERC, 6/82). See also, City of Appleton, Dec. No. 14615-C (WERC, 1/78).

6/ Racine Unified School District, Dec. No. 13957-C (WERC, 1/83); City of Richland Center, supra; Cadott School District, supra.

Based upon this record, there can be no doubt that Article XIV, Section 3 and Work Rule 6 operate as a contractual waiver of the parties' right to bargain over sick leave usage for the term of the 1993-95 contract and that the parties have previously fully discussed the subject whether a doctor's certificate can be required for absences of less than three consecutive days. Therefore, assuming, arguendo, that Howard Young's July 7, 1993 constituted a proper request for mid-term bargaining regarding sick leave, the Union was under no obligation to respond to that letter or to engage in such bargaining during the term of the 1993-95 contract. 7/ Rather, the Union was entitled to enjoy the benefit of its bargain regarding sick leave usage for the term of the 1993-95 contract.

7/ City of Beloit (Fire Department), Dec. No. 27961-B (Shaw, 1/95) and cases cited therein; Brown County, Dec. No. 20620 (WERC, 5/83).

The remaining question in this case is whether, given the fact that no obligation to bargain mid-term of the agreement existed, did the City's implementation of the AIP affect a unilateral change in terms and conditions of employment relating to sick leave. Based upon the evidence in this case, I believe this question must be answered in the negative. By implementing the AIP, the City neither created a "new" Work Rule nor altered the manner in which it administers the 1993-95 contract or the Work Rules. Rather, it appears that the City, by implementing the AIP, is attempting, for the first time, to administer Article XIV Sections 3(c) and (e) to minimize sick leave abuse. In this regard, I note that both before and after the AIP was put in place, employes were expected to use sick leave for the reasons listed in the contract and that there was no understanding between the City and its employes prior to the implementation of the AIP that sick leave abuse would be condoned. In addition, on this record, I can find no provision of the AIP nor any evidence of City actions which contradict or abrogate the labor agreement, Work Rules or the bargaining history regarding the City's not requiring employes to present doctor's certificates for absences of less than three consecutive days. 8/

Therefore, because insufficient evidence exists to show that a unilateral change has actually occurred on this point, I cannot and have not ordered a remedy in this area. In my view, the provisions of the AIP either generally restate Article XIV and Work Rule 6, constitute instructions to City supervisors regarding the management procedures they may follow when a sick leave request has been made, 9/ or provide a stricter method of monitoring sick leave where no such method previously existed to require supervisory and employe actions. 10/

On the latter point, the City is correct that the AIP constitutes a lawful method of tracking and monitoring sick leave use pursuant to Work Rule 6 and Article XIV and that therefore, the AIP does not violate the Act. The fact that the City has never before used a computer to keep track of sick leave, that it did not previously create "Exception Reports" or lists of healthy employes, and that the City's supervisors have been lax (prior to May, 1994) in monitoring and analyzing sick leave requests and in counseling employes regarding their sick leave use, does not mean that the City must be forever precluded from more diligently tracking and monitoring sick leave by using a computer and lists/reports and by more frequently counseling employes regarding their use of sick leave. Thus, such a lax approach cannot become a binding past practice where, as here, the City has specifically retained the right to make "reasonable" work rules and to discipline employes regarding

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8/ There was much testimony from City managers Young and Janicek regarding what might happen to employes if they stayed on the AIP "Exception Report" lists for several months and/or failed to give management satisfactory excuses for their sick leave absences during AIP counseling sessions. This testimony was not supported by any facts to show that the City has taken actions against employes in these areas. In addition, I note that the AIP does not expressly address these matters.

9/ Footnote found on following page.

10/ Footnote found on following page.

sick leave abuse. 11/ Therefore, the City's generation and use of "Healthy Ones" lists and

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9/ I note that Section III, Para. 3 of the AIP uses the term "any suspicion" which is not used in Article XIV or Work Rule 6. The use and application of this term goes to the sufficiency (or lack thereof) of the evidence used by a supervisor to determine whether discipline may be warranted in a particular case, which would be part and parcel of any grievance arbitration case regarding the application of Article XIV, Section 3. Also, Article XIV, Section 3 contains undefined terms such as "bona fide illness" and "other satisfactory evidence." Whether or not the data gathered by the City's computer will ultimately constitute "other satisfactory evidence" under Article XIV, Section 3, is for an arbitrator to

"Exception Reports" on its computers did not constitute illegal unilateral changes. 12/

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determine in a proper case. School District of Cadott, supra; Janesville School District, Dec. No. 15590-A (Davis, 1/78) aff'd by operation of law (WERC, 2/78).

10/ Section II of the AIP requires employes to state the nature of their illnesses on their time cards. The record in this case indicated that in the past, some supervisors required employes to state the nature of their illnesses on the back of their time cards while others did not. Thus, no clear past practice existed on this point and it cannot be concluded that on this point, the AIP changed Article XIV or Work Rule 6 or otherwise amounted to a unilateral change to be remedied by this decision.

11/ City of Milwaukee, Dec. No. 27316-A (Crowley, 11/93); aff'd by operation of law, Dec. No. 27317-B (WERC, 12/93); City of Madison (Fire Dept.), Dec. No. 27757-B (WERC, 10/94); Village of Stoddard, Dec. No. 27970-B (WERC, 11/94).

12/ No evidence was offered by the Union to demonstrate that employes placed on the "Healthy Ones" lists were, in fact, promised or given any benefits because of their "healthy" status.

In the instant case, Union President Baseler testified regarding his attendance at two AIP counseling sessions. Baseler stated that prior to both sessions, he received letters requesting that he attend the counseling session; and that at each session, Superintendent Janicek reviewed his (Baseler's) sick leave record and asked him the reasons for his having taken sick leave in September (and October) 1994. In my view, neither the letters sent to Baseler and to other employes before and/or after their counseling sessions, nor the content of the counseling sessions constituted unilateral changes, in violation of Sec. 111.70(3)(a)4, Stats., 13/ or derivatively violated Sec. 111.70(3)(a)1, Stats. 14/

Rather, it is clear (and admitted by the Union herein) that the City has the contractual right to investigate, counsel and to discipline employes for cause pursuant to the contract and the Work Rules, and that the contract is silent regarding the above-described actions taken by the City. The fact that some letters contained a statement or a supervisor told an employe that the employe may be subject to discipline if the employe's attendance does not improve, goes no farther than the labor agreement itself (assuming such statements are made based upon proper cause). In addition, although it may be annoying to certain employes that they have been required, on more than one occasion, to answer the same questions regarding the reasons for their sick leave absences and to listen to restatements of City policy thereon, I do not believe that this constituted harassment in violation of the Act.

Dated at Oshkosh, Wisconsin this 30th day of August, 1996.

13/ I am aware that Janicek testified that in his opinion, the initial letters sent to employes constituted "verbal warnings". The proper forum for raising the issue whether such actions by Janicek actually constituted verbal warnings for cause is the grievance arbitration forum where the Union would be free to grieve both the issuance of these letters as well as their placement in the employes' personnel files.

14/ As the Union failed to argue that any of the City's actions herein constituted independent Section 111.70(3)(a)1, Stats. violations of employe's Sec. 111.70(2), Stats. rights, the Union's allegations in this area have been analyzed by determining whether derivative violations of Sec. 111.70(3)(a)1, Stats. have occurred.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner