BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MARATHON COUNTY (DEPARTMENT OF SOCIAL SERVICES)	Case 172 No. 44348 MA-6260
and	
COURTHOUSE EMPLOYES, LOCAL 2492 (PARA-PROFESSIONAL AND CLERICAL UNIT), AFSCME, AFL-CIO 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 54

ARBITRATION AWARD

Marathon County Department of Social Services (Paraprofessional and Clerical Unit), Local 2492, 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 collective bargaining agreement by denying Debbie Kurth one hour of family illness sick leave for March 6, 1990? If so, what is the proper remedy?

The County frames the issue as follows:

> Whether the County violated Article 14 - Sick Leave, Paragraph "D" - Family Illness when it refused to allow the Grievant to use sick leave to take her son to a doctor's appointment? 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 Debbie Kurth's request to use one hour of family illness sick leave for March 6, 1990?
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISION:

ARTICLE 2 - MANAGEMENT RIGHTS

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

A. To direct all operations of the Social Services Department;

B. To establish reasonable work rules;

C. To hire, promote, transfer, assign and retain employees;

D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;

E. To relieve employees from their duties because

of lack of work or for other legitimate reasons;

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

G. To take whatever action is necessary to comply with State or Federal law;

H. To introduce new or improved methods or facilities;

I. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, and to determine the competence and qualifications of employees;

J. To change existing methods or facilities;

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

L. To take whatever action is necessary to carry out the functions of the department in situations of emergency;

M. To utilize temporary, part-time or seasonal employees when deemed necessary, provided such employees shall not be utilized for the purpose of eliminating existing full-time positions; and

N. To contract out for goods and services so long as no employees are laid off or released by such action.

The rights of management set forth above are not all inclusive, but indicate the type of matters or rights which belong to and are inherent to management. Any of the rights, powers and authority the County had prior to entering into this collective bargaining agreement are unqualified, shall remain exclusively in the County, except as specifically abridged, delegated, granted or modified by this Agreement.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein; however, the pendency of any grievance or arbitration shall not interfere with the right of the County to continue to exercise these management rights.

ARTICLE 3 - GRIEVANCE PROCEDURE

* * *

B. Arbitration

* * *

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

* * *

ARTICLE 14 - SICK LEAVE

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

D. Family Illness: Employees will be allowed to use sick leave in case of serious illness in the immediate family where the immediate family member requires the constant attention of the employee. The Director may require that the employee make other arrangements for the ill family member within five (5) working days. Immediate family is defined as the employee's spouse, children, parents, or member of the employee's household.

E. Advance Notice and Use: In the event that an employee is aware in advance that sick leave benefits will be needed or due, it shall be the duty of the employee to notify the Department Head as far in advance as possible in writing of the anticipated time and duration of such sick leave, the reason for requesting such sick leave and medical certification that the employee will be unable to perform his/her normal work function. Employees will be required to begin using sick leave on the date which their doctor certifies that they are medically unable to perform their normal duties. An employee on sick leave required to notify the Department Head at the earliest possible time of the anticipated date on which the employee will be able to resume his/her normal duties.

* * *

ARTICLE 24 - MAINTENANCE OF BENEFITS

Any benefits received by the employees, which are mandatorily bargainable but not referred to in this document, shall remain in effect for the life of this Agreement unless changed by mutual agreement.

ARTICLE 29 - ENTIRE OF MEMORANDUM OF AGREEMENT

The following constitutes the entire memorandum of agreement between the parties by which the parties intend to be bound, and no verbal statements shall supersede any of these provisions. The County agrees that it will not enter into any other agreement written or verbal, with the employees covered by this Agreement, other than through the Union. This Agreement is subject to amendment, alteration or addition only by subsequent written agreement between and executed by the County and the Union where mutually agreeable. The waiver of any breach, term or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all of its terms and conditions.

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 March 28, 1989, the parties executed a collective bargaining agreement which by its terms was effective from January 1, 1989 through December 31, 1990.

On July 24, 1989, 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.

Attached to the letter of July 24, 1989 was the following:

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 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.

Debbie Kurth, who is represented by Local 2492, is a Support Services Worker and has been employed in the County's Social Services Department for approximately 4 1/2 years. On March 4, 1990, Kurth's twelve year old son complained of severe knee pain. When Kurth telephoned the doctor to obtain an appointment for her son, she was told that the earliest appointment was on March 6, 1990. Kurth accepted the March 6, 1990 appointment.

Kurth's son was able to walk and did not miss any school on March 4 or on March 5, 1990. On March 4, Kurth drove her son to school and he returned home on the bus. Kurth's son also went to school on the day of the appointment.

Kurth submitted a sick leave request for one hour of sick leave for the purpose of taking her son to the doctor on March 6, 1990. Kurth's immediate supervisor approved the request. Kurth's request was subsequently denied by the Department's Administrative Services Supervisor, Linda Berna. As a result of the denial of her request to use sick leave, Kurth used one hour of vacation on March 6, 1990 for the purpose of taking her son to the doctor.

On March 13, 1990, Kurth filed a grievance alleging that the County violated Article 14(D), Family Illness, when it denied her request to use one hour of sick leave on March 6, 1990. The statement of the grievance contained, inter alia, the statement that "mother was needed at emergency doctor appointment. Child's knee out of joint -took two days to get to see doctor." As an adjustment of the grievance, the Grievant requested that sick leave be granted instead of forced use of vacation, and that the one hour of vacation be reinstated.

In response to the grievance, the County's Director of Social Services, James E. Dalland, issued the following letter:

RE: AFSCME Local 2492 - Grievance No. 1-90

Dear Mrs. Kurth:

On March 13, 1990, you filed a grievance regarding Family Illness Sick Leave. A Step 1 grievance hearing was held in my office on March 15, 1990.

During the course of the hearing it was revealed that your son was injured last summer but there had been a recent flair (sic) up of knee trouble. You had read your health insurance contract but did not believe that the medical treatment would be covered if you took your son to an emergency room. You called your doctor regarding treatment for your son's knee but were unable to get an appointment for a period of two days. You also indicated that your husband had an appointment he couldn't break and that other relatives were not available. You stated that your doctor will not treat any child under age eighteen without a parent being present. You did not say so but I assume that your son carried on his normal activities during those two days.

Considering the information presented at the hearing, I do not believe that the contract language which describes "serious illness in immediate family" or contract language "requires the constant attention of the employee" applies in this situation. In addition, the County guidelines clearly do not provide family illness usage of sick time for this type of situation.

Based on the above I find that the labor agreement has not been violated and deny the grievance.

On May 1, 1990, County Personnel Director Karger issued the following letter to Union Representative Salamone:

Re: Grievance No. 1-90 (Kurth)

On April 26, 1990, a meeting was held to discuss a grievance submitted by Debbie Kurth of the Social Services Department involving the use of sick leave to see a physician. You were present at the meeting along with the grievant, Charlie Sparr, and myself.

The facts appear to be as follows:

1. On March 4, 1990, Ms. Kurth's 12 year old son complained of pain in his legs. An appointment was made for two days later to see Dr. Buechel.

2. On March 6, 1990, Ms. Kurth accompanied her son to the medical appointment which required her to be away from work for a period of one hour.

3. The request of Ms. Kurth to use sick leave for March 6, 1990, was denied.

The grievance cites Article 14(D) as the source of the controversy: (Emphasis Added)

> Employees will be allowed to use sick leave in the case of <u>serious illness</u> in the immediate family where the immediate family member requires the <u>constant attention</u> of the employee.

In making the decision to deny the sick leave request the Social Services Department relied upon a document entitled <u>Statement Regarding Use of Sick Leave for Family Illness</u>. This document was created in an effort to bring consistency within the County in responding to requests for the use of sick leave for family illnesses. Page 2 of that document cites some examples of incidents that should not receive family illness sick leave:

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

check.

3. Take daughter to doctor to have stitches removed.

The statement on family illness has been shared with the Union. On November 22, 1988, a letter was sent to the Union which initially distributed the statement and on July 24, 1989, another letter was sent to the Union offering to allow employees an opportunity to use vacation in one hour increments in order to facilitate the transition to the procedures outlined in the policy statement.

In conclusion, I find that the request for the use of sick leave was appropriately denied. The incident does not meet the standard of being a serious illness requiring the constant attention of the employee. Application of the policy statement on sick leave for family illness leave indicates no doubt that the Social Services Department acted appropriately in reviewing Ms. Kurth's request.

Grievance No. 1-90 is denied.

On June 11, 1990, the Marathon County Personnel Committee denied the grievance and, thereafter, the matter was scheduled for grievance arbitration.

POSITIONS OF THE PARTIES:

Union:

At issue, is the interpretation of Article 14, D. The term "serious illness" lacks specificity. Through the years, the parties' practices have given meaning to this ambiguous contract term. The County incorrectly asserts that it can unilaterally repudiate such a practice. 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 of Article 14, D.

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 Kurth's son met this definition.

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 and 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.

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 the 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 so radical a change among its own departments.

Grievant Kurth's request for Family Illness sick leave to take a young child who had suffered a knee dislocation to the doctor was contractually appropriate. One may reasonably conclude that a knee dislocation is a serious illness.

Article 24 of the agreement contains a "Maintenance of Benefits" provision guaranteeing that any mandatorily-bargainable benefit shall remain in effect until changed by mutual agreement. Additionally, the agreement contains a "zipper clause" which prevents the unilateral application of policies such as that attached to Personnel Director Karger's letter of July 24, 1990.

Despite the County's claim to the contrary, the Union has never accepted

the sick leave policy which the County attempted to effectuate 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 prohibits the introduction of unilateral changes.

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.

The County's claim that Kurth's child did not require the constant attention of the employe is not substantiated by the record. May one reasonably
expect a twelve year old child to drive himself to the doctor? The evidence of past practice demonstrates that the parties have recognized that taking a child to the doctor requires "constant attention".

The County's argument that Kurth did not provide proper notice of her intent to utilize Family Illness sick leave is an argument which has not been previously raised by the County. Inasmuch as the County never raised this issue before filing post-hearing briefs, the record presented herein does not address the issue. Prior notification, or lack thereof, is simply not relevant to the instant dispute.

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.

The language of Article 14, D, must be given the meaning which has been established by the parties' past practices. The County violated the provisions of Article 14, D, when it denied the Grievant's request for family illness sick leave. Accordingly, the grievance must be sustained.

County:

Article 14(D) of the contract with Local 2492 entitles employes to use family illness leave if certain requirements are met. To be eligible for family illness leave, there must be (1) an immediate family member (2) who has a serious illness (3) which requires the constant attention of the employe. At issue, is whether under the circumstances presented, the Grievant was entitled to family illness leave.

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". Application of the common and ordinary definition to the phrase "serious illness" leads to the conclusion 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.

Kurth requested family illness leave to take her son to a medical appointment for treatment of an injury which had occurred during the previous summer. This appointment was scheduled two days in advance. During this two day period, Kurth's son attended school and rode the bus from school. Clearly, her son's condition did not constitute a "serious illness" as contemplated by Article 14(D).

Another element to be satisfied before an employe is entitled to Family Illness leave is that the family member require the employe's constant attention. Kurth's son did not require her "constant" attention. If Kurth's son did require her constant attention, one must ask how her son could attend school, without such "constant" attention, for two days prior to the pre-scheduled appointment.

It is well recognized that the provisions of a labor agreement must be construed as a whole. Article 14(A) requires that an employe "must report that he/she is sick no later than one-half hour after the earliest time which he/she is scheduled to report to work. . ." Article 14(E) provides that "in the event that an employe is aware in advance that sick leave benefits will be needed or due, the employe is to notify his/her Department Head" as far in advance as

possible in writing of the anticipated time and duration of such sick leave. Construing these provisions as a whole, it is evident that the parties intended that if an employe wished to utilize sick leave, then the employe was to notify his/her supervisor in advance and no later than one-half hour after the start of the employe's regular work day. A previous Arbitrator has found that Section "A" must be read to apply to sick leave requests arising under Section "D" (citations omitted).

Kurth did not provide advance notice that it would be necessary for her to utilize family illness leave. Kurth scheduled her son's medical appointment two days in advance of the appointment. By her own admission, she did not request family illness leave until the day of the medical appointment. Clearly, Kurth did not provide proper notice and, thus, was not entitled to Family Illness leave under the terms of Article 14(A).

Kurth sought to use sick leave for one hour in order to take her son to a specialist physician appointment even though her son had been suffering a knee injury for several days and the medical appointment had been scheduled two days in advance. The Union has not provided any evidence on which the Arbitrator could find a binding past practice regarding the use of sick leave for a routine medical appointments such as that of Kurth's son. Rather, sick leave for medical appointments has only occurred under very narrow circumstances involving instances of serious illness or injury or instances in which immediate medical attention was received.

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 the parties' past practices provides employes with 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 conclusion. 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.

In the interest-arbitration proceeding involving Local 2492, the Union introduced a proposal which, if adopted, would have required the County to retract its repudiation of the alleged past practice and revert to the previous pre-bargaining status. By this act, the Union recognized that the County could lawfully repudiate the alleged practice. The County and Local 2492 signed its 1989-90 labor agreement on March 28, 1989. At this time, the Union was fully aware of the County's repudiation of the alleged practice. The Union did not request a revision of Article 14(D) or any assurance that the alleged past practice would 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, the practice 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 reliance on Article 24, Maintenance of Benefits, is misplaced. The provision's reference to "benefits" is clearly intended to refer to a specific fringe benefit (e.g., provision of supplies, coffee breaks, etc.) existing outside of the Agreement. This conclusion is supported by the fact that the provision refers to "benefits" which are mandatorily bargainable but not referred to in this agreement. Article 14(D) of the labor agreement specifically refers to Family Illness leave. Thus, Article 24 has no bearing on that fringe benefit.

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.
>
> 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

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

> negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.
>
> 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.
>
> 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.
>
> 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 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 on family illness leave in a manner consistent with the specific wording and intent of the contract language. 4/

During the negotiations which culminated in the parties' 1989-90 agreement, the parties discussed, but did not agree upon, any changes to the family illness leave provision. When the parties executed their 1989-90 agreement, the agreement in dispute herein, the family illness leave provision remained unchanged. Applying the principles of past practice set forth above to the present case, the undersigned is persuaded that the County's repudiation of the past practice is effective to repudiate a practice which was contrary to the plain 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.

As the County argues, arbitrators have found that contract provisions such as Article 29, which the County refers to as a "zipper clause, preclude the enforcement of a past practice which exists outside of the labor contract. However, a past practice which gives meaning to ambiguous contract language is not a practice which exists outside of the labor contract. Article 29 does not prevent an arbitrator from construing contact language in a manner which is consistent with the meaning demonstrated by the evidence of the parties' past practices.

The language of Article 14, C, 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 14, D. Thus, Kurth

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

3/ Joint Exhibit #19.

4/ At issue is the County's denial of Kurth's request to use family illness leave. The undersigned makes no determination as to whether or not the County's "Statement Regarding Use of Sick Leave For Family Illness" is "consistent with the specific wording and intent of the contract language."

is entitled to use sick leave to accompany her son to the doctor on March 6, 1990 only if she falls within the exception found in Article 14, D.

Article 14, D, provides, in relevant part, that "Employees will be allowed to use sick leave in case of serious illness in the immediate family where the immediate family member requires the constant attention of the employee." Thus, to be eligible for family illness leave an employe must have (1) a serious illness (2) in the immediate family which (3) requires the constant attention of the employe.

The Article 14, D, definition of "immediate family" expressly includes an employe's children and neither party argues that Kurth's son is not an immediate family member. Rather, the dispute centers on the issue of whether Kurth's son had a serious illness which required Kurth's constant attention.

Article 14, D, does not define the term "serious illness", nor does it provide any examples of a "serious illness". Accordingly, the term is neither clear nor unambiguous.

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 members 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.

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 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".

In the present case, Kurth's son complained of severe knee pain and was taken to the physician to be treated for this complaint. The record demonstrates that the physician who treated Kurth's son required a parent to be present when treating a child under the age of eighteen. The record further demonstrates that Kurth's husband was not available to accompany the son to the appointment. The undersigned is persuaded that the son's medical appointment involved an immediate family member who required Kurth's constant attention. There remains the issue of whether the son was suffering from a serious illness.

Kurth's twelve year old son first complained of severe knee pain on March 4, 1990. When Kurth telephoned the doctor to obtain an appointment for her son, she was told that the earliest appointment was on March 6, 1990. Kurth accepted the March 6, 1990 appointment. Kurth's son was able to walk and did not miss any school on March 4 or on March 5, 1990. Kurth's son also went to school on the day of the appointment. On March 4, Kurth drove her son to school and he returned home on the bus.

Apparently, the physician's examination revealed that Kurth's son had a knee which was out of joint. At hearing, the Grievant indicated that she thought that the knee condition may have been related to an injury which the son had suffered during the previous summer. The record fails to reveal what, if any, treatment was prescribed for the son, nor is it evident that the son was required to curtail any of his normal activity.

Undoubtedly, Kurth's son was in some discomfort. However, the fact that Kurth's son was able to attend school persuades the undersigned that the knee condition was not serious. To be sure, there may be situations in which an employe may unwittingly send a child to school when the child is not medically fit to attend school. However, it is not evident that the instant case presents
such a situation. Since Kurth did not meet the requirements of Article 14, D, Kurth was not entitled to the one hour of family illnes leave in dispute herein.

The record demonstrates that the County's denial of Kurth's sick leave request was predicated upon the County's belief that Kurth did not meet the requirements of Article 14, D. In post-hearing argument, the County raised for the first time, the argument that Kurth's request for sick leave need not be granted because Kurth violated the Advance Notice and Use provisions of Article 14, E. By failing to raise this issue prior to hearing in this matter, the County has waived its right to rely upon this provision in the present case. To hold otherwise would be contrary to the principles underlying the contractual grievance arbitration procedure, i.e., the encouragement of the settlement of disputes through full and open discussion of each parties respective positions and the provision of the opportunity to fully litigate all issues which are to be resolved through the arbitration proceeding.

Article 24 requires the maintenance of benefits which are "manditorily bargainable but not referred to in this document". Assuming arguendo that family illness leave is manditorily bargainable, Article 24 is not controlling because family illness leave benefits are referred to in the labor contract.

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

AWARD

1. The County did not violate the collective bargaining agreement when it denied Debbie Kurth's request to use one hour of family illness sick leave for March 6, 1990.

2. The grievance is denied and dismissed.

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

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