BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MANITOWOC COUNTY COURTHOUSE EMPLOYEES, LOCAL 986-A, of the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	Case 226 No. 43343 MA-5955
and	
MANITOWOC COUNTY BOARD OF SUPERVISORS	

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54221-0370, appearing on behalf of Manitowoc County Courthouse Employees, Local 986-A, of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Mark Hazelbaker, Administrative Coordinator/Corporation Counsel, 1010 South Eighth Street, Room 308, Manitowoc, Wisconsin 54220, appearing on behalf of Manitowoc County Board of Supervisors, referred to below as the Employer, or 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 Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Charlotte Endries, 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 Manitowoc, Wisconsin, on April 10, 1990. The hearing was transcribed. The parties filed briefs by June 4, 1990.

ISSUES

The parties stipulated the following issue for decision:

> Was the Grievant, Charlotte Endries, "required" to attend upon her adult daughter and therefore eligible to claim sick leave for the three days of work she missed, November 20, 21 and 22, 1989? 1/

RELEVANT CONTRACT PROVISIONS

ARTICLE 14 - SICK LEAVE

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B. Notice of Sick Leave: In order to be eligible for sick leave pay, it is understood that on any work day when an employee is unable to perform his or her duties, he or she shall so advise his or her immediate supervisor or Department Head or Department Head's designee prior to the start of his or her work shift, if possible.

In the event of critical illness or required attendance upon an employee's father, mother, spouse or child, an employee shall be allowed to use accumulated sick leave.

C. Regulation: Any employee off work due to illness for three (3) or more consecutive days

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1/ The parties also stipulated to the following remedy if the grievance was determined meritorious: "If so, the remedy would be to restore those hours as vacation time and debit her accumulated sick leave."

> may be required by the Employer to submit a physician's statement.
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> After five (5) occurrences . . . the Employer may require an employee to furnish a physician's certificate for the sixth (6th) sick leave occurrence and thereafter in a calendar year . . .
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> As to sick leave absences caused by a dependent's sickness, the County may, if it has a reasonable basis for questioning the taking of such leave, require that after five (5) total absences covering all sicknesses during a calendar year, that the employee supply a physician's certif-icate covering the sickness of the dependent, provided that the County pays for the cost of the physician's certificate. Furthermore, it is understood that in counting occurrences for dependent's sickness, no occurrence shall be counted if it is accompanied by a physician's certificate.
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> . . .

BACKGROUND

The grievance concerns the Grievant's absences on November 20, 21 and 22, 1989, 2/ to provide "home medical care" to her daughter. The Grievant's daughter lives in Wausau, and gave birth to her first child at about 5:00 p.m. on November 14. The birth was effected by Cesarean Section.

The Grievant's daughter had been due to deliver the baby on November 1. The decision to deliver the baby by Cesarean Section was not made until the afternoon of November 14. The Grievant learned of the decision when she returned home after work on that date. She and her husband determined that evening to go to Wausau, and did so on November 15. She took one day of vacation, and returned to work on November 16. Her daughter was discharged from the hospital on Saturday, November 18. The Grievant returned to Wausau the following Monday, November 20, and remained there through the following Wednesday, November 22. In the evening of November 22, the Grievant and her daughter's family returned to Manitowoc. The Grievant and her daughter attended church services on Thursday, November 23, at about 9:00 a.m.

The Grievant works in the office of the County Clerk, Daniel Fischer. She had informed Fischer, months before the delivery, that she intended to take vacation when her daughter delivered the baby.

The facts summarized above are undisputed. The Grievant testified that sometime during work on November 16 or 17, she informed Fischer that she planned to return to Wausau by the following Monday and take sick leave to care for her daughter. Fischer testified that he thought the Grievant did not request sick leave until she filled out her time card for the payroll period in which the absences occurred. In any event, Fischer responded to the Grievant's request for sick leave by saying he would check with the Human Resources Department, which informed Fischer the request should be denied.

The Grievant noted in testimony that her daughter is five feet tall, and delivered a baby which weighed roughly nine and one-third pounds. She stated that when she first saw her daughter on November 19, her daughter appeared to be exhausted physically and emotionally. She acknowledged she did not afford her daughter medical care, such as changing bandages, but stated she did attend to both her daughter and grand-daughter to permit her daughter to rest.

The balance of the evidence adduced at hearing concerned past practice and bargaining history. Catherine LeClair, Margaret Bessert, Marilyn Kadow, the Grievant and Diane Schmidt testified regarding past practice.

LeClair testified that she had used sick leave to attend to illnesses within the family "about 10 or 12" times. 3/ Three of those instances involved her adult daughter. Specifically, she stated that in August of 1978, she used sick leave to take her daughter, then twenty-three years old, to and from the dentist's office for the removal of her daughter's wisdom teeth. LeClair worked, at that time, in the County Clerk's Office, and the then-incumbent County Clerk approved the leave. She also noted that on February 5, 1979, she

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2/ References to dates are to 1989, unless otherwise noted.

3/ Transcript (Tr.) at 10.

was permitted to take one day of sick leave to attend to her daughter, who had delivered a baby which required immediate surgery. LeClair used the leave to stay with her daughter, to permit her son-in-law to attend to the details surrounding the infant's surgery. LeClair was then working in the office of the County Comptroller, and the then-incumbent Comptroller approved her sick leave request. The final instance testified to by LeClair occurred in December of 1987. At that time, Helen Miller, the County's Public Health Nurses' Director, approved LeClair's use of sick leave to care for her daughter in Janesville. Her daughter, then thirty-three years old, had undergone a biopsy, which revealed a malignancy which was treated by a complete mastectomy.

Margaret Bessert is the County's Payroll Supervisor, and is a member of the bargaining unit represented by the Union. Bessert testified that in August or September of 1986 she requested, and was granted by the then incumbent County Comptroller, three days of sick leave to attend to her then twenty-eight year old daughter, who had oral surgery which involved the removal of twenty teeth.

Marilyn Kadow is employed in the office of the Register in Probate. She testified that she requested, and was granted by the Register in Probate, sick leave on approximately five occasions to transport her daughter to an allergist in Waukesha. Three to four of those instances occurred after her daughter's eighteenth birthday.

The Grievant testified that she requested, and was granted sick leave in 1982 or 1983 to take care of her eldest daughter, who was married and living in Chicago. Her daughter had maxillofacial surgery, and the Grievant used the sick leave to care for her daughter after she returned from the hospital. The leave was approved by Miller, who was, at that time, her supervisor.

Diane Schmidt, who is presently employed by the County as its Deputy Human Resources Director, has been employed by the County in various positions in its Personnel and Human Resources Department. She has been employed from the time the County created its Personnel Department until that department became the Human Resources Department. She testified that the Personnel Department was not advised of any of the usages of sick leave summarized above. Fischer contacted her to determine if the requested use of sick leave at issue here should be granted, and she advised Fischer that the Grievant would have to use vacation.

The balance of the evidence adduced at hearing concerned bargaining history. LeClair testified that she was on the Union's bargaining committee in 1977, when the parties agreed to the predecessor of what now appears as the second paragraph of Article 14, Section B. The paragraph inserted into the 1977 labor agreement appeared as the second paragraph of Article XII, Section B, and read thus:

> In the event of critical illness or required attendance upon a father, mother, spouse or children, employee shall be allowed to use accumulated sick leave.

During the collective bargaining which produced the 1982 labor agreement, the parties revised this language to read as it does in Article 14, Section B, of the current agreement. During that bargaining, the parties also added what presently appears as the third paragraph of Article 14, Section C.

The paragraph which presently appears as the first paragraph of Article 14, Section B, has not been altered, in any way relevant to this matter, since at least the 1975-76 agreement.

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

THE UNION'S POSITION

After a review of the record, the Union asserts that both Article 14 and Article 16 refer to "child," not "dependent child," and that the reference to "dependent" in Article 14, Section C, has no bearing on the reference to "child" in Article 14, Section A. Beyond this, the Union contends that the parties' past practice and relevant bargaining history establish that "(e)mployees could and did use their sick leave time for attendance upon adult children and other nondependent family members" and that "(s)upervision was aware of the policy." Contending that personnel changes in the Employer's administrative staff account for the "new interpretation" of the sick leave benefit sought by the Employer here, the Union concludes that "(t)he expressed language, the bargaining history and the past practice under the language all attest to the validity of the claim brought by the grievant."

Beyond this, the Union asserts that the reference in Article 14, Section A, to "required attendance" must be given its commonly understood meaning of ". . . to have need of . . . requires medical care." Noting that Article 14, Section C, has no bearing on this definition, and that the contract

does not specify who determines "whether or not the employee is needed," the Union concludes that the record supports the Grievant's judgement that her daughter needed her and must, accordingly, be affirmed here.

Asserting that the Cesarean Section was major surgery and challenging the Employer's assertion that the availability of sources of alternative care is a relevant consideration, the Union concludes that the Grievant's use of sick leave "is the very type of situation the authors of the language envisioned when drafting the language to permit family sick leave." It follows, according to the Union, that the grievance must be sustained.

THE COUNTY'S POSITION

After a review of the record, the Employer asserts that the grievance must be denied because "(t)he collective bargaining agreement does not allow use of sick leave to care for adult children." Contending that "words must be defined in their ordinary and accepted sense as the parties would have understood them,"
the Employer asserts that "child," thus defined, connotes a non-adult. Beyond this, the Employer contends that construing "child" to include an adult would be "inconsistent with the tenor of the agreement." Specifically, the Employer argues that the other people noted in Article 14, Section A, "have one common trait -- they are legitimately dependent on others at various times and in various conditions."

Beyond this, the Employer contends that accepting the Union's interpretation of "required" would "stretch the meaning of the word . . . beyond all reason." The more persuasive interpretation, according to the Employer, refers to a type of obligation which connotes "some outside coercion" such as "the force of law." To accept the Union's interpretation, according to the Employer, would recognize the shifting and unenforceable "dictates of an individual employee's conscience."

Beyond this, the Employer asserts that the terms "child" and "required" must be read together, and the Employer argues that Wisconsin imposes no legal duty on a parent to care for a child which has reached the age of majority.

Even if the contract permitted the use of sick leave for the care of an adult child, the record, according to the Employer, "contains no proof this Grievant was required in fact to attend upon her adult daughter." Specifically, the Employer asserts that the time off "was not immediately after the baby was delivered"; that the Grievant had acknowledged the leave was for personal reasons by requesting vacation time; that alternative providers of the care were available; that the Grievant was not alone, and could have been cared for by her husband; that the care provided by the Grievant was a matter of personal preference, not medical need; and that the Grievant's daughter "was well enough to travel to Manitowoc on the third day for which Grievant claimed sick leave and attend church the next morning." Acknowledging that this line of argument "sounds harsh," the Employer contends that it provides a "generous vacation allowance" and that the absence itself is not in issue but merely whether the Employer should finance it through sick leave.

The Employer's next major line of argument is that "(t)here is no 'past practice' of paying sick leave for care of adult children." More specifically, the Employer asserts that the evidence establishes only that there has been sporadic incidents of sick leave usage for the care of an adult, and that there is no evidence the Personnel Department ever approved of that usage. It follows, according to the Employer, that the evidence does not establish any of the recognized indicia of a past practice. Beyond this, the Employer argues that the Union has failed to establish any credible evidence of bargaining history favoring its interpretation. Specifically, the Employer notes: "The evidence shows no actual or tacit acceptance of such a practice by the County's authorized labor relations managers -- the Personnel and later, the Human Resources Department." Even if the Union had offered credible evidence of past practice or bargaining history, the Employer contends that the language of Article 14, Section A, is not ambiguous and permits no room for such interpretive guides.

The Employer concludes that no contractual right exists "for employees to use sick leave to care for non-dependent adult children" and that even if it did, "the record does not show the Grievant was eligible to use sick leave even under the Union's expansive reading of the Agreement." It follows, according to the Employer, that the grievance must be denied.

DISCUSSION

The County accurately notes that the stipulated issue does not question the propriety of the Grievant's absence from work to care for her daughter, but questions the type of paid leave which must be used to account for the absence.

While Fischer testified that he "thought" 4/ the Grievant did not notify him of the request until after she took the leave, the County has not asserted that the Grievant failed to afford the County sufficient notice to comply with the first paragraph of Article 14, Section B.

The stipulated issue appears to narrowly focus on one of the requirements of the second paragraph of Article 14, Section B. However, as shown by the parties' arguments, their dispute questions more than whether the Grievant's attendance was "required" by her daughter. Those arguments establish that the stipulated issue also questions whether the Grievant's adult daughter can be considered a "child," within the meaning of Article 14, Section B.

Neither "child" nor "required attendance," can be considered clear and unambiguous. The dictionary definitions for "child" supplied by the County range from "unborn person" through "a young person esp. between infancy and youth" through "a son or daughter of human parents." Although the County asserts the more commonly used meaning connotes a non-adult, it is apparent that the definition is sufficiently broad to encompass adults and non-adults. Sec. 49.90, Stats., cited by the County to establish the limits of parents' liability for a dependent person, establishes the broad scope of the term in its reference to "a child 18 years of age or older." In sum, the term "child" is sufficiently broad to refer to either adult or non-adult offspring.

Similarly, the terms "required attendance" can plausibly be read to support the interpretation of either the Union or the County. The parties' arguments reflect this by defining the disputed terms in a manner which is unenforceable if taken beyond the facts of the present grievance.

The Union defines "required" to mean "needed," and focuses on the Grievant's daughter's need for her mother's attendance. Because the Grievant reasonably perceived need on her daughter's behalf, it follows, according to the Union, that the "required attendance" standard has been met. This standard cannot, however, be given meaning outside of the facts on which it is based. Presumably, a loving parent can reasonably perceive "need" in their child in any stressful situation encountered by the child. If it follows from this that the parent's attendance is required, it is difficult to imagine any situation in which the County could deny a parent the use of sick leave.

The County focuses on this, asserting that "required attendance" must mean something more than situations in which attendance is "desirable." From this, the County offers a definition which focuses on whether the parent is legally obligated to attend to the child, and on whether the parent's attendance is "essential." Neither standard can be given meaning outside of the facts on which it is based. That the law may impose upon a parent the obligation to financially support a minor child says nothing about what situations "require" that parent's "attendance." For example, the law may obligate a parent to pay for a minor child's medical bills. This does not mean the law (or the contract) "requires" a parent's "attendance" at every visit by their minor child to the doctor. Nor can focusing on situations in which a parent's attendance is "essential" be given meaning outside of the underlying facts. Presumably, a parent's attendance could reasonably be considered "required" during, for example, a life-threatening surgery to their child. The attendance need not, however, be either legally compelled or "essential." Presumably, the child will live or die based on underlying medical factors, and the parent's attendance is only "desirable." The County's definition, taken to its extreme could be used to deny any sick leave request.

Thus, neither party offers a generally enforceable standard to define the terms "required attendance." This is not because of any limitation on the parties' part. Rather, the disputed terms are broad enough to cover a wide spectrum of facts, encompassing either party's view of the grievance.

It is necessary, then, to determine the most appropriate means to clarify the ambiguous terms. The parties have asserted that the ambiguity can be resolved by recourse to the dictionary, to the parties' past practice, or to bargaining history. Each is an appropriate guide, but the latter two are the most reliable, since each focuses on the conduct of the bargaining parties, who are the source of meaning for the terms of the labor agreement.

The County forcefully argues that the past practice evidence advanced by the Union does not meet the standards required by arbitral precedent, since the alleged practice cannot be considered "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties."

The practice at issue here, however, is not based on arbitral inference but on the language of the parties' collective bargaining agreement. From at least 1975 through the present, the parties' labor agreement has referred sick leave requests to the employe's "immediate supervisor or Department Head or

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4/ Tr. at 56.

Department Head's designee." At the time the parties created the entitlement to use sick leave for "required attendance" upon an employe's "children," the County did not have a Personnel Department. Thus, the bargaining parties in 1977 created a procedure to define "required attendance" and "children" which was based on the determination of an employe's "immediate supervisor or Department Head or Department Head's designee." That procedure has been unaltered in the collective bargaining process which changed "children" to "child," and added certain qualifications for the use of sick leave for a "dependent."

The County did, however, alter its administrative structure by creating a Personnel/Human Resources Department, and contends here that the supervisory personnel noted above cannot set County personnel policy, which is now set by the Human Resources Department. An arbitrator's jurisdiction is defined by, and limited to, a collective bargaining agreement. In this case, the collective bargaining agreement has, for a considerable period of time, referred questions regarding sick leave eligibility to the supervisory personnel noted above. The County Board, by ratifying those agreements, made the policy determination that sick leave requests would be so processed and approved. While the County has unilaterally altered its administrative structure to create a Personnel/Human Resources Department, the fact remains that the various approvals of sick leave requests testified to by LeClair, Bessert, Kadow and the Grievant complied with the then-effective collectively bargained labor agreements. Beyond this, no labor agreement entered into the record reserves the ultimate eligibility determination to the Human Resources Department. Against this background, it is impossible to characterize the approvals of sick leave requests testified to by LeClair, Bessert, Kadow and the Grievant as anything other than past practice.

Concluding that the instances noted above constitute past practice resolves the ambiguity manifested by "child." The County has permitted LeClair, Bessert, Kadow and the Grievant to use sick leave to attend to an adult child. With this established by practice, change must come through negotiation, not arbitration.

The ambiguity manifested by "required attendance" is not, however, resolved by the past practice standing alone. The contract calls for the terms to be given meaning through a case by case application of the terms. This application is procedural and substantive. Procedurally, the contract requires the employe's "immediate supervisor, or Department Head or Department Head's designee" to initially apply the contractual terms to a specific request. This application is, in turn, subject to arbitral review. In this case, the County Clerk did not approve the request but referred the matter to the Human Resources Department, which directed the County Clerk to deny the request. That the County Clerk consulted the Human Resources Department poses no issue here. It is undisputed that the County, through its Human Resources Department, may act to standardize the exercise of discretion by its department heads. The disputed point here is whether the Clerk's denial of the sick leave request can withstand arbitral review.

This poses the substantive issue whether the Grievant's "attendance" was "required" by her daughter. The appropriate standard of review for assessing the Clerk's decision is not at issue here. The most limited review of the decision possible would be to determine if it was arbitrary or capricious, and the Clerk's decision cannot withstand review under that standard. Past practice is the most reliable guide to clarify the nature of a condition requiring an employe's attendance. In this case, the Grievant had been afforded leave to care for her eldest daughter after that daughter returned home from maxillo-facial surgery. Her youngest daughter went through major surgery to deliver a child, and the record affords no basis to believe that surgery was a physically or emotionally less demanding procedure than that for which the County had previously approved sick leave. Each daughter's husband was available to assist in the recuperation. There is, then, no basis to justify treating the later request differently than the earlier. A review of the leaves approved for LeClair, Bessert and Kadow only reinforces the conclusion that the Grievant's request met the "required attendance" standard.

Ultimately, the persuasive force of the County's justification of the denial of sick leave in this case is based on its assertion that the Human Resources Department cannot be bound by decisions of supervisory personnel in which it was not, or could not be, consulted. If this assertion could be accepted, the issue posed would be closer. However, because the earlier decisions complied with known and bargained procedures, they must be accepted as past practice relevant to the resolution of the issues posed here.

The conclusion reached above cannot generally define "required attendance." As noted above, resort to synonyms is unhelpful and the terms must be given meaning by applying the procedures of Article 14 to the facts of each request. While the Human Resources Department may wish to standardize the discretion exercised by supervisory personnel within each department, it cannot turn its back on the specific examples of discretion exercised by such personnel in the past.

AWARD

The Grievant, Charlotte Endries, was "required" to attend upon her adult daughter and therefore was eligible to claim sick leave for the three days of work she missed, November 20, 21 and 22, 1989.

As the remedy appropriate to the County's violation of Article 14, Section B, the County shall restore those hours as vacation time and debit her accumulated sick leave.

Dated at Madison, Wisconsin, this 7th day of September, 1990.

By_____
Richard B. McLaughlin, Arbitrator