STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Arbitration of a Dispute Between	
DOOR COUNTY SOCIAL SERVICES DEPARTMENT EMPLOYEES, LOCAL 1658, AFSCME, AFL-CIO	
and	Case 17 No. 42570 MA-5736
DOOR COUNTY (DEPARTMENT OF SOCIAL SERVICES)	

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370 Manitowoc, WI 54221-0370, on behalf of the Union.

Mr. Dennis D. Costello, Corporation Counsel, Door County, 138 South Fourth Avenue, P.O. Box 67, Sturgeon Bay, WI 54235-0067, on behalf of the County.

ARBITRATION AWARD

Door County Social Services Department Employees, Local 1658, AFSCME, AFL-CIO, hereafter the Union, and Door County, hereafter the County, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to funeral leave. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Sturgeon Bay, Wisconsin, on September 25, 1989. No stenographic transcript was made. Briefs were submitted on October 10, 1989, at which time, the parties having waived reply briefs, the record was closed.

ISSUE

As expressed by the Union, and agreed to by the County, the issue is as follows:

> Is the grievant entitled to sick leave benefits in accordance with Article IX, Section J for Monday, March 27, 1989?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE IX -- SICK LEAVE

. . .

D. Sick Leave Use: Each non-probationary employee who has earned sick leave credits shall be eligible for sick leave for any period of absence from employment which is due to illness, bodily injury (except where the injury or illness is compensable under the Worker's Compensation Law) or exposure to a contagious disease.

. . .

G. Death of Immediate Family Member(s): Where death occurs in the immediate family of an employee, accrued sick leave may be used. Immediate family is defined as, and limited to: the parents, step-parents, grandparents, foster parents, children, stepchildren, grandchildren, foster children, brothers (and their spouses), and sisters (and their spouses) of the employee or spouse; son-in-law or daughter-in-law of the employee or spouse; or other relatives of the employee or spouse residing in the household of the employee. Use of accrued sick leave for death in the immediate family is limited to three (3) work days, however, extension may be granted by the Department Head if mitigating circumstances warrant such extension.

H. Death of Extended Family Member(s): Employees may use one (1) day of accrued sick leave to attend the funeral of nieces, nephews, or cousins of the employee or spouse.

I. Medical Certificate: In the event that the Employer has

reason to believe that an employee is abusing sick leave privileges, or may not be physically fit to return to work, the Employer may require a medical certificate or other appropriate verification for absence covered by this Article. If the medical certificate verifies that the employee was not abusing sick leave or is physically fit for work, the Employer shall pay the cost of the medical certificate. Abuse of sick leave shall subject the employee to disciplinary action. On the Employer's request for such certification or verification, the Doctor shall be so designated by the County.

J. Notice of Sick Leave: Employees shall notify the Department Head or immediate supervisor of his or her intent to use sick leave at least one-half (1/2) hour prior to the normal starting time for the work day, to be eligible for sick leave use.

. . .

BACKGROUND

Marlys Trunkhill, the grievant, is a social worker for the Door County Department of Social Services. This grievance concerns her request for one day of paid sick leave for her attendance at a funeral held on a day on which she had previously scheduled vacation.

By prior approval, the grievant was scheduled for paid vacation the week of March 27 to March 31, 1989; by contract, she was also off the afternoon of March 24, which was Good Friday. On the morning of March 25, her father-in-law passed away. The funeral, which the grievant attended, was held in Sturgeon Bay on Monday, March 27.

Upon her return to work on Monday, April 3, the grievant, pursuant to routine practice, submitted her time sheet for the previous two weeks. After consultation with the department's administrative assistant, she indicated sick leave (funeral), rather than vacation, for March 27. In the temporary absence of the Department Director, Michael Van Dyke, the administrative assistant approved and processed the time sheet.

The following day, when he became aware of this change, the department head disallowed the charging to sick leave rather than vacation for March 27. However, because of the County's internal process, this disallowance did not become effective until the following payroll period. Upon receipt of that subsequent paycheck, on which the eight hours was accounted for as vacation and not sick leave, Trunkhill filed a grievance.

On May 4, 1989, Van Dyke denied Trunkhill's request that the eight hours be accounted for as sick leave rather than vacation, stating in part as follows:

> In this case Mrs. Trunkhill did not contact the Department head nor the Department office to notify me of the change until she returned to work on April 3rd. Such after the fact notice is not allowed for under the contract and is against the Department practice of prior notification that I have directed in the three years I have worked in Door County.
>
> Mrs. Trunkhill appears to ignore Article IX of the Contract and rather relies on a previously approved leave situation from 1983. Current management was not aware of this incident and would submit that a one time occurrence does not constitute an approved practice with a new administration. The current labor contract in effect and directives from administration should be the source documents.

Trunkhill and the Union thereafter brought the grievance to the County Executive and Personnel Committee, which denied the grievance on July 11, 1989.

POSITIONS OF THE PARTIES

In support of its position that this grievance should be sustained, the Union asserts and avers as follows:

> Throughout this process, the department head has based his disallowance of the change from vacation leave to sick leave solely on the grievant's failure to comply with the half-hour notice provision, Article IX, Section J. However, at hearing, the director admitted that the purpose of this notice provision is to save the employer from undue inconvenience in planning work assignments; here, though, the grievant was already scheduled to be off work. Thus, there can not have been any inconvenience at all to the employer by reason of the substitution of a sick leave day for a vacation

day. Further, the Director testified that there are reasonable exceptions to the notice requirement; to refuse to consider this a reasonable exception is contrary to common sense and leads to an absurd result.

Further, there are at least two instances of past practice which support this grievance. One employe (Cheryl Burmeister) used sick leave in similar circumstances during Christmas, 1983, while another (Connie Rockwell) did likewise in 1985. The fact that the language at issue has remained constant throughout is controlling; that the Department now has a different Director, who may not have been aware of the Rockwell incident, is not.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The contract language is clear and unambiguous, and thus does not allow for consideration of purported past practices. That language explicitly requires an employe to notify the department head of an intent to use sick leave; prior approval is a stated prerequisite for accessing this benefit.

The past practice argument made by the Union is not applicable because the circumstances were distinctly different; in those cases, the then-department head allowed the change from vacation to sick leave, whereas the current department head disallowed the change requested by the grievant. Such denial was completely within the department head's discretion, and complied with the contract language.

Further, these prior instances did not meet the established tests for determining the establishment of a past practice, in that the contract language is not sufficiently ambiguous, and the prior instances are not sufficiently fixed. Moreover, the current administration certainly has the right to repudiate any practices of the prior department head. There have been two contracts negotiated since the first alleged incident in 1983; had the Union wanted such practice put into the contract, it should have bargained for it.

Had the grievant requested the change from vacation to sick leave in advance, the department head probably would have agreed. But his policy of not granting after-the-fact access to sick leave is consistent with the contract.

DISCUSSION

Grievances involving an employe's request to amend vacation leave to sick leave or funeral leave often focus on the issue of whether the employe, having made the choice for when to take vacation, must then accept the unfortunate consequences of illness or a family death occurring at the same time. Here, though, that is not the issue presented, for the County has indicated that it had no objection to such a modification of leaves, per se. Indeed, the Department Director expressly testified that, had the grievant provided timely notice, he would have allowed her to count March 27, 1989 as sick leave/funeral, rather than vacation. Thus, the question which I address is whether the grievant, having failed to provide such notice, was nonetheless entitled to such modification.

Past practice suggests that she was. The record evidence indicates that there have been at least two instances, in 1983 and 1985, of department employes receiving approval for after-the-fact modification of vacation leave to sick leave/funeral. The County, which objected to the admission of this evidence, challenges its probative value but not its truthfulness. The fact that there is a new Department head, however, does not negate its import, inasmuch as the relevant contractual provisions have remained constant throughout. Nor can the County convincingly claim ignorance of these past instances; as keeper of the records, the County must be presumed to be aware of the actions which those records reflect. The County contends that it was the Union's burden to seek codification of this practice in the collective bargaining agreement; I respectfully conclude to the contrary, finding that, having created the practice, it was the County's burden to disavow it (if it so chose). While the Director has now clearly stated his policy of disallowing such after-the-fact modifications, the record does not establish that he did so prior to March 27, 1989. Having been aware that such modifications had been allowed in the past, the Union could reasonably rely on this policy continuing, until notified to the contrary.

In explaining his policy of disallowing such after-the-fact modifications, Director Van Dyke stated that it was an operational necessity, so that the Department would not be suddenly short-staffed by employes unexpectedly not reporting for work. However, since the grievant was already scheduled to be off work on March 27, such consideration is irrelevant in this

instance. Van Dyke also testified that this policy was necessary, lest employes return from vacation and, claiming illness, seek the retroactive recovery of vacation leave at the expense of sick leave. That may be a valid concern; however, since this grievance is limited to the use of sick leave for the purpose of attending a funeral, rather than for general illness, such concern is not entirely on point.

Van Dyke also testified that, in certain respects, the contract does not necessarily mean exactly what it says. That is, notwithstanding the half-hour notice requirement, he would not disallow immediate sick leave for an employe who took ill during the work-day, or for an employe who waited until the office opened to give notice. Thus, by the Director's own testimony, the strict language of the contract will yield to reasonable interpretation. The policy of allowing after-the-fact modification of vacation leave to sick leave/funeral, which was in force at the time of the events described herein, was an example of such reasonable interpretation.

Accordingly, on the basis of the record evidence and the arguments of the parties, it is my

AWARD

That this grievance is sustained. As soon as is administratively practicable, the County shall amend its payroll records to reflect eight hours of sick leave, rather than vacation, for Marlys Trunkhill on March 27, 1989.

Dated at Madison, Wisconsin this 27th day of October, 1989.

By _____
Stuart Levitan, Arbitrator