BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between MENONOMIE CITY EMPLOYEES LOCAL 734, AFSCME, AFL-CIO and CITY OF MENOMONIE	Case 65 No. 42643 MA-5757

Appearances:

Mr. John K. Higley, Assistant City Attorney, Stearns, Skinner, Schofield & Higley, P.O. Box 280, Menomonie, Wisconsin, appearing on behalf of the City.
Ms. Margaret M. McCloskey, Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1203 Knollwood Court, Altoona, Wisconsin, appearing on behalf of the Union.

ARBITRATION AWARD

The Menomonie City Employees, Local 734, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Menomonie, hereinafter referred to as the City, are parties to a collective bargaining agreement effective January 1, 1989 through December 31, 1989, which provides for final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission, hereinafter the Commission, to designate a member of its staff as Arbitrator to hear and determine the instant dispute. Hearing on the matter was held on February 28, 1990 in Menomonie, Wisconsin. The record was closed on April 6, 1990 when notice of intent to file reply briefs was not received.

STATEMENT OF THE ISSUE

The Union framed the issue as "Does the Sick Leave Policy violate the Collective Bargaining Agreement? If so, what is the appropriate remedy?". The Employer framed the issues as "Does the sick leave policy violate the collective bargaining agreement?" and "Did the City violate the collective bargaining agreement by notifying James Molnar of the possibility he would be placed on restricted sick leave?" Since the parties were unable to agree upon a statement of the issues, the Arbitrator frames the issues as follows:

Does the sick leave policy violate the collective bargaining agreement?
Did the Employer violate the collective bargaining agreement when it notified the Grievant of the possibility that he would be placed on the restricted sick leave?
If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 1 - RECOGNITION

. . .

Section 1.04 Management Rights The UNION recognizes the rights and responsibilities belonging solely to the CITY, prominent among which but by no means wholly inclusive are the rights to hire, promote, discharge or discipline for just cause, the right to decide the work to be done and location of the work. Such authority shall not be in a manner inconsistent with any of the other provisions of this AGREEMENT.

Section 1.05 Rights Limited Rights claimed in this AGREEMENT shall be consistent with those rights and responsibilities conferred upon the CITY and/or the UNION by applicable state and federal statutes.

A) Nothing contained in this AGREEMENT shall be interpreted as granting to either party hereto authority to unilaterally establish any matter which is subject to collective bargaining pursuant to Wisconsin statutes.

. . .

ARTICLE 3
GRIEVANCE PROCEDURE

. . .

Section 3.03 Arbitration Any grievance which cannot be

settled through the above procedures may be submitted to final and binding arbitration as follows:

. . .

B) In the event the parties are unable to agree upon an arbitrator with then (10) days after the meeting with the Mayor proves unsuccessful, either party may request the Wisconsin Employment Relations Commission (WERC) to appoint one of their staff members as sole arbitrator;

. . .

Section 3.04 Arbitration Hearing The arbitrator shall meet with the parties at a mutually agreeable date and place to review the evidence and hear testimony relating to the grievance. Upon completion of this hearing, the arbitrator shall render a written decision to both the CITY and the UNION.

Section 3.05 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. The arbitrator shall not modify, add to or delete from the express terms of the AGREEMENT. The arbitrator's decision shall be final and binding upon both parties.

. . .

ARTICLE 4 - DISCIPLINARY AND DISCHARGE PROCEDURE

Section 4.01 Disciplinary Action It is the CITY'S responsibility to offer and provide reasonable training and supervision and to establish reasonable work rules. Disciplinary action may only be imposed on an employee for failure to fulfill his/her responsibilities as an employee. Any disciplinary action or measure imposed upon an employee may be appealed through the regular grievance procedure.

A) If the CITY has sufficient reason to reprimand an employee, it shall be done in a manner that will not embarass the employee before other employees or the public.

Section 4.02 Just Cause Notification Employees shall not be disciplined or discharged without just cause . . . .

Section 4.03 Procedure The normal procedure for discipline and/or discharge shall, when possible, be progressive. This shall include only the following:

A) Oral reprimand
B) Written warning;
C) Suspension;
D) Discharge.
   1. The number of written warnings and length of suspensions shall be determined by the CITY in accordance with the gravity of the violations, misconduct or dereliction involved, taking into consideration that such steps are intended as corrective measures.

. . .

ARTICLE 8 - SICK LEAVE

. . .

Section 8.01 Accrual Every employee shall be entitled to accumulate to a total of not to exceed nine hundred and sixty (960) hours of sick leave at the rate of eight (8) hours per month. [Employees scheduled for seven hour days shall be at the rate of seven (7) hours per month.]

. . .

B) In addition to usage for personal illness or injury, sick leave may be used for absences caused by medical emergencies in the immediate family. Sick leave may be taken in a minimum of one (1) hour segments.

. . .

Section 8.03 Qualification In order to qualify for sick leave, an employee must report to the department head that he/she is sick not later than one-half hour after the earliest time for which he/she is

scheduled to report for work, whenever possible.

Section 8.04 Verification Each sick employee is subject to check to verify the alleged sickness by a CITY representative. Any employee who, after proper hearing before the Mayor, is found to have violated any sick leave regulation is subject to discipline or discharge to be determined by the department head and the designated committee subject to the grievance procedure.

. . .

ARTICLE 9 - LEAVES OF ABSENCE

. . .

Section 9.02 Illness and Injury Leave A period of not more than two (2) years shall be granted as leave of absence due to personal illness or for disability due to accident, provided a physician's certificate is furnished from time to time to substantiate the need for continuing the leave. Additional time may be extended in such cases by mutual consent of the UNION and the CITY.

. . .

OTHER PERTINENT DOCUMENTS

SICK LEAVE POLICY
(Effective September 21, 1987)

1. For absences of less than three (3) consecutive working days, supervisors need not require a physician's verification of illness. However, medical documentation is required only when the employee is on restricted sick leave. A taking of (a) vacation day(s) immediately before, after or during the taking of three (3) or more sick days shall not alter this requirement.

2. A physician's verification of illness must be presented upon return to work after any sick leave in excess of three (3) or more days.

3. Employees on sick leave for extended periods are required

to submit, at appropriate intervals, but not more frequently than one (1) time per pay period, satisfactory evidence of continued incapacity for work, unless some responsible supervisor has knowledge of the continuing incapacity for work.

4. When employees are required to submit medical documentation pursuant to these regulations, such documentation should be furnished by the employee's attending physician or other attending practitioner. Such documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his normal duties for the period of absence. Normally, medical statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation to perform duties.

5. Supervisors who have evidence indicating that an employee is abusing sick leave privileges may place an employee on the restricted sick leave list. In addition, employees may be placed on the restricted sick leave list after their sick leave use has been reviewed on an individual basis and the following actions have been taken:

   a. Establishment of an absence file;
   b. Review of the absence file by the immediate supervisor and by the Mayor.
   c. Review of the monthly listings of leaves of absence and sick leave used by employees. (No minimum sick leave balance is established below which the employee's sick leave record is automatically considered unsatisfactory).
   d. Supervisor's discussion of absence record with the employee.
   e. Review of the subsequent monthly listing. If listing indicates no improvement, the supervisor is to discuss the matter with the employee to include advice that if next listing shows no improvement, employee will be placed on restricted sick leave.

6. Supervisors shall provide written notice to employees that

their names have been added to the restricted sick leave listing. The notice also explains that, until further notice, the employees must support all applications for sick leave by physician's verification of illness.

7. Supervisors shall review the monthly leave listings of those placed on the restricted sick leave listing on a semi-annual basis. If there has been a substantial decrease in absences charged to sickness, the employee's name is to be removed from the restricted sick leave list and the employee is to be notified in writing of the removal.

8. When the reason for an employee's sick leave is of such nature as to raise justifiable doubt concerning the employee's ability to satisfactorily and/or safely perform duties, a fitness for duty medical examination is requested through appropriate authority. A complete report of the facts, medical and otherwise, should support the request.

9. Nothing in this policy shall prohibit the City from checking to verify the alleged sickness of an employee. Any employee who, after a proper hearing, is found to have violated any sick leave regulation may be subject to discipline or discharge.

Letter dated September 29, 1987

Mr. Dick Agnew
Local 734
Menomonie, WI 54751
Re: Grievance No. 87-05 ST

While it is a part of management rights to proceed with a policy to cover sick leave covering employees of the City of Menonomie there was a statement that should be added to the policy now in force. That statement is to read: "This policy is in force for the City of Menomonie where it does not conflict with city labor contracts. Language in conflict is superseded (sic) by existing labor contracts."

/s/
Chuck Stokke

Mayor

BACKGROUND

On September 9, 1987, the Mayor of the City distributed a sick leave policy to department heads and supervisors which was to become effective September 21, 1987. Two days later, the Union grieved the policy alleging that the Employer unilaterally established a sick leave policy and sought as corrective action that "All bargaining unit employees will abide by contract language in effect, and reserve the right to use the grievance procedure to settle any conflicts that may arise." The Mayor responded to this grievance by letter dated September 29 in which he stated "...there was a statement that should be added to the policy now in force. That statement is to read: 'This policy is in force for the City of of Menomonie where it does not conflict with city labor contracts. Language in conflict is superseded (sic) by existing labor contracts.'" Following receipt of this letter the grievance was dropped.

On November 3, 1989, based upon a review of the grievant's past use of sick leave and his failure to report to a supervisor that he was leaving work early because he did not feel well on October 29, the City notified the Grievant by letter that "(he) may soon be added to the restricted sick leave listing" which would require that "until further notice, all applications for sick leave must be supported by a physician's verification of illness......" In this letter, the grievant was informed that in accord with the sick leave policy an absence file on the grievant had been established and that it had been reviewed by the mayor and the grievant's department head and that the absentee records of all the employees had been reviewed. The grievant was also informed that this letter was notice to him that his attendance is not satisfactory, that his future monthly sick leave listings will be reviewed and that action will be taken against him if there is evidence of abuse or if no improvement is shown.

The Grievant and the Union filed a grievance on November 20, 1989 asserting that the "restricted sick leave listing" referred to in the letter was part of a sick leave policy which was unilaterally implemented by the Employer, is a mandatory subject of bargaining, is unreasonable and was never distributed among Union members. The grievance was not resolved and has been appealed to arbitration.

POSITIONS OF THE PARTIES

According to the City, it has collectively bargained for and consistently maintained its right to verify sick leave usage and its right to discipline employees for violation of sick leave regulations. Further, it contends that the sick leave policy it implemented in 1987 is consistent with its past policy and practice and that the grievant was notified of possible placement on the restricted sick leave list consistent with the policy.

Specifically addressing its past practice, the City asserts that the language contained in

Section 8.04 of the current collective bargaining agreement remains the same as the language which was agreed upon in the 1978-79 collective bargaining agreement and that the sick leave policy restates the medical verification policy it has followed for fifteen years under this language. The City continues that the sick leave policy is only expanded to establish a step by step procedure for supervisors to follow which will result in an employee being required to provide medical verification.

Referring to its requirement of medical documentation when an employee has been absent three or more consecutive days under the sick leave policy, the City contends that although this has been a requirement for over fifteen years which has remained unchallenged even though the Union has been aware of and abided by it during that time. According to the City, this policy recognizes that a three day illness is serious and requires assurance that an employee is fit to return to work and recognizes that illnesses of two days or less may not require a visit to a physician or other health care provider. With respect to its procedure which results in an employee being placed on a restricted sick leave list which requires employees to submit medical verification for all sick leave used in instances where sick leave abuse is suspected, the City declares that this part of the policy recognizes that most employees using sick leave do not abuse it.

The City acknowledges that the Union filed a grievance regarding the unilateral implementation of this sick leave policy but does not agree with the Union that it agreed the policy does not apply to the bargaining unit. According to the City, its response to the grievance merely indicated that it would not take action inconsistent with the collective bargaining agreement. In this respect, it asserts that its actions are consistent with the collective bargaining agreement.

Finally, the City concludes that its letter advising the grievant that the procedure for possible placement on the restricted sick leave list had been put into place is consistent with its right to discipline the grievant. According to the City, it has the right to discipline the grievant since he failed to notify a department head of illness prior to leaving work, a fact which the Union does not contest. It also contends it has the right to commence the procedure for possibly placing the grievant on the restricted sick leave list since it suspects the grievant of sick leave abuse.

Rather than contest whether or not there is cause to discipline the grievant, the Union has addressed the issue of whether or not the City has the right to impose its sick leave policy upon the Union and its bargaining unit members. According to the Union, the City unilaterally adopted the sick leave policy referenced in the current disciplinary action in 1987 and it was challenged by the Union then on the basis that the City did not have the authority to do so under Article 1.05A (sic) of the collective bargaining agreement. The Union continues that it did not pursue the grievance then, however, since the City responded to its objection by stating that the policy would be in force only where it did not conflict with the collective bargaining agreements, a response which the Union believed was an admission that the policy would not affect it. The Union adds that its assumption was further reinforced by the fact that the policy was never disseminated to bargaining unit members.

Stating that the policy has resurfaced with the disciplinary action taken against the grievant, the Union contends again that the policy has never been negotiated, that it is unreasonable in many ways and that it was previously resolved in the Union's favor. Again citing Article 1.05A (sic) and declaring that sick leave is a mandatory subject of bargaining, the Union alleges that Article 1.05A (sic) prevents the City from unilaterally imposing rules on any subject of bargaining which abridges employees' rights without negotiating and therefore the City does not have the right to impose this sick leave policy upon it. Further, it maintains that the policy is unreasonable and has an inhibiting effect upon the employees' free use of negotiated sick leave benefits. Among the objections raised by the Union are the requirement that an employee provide a doctor's certificate for each instance of illness if an employee is placed on the restricted sick leave list; that the certification must be provided at employee expense; that the policy is not consistently applied and that the manner in which the certification must be written imposes an unacceptable burden upon the employees. The Union also objects to the long standing practice of the City requiring medical verification of illness upon three consecutive days of illness stating that frequently employees take a day of vacation on the third day in order to avoid the need for a medical verification, a practice which results in negating an employee benefit intended for other purposes.

In addition, the Union asserts that even if the sick leave policy does not violate the collective bargaining agreement it should not be enforced since it has never been disseminated to bargaining unit members and bargaining unit members have not officially known of its existence. It also contends that the three day policy should not be enforced because it existed prior to the time when the bargaining unit was formed and it has not been consistently applied ever since. Finally, the Union argues that the intent of the policy is to use it as part of employee discipline and that Article 4 of the collective bargaining agreement clearly spells out the procedure to be used.

As remedy, the Union seeks that the policy be declared null and void, that the disciplinary action resulting from its implementation be rescinded and that employees be made whole for any harm caused. Further, the Union posits that if the policy is not a violation of the collective bargaining agreement the disciplinary action resulting from it should be declared illegal since the employees were not properly informed of the policy. Finally, the Union also seeks that the Employer be required to negotiate any policies or rules which deal with mandatory subjects of bargaining and that the employees be made whole for any harm done them by the Employer's failure to do so.

DISCUSSION

While this dispute originates over whether the City violated the collective bargaining agreement when it notified the grievant of possible placement on a restricted sick leave list, the issue primarily argued relates to whether or not the City has the right to implement a sick leave policy. Among the challenges raised are does the sick leave policy referenced in the letter of discipline apply to bargaining unit members, does the City have the right to establish work rules,

does the sick leave policy conflict with the collective bargaining agreement, is the sick leave policy reasonable and does the City have the right to enforce this policy. In order to resolve this dispute, each question will be addressed.

Does the Sick Leave Policy Referenced in the Letter of Discipline Apply to Bargaining Unit Members?

According to the Union this policy was grieved once before by it in 1987 and was resolved in its favor. The evidence does not sustain this finding, however. While it is clear that the issue was grieved once before, neither the City's response to the grievance nor the Union's failure to follow through on the grievance establish that the grievance was resolved in the Union's favor.

The Union asserts that it assumed the grievance was resolved in its favor because the Mayor had stated the policy would be in force only where it did not conflict with language in the collective bargaining agreements and because it believed that its collective bargaining language prevented the City from unilaterally establishing work rules and that the policy conflicted with rights which had been bargained. It also believed that the grievance was resolved in its favor since the City did not disseminate the policy to the employees in the bargaining unit. From the City's response to that grievance, however, it is clear that Union's assumption is merely an assumption. Nothing within the response indicated that the policy would not apply to the Union nor was there any indication that certain aspects of the policy would not be enforced because it conflicted with specific contract language.

Further, it cannot be assumed that the City did not inten the policy to affect employees in this bargaining unit simply because it has not distributed the policy to the employees. In order to enforce a work rule, it is not necessary that the rule be distributed to the employees but only that the employees be advised of the work rule. At the time of the first grievance, it is clear that the Union knew of the policy even if the employees did not since the Union grieved the policy. Further, with respect to the instant grievance, even though the Union contends that the policy does not apply to it, it did not establish that the employees have not been advised of the policy. To the contrary, evidence in the record indicates that at least in some instances employees in this bargaining unit, including Union officers, have abided by rules set forth in the policy. Thus, it cannot be concluded that the employees have not been advised of the work rule or that the work rule does not apply to the employees in this bargaining unit.

Does the City Have the Right to Establish Work Rules?

The Union has challenged the City's right to establish work rules concerning mandatory subjects of bargaining without negotiating them asserting that Section 1.05A of the collective bargaining agreement prevents the City from doing so. While it is true that Section 1.05A requires the City to bargain over matters subject to collective bargaining, Section 4.01 of the collective bargaining agreement specifically gives the City the right, as well as the responsibility,

to establish reasonable work rules. Consequently, since the parties have bargained over whether or not the City has the right to establish reasonable work rules, it cannot be concluded that Section 1.05A prevents the City from establishing a sick leave policy which includes work rules as long as as the policy and rules are not inconsistent with the collective bargaining agreement and are reasonably related to the safe, orderly and efficient operation of the work force. Further, absent any showing that the policy does conflict with the collective bargaining agreement or is not reasonably related to the safe, orderly and efficient operation of the work force, it is concluded that the City does have the right to establish work rules.

Does the Sick Leave Policy and its Pertinent Work Rules Conflict with the Collective Bargaining Agreement and is the Requirement Reasonable?

There are four parts of the collective bargaining agreement which pertain to sick leave and discipline for abuse of sick leave or sick leave regulations. They are Section 8.O1B which allows sick leave to be used for absences caused by medical emergencies in the immediate family, Section 8.04 which states the City has the right to verify any alleged employee sickness and the right to discipline for evidence of violation of any sick leave regulation, Section 9.02 which allows extended leaves of absence due to illness provided a physician's certificate is furnished from time to time and Section 4.03 which provides that when discipline is imposed it shall be progressive in nature when possible. The sick leave policy essentially formulates rules for documenting illness, defines the form in which medical verification must be provided when it is required and establishes a system for policing the use of sick leave. Absent any contract restrictions, the City has the right to establish this sick leave policy as long as it is not arbitrary, discriminatory or unreasonable.

In order to determine whether the sick leave policy conflicts with the contract provisions and whether its requirements are reasonably related to the City's legitimate objective of preventing sick leave abuse or excessive absenteeism, each section of the policy was evaluated. In this respect, it is concluded that the primary purpose of part of Provision 1 and Provisions 2, 3, and 9 of the policy, is to reaffirm existing contract language or existing past practices, and that parts of Provision 1 and Provisions 5, 6, 7 and 8 expand upon the City's prior practice but do not conflict with existing language within the collective bargaining agreement.

In Provision 1 and 2 of the policy a physician's verification is mandatory upon return to work only after any sick leave in excess of three days or more. This work rule reiterates the City's past practice of fifteen years. Although the Union argues this practice should be negated since it was in existence before the bargaining unit was formed and it is not consistently enforced, these arguments are not persuasive. The record indicates not only that this was the City's practice prior to the forming of the bargaining unit but that the practice continued even though the bargaining unit was formed and several collective bargaining agreements were reached. If the Union did not agree with the practice, it could have been a subject of bargaining and the Union could have bargained to prohibit the practice. There is no evidence that this occurred. Further, whether the practice has been consistently enforced is not a determinant of whether or not the rule

is reasonable.

In Provision 3 of the policy, an employee is required to submit satisfactory evidence of continued incapacity when on extended periods of sick leave. This work rule is no different than Section 9.02 of the collective bargaining agreement except that it defines the frequency that evidence should be submitted. Rather than impose an additional burden upon the employee this definition acts to prevent a supervisor from acting in an arbitrary manner by requiring more verification and again provides a safeguard for the employees.

Provision 9 of the policy is essentially a restatement of Section 8.04 of the collective bargaining agreement. The primary difference between the two statements is that Provision 9 of the policy refers only to "proper hearing" while Section 8.04 of the collective bargaining agreement refers to "proper hearing before the Mayor." As long as the "proper hearing" in this Provision 9 is a hearing before the mayor as required by Section 8.04 of the collective bargaining agreement, the policy is not in conflict with the contract.

In part of Provision 1 and in Provisions 5, 6, and 7 of the policy, the City has expanded upon its prior practice by setting into place a system for policing the use of sick leave. Included in this system is a procedure to be followed by supervisors in determining if absenteeism is a problem and a provision for documenting absences (the restricted sick leave list) in suspected instances of sick leave abuse or excessive absenteeism. Nothing within the collective bargaining agreement prevents the City from directing its supervisors to use a specific procedure when determining if there is an absenteeism problem or that an employee be disciplined for false claims of illness, improper use of sick leave or for excessive absenteeism. There is also nothing within the agreement which prevents the City from requiring documentation for absences to protect against sick leave abuse or excessive absenteeism. In fact, under the collective bargaining agreement the City's has the right to verify each illness.

Although it may be construed that Provision 6 of the policy conflicts with Section 8.04 of the collective bargaining agreement, it is concluded that it does not. Section 8.04 specifically requires a hearing before the mayor when a supervisor has evidence that an employee has abused a sick leave regulation before discipline can be imposed. Provision 6 of the policy is not discipline but an effort on the City's part to curb imprope@ use of sick leave and is conceivably the step before discipline is imposed. Consequently, as long as the evidence is submitted in a hearing before the mayor prior to imposing discipline, there is no conflict between the collective bargaining agreement and the policy's requirement that an employee provide a physician's verification for all requests for sick leave.

In addition to finding that Provisions 5, 6 and 7 of the policy do not conflict with the collective bargaining agreement, it is also concluded that these provisions are not unreasonable. These three provisions specifically provide safeguards for the employees by requiring that the supervisor establish an absence file, review it with the mayor, discuss the absences with the

employee and review the employee's absentee record following the discussion before placing the employee on a restricted sick leave list and by requiring the supervisor to notify the employee when placement on a restricted sick leave list occurs and that the employee will need to provide medical documentation each time a request for sick leave is made and by providing for an employee's removal from a restricted sick leave list. While these requirements may not prevent the City from acting in an arbitrary or disciminatory manner, the standards which are set forth will place a burden upon the City to demonstrate it has maintained a record of employee absences, has discussed the problem with the employee and has acted reasonably if it decides discipline is appropriate for abuse of sick leave or excessive absenteeism.

While Provision 8 of the policy is also an expansion on the City's past practice, absent specific contractual language to the contrary, the right to require employees to take a fitness for duty medical examination is a basic management right since management assumes responsibility for the overall safety of the workforce and is also subject to contractual and in some cases statutory or common-law tort liability for the injuries caused by its work force.

The last provision of the policy to be discussed is Provision 4 which is also determined to be a reasonable work rule. Although the Union argues that this requirement places an inordinant burden upon the employee by requiring the employee to remember what is acceptable language and by requiring the employee to dictate to his or her attending physician what must be stated in such a verification, it is concluded this argument is more speculation than substance and is not persuasive. Further, this provision, like many of the other provisions within the policy provides protection for the employee in the sense that it clearly defines what is not acceptable evidence or proof of illness and gives direction as to what will be considered acceptable, again a safeguard against arbitrary supervisory action.

In conclusion, with regard to whether the sick leave policy violates the collective bargaining agreement, imposes an unreasonable burden upon the employees or must be bargained, it is found that to the extent the policy sets forth procedures for verification of illnesses and determines whether or not there is cause to discipline an employee for improper use of sick leave, the City is within its right to establish the procedure. It is also concluded that the part of the policy which requires employees to provide medical verification of illness upon return to work after taking sick leave in excess of three or more days, the part of the policy which requires employees to submit evidence of continued incapacity for work during extended sick leave periods and the part of the policy which defines acceptable medical verification is not unreasonable and does not conflict with the collective bargaining agreement and therefore the City has the right to set forth such work rules and make them applicable to the Union.

Does the City have the Right to Enforce the Sick Leave Policy?

The Union argues that even if it is found that the policy does not conflict with the collective bargaining agreement, it should not be enforced because it is inconsistently applied and because its

employees are unaware of the policy. Based upon the evidence which was submitted the Union's argument must be rejected.

The only evidence to support of the Union 's contention that the policy was not consistently enforced relates to whether the City consistently required a physician's verification upon absences from work of three days or more. With respect to this evidence, the Union testified that it knew of instances where physician verifications were not required but it failed to cite any specific incidents. The record, however, does indicate that the Employer had waived the requirement in an instance when it had known an outbreak of influenza caused employees to be absent three days or more. This fact tends to reinforce the Employer's position that the policy is consistently enforced and disputes the Union's assertion that that it is not consistently enforced. Consequently, the evidence is insufficient to conclude that the policy was inconsistently applied.

The is also insufficient evidence to conclude that the employees are unaware of this sick leave policy. While the record does not reflect that this policy has been posted, it also does not support a finding that employees are unaware of the policy. A policy does not have to be posted in order for employees to be made aware of it. It only needs to be communicated with the employees. Consequently, absent proof that the policy has not been communicated to the employees, it cannot be concluded that the City does not have the right to enforce the policy.

The second issue raised in regard to enforcement of the policy is whether the City has the right to notify the grievant of possible placement on a restricted sick leave list. Since it has been concluded that the City has the right to establish a sick leave policy and that the policy does not conflict with the collective bargaining agreement it is also concluded that the City has the right to notify the grievant of possible placement on a restricted sick leave list. According to the City, the grievant received the notice because of his prior absentee record and because he had left work early and failed to report to his supervisor that he was doing so. The Union does not contest these facts. Since there is no evidence that the City has acted in an arbitrary or disciminatory manner when it notified the grievant of possible placement on a restricted sick leave list, it must be concluded that the City acted in a reasonable manner when it so notified the grievant.

In conclusion, the record does not demonstrate that the Employer violated the collective bargaining agreement when it implemented the sick leave policy; that the sick leave policy alters the sick leave language which has been bargained; that the sick leave policy imposes an unreasonable burden upon the employees or that the grievant was unjustly notified of possible placement on the restricted sick leave list.

Based upon the record as a whole and the discussion as set forth above, the following award is issued.

AWARD

The sick leave policy does not violate the collective bargaining agreement.

The Employer did not violate the collective bargaining agreement when it notified the Grievant of the possibility that he would be placed on the restricted sick leave.

The grievance is denied.

Dated at La Crosse, Wisconsin this 9th day of August, 1990.

By Sharon K. Imes /s/
Sharon K. Imes, Arbitrator