BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES AND COURTHOUSE EMPLOYEES, LOCAL 2492, (Paraprofessional and Clerical Unit), AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO and COUNTY OF MARATHON	Case 165 No. 43443 MA-5974

Appearances:

Mr. Philip Salamone, Staff Representative, N-419 Birch Lane, Hatley, Wisconsin 54440, appearing on behalf of Marathon County Department of Social Services and Courthouse Employees, Local 2492, (paraprofessional and clerical unit), American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Jeffrey T. Jones, with Mr. Dean R. Dietrich on the brief, Mulcahy & Wherry, S.C., Attorneys at Law, 401 Fifth Street, P.O. Box 1004, Wausau, Wisconsin 54402-1004, appearing on behalf of County of Marathon, referred to below as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Pat DeTienne, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as the Arbitrator. Hearing on the matter was held in Wausau, Wisconsin, on March 21, 1990. The hearing was not transcribed. The parties filed briefs by April 30, 1990, and the County filed a reply brief on May 21, 1990. The Union waived the filing of a reply brief, and I confirmed that waiver in a letter to the parties dated June 12, 1990.

ISSUES

The parties stipulated the following issues for decision:

> Whether the County's refusal to grant the Grievant's request to convert an approved vacation day to a family illness day, while utilizing the vacation day, constituted a violation of the provisions of the collective bargaining agreement?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - MANAGEMENT RIGHTS

> The County possesses the sole right to operate the department and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:
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> A. To direct all operations of the Social Services Department;
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> B. To establish reasonable work rules;
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> . . .
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> F. To maintain efficiency of department operation entrusted to it;
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> . . .
>
> The rights of management set forth above are not all inclusive, but indicate the type of matters or rights which belong to and are inherent to management. Any of the rights, powers and authority the County had prior to entering into this collective bargaining agreement are unqualified, shall remain exclusively in the County, except as expressly and specifically abridged, delegated, granted or modified by this Agreement.
>
> Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement

may be processed through the grievance and arbitration procedure contained herein; however, the pendency of any grievance or arbitration shall not interfere with the right of the County to continue to exercise these management rights.

. . .

ARTICLE 3 - GRIEVANCE PROCEDURE

. . .

B. Arbitration:

. . .

5. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

. . .

ARTICLE 11 - VACATION

. . .

F. Scheduling: The department head shall determine the number and classification of employees on vacation at any one time. Employees wishing to take their vacation during specific days shall make their request to their immediate supervisor within at least two (2) weeks prior to the dates requested unless otherwise agreed.

. . .

ARTICLE 14 - SICK LEAVE

A. Rate of Earnings: Every employee shall be entitled to accumulate a total of not to exceed nine hundred and sixty (960) hours of sick leave. Employees hired after June 1, 1977, shall earn sick leave at the rate of eight (8) hours per month (3.6923 hours

biweekly) for the first five (5) years of employment and twelve (12) hours per month (5.5385 hours biweekly) thereafter. Employees hired prior to June 1, 1977 shall earn sick leave at the rate of twelve (12) hours per month. In order to qualify for sick leave, an employee or his/her representative must report that he/she is sick no later than one-half (1/2) hour after the earliest time which he/she is scheduled to report for work except in case of emergency or when the Employer is fully aware the employee will be on sick leave for an extended period.

B. Evidence of Illness - Abuse: If sick for more than three (3) consecutive work days, the employee shall furnish his/her supervisor with a certificate of illness signed by a licensed physician if requested by the Director or the employee's immediate supervisor.

. . .

C. Personal Use: Except as provided in "D" Family Illness, sick leave may only be used for illness or disability of the employee . . .

D. Family Illness: Employees will be allowed to use sick leave in case of serious illness in the immediate family where the immediate family member requires the constant attention of the employee . . . Immediate family is defined as the employee's . . . children . . .

E. Advance Notice and Use: In the event that an employee is aware in advance that sick leave benefits will be needed or due, it shall be the duty of the employee to notify the Department Head as far in advance as possible in writing of the anticipated time and duration of such sick leave . . .

BACKGROUND

The Grievant is presently classified as an Income Maintenance Worker, and has worked in that classification for about six years.

On May 10, 1989, Jeanne Brandl, the Grievant's supervisor, approved the Grievant's request to take Friday, May 12, 1989, as a vacation day.

The Grievant testified that in the morning hours of May 12, 1989, she discovered her two-year old daughter had come down with chicken pox. The Grievant stated she phoned Brandl at work sometime around 8:30 a.m. She reached a receptionist, who forwarded the call to Brandl. The Grievant testified neither Brandl nor the receptionist responded to the subsequent ringing of the phone. The Grievant next called the department at sometime around 11:30 a.m. and did get put through to Brandl. The Grievant then informed Brandl that she wished to convert her leave for May 12, 1989, from vacation to sick leave. Brandl responded, according to the Grievant, that such a conversion would not be a problem. The Grievant next spoke to Brandl on May 15, 1989, and Brandl informed the Grievant the County would not make the conversion.

Brandl testified that the Grievant did call her at sometime between 11:00 and 11:30 a.m. on May 12, 1989, to request the conversion of the vacation day to sick leave. Brandl testified that she responded that she did not think the conversion would pose a problem, but that she would check on it. Brandl stated she spoke with Suzanne Aho, the Confidential Secretary to Department Director James Dalland, "soon after" the Grievant's phone request. Aho informed Brandl that the County would not convert vacation to sick leave if the request was made while the vacation was being taken. Brandl did not report this to the Grievant on May 12, 1989, but, on the following Monday, informed her of the denial.

Linda Berna, the County's Administrative Services Supervisor, testified that the County's phone system is designed to return a phone call to the receptionist if the forwarded call has not been responded to within five rings.

Both parties introduced evidence on past practice. The Union offered the testimony of Kathy Jahnke, who works in the Child Support Division of the Department of Social Services. Jahnke testified that she had secured approval for one-half of a day vacation for the afternoon of May 26, 1989. In the morning of that date she experienced a migraine headache, and received one-half hour of leave to obtain medication. She returned to work, found the headache was not improving, and asked that her vacation be converted to sick leave. Because her supervisor was not available, Jahnke approached Tom Buettner, a Deputy Director of the Social Services Department, who approved the conversion. Jahnke worked a half-day on May 26, 1989, before leaving on sick leave, and was still working when Buettner approved the conversion.

Pat Haskin works in the Department's Child Support Division, and testified that the County has, on many occasions, approved her conversion of a vacation or personal day into a work day. She stated she was aware of no denials of such requests, but that she has always secured such a conversion before the commencement of a work day.

Brandl testified that she was unaware of any County policy precluding the sort of conversion requested by the Grievant before she spoke with Aho on May 12, 1989. Berna testified that the County's policy was formalized in a memo dated January 10, 1983, from then-incumbent Department Director, Dave Carlson to "Administrative Staff". That memo reads thus:

Since this issue was first raised last week, it has been reviewed regarding past agency practice by Mr. Delap and Linda Berna, has been discussed at our Administrative Staff Meeting, has been discussed between myself and two (2) or more supervisors, and has been discussed twice by Mr. Delap and myself. As it has been discussed it has appeared to become a more complicated question than perhaps it needs to be. The following will be our interim, and perhaps permanent, response to requests for sick leave when in vacation status. I mention interim because, if you feel it would be useful, I would be willing to raise the question with the Personnel Department to see if there are any existing precedents or policy relative to this issue.

It appears that the best source of guidance as to this question is ordinance #212 and AFSCME Contracts 2492 and 2492A. Section 18(11) (b) of the Ordinance indicates, " . . . may draw sick leave allowance when due to sickness, or temporary disability, the employee is unable to perform duties of employment." Both of the above-referenced contracts in Article 14(a) use the following language: "In order to qualify for sick leave, an employee or his representative must report that he is sick no later than one half (1/2) hour after the earliest time which he is scheduled to report for work . . . . " The interpretation of the sick leave provision in the ordinance is that there are no duties of employment if someone is on vacation and as a result sick leave does not apply. The interpretation of the contracts is that a person on vacation is not scheduled to report for work and, therefore, there would not be eligibility for sick leave. I had suggested, when this matter was discussed, that if a vacationing employee should be hospitalized, that perhaps it would be appropriate, upon proper notice, to change the status from that of vacation to that of sick leave. This appears to be somewhat inconsistent with requirements of the contract and the ordinance and, at least as part of any interim practice, the hospitalized person who is on vacation would only qualify for sick leave upon the date scheduled to return to work if still hospitalized.

In summary, I am saying that a conservative interpretation of the contract and ordinance requirements will be taken. That is, when a staff member is on a scheduled vacation, there is no eligibility to make use of sick leave.

Berna estimated that since 1979, the County may have received as many as twenty to twenty-five requests from bargaining unit employes to convert vacation to sick leave. The County has, however, no formal record of these denials. Both Berna and Aho have, after the issuance of the 1983 memorandum, unsuccessfully sought to have vacation time converted to sick leave.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

After a review of the facts, the Union notes that "(t)he clear and unambiguous language of the agreement allows for sick leave usage for illnesses in the employee's immediate family where the constant attention of the employee is required"; that almost any infant illness meets this criterion; and that the County has not challenged the propriety of the Grievant's request for sick leave to attend to her child. It follows, the Union concludes, that "(t)he primary question in this dispute is whether an employee may substitute a day of sick leave for a day which had originally been approved for vacation."

The Union's first major line of argument is that "(n)owhere in the agreement is there any direct or implied prohibition of such a conversion." Asserting that the County does permit the conversion of an approved vacation day into a work day, and that the Grievant's supervisor had initially indicated she thought the conversion would be approved, the Union concludes that the Grievant's requested conversion should have been approved. Beyond this, the Union contends that Brandl initially misled the Grievant into believing the conversion for Friday would be approved, and that the County failed to deny the conversion until the following Monday. From this, the Union concludes that "the employer's failure to inform in a timely manner clearly places the burden to justify the refusal of the request for substitution upon the shoulders of the County."

Since the purpose of a vacation day is to permit an employe "to have a respite from work" and since the purpose of sick leave for family illness is to permit a parent to attend to the illness of a family member, it follows, the Union contends, that the requested conversion is consistent with the evident purposes of Article 14.

While acknowledging that each party contends past practice supports its view, the Union argues that "close examination of the record in this case clearly demonstrates that the only appropriate specific examples of valid past practices indicate that the Union's interpretation should prevail." The County's assertions mistakenly focus on general allegations of denials of conversion requests made after an employe's return from vacation. Beyond this, the Union contends that the 1983 Memorandum was not communicated to the Union, and is controverted by the County's approval of Jahnke's request. The County's approval of Jahnke's request is the only valid indication of a past practice, according to the Union.

Citing Door County Social Services, (Levitan, 10/89), the Union contends that arbitral authority supports the result the Union seeks here. Viewing the record as a whole, the Union concludes that "the grievance should be sustained and the grievant made whole for her loss."

THE COUNTY'S POSITION

The County's Initial Brief

After a review of the facts, the County notes that "the only issue before the Arbitrator is whether the County's denial of the Grievant's request to convert her approved vacation day to a family illness day, while utilizing the vacation day . . . constituted a violation of Article 14, Sick Leave, Paragraph D, Family Illness, or any other provision of the Agreement." The County generally asserts that this issue must be resolved against the Union since "no provision of the Agreement . . . nor any past practice" supports the Union's position. More specifically, the County contends that Article 2 vests it with sufficient authority to establish a policy precluding the sort of conversion urged by the Union here. Such a policy has been consistently maintained by the County since at least 1979, according to the County. The informal policy was confirmed by the 1983 Memorandum which, although not distributed by the County to the Union, codified then existing and known practice, according to the County.

Beyond this, the County argues that "(a) review of relevant provisions of the agreement demonstrate that the parties did not intend that an employee be permitted to convert an approved vacation day to a family illness day when already utilizing the vacation day or after-the-fact." Noting that the Agreement does not expressly address this point, the County contends that the agreement is ambiguous and must be interpreted. Neither Article 11 nor Article 14 affords any basis, according to the County, to conclude the parties mutually intended to permit the sort of conversion requested by the Grievant. The County asserts that the notice requirements stated in Article 14, which the Grievant failed to comply with, establish the parties' intent not to permit the sort of conversion requested by the Grievant.

The most appropriate guide for resolving the gap in the agreement's coverage is, according to the County, the parties' past practice. Arbitral precedent establishes this point, the County contends, as well as that a practice can be established through acquiescence. The County applies this consideration to the record thus:

> There can be no question that a past practice exists in regard to conversion of vacation days to sick leave days. Since at least 1979, Department employees, Union and nonunion alike, have submitted one or two oral requests per year to convert approved vacation leave, either while actually using the vacation day in question or after returning to work from vacation, to sick leave . . . The County has consistently denied all of these requests . . . The Union was

certainly aware, or should have been aware, of the practice.

Beyond this, the County contends that "(t)he agreement's provisions must be given a reasonable interpretation." The County asserts that the Union's interpretation would lead to the absurd result that an employe on a two week or longer vacation could claim sick leave and recover from the illness before the County could in any way verify the veracity of the request. This interpretation reads the safeguards of Article 14, Section B, out of existence, according to the County.

Beyond this, the County contends that Brandl's testimony must be credited over that of the Grievant. As a result, the Union's contention that the Grievant properly notified the County of the absence must be rejected, the County concludes. Since the Jahnke request was submitted before the commencement of the approved vacation, it has no bearing on this matter, according to the County. Similarly, the County rejects the Union's contention that the conversion of vacation to work days has any bearing on this matter.

Viewing the record as a whole, the County asks that the grievance be dismissed "in its entirety."

The County's Reply Brief

The County argues initially that "(t)he Union has mischaracterized the evidence in this dispute." More specifically, the County contends that the evidence demonstrates that the Grievant did not contact Brandl "at the beginning of the workday", and that Brandl did not advise the Grievant that she did not "see this as a problem". In addition, the County contends that the Union has exaggerated the County's policy in regard to vacation-workday conversion. The County acknowledges that it "does permit employees to convert vacation to workdays", but contends "employees may do so only in whole day increments." Beyond this, the County argues that the Grievant's request to convert approved vacation, retroactively, to sick leave has nothing to do with this policy. Another distinguishing feature, according to the County, is that "conversion of vacation to work days does not involve additional County costs." The County then addresses the Union's contention that if Brandl had denied the request immediately, the Grievant "could have returned to work and personally requested family illness leave." This line of argument is, according to the County, "mere speculation", and, in any event, poorly-supported by the evidence. Beyond this, the County argues that it has no obligation to notify an absent employe of the denial of a leave-conversion request. Because the Jahnke request is distinguishable from the Grievant's and because it is only one request, the County concludes that it can not be regarded as a past practice. Because there is no established past practice; because the County here objects to a retroactive conversion of leave; and because the County here has a valid reason for denying the conversion, the Door County case cited by the Union undercuts the Union's case, according to the County. Viewing the record as a whole, the County "requests the Arbitrator to dismiss the Grievance in its entirety."

DISCUSSION

The stipulated issue focuses on the contractual propriety of the County's refusal to grant the Grievant sick leave for May 12, 1989. Since the County had approved the Grievant's request to take that day as vacation, the dispute focuses on the contractual propriety of the County's refusal to convert the day of vacation into a day of sick leave for family illness.

This dispute potentially encompasses Articles 2, 11 and 14. The Union focuses on Article 14, Section D, and the absence of any provision precluding the conversion of Article 11 vacation into sick leave. The County focuses on Article 2 and Article 14, Section A, coupled with the absence of any provision authorizing the conversion of Article 11 vacation into sick leave.

Article 14 ultimately governs the dispute. A conversion of vacation to sick leave assumes that the employe has qualified for vacation and for sick leave. Since it is undisputed that the Grievant had been granted a day of vacation for May 12, 1989, the threshold issue is whether the Grievant qualified for sick leave under Article 14.

Sections A and D of Article 14 govern whether the Grievant qualified for sick leave on May 12, 1989. Since the Union's characterization of the elements to the operation of Section D is persuasive, the dispute turns on Section A. More specifically, the Union has accurately noted that Section D requires (1) a serious illness; (2) in the immediate family; which (3) requires the constant attention of the employee. Since, as the Union notes, the County has not challenged that the chicken pox was a serious illness to the Grievant's daughter; that the Grievant's daughter is an "imediate family" member; and that the Grievant's daughter required her constant attention, it follows that the elements to the operation of Section D, have been met here. Thus, the parties' dispute focuses on whether Section A, places a fourth requirement on the granting of sick leave for an unexpected family illness, and on whether the Grievant met that requirement.

The County contends that Article 14, Section A, requires that an employe advise the County of a request for sick leave "no later than one-half (1/2) hour after the earliest time which . . . she is scheduled to report for work".

The Union has not contested the County's assertion that the notice requirement of Section A, applies to requests for sick leave under Section D for family illness, and the language of the two sections inextricably links them. Section A states the amount of sick leave which can be earned and the rate at which it is earned, as well as providing the requirements to be met "(i)n order to qualify for sick leave". This section is, then, one of general applicability for Article 14. It can be noted that the notice requirement of Section A is directed toward the personal illness of an employe, but this is not significant here since Section C specifies that sick leave is restricted to an employe's personal use except as provided by Section D. Section A is, then, drafted to address the rule, not the exception. Section D does provide that personally earned sick leave may be used

for certain illnesses within a family. That section presumes, however, that the leave has been earned, and the requirements for earning the leave are stated by Section A. Nothing in the language of Section D indicates that the qualifying requirements of Section A are not applicable to Section D. That Section A has been drafted to apply generally to sick leave usage is demonstrated by the two exceptions to the notice requirement stated at the close of the final sentence to Section A. Section E places a general duty on employes to advise the County in advance of the actual leave where "an employe is aware in advance that sick leave will be needed". In the absence of the final exception stated in Section A, the duty to request sick leave before scheduled work would require an employe to meet the notice requirement of Section A for an absence already reported under Section E. Thus, Section A must be read to apply to sick leave requests arising under Section D.

Although the Union has not contested that the notice requirement of Section A applies to a request under Section D, it has contended that the Grievant's phone calls on May 12, 1989, met the notice requirement.

The Union's assertion that the Grievant met the notice requirement of Article 14, Section A, is not, however, sustained by the evidence. Article 14, Section A, requires the "employee or . . . her representative to report" the illness "no later than one-half (1/2) hour after the earliest time . . . she is scheduled to work." The Grievant's 8:30 a.m. phone call would have met this requirement if she had completed the call. She did not, however, and did not return the call until roughly three hours later. There is no persuasive evidence that she could not have completed the call, or was prevented from promptly following up the unanswered call by the severity of her daughter's symptoms. The Grievant's general assertion that the illness required her attention is not sufficiently specific to prove either point.

Section A lists two exceptions to the notice requirement, neither of which has been proven here. The first is "in case of emergency". The illness could not have been a continuous emergency or the Grievant would not have made the 8:30 a.m. call. Her testimony was, as noted above, too general to permit a conclusion that severe symptoms made it impossible for her to complete that call or promptly return it. The second exception is "when the Employer is fully aware the employee will be on sick leave for an extended period." That exception does not apply since the illness came on suddenly, and on a day in which the County expected the Grievant to be on vacation.

Another possible exception to the notice requirement is the provision of Article 2 which permits review of "the reasonableness of the application of said management rights". While the reasonableness of the County's denial of the conversion as an exercise of its Article 2 management rights can be questioned on a general level, the granting of sick leave is specifically governed by Article 14. To apply the reasonableness review of Article 2 to overcome the specific notice requirement of Article 14, Section A, would improperly use a general provision to read a specific provision out of existence.

In sum, although the parties' dispute potentially covers Articles 2, 11 and 14, the threshold issue is whether the Grievant qualified for sick leave under Article 14. Although the Union has proven the Grievant met the requirements for the use of sick leave for family illness under Article 14, Section D, the evidence does not demonstrate that the Grievant afforded the County the notice required by Article 14, Section A. Because the Union has not demonstrated the Grievant met the requirements for sick leave, the County's refusal to convert the May 12, 1989, absence from vacation to sick leave cannot be considered a contract violation.

The conclusion stated above resolves the parties' dispute on the narrowest basis possible. Because the parties have argued broader issues, it is necessary to address certain points of contention bearing on the scope of the conclusion stated above. Application of Article 14, Section A, to the present grievance assumes the Grievant was "scheduled to report for work" within the meaning of that section. This requires reading the terms "scheduled to . . . work" to refer to the Grievant's regular hours of work, not to the County's expectation that she would report for work on May 12, 1989. Since the Grievant's vacation for that date had been approved, the County could have had no such expectation. The interpretation adopted here is rooted in the persuasiveness of the County's assertion that the notice provision serves not only as a basis to permit it to obtain replacement workers, but as a basis to monitor potential abuse of sick leave. 1/ In the absence of the notice provision of Article 14, Section A, this assertion would not be persuasive as applied to the present facts, since the Grievant notified the County of the illness in a sufficiently timely fashion to permit the County to investigate if it chose to do so. However, Article 3, Section B, 5, limits an arbitrator to the "express terms of the Agreement", and the express terms of Article 14, Section A, impose a requirement the Grievant did not meet.

The notice requirement enforced in this decision is the preface to the parties' broader dispute concerning the circumstances in which the County can be obligated to convert vacation to sick leave. Given the conclusions stated above, that dispute cannot be addressed here. This grievance underscores that, in a requested conversion of vacation to sick leave, the requesting employe must first meet the contractual notice requirements for the use of sick leave. Under what circumstances a requested conversion must be granted must be left to the parties to resolve in bargaining or in litigation on appropriate facts.

In light of the conclusions stated above, no attempt will be made to address the full scope

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1/ It should be noted that the 1983 Memorandum arguably contradicts this interpretation asserted by the County, as well as the County's conduct regarding Jahnke's request. However, even assuming the 1983 Memorandum has persuasive force, it is irrelevant to the facts posed here, which question whether the Grievant afforded the County proper notice. If she did, she was not "in vacation status" as addressed by the 1983 Memorandum, and if she did not, as concluded above, the requirements of Article 14, Section A, have not been met.

of the alleged past practices advanced by each party. Such evidence applies to this case only by indicating that Jahnke's request for sick leave was timely made under Article 14, Section A, and that Haskin requested conversion of vacation to work time before, not during, her use of vacation time. The Door County case cited by each party is inapplicable to this case. The Door County case did involve the litigation of a notice requirement for the use of sick leave. In that case, however, the requested conversion was of vacation to funeral leave, and the record evidence established that the employer had not applied the notice requirement in the past. In this case, there is no such evidence. Rather, the evidence indicates the County has strictly applied the notice requirement in the past.

AWARD

The County's refusal to grant the Grievant's request to convert an approved vacation day to a family illness day, while utilizing the vacation day, did not constitute a violation of the provisions of the collective bargaining agreement.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 8th day of August, 1990.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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