BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MARATHON COUNTY COURTHOUSE and AFFILIATED DEPARTMENTS NON-PROFESSIONAL EMPLOYEES LOCAL 2492-E, AFSCME, AFL-CIO	Case 170 No. 44062 MA-6157
and	
MARATHON COUNTY	

Appearances:
Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI
Ruder, Ware and Michler, S.C., 500 Third Street, P.O. Box 8050, Wausau, WI 5

ARBITRATION AWARD

Marathon County Courthouse and Affiliated Departments Non-Professional Employees, Local 2492-E, AFSCME, AFL-CIO, hereinafter the Union, and Marathon County, hereinafter the Employer or County, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. On June 25, 1990, the Commission designated Coleen A. Burns, as Arbitrator. Hearing was held on September 11, 1990 in Wausau, Wisconsin. The hearing was not transcribed and the record was closed on November 19, 1990, upon completion of the post-hearing briefing schedule.

ISSUE:

The parties were unable to agree upon a statement of the issue. The Union frames the issue as follows:

> Did the County violate the AFSCME 2492-E collective bargaining agreement by its denial of Terry Mayer the right to use Family Illness Sick Leave for April 3, 1990?
>
> If so, what is the proper remedy?

The County frames the issue as follows:

> Whether the County violated Article 13, Sick Leave, Paragraph "E" - Family Illness, when it denied the Grievant use of sick leave on April 3, 1990?
>
> If so, what is the appropriate remedy?

The Arbitrator frames the issue as follows:

> Did the County violate the collective bargaining agreement when it denied Terry Mayer's request to use eight hours of family illness sick leave for April 3, 1990?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE 2 - MANAGEMENT RIGHTS

The County possesses the sole right to operate the departments of the county and all management rights repose in it, but such rights must be exercised consistently with the other provision of the contract. These rights include, but are not limited to, the following:

A. To direct all operations of the respective departments;

B. To establish reasonable work rules;

. . .

F. To maintain efficiency of department operations entrusted to it;

. . .

H. To introduce new or improved methods or facilities;

I. To manage and direct the working force . . .

J. To change existing methods or facilities;

K. To determine the methods, means and personnel by which operations are to be conducted;

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 13 - SICK LEAVE

A. Accumulation: . . .in order to qualify for sick leave, an employee or their representative must report that the employee is sick no later than one-half (1/2) hour after the earliest time which the employee is scheduled to report for work except in cases of emergency or when the Employer is fully aware the employee will be on sick leave for an extended period. Sick leave may be used in increment of not less than one-half (1/2) hour; any fraction of less than one-half (1/2) hour shall be qual to one-half (1/2) hour.

. . .

D. Personal Use: Except as provided in "E", Family Illness, sick leave may only be used for illness or disability of the employee or for medical and dental appointments of any employee. Employees will make

every attempt to schedule medical and dental appointments outside of normal working hours. However, if this is not possible and they must be scheduled during the normal work day, every attempt will be made to schedule the appointment near the beginning or end of the normal work day or near the lunch hour.

E. Family Illness: Employees will be allowed to use sick leave in case of a serious illness (e.g., child breaks arm on school playground) in the immediate family where the immediate family member requires the constant attention of the employee. The department head may require that the employee make other arrangements for the ill family member within five (5) working days. Immediate family member is defined as the employee's spouse, children, parents, or member of the employee's household.

This provision shall not apply to employees accompanying family members to any routine scheduled medical or dental appointments. This provision shall apply to all other requests for sick leave including requests relative to surgery.

ARTICLE 29 - ENTIRE MEMORANDUM OF AGREEMENT

This Agreement constitutes the Agreement between the parties and no verbal statement shall supercede any of its provisions. Any amendments supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that, during negotiations which resulted in the Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any items covered by the terms of this Agreement and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity is set forth in this Agreement. Waiver of any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

BACKGROUND:

On November 22, 1988, during the term of the parties' former collective bargaining agreement, County Personnel Director Brad Karger issued the following letter to Union Representative Philip Salamone:

Re: Interpretation of Family Illness Article

At the bargaining sessions with the various AFSCME locals, the parties agreed to set aside proposals to modify the language on family illness. This was done in anticipation that an agreement would be reached to clarify the principles to be applied when reviewing a request to use sick leave for family illness. For your consideration, I have enclosed a document which I feel clarifies the principles which are to be applied for use of family illness and sets forth some specific examples of incidents that would or would not qualify for family illness leave.

It was pointed-out at the last bargaining session with the Social Services Para-Professional Unit that some

supervisors in that department may have authorized family illness leave for certain uncomplicated illnesses of a child (flu, sore throat). I have not investigated the accuracy of the statement as of yet. However, should this be the practice within this or any other bargaining unit within Marathon County, the County is with this letter repudiating this practice upon the termination of the current labor agreement. It is the County's intention to apply the language on family illness in a manner consistent with the specific wording and intent of that language.

Please contact me with your thoughts after reviewing this proposed statement.

The following statement was enclosed with the letter:

STATEMENT REGARDING USE OF SICK LEAVE FOR FAMILY ILLNESS

A number of questions and interpretations have arisen regarding the use of sick leave under this language. The following principles are to be used by the Department Heads in interpreting this language and allowing for the use of sick leave for family illness.

A. This provision is intended to allow employees at work to receive time off with use of sick leave in the event of an emergency where there is no other family member available to address or handle an emergency situation involving a member of the family. This is the reason for the example used in the language of a "child breaks arm on school playground." Thus, sick leave is to be used only for those instances where the employee is the only family member available to address the situation or provide constant attention to the family member.

B. Sick leave is only to be used in cases of serious illness. Again, the example of child breaking an arm shows the seriousness of the illness. The sick leave usage is not to be allowed for uncomplicated matters such as sore throat or flu symptoms. The language is intended to allow the employee off without loss of pay in those instances where constant attention is required and the matter is of a serious health nature.

C. A number of questions arose over the years regarding the use of sick leave for routine scheduled medical or dental appointments. Thus, the parties have negotiated clear language prohibiting the use of this provision for routine medical or dental appointments that are scheduled in advance. This provision also prohibits the use of sick leave for family illness which involves scheduled routine surgery such as routine out-patient surgery. However, the interpretation has allowed the use of family illness in those instances where the scheduled surgery is of a life threatening nature such as heart transplant or heart bypass surgery and in those instances it is determined that the surgery warrants the constant attention of the employee.

The following are actual examples where the use of family illness sick leave is appropriate:

1. Attend wife in hospital for birth of

child.

2. Pick up ill child at baby-sitter to take to doctor.

3. Pick up ill child at school to take to doctor.

4. Travel to hospital to attend ill child that was transported from school for emergency treatment.

5. Incident where child contracted serious illness following birth.

6. Transport son to doctor for emergency due to eye injury.

7. Husband injured at work and employee required to pick up husband from emergency room to take home.

8. Take daughter to doctor after injuring hand at school.

9. Attend to daughter in intensive care at hospital due to car accident.

10. Attend to husband who had chain saw accident and was being transported to Wausau Hospital.

The following incidents should not receive family illness sick leave:

1. Daughter is sick and husband and wife are sharing time at home with child or husband is only able to stay home during mornings.

2. Transport son to doctor to recheck eye after eye injury on routine check.

3. Take daughter to doctor to have stitches removed.

4. Take daughter to dentist for tooth filling.

5. Both wife and child have flu symptoms and no one is able to care for child at home.

6. Wife being discharged from hospital and requires spouse to transport home.

7. Husband required to attend doctor's appointment following positive pregnancy test.

On July 24, 1989, County Personnel Director Karger issued the following letter to Union Representative Salamone:

RE: Use of Sick Leave for Family Illnesses

During the last round of bargaining with all AFSCME units, the County presented a policy statement regarding the interpretation of the sick leave article and in a separate communication repudiated practices not in conformance with the language or intent of the parties. Marathon County is now proceeding with the implementation of the Statement Regarding the Use of Sick Leave for Family Illness on Monday, September 5, 1989, in all County departments (Statement enclosed). The goal of this Policy Statement is to bring consistency within the County's structure in the handling of requests for the use of sick leave for family illnesses.

In order to facilitate the transition called for in the Statement, the County has liberalized the Ordinance which applies to non-represented employees in two

areas: Minimum usage periods and advance notice for vacation requests (see Resolution No. R-67-89 enclosed). We would be willing to discuss similar adjustments in the Labor Agreements with the Office-Technical, Courthouse Pro, DSS Para-Pro, DSS Pro, and Health Pro employee unions in order to facilitate the transition to the procedures outlined in the Policy Statement.

I would appreciate it if you would review this letter with the leadership of the Courthouse, Health Department and Social Services units, and let me know if there is interest in making adjustments similar to those made to the County Ordinance.

The attached policy stated as follows:

STATEMENT REGARDING USE OF SICK LEAVE FOR FAMILY ILLNESS

A number of questions and interpretations have arisen regarding the use of sick leave under this language. The following principles are to be used by the Department Heads in interpreting this language and allowing for the use of sick leave for family illness.

A. This provision is intended to allow employees at work to receive time off with use of sick leave in the event of an emergency where there is no other family member available to address or handle an emergency situation involving a member of the family. This is the reason for the example used in the language of a "child breaks arm on school playground." Thus, sick leave is to be used only for those instances where the employee is the only family member available to address the situation or provide constant attention to the family member.

B. Sick leave is only to be used in cases of serious illness. Again, the example of child breaking an arm shows the seriousness of the illness. The sick leave usage is not to be allowed for uncomplicated matters such as sore throat or flu symptoms. The language is intended to allow the employee off without loss of pay in those instances where constant attention is required and the matter is of a serious health nature.

C. A number of questions arose over the years regarding the use of sick leave for routine scheduled medical or dental appointments. Thus, the parties have negotiated clear language prohibiting the use of this provision for routine medical or dental appointments that are scheduled in advance. This provision also prohibits the use of sick leave for family illness which involves scheduled routine surgery such as routine out-patient surgery. However, the interpretation has allowed the use of family illness in those instances where the scheduled surgery is of a life threatening nature such as heart transplant or heart bypass surgery and in those instances it is determined that the surgery warrants the constant attention of the employee.

The following are actual examples where the use of family illness sick leave is appropriate:

1. Attend wife in hospital for birth of

child.

2. Pick up ill child at baby-sitter to take to doctor.

3. Pick up ill child at school to take to doctor.

4. Travel to hospital to attend ill child that was transported from school for emergency treatment.

5. Incident where child contracted serious illness following birth.

6. Transport son to doctor for emergency due to eye injury.

7. Husband injured at work and employee required to pick up husband from emergency room to take home.

8. Take daughter to doctor after injuring hand at school.

9. Attend to daughter in intensive care at hospital due to car accident.

10. Attend to husband who had chain saw accident and was being transported to Wausau Hospital.

11. Attend to a child who became ill at the day care center and child care center requires removal of child.

The following incidents should not receive family illness sick leave:

1. Daughter is sick and husband and wife are sharing time at home with child or husband is only able to stay home during mornings.

2. Transport son to doctor to recheck eye after eye injury on routine check.

3. Take daughter to doctor to have stitches removed.

4. Take daughter to dentist for tooth filling.

5. Both wife and child have flu symptoms and no one is able to care for child at home.

6. Wife being discharged from hospital and requires spouse to transport home.

7. Husband required to attend doctor's appointment following positive pregnancy test.

On August 22, 1989, Union Representative Salamone sent the following letter to Personnel Director Brad Karger:

RE: Liberalization of Vacation
Usage Policy

I have notified all of the AFSCME Local Unions of the County's desire to liberalize the vacation usage policy as indicated in Resolution #R-67-89 as well as the new Family Illness sick leave policy.

No AFSCME locals have problems with the new vacation usage policy.

If you have further questions, please advise.

On September 1, 1989, Personnel Director Brad Karger sent the following Memorandum to County Department Heads:

> The new policy on Family Illness (attached) is scheduled to go into effect on Tuesday, September 5, 1989. If questions arise regarding the proper interpretation of the policy statement, please contact our office.

The attached policy was identical to the Statement Regarding Use of Sick Leave for Family Illness which had been provided to Union Representative Salamone in Personnel Director Karger's letter of July 24, 1989. On September 26, 1989, the County and the Union executed a collective bargaining agreement which by its terms was effective from January 1, 1989 to December 31, 1990.

On April 4, 1990, Theresa A. Mayer, hereinafter the Grievant, submitted an Absent Request Form requesting eight hours of sick leave for April 3, 1990. The space designated REASON FOR MEDICAL ABSENCE contained the following statement: "Nick sick - took him to see Dr. Bobinski."

On April 4, 1990, the Grievant received the following memo from her supervisor, District Attorney Grau:

> I checked with Brad Karger to see whether or not your representations on your absent request form of April 3, 1990 were sufficient to allow you to be awarded sick time. Mr. Karger indicated to me that the representations were not sufficient. Consequently, you will have to resubmit a form seeking some other type of absence award, or provide sufficient information that would allow you to partake in the sick time benefit. Please advise. Thanks.

On April 6, 1990, the Grievant resubmitted an Absent Request Form requesting eight hours of sick leave for April 3, 1990. Attached to the Absent Request Form was the following memo to District Attorney Grau:

> This is my response to your memo of April 4, 1990.
>
> The reason I was absent on April 3, 1990 was due to my son, Nicholas' illness. He was vomitting and very cranky. Due to his illness, I phoned his doctor, Dr. Bobinski, who recommended I bring him in so they could check him over. So, I took him to his doctor, as he could not do that himself, as he is only ten months old. Also, my day care provider is not appreciative of a sick and vomitting baby.
>
> I feel I had no other alternative but to take him to the doctor, and like stated above, he is not old enough to take himself, it was <u>not</u> a routine check-up/visit and he would not have been welcome at the sitter's. Therefore, I feel I should be allowed to use sick time. Thank you.

District Attorney Grau responded in a memo which stated as follows:

> In answering your request for the allotment of sick time to cover your absence on April 3, 1990, I rely on Article 13, Section "E" of the contract. It states that employes 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 employe. That section gives the example of a child breaking his or her arm on the school playground. I do not believe that this section of the contract covers the type of situation that you have brought into question. Therefore, I feel compelled to deny your request.
>
> Thanks.

On April 9, 1990, the Grievant filed a grievance alleging that the denial of her request for eight hours of sick leave on April 3, 1990 violated Article 13(E) of the parties' collective bargaining agreement and a long-standing past practice. The Grievant asked to be allowed to take eight hours of sick leave for her absence on April 3, 1990. On May 1, 1990, Personnel Director Karger issued the following letter to Union Representative Phil Salamone:

> Re: Grievance No. 90-6 (Mayer)
>
> On April 26, 1990, a meeting was held to discuss Grievance No. 90-6 submitted by Theresa Mayer of the District Attorney's Office. You were present at the meeting along with the grievant, Bob Rozewicz, and myself.
>
> The facts of the matter and the processing of the request appear to be as follows:
>
> 1. On April 4, 1990, the grievant completed a "Absence Request Form" which requested the use of eight hours of sick leave for the day prior. That request cited "Nick sick - took him to see Dr. Bobinski" as the reason for the medical absence.
>
> 2. On April 4, 1990, the District Attorney indicated that additional information would be needed before he could authorize the use of sick leave.
>
> 3. On April 6, 1990, the grievant indicated that her son had been "vomiting and very cranky" on April 3, 1990.
>
> 4. On April 6, 1990, the District Attorney acted to deny the request for sick leave.
>
> During the grievance meeting, I asked Ms. Mayer why she had a bank of only 20.75 hours after nine years of employment with the County. She indicated that she had taken a maternity leave of four months in 1989. However, a subsequent review of the department's records indicate that Ms. Mayer had a balance of only 86.16 hours on May 5, 1989, when she left due to the impending birth of her child.
>
> The controversy involves Article 13(E) of the Labor Agreement which reads as follows: (Emphasis Added)
>
> > Employees will be allowed to use sick leave in case of a <u>serious illness</u> (e.g., child breaks arm on school playground) in the immediate family where the immediate family member requires the <u>constant attention</u> of the employee.
>
> Additionally, the grievance cites a long-standing past practice with respect to family illness leave. However, this argument seems to be nullified by a

> November 22, 1988 letter to the Union in which Marathon County repudiated any past practice with respect to the "uncomplicated illness of a child (flu, sore throat)." That repudiation became effective with the implementation of the 89-90 labor agreement.
>
> In conclusion, I find that the request for family illness leave for April 3, 1990, was appropriately denied. The illness which was described as involving vomiting and being cranky does not meet the standard of a serious illness (e.g. child breaks arm on the school playground), requiring the constant attention of the employee. The situation is better described as an uncomplicated illness of a child as envisioned in the letter which repudiated any past practice.
>
> Grievance No. 90-6 is denied.

Thereafter, the grievance was also denied by the County Personnel Committee and, subsequently, submitted to grievance arbitration.

POSITIONS OF THE PARTIES:

Union:

At issue is the interpretation of Article 13(E). Article 13(E) contains an example of the term "serious illness", i.e., "child breaks arm on playground", but does not clearly define the term. However, through the years, the parties' practices have given meaning to this ambiguous contract term.

The documents introduced at hearing and the testimony of the Union's witnesses demonstrate a past practice of using sick leave to care for a sick child or to take a child to a doctor's appointment. Such leave has been liberally granted, with the employe providing little more explanation than "child sick" or "doctor's appointment for child". To do otherwise, would require County managers to make determinations for which they are extremely unqualified to make, which could possibly lead to tragic, unconscionable and rather absurd results. Since a parent may reasonably argue that almost any illness of a child is a "serious illness", it is easy to understand why the parties have given the employe much latitude in using sick leave for family illnesses. Contrary to the argument of the County, the standards of mutuality have been met. The record demonstrates that employes have requested sick leave for family illnesses and the County has granted it. Clearly, both sides have accepted the practice.

Any doubt as to the existence of a past practice of liberal interpretation of the family illness language must vanish in the face of the evidence of the County's attempts to repudiate the practice. By attempting to repudiate the practice, the County has acknowledged the existence of the practice. Indeed, following the County's attempt to repudiate the practice, and the issuance of Personnel Director Karger's letter of July 24, 1989, County supervisory personnel continued to be extremely lenient in granting sick leave for instances
of family illness. The practice had become so ingrained or "ripened" that the County was not able to effectively implement the radical change embodied in its sick leave policy.

The County incorrectly asserts that it can unilaterally repudiate the past practice which gives meaning to the ambiguous contract language of Article 13(E) In order to change the interpretation of this language, the parties must agree to modify the language. During the 1989-90 contract negotiations, the parties discussed, but could not agree upon, any modification to the language.

Contrary to the argument of the County, neither case law nor precedent supports an argument that a zipper clause precludes the arbitrator from utilizing past practice to interpret ambiguous contract language. To the contrary, the zipper clause, which requires a written agreement executed by both parties, acts to prohibit the County's unilateral implementation of the July 24, 1989 policy.

Grievant Mayer indicated that her ten-month old son was vomiting and needed to go to the doctor. Obviously, this illness could have been appendicitis or an intestinal blockage. Clearly, the condition of Mayer's son was a "serious illness" and was a condition which required Mayer's constant attention. There is little, if anything, in the record which would indicate that Personnel Director Karger was medically qualified to make the determination that the illness suffered by Grievant Mayer's child, i.e., cranky and vomiting, was not a serious illness.

The County's claim that Grievant Mayer's child did not require the constant attention of the employe is not substantiated by the record. Was Grievant Mayer's vomiting infant to be expected to drive himself to the doctor? Moreover, taking a child to the doctor has been interpreted in the past as requiring "constant attention".

The County, relying on Webster's Dictionary, compounds the definition for the word "serious" and the word "illness" and argues that the term "serious illness" should be defined as a circumstance "where a family member's poor health, sickness, or disease is of vital concern or poses a danger to the family member's continued health". Assuming arguendo, that this is an appropriate consolidated definition, one may reasonably conclude that the condition of Grievant Mayer's child met this definition.

Despite the County's claim to the contrary, the Union has never accepted the sick leave policy which the County sought to implement in September of 1989. While the County claims that the Union raised no objection to the implementation of the County's new Family Illness policy, the Union effectively objected to the implementation of the policy by advancing the instant grievance. It is well established that a unilaterally-implemented management policy does not take precedence over the terms of a labor agreement. Especially, where as here, there is a "zipper clause" which clearly prevents the unilateral application of policies such as that attached to Personnel Director Karger's letter of July 24, 1990.

The language of Article 13(E) must be given the meaning which has been established by the parties' past practices. The County violated the provisions of Article 13(E) when it denied the Grievant's request for family illness sick leave. Accordingly, the grievance must be sustained.

County:

Article 13(E) entitles employes to family illness leave if certain requirements are met. To be eligible for family illness leave, there must be (1) an immediate family member (2) with a serious illness (2) which requires the constant attention of the employe. The provision expressly prohibits the use of this leave to accompany family members to any routine scheduled medical or dental appointments.

Arbitrators have long ruled that in the absence of an understanding by the parties to the contrary, the ordinary definition of the terms used in a contractual provision, as defined by a reliable dictionary, should control. Webster's New World Dictionary defines "serious" as "giving cause for concern, dangerous" and defines "illness" as "the condition of being ill, or in poor health, sickness, or disease". Applying the common and ordinary definition to the phrase "serious illness" demonstrates that the parties clearly intended family illness leave to be limited to circumstances in which a family member's poor health, sickness or disease is of vital concern or poses a danger to the family member's continued health. Such a conclusion is supported by the example of serious illness contained in Article 13(E) of the Local 2492-E contract, i.e.,, "child breaks arm on school playground". Minor ailments and conditions are simply not encompassed by the family illness leave provision.

Grievant Mayer's request for Family Illness leave was based upon her statement that her child was "vomiting and cranky" and that her baby sitter would not appreciate caring for an ill child. Young children vomit and become cranky. The record fails to demonstrate that the child's condition was related to a sickness or disease. Nor is there any evidence that the child was under the continuing care of a physician or other health care provider. More importantly, there is no evidence that Mayer required eight hours of absence from work to provide "constant" attention to her child. Clearly, Mayer was not entitled to Family Illness leave under Article 13(E)

A review of the testimony presented at hearing demonstrates that the reasons for granting sick leave to an employe were all far more serious than those identified by Mayer. The testimony demonstrates that employes have been allowed to use sick leave to attend a family member in instances where the family member was experiencing a serious illness or injury that required consideration by the Employer of the needs of the family member or instances where the employe was given sick leave time off to pick up a child from the baby sitter/day care provider because the child was sick and should not be with other children.

Grievant Mayer was granted sick leave on the afternoon of April 2 to pick up her child from the day care provider and to make arrangements to see a physician if necessary. Mayer was appropriately denied the use of eight hours of sick leave on April 3, 1990 to stay home the next day to care for a child who was cranky and vomiting. This type of illness is certainly not consistent with the illnesses involved in the "past practices" described by the other witnesses. Indeed, Mayer recognized that sick leave should not be used for routine family illness when she used vacation to remain at home with a child who was not feeling well.

To constitute a binding past practice, the practice must meet certain criteria including that of "mutuality". The record fails to demonstrate that there was a "meeting of the minds" with regard to the granting of family illness sick leave. The evidence presented at hearing, including the testimony of the Union's witnesses, quite clearly indicates that, in the vast majority of family illness leave requests, County officials granted the leaves without

discussion or consultation with the employes involved or Union representatives. It is evident that the County unilaterally determined and applied the family illness leave language as it saw fit. A procedure unilaterally and voluntarily implemented by the Employer, as a result of mere happenstance, operational necessity, or generosity, and thus, without mutual agreement between the Employer and the Union involved, does not constitute a binding past practice.

The Union apparently contends that, in accord with past practice, employes
have a right to utilize family illness leave whenever a family member is ill, regardless of the lack of severity of the illness. The clear language of the family illness leave provision does not, however, support this contention. Pursuant to Article 3(B)5 of the labor agreement, the Arbitrator is required to give effect to the language of the family illness leave provision as written. Past practice cannot override clear contract language.

It is well recognized that an employer may repudiate a past practice by giving notice to the Union of its intention not to carry the practice over to the next labor agreement. After such notice has been given, the Union is under a duty to have the practice written into the successor agreement to prevent its discontinuance. Personnel Director Karger advised Union Representative Salamone, by letter dated November 22, 1988, that the County was repudiating the alleged past practice in regard to family illness leave usage. In that letter, Personnel Director Karger also advised Union Representative Salamone that, in the future, the County would rely on the specific wording of the family illness leave provision in granting such leave. The Union took no immediate action in regard to Personnel Director Karger's letter.

On September 26, 1989, the County and Local 2492-E signed a successor 1989-90 labor agreement. At that time, the Union was fully aware of the County's repudiation of the alleged past practice in November of 1988 and the County's implementation of its new family illness leave policy effective September 5, 1989. The Union did not request either a revision to Article 13(E) or that the alleged past practice be carried over to the new agreement.

Upon receiving notification of the County's repudiation of the practice prior the expiration of the 1988 labor agreement, the Union was under a duty to have the practice written into the agreement if it was to be continued. The Union, however, took absolutely no action to do so. Assuming arguendo that the alleged practice did exist prior to 1989, it did not survive or "carry over" to the 1989-90 AFSCME labor agreements.

Article 29, "Entire Memorandum of Agreement", explicitly states that any amendment to the Agreement must be made in writing and executed by both of the parties. By agreeing to the provisions of Article 29, a "zipper clause", the parties demonstrated their intention to have their written agreement embody all terms and conditions of employment and to nullify any prior practices existing outside of the agreement. Such a finding is particularly compelling in light of the fact that the Union signed the labor agreements with full knowledge of the County's repudiation of the alleged practice and, with respect to Local 2492-E, with full knowledge that the County had implemented its Family Leave policy effective September 1, 1989. The evidence of past practice may not be used to modify or amend the unambiguous language of the family illness leave provision.

Article 2, Management Rights, reserves to the County the right to "direct all operations", "establish reasonable work rules", "maintain efficiency of department operations", "introduce new or improved methods", "manage and direct the working force", and "change existing methods". In light of this broad language and the absence of any limiting contractual provision, the County was vested with authority to formulate and implement its Family Illness Leave policy. The fact that the Union did not object to the policy when it was first implemented demonstrates that the Union understood that the County had the authority to implement the policy.

The Union's allegation that the County advised the Union that the County would be implementing its new Family Illness Leave policy "after settlements of the 1989 contracts" is in error. Personnel Director Karger's letter of July 24, 1989 expressly stated that the County would be implementing its new policy effective September 5, 1989.

The Union's suggestion that it immediately began grieving denials of family illness leave usage after July 24, 1989 is contrary to the evidence and its reliance upon the Boettner and Christensen incidents to support this suggestion is misplaced. The Boettner incident took place on July 18, 1989, prior to the implementation of the new policy on September 5, 1989. The Christensen incident did not occur until late November of 1989. Moreover, the Boettner and Christensen grievances were not "granted". Boettner and Christensen each testified that, following a more detailed review of the severity of their children's illnesses, the Director of the Department of Social Services voluntarily reversed his decision and permitted the use of Family Illness leave.

As the Union recognizes, Boettner and Christensen belong to different

collective bargaining units and their grievances arose under different collective bargaining agreements. Accordingly, these two grievances are totally irrelevant to the resolution of this dispute. As the testimony of Michael Seidel demonstrates, the County has consistently enforced its Family Leave policy after its implementation on September 5, 1989.

For the foregoing reasons, the County respectfully requests the Arbitrator to dismiss the grievances in their entirety.

DISCUSSION:

It is generally recognized that evidence of past practice may be considered for the following purposes: (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of ambiguous contract language; or (3) to support allegations that clear language of the written contract has been amended by mutual action or agreement. 1/ Where the past practice is contrary to the clear language of the agreement, either party may unilaterally repudiate the practice upon expiration of the agreement by giving due notice of intent not to carry the practice over to the next agreement. Upon receipt of such notice, the other party must have the practice written into the agreement to prevent its discontinuance. The proper procedure for repudiating other types of past practice has been described by Arbitrator Richard Mittenthal as follows:

> "Once the parties become bound by a practice, they may wonder how long it will be binding and how it can be terminated.
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> Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For, as I explained earlier in this paper, if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.
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> The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.
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> Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of the provision. As such it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.
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> It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supersede the practice, by eliminating the provision entirely, etc." 2/

Prior to the expiration of the parties' previous collective bargaining agreement, the County notified the Union that should there exist a practice of

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1/ Elkouri and Elkouri, How Arbitration Works (BNA, Fourth Edition, 1985), p. 437.

2/ Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements", Proceedings of the 14th Annual Meeting of NAA 30, 56 (BNA Books, 1961).

authorizing "family illness leave for certain uncomplicated illnesses of a child (flu, sore throat)", then the County was repudiating this practice effective with the expiration of the then current labor agreement 3/. The County further notified the Union that it intended to apply the language of family illness leave in a manner consistent with the specifice wording and intent of the contract language. During the negotiations which culminated in the parties' 1989-90 agreement, the agreement at issue herein, the parties discussed but did not agree upon any changes to the sick leave provision. When the parties executed their 1989-90 agreement, the sick leave provision remained unchanged. Applying the principles of past practice set forth above, the undersigned is persuaded that the County's repudiation of the past practice is effective to repudiate a past practice which was contrary to the clear language of the contract or which existed outside the terms of the contract, but is not effective to repudiate a past practice which establishes the meaning of ambiguous contract language.

The language of Article 13(D) expressly provides that sick leave may be used only for illness or disability of the employe or for medical or dental appointments of the employe, except as provided in Article 13(E). Thus, Mayer was entitled to use sick leave on April 3, 1990 only if she falls within the exception found in Article 13(E).

Article 13(E) provides, in relevant part, that "Employees will be allowed to use sick leave in case of a serious illness (e.g., child breaks arm on school playground) in the immediate family where the immediate family member requires the constant attention of the employee." Article 13(E) also expressly states that the provision is not applicable to employes accompanying family members to any routine scheduled medical or dental appointments.

The Article 13(E) definition of "immediate family" expressly includes an employe's children and neither party argues that Mayer's son is not an immediate family member. Rather, the dispute centers on the issue of whether Mayer's son had a serious illness requiring Mayer's constant attention.

Article 13(E) does not define the term "serious illness". While the example of a "serious illness", i.e., "child breaks arm on school playground" is of assistance in defining the term "serious illness", it does not provide a clear and unambiguous definition of the term "serious illness".

Inasmuch as the family illness provision does not identify those illnesses which are serious, the undersigned is persuaded that the term "serious illness" is ambiguous. Applying the principles of past practice enunciated above, the undersigned is persuaded that it is appropriate to consider the evidence of past practice to determine whether the parties, through their conduct, have established a meaning for the term "serious illness".

As the Union argues, prior to the execution of the current collective bargaining agreement, the County was liberal in granting family illness sick leave. The testimony of the witnesses and the sick leave records presented at hearing establish that for years prior to the execution of the parties' 1989-90 labor contract, the County routinely granted family illness leave for the purpose of picking-up a sick child at school or child care and attending the child at home or taking the child to the doctor. Additionally, the County has routinely permitted employes to stay home to care for sick children and to take children to medical appointments. As the Union further argues, the County frequently granted requests for family illness leave with little more information than "child sick" or "doctor's appointment for child". It is not evident that, prior to the execution of the current collective bargaining agreement, that the County ever denied any request for family illness leave.

The undersigned is persuaded that, prior to the execution of the current collective bargaining agreement, the County granted family illness leave automatically upon request of the employe without any consideration of the nature of the illness. Since the County granted family illness sick leave automatically without any consideration as to the nature of the illness, there is no past practice which demonstrates a mutual intent with respect to the meaning of the term "serious illness".

Had the parties intended family illness leave to be available for all family illnesses, the parties would not have used the modifier "serious". Clearly, the County is contractually entitled to consider the nature of the family member's illness when determining whether or not to grant an employe request for family illness leave. To require the County to continue the past practice of granting family illness leave automatically without any consideration of the nature of the illness would be to deny the County a clear contractual right. As discussed supra, the County's conduct was sufficient to repudiate any past practice which was contrary to the clear contract language.

3/ Joint Exhibit #19.

As the County argues, in the absence of evidence to the contrary, an arbitrator may reasonably assume that parties to a collective bargaining agreement intended a word to be construed in a manner which is consistent with the word's common and ordinary definition as established in a reliable dictionary. The County, relying upon the Webster's New World Dictionary definition of the word "serious", i.e., "giving cause for concern, dangerous" and of the word "illness", i.e., "the condition of being ill, or in poor health, sickness, or disease", argues that the application of the common and ordinary definition of the phrase "serious illness" leads to the conclusion that the parties intended family illness leave to be used in circumstances in which "a family member's poor health, sickness or disease is of vital concern or poses a danger to the family member's continued health."

The undersigned notes that the definition of the word "serious" relied upon by the County is "giving cause for concern, not "giving cause for vital concern". Thus, if one were to define the term "serious illness" by combining the definition's relied upon by the County, one would conclude that family illness leave was intended to be used in circumstances in which "a family member's poor health, sickness or disease gave rise to concern or which is dangerous". By inserting the word "vital", the County has exaggerated the nature of a "serious illness".

On April 2, 1990, the Grievant's child care provider called the Grievant at work to advise the Grievant that her ten-month old son was vomiting. The Grievant requested and received two hours of sick leave to attend to her child. When the Grievant picked up her child, he was vomiting, had a fever and was cranky. Concerned that such symptoms were indicative of a serious illness, the Grievant telephoned her child's doctor and received an appointment for April 3, 1990. 4/

On the morning of April 3, 1990, the Grievant telephoned her office and explained that she would not be in that day because she had to take her son to the doctor. The Grievant believes that she may have referred to her son's fever when she called to report that she would be absent on April 3, 1990. When the Grievant initially requested eight hours of family illness leave for April 3, 1990, she provided the following reason for the request: "Nick sick - took him to see Dr. Bobinski". In a memo dated April 4, 1990, the Grievant's supervisor, District Attorney Grau, advised the Grievant that she had not provided sufficient information to receive family illness leave.

The Grievant responded to Grau's memo of April 4, 1990 by resubmitting an Absent Request Form which stated that she was absent on April 3 because her son was ill and she took her son to the doctor. The Grievant further stated that on April 3, 1990, her ten-month old son was very cranky and vomiting and that the doctor recommended that the child be examined.

It is not evident that, following Grau's request for information to substantiate the Grievant's request for family illness leave on April 3, 1990, that the Grievant advised Grau that her son had a fever or that he was contagious. Accordingly, neither of these symptoms may be considered when determining whether the Grievant's son had a serious illness within the meaning of Article 13(E).

As the County argues, it is not uncommon for a baby to vomit. The undersigned would further agree that not all babies who vomit are experiencing a serious illness. However, it is not evident that the Grievant's son experienced an isolated incident of vomiting. Rather, the evidence indicates that the Grievant's child had been vomiting on April 2 and that the vomiting continued on April 3. As the Union argues, persistent vomiting can be symptomatic of a serious illness such as a bowel obstruction. Additionally, a ten month old child with perisistant vomiting may quickly become dehydrated. If not treated promptly, such dehydration may have serious health consequences. One may reasonably conclude that had the doctor not shared the Grievant's concern, the doctor would not have recommended that the child be seen by the doctor. Despite the County's assertions to the contrary, the undersigned is persuaded that the circumstances of April 3, 1990 did involve (1) an immediate family member (2) with a serious illness (2) which required the constant attention of the employe.

As the County argues, Article 13(E) expressly provides that family illness leave may not be used to accompany family members to "any routine scheduled medical or dental appointments". Given the fact that the appointment was a response to a sudden, serious illness, the undersigned must reject the conclusion that the appointment was a "routine scheduled appointment". Having met the requirements of Article 13(E), the Grievant was contractually entitled to receive eight hours of family illness leave for April 3, 1990.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

4/ The Grievant could not recall if she called the doctor on April 2 or April 3.

1. The County violated the collective bargaining agreement when it denied Terry Mayer's request to use eight hours of family illness sick leave for
April 3, 1990.

2. The County is to immediately grant Terry Mayer's request to use eight hours of family illness sick leave for April 3, 1990 and to immediately restore the eight hours of vacation time which Terry Mayer used on April 3, 1990.

Dated at Madison, Wisconsin this 7th day of January, 1991.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator