BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

RICE LAKE PROFESSIONAL FIRE FIGHTERS

and

CITY OF RICE LAKE

Case 41
No. 44353
MA-6264

Appearances:

Mr. Michael Dietz, President, Local 1793, I.A.F.F., appearing on behalf of the Union.

Mulcahy & Wherry, S.C. , Attorneys at Law, by Mr. Stephen L. Weld, appearing on behalf of the City.

ARBITRATION AWARD

Rice Lake Professional Fire Fighters Association, Local 1793, I.A.F.F., hereinafter referred to as the Union, and the City of Rice Lake, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Ccmmission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Rice Lake, Wisconsin on September 19, 1990. The hearing was not transcribed and the parties orally argued their respective positions at the conclusion of the presentation of the evidence.

BACKGROUND

The facts underlying the grievance are not in dispute. The grievant, a probationary firefighter, broke his arm while playing softball and was unable to perform his duties as a firefighter. While he was unable to work, the grievant was allowed to use four sick days and two emergency days. The grievant was not able to return to work after he used the above six days and there was no light duty work available which meant that he would not be paid while unable to work. The Fire Chief and the Union and members of the Fire Department reached an agreement whereby each of the members would donate one day of sick leave to the grievant until his return to work, thereby permitting him to remain in pay status. The City's Personnel and Negotiating Committee rejected the sick leave donation agreement on June 26, 1990. The grievant had gotten paid for five days of traded sick leave under this agreement. The grievant went off the

payroll effective June 26, 1990 and missed five days of work before returning to his normal duties. The grievant then filed the instant grievance.

ISSUE

The parties stipulated to the following:

> Did the City violate Article XIX of the agreement by not advancing sick leave to the grievant who was off due to an injury?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE V

SICK LEAVE

Employees covered by this agreement shall be granted sick leave at the rate of one day per month, beginning with the first month of employment, cumulative to a maximum of 120 days. Sick leave shall be taken only for legitimate illness and any abuse of sick leave may result in the suspension of the employee for a period of from one day to two weeks, depending on the seriousness of the abuse. The City reserves the right to send a member of the Health Department to the home of the ailing employee or to request a doctor's certificate as proof of illness. Time lost from accident outside the City employment shall be charged as sick leave and shall be paid for. Fire Department employees shall be charged for sick days only on actual scheduled work days, day for day.
Two (2) days per year may be used for serious injury or serious illness in the employee's immediate family (parents, spouse, children). Time spent in such emergency leave shall be deducted from the employee's accrued sick leave.

. . .

ARTICLE XIX

SAVINGS CLAUSE

. . .

All privileges, benefits, and rights enjoyed by the members of the Rice Lake Professional Firefighters Association which are not specifically provided for or abridged in this Agreement are hereby protected by this agreement.

UNION'S POSITION

The Union contends that there is a past practice whereby firefighters have remained in pay status during times when they had not accumulated sufficient sick leave to cover absences due to illness or off-duty injuries. It insists that an arrangement had always been worked out to keep the employe in pay status. It points out that such an agreement was worked out in this case but the Personnel Committee reversed the arrangement. The Union insists that Article XIX is a maintenance of standards clause which provides that employes be allowed by any agreed method to remain in pay status when they are off due to illness or injury and do not have sufficient sick leave to cover it.

CITY'S POSITION

The City contends it has not violated the agreement. It submits that the grievant did not have sufficient sick leave to cover his absence. It maintains that the grievant was given four days of accumulated sick leave and two emergency days. It asserts that an employe cannot borrow sick leave against the future as Article V only permits use of accumulated sick leave. The City further argues that there has been no violation of Article XIX because there is no binding past practice. It claims that an instance in 1956 is too remote and any past practice must be on-going. It further claims that no practice was attributed to the City. It insists that the City was fair to the grievant, who was on probation and could have been terminated, but instead the City retained the grievant and it honored the deal with the Union and employe, allowing trades for five days, and only rejected it prospectively, so the grievant lost only five days of work rather than ten. It asks that the grievance be denied.

DISCUSSION

Article V of the parties' agreement provides that employes earn sick leave at the rate of one day per month. Time off from work due to illness or from an accident outside the City's employment may be charged to accrued sick leave. Nothing in Article V provides for the use of sick leave which has not been earned or for the advancement of sick leave. In the instant case the grievant was paid his accrued sick leave and the denial of advanced use of sick leave does not violate Article V. Article V is silent on the trading of sick leave and the City's refusal to allow the continuation of the trading of sick leave also did not violate Article V.

Article XIX of the parties' agreement contains a maintenance of standards clause. Whether this Article is applicable depends on the establishment of a past practice. Generally, arbitrators require a past practice to be unequivocal, clearly enunciated and acted upon and readily ascertained over a reasonable period of time as a fixed and established practice. 1/ A particular practice may

1/ Elkouri & Elkouri, How Arbitration Works, (4th Ed., 1985) at 439, et seq.

no longer be applicable where the underlying basis for the practice has changed. 2/

The evidence in the instant matter presented several problems of proof of a past practice. First, it was difficult to find a clearly enunciated practice. The Union asserted that the practice was for employes without sufficient accrued sick leave, to remain in pay status while off work. The weakness of this argument is that this is more the result of a practice rather than a practice itself. The Union presented three instances of the use of advancing sick leave. In 1956, Robert Reiten got the flu after only one month of employment and was advanced sick leave and remained in pay status. In 1975, a Chuck Airsmith apparently was advanced sick leave. In 1980, a Jim Lansworth, a dispatcher, was advanced four sick days when he had a problem with his gall bladder. The exact specifics of each of these incidents was not clearly shown. The 1956 incident is very remote and the hours of work were entirely different then and how employes were paid at that time was not shown. They could have been salaried rather than hourly. This incident is just too remote from the next instance, 19 years, to have any probative effect. The Airsmith matter also was not clear as to what amount of sick leave was advanced, if any, and the evidence mainly related to a statement attributed to a prior Fire Chief, Chartier, as to how he would handle sick leave. The last instance involved a different occupation, a dispatcher, and a different department, the police department, where the hours of work and conditions of employment are different, so it sheds no light on any practice in the Fire Department. These three incidents over 34 years with the last ten years ago, are simply insufficient to show a clear and unequivocal practice related to advancing sick leave to remain in pay status while off work due to an illness or injury.

The evidence also established that when these incidents occurred, employes did not earn sick leave or could not use sick leave during the first six or twelve months of employment, so occasionally a day of sick leave was advanced. This underlying condition does not now apply under the terms of the agreement so the underlying basis for the practice has changed. It also appears that employes were not represented when these incidents occurred, so an individual agreement with each employe may have been struck. It really makes no difference however because the incidents were so few and so far apart in time and uncertain in the facts of each case, that it is concluded that no practice has been established, and thus, no violation of Article XIX has been proved. The Union asserted that each time an incident of this nature arose, the parties were able to work out a solution so the employe remained in pay status. Although the parties were able to work out a solution in the past to keep an employe in pay status, no enforceable past practice would be created requiring the parties to workout a solution in the future. If the parties can't agree to a solution, the undersigned cannot force them to agree and nothing in Article XIX requires them to agree. Thus, the City's refusal to advance the grievant sick leave does not violate any past practice nor does it violate Article XIX.

2/ Id.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this Ist day of October, 1990.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator