BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WALWORTH COUNTY HUMAN SERVICES
NON-PROFESSIONAL EMPLOYEES, LOCAL
1925C, AFSCME, AFL-CIO

and

WALWORTH COUNTY
Department of Human Services

Doris Peters
sick leave grievance
dated 6-25-90

Case 107
No. 44670
MA-6381

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, PO Box 624, Racine, WI 53401-0624, appealing on behalf of the Union.

Mr. Alfred A. Heon, Whyte & Hirschboeck, S.C., 2100 Marine Plaza, Milwaukee, WI 53202-4894, and Ms. Janice St. John, Personnel Director, appearing behalf of the County.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and decide a dispute concerning the above-noted grievance under the arbitration procedures contained in the parties' 1990-91 Agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing in the Walworth County Courthouse, Elkhorn, Wisconsin on January 28, 1991. No transcript was made; however, by agreement of the parties the Arbitrator maintained an audio tape recording of the hearing for his exclusive use in award preparation.

Post-hearing briefing was completed on March 5, 1991, at which time the evidence and arguments in the matter were fully submitted.

ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the County violate Sec. 15.06 of the Agreement in processing the request for sick leave of the Grievant?

2. If so, what is the appropriate remedy?

Although the parties agreed on the above-noted statement of the issues, the parties' respective presentations during the hearing revealed that they had differing views about the meaning of the phrase "the request for sick leave of the Grievant" in ISSUE 1. The Union's position at the hearing was that the quoted phrase included Grievant's written request for leave dated May 15, 1990, a written amendment of that request dated May 29, 1990, and a verbal request for part-day segments at the beginning of each shift to care for her mother at Grievant's home on and after June 5, 1990. The County's position was that the quoted phrase included only the verbal request for part-days of sick leave beginning on and after June 5.

While the grievance initiation form leaves some doubt as to which of the foregoing reflects the scope of the claim Grievant intended to pursue, her written appeal to Step 2 refers solely to the fact that "I have asked for 1-1 1/2 hours each morning to assist my mother. . . " and so it is to that verbal request alone that the Arbitrator finds that ISSUE I is appropriately limited. That conclusion draws further support from the Grievant's specification of "June 5, 1990" as the "Date of the alleged infraction" on her grievance initiation form; from the fact that June 5 was the first day on which Grievant took a part-day of vacation to care for her mother in the morning; and from the fact that the request for the part-day segments was the only request referred to in the County's minutes of the Step 3 grievance hearing.

The Arbitrator has nonetheless taken the County's processing of the May requests into account as background in addressing the question of whether the County violated Sec. 15.06 in processing the Grievant's request for part-days of sick leave at the beginning of each shift on and after June 5, 1990.

PERTINENT PORTIONS OF THE AGREEMENT

ARTICLE XV - SICK LEAVE

. . .

15.06 Sick Leave for Certain Family Members. An employee may use sick leave for the illness or injury of their spouse, child, or parent, when care and attendance by the employee is medically required. Sick leave under this section shall be approved by the

Department Head and the employee may be required to furnish proof of medical need, if requested by the County.

. . .

ARTICLE XX - OTHER LEAVES

20.01 Procedure Applications for leaves of absence for personal reasons must be made in writing stating the reason and given to the Department Head and a copy to the Union. The Department Head shall send the application to the County Personnel Director with a recommendation. The Personnel Director shall notify the Department Head and the Union if the leave of absence is denied or authorized, indicating the duration of the authorization and of subsequent renewals.

20.03 Personal Leave. A leave of absence granted for personal reasons shall not be a paid leave.

. . .

FACTUAL BACKGROUND

The Union represents a bargaining unit of nonprofessional employes in the County's Human Services Department. The bargaining unit was formed in or about 1988 as a consequence of unit determination proceedings following the County's creation of a Human Services Department combining previously separate organizational sub-divisions. The instant bargaining unit combined the non-professional employes from previously separate bargaining units of Lakeland Counseling Center clerical employes, Lakeland Counseling Center paraprofessional employes, and Department of Social Services employes, with a group of nonrepresented employes of the County's Department of Aging. The first agreement covering the Local 1925C bargaining unit was negotiated for 1988-89.

The Grievant is employed in the Human Services Department's Transportation work unit as a Van Driver. She has been employed by the County since January of 1984. Grievant's job involves providing transportation services to Department clients to assist those individuals in getting to and from such daily activities as shopping, professional appointments and the like. Grievant is normally scheduled to work eight hours, Monday through Friday, beginning at 7:30 AM. The record does not indicate the length of her unpaid lunch hour, but it is clear that her normal quitting time was before 5:00 PM.

In May of 1990, Grievant's mother, who was then living alone in California, became seriously ill and was hospitalized with congestive heart failure. On the advice of her mother's

doctor, Grievant made plans to travel to California to attend to her mother's needs. Grievant did not know whether her mother would live to be discharged from the hospital.

Grievant told her immediate supervisor, Joan Palmer, that she needed to go to California for an indefinite period of time to attend to her mother's needs and that she wanted to take paid sick leave under Sec. 15.06 to cover her absence. Grievant was referred to Ruth Anderson (then an employe in the Personnel Department) who directed Grievant to fill out a Walworth County Leave of Absence Request form, which the evidence establishes is the only leave form the County uses for all types of leave requests.

Grievant signed and dated that form on May 15, 1990, requesting Family Medical leave for the specific stated reason, "Mother critically ill in California." Grievant's form received the unqualified "approval reconnnended" signatures of Palmer and Grievant's Department Head, Thomas Mackesey, the Director of the Department of Human Services, both dated May 15, 1990. The final line on the form has a place for the signature of the County's Personnel Director following "approved" or "denied" blanks. County Personnel Director Janice St. John checked "Approved" and signed the form on May 16, 1990, but entered a handwritten notation stating, "May Use Sick Leave Up to 10 days. Vacation thereafter."

St. John transmitted a copy of the completed Request form to Grievant in a letter dated May 24, 1990, with copies to Mackesey and the Union, among others. That letter read, in pertinent part, as follows:

> re: Leave of Absence Request Approval
>
> Your request for a family-medical leave of absence has been approved. Under County policy, you are required to exhaust all available and applicable accrued leave before an unpaid leave may commence. Your last day worked is May 11, 1990 and you will receive pay from accrued leave balances through approximately May 31, 1990. Please note that your first 10 days are considered to be a family-medical leave during which you may use sick leave. The remainder of the leave is considered personal leave. You are expected to report to work on June 1, 1990.
>
> You will not be required to make any payments for insurance during this leave.
>
> It is important that you review the enclosed Personnel Policies which are conditions of your leave.
>
> If for any reason you are unable to return as expected, it is your

> responsibility to submit an amended leave of absence request form which must be received by your department head at least 3 days prior to the expected return date. If you fail to report for duty on the scheduled return date you will be held to have resigned.
>
> . . .

Anderson also directed Grievant to have her mother's attending physician complete the County's "Certification for Family Leave or Medical Leave" form. Anderson noted on Grievant's May 15 Leave Request form that Grievant was taking the Certification form with her to California for completion and would be mailing it back, which she did. Grievant signed the employe portion of the Certification form after checking that she was requesting "Family Leave to care for my parent with a serious health condition." There was no alternative selection option for sick leave for family members. Grievant's mother's physician signed the physician portion of the form on May 18, 1990, attesting that Grievant's mother had a "serious health condition" within the meaning of Sec. 103.10(1)(g), Wis. Stats., wherein that term is defined as "a disabling physical or mental illness, injury, impairment or condition involving any of the following: (1) inpatient care in a hospital, nursing home, or hospice, or (2) outpatient care that requires continuing treatment or supervision by a health care provider." The physician further attested that the duration of Grievant's mother's serious health condition was "permanent;" that the medical facts regarding that serious health condition are "congestive heart failure - age;" that the employe must cease work effective on "May 15;" and that the the date on which the employe may return to work was "?", i.e., uncertain. The copy of that Certificate placed into evidence from the County's files also bears a note from Anderson to St. John identifying the document and stating that Grievant had her mother's physician complete it in California and that Grievant "hopes to bring her mother back to care for her here."

Grievant's mother was ultimately discharged from the hospital in California; however, her physician told Grievant that her mother could no longer live alone because of her heart condition. Accordingly, Grievant arranged to bring her mother back to Wisconsin to live at home with Grievant and Grievant's husband. Following her arrival with her mother from California, Grievant signed another Leave of Absence request for "Family Medical Leave Extension," checking the "Amended Request" rather than "Original Request" box. Grievant's signature on that form was dated May 29, 1990. In that request, Grievant stated,

> I was able to bring my mother from California and am in process of establishing medical care and life support systems for her, here. I need the additional day (6/01/90) and am also requesting approval to use Sick Time for 5/29/90 through 6/01/90, in accordance with [Agreement] Sec. 15.06….

Grievant entered "Submitted with original Leave Request" next to the note on the form that "All

medical leaves require the attending physician to complete the employer's Certification form."

Supervisor Palmer and Department Head Mackesey also signed that form on May 29, 1990, affirming that they each reconunended approval of the request it contained. St. John signed the last line of the form on June 11, 1990, checking neither approved nor denied but writing "See letter" with a line drawn to the word "approved." St. John's letter forwarding that form to Grievant (again with copies to Mackesey, the Union and others) was dated June 6, 1990. It read in pertinent part as follows:

> Re: Leave of Absence Request Approval
>
> Your request for a leave of absence has been amended and extended as a personal leave. The County is only legally required to approve a family medical leave up to 80 hours per year. You have already exhausted family leave benefits but can receive a personal leave.
>
> Under County policy, you are required to exhaust all available and applicable accrued leave before an unpaid leave may commence. Sick leave does not apply during this extended leave. Your last day worked was May 11, 1990 and you will receive pay from accrued leave balances through approximately June 1, 1990. You are expected to report to work on June 4, 1990.
>
> It is important that you review the enclosed Personnel Policies which are conditions of your leave.
>
> If for any reason you are unable to return as expected, it is your responsibility to submit an amended leave of absence request form which must be received by your department head at least 3 days prior to the expected return date. If you fail to report for duty on the scheduled return date you will be held to have resigned.
>
> . . .

Grievant returned to work on Monday, June 4, 1990. On or about that day, she verbally informed Palmer that Grievant would need to help her mother get up, do her lavatory and wash up functions and give her mother breakfast before coming to work. This, Grievant told Palmer, would require her to be absent from work each day at the beginning of the shift for periods of time variously referenced in the record as being either from 1 to 1.5 hours or from 2 to 2.5 hours. Palmer suggested that Grievant begin and end her workday later to accommodate her mother's needs in the morning. Grievant did not pursue that approach, explaining that it would prevent Grievant from being home in the late afternoon when she needed to prepare the evening meal and

see to her mother's needs at that time. Grievant requested, instead, that she be granted paid sick leave for the above-noted periods she would be absent each morning. Grievant's request in that regard was for an indefinite period of time because Grievant did not know how long her mother would live and/or be able to continue living at Grievant's home.

Grievant's verbal request for daily part-day family sick leave was never reduced to writing. According to Grievant, Palmer, for her part "approved" the request and passed it along to Mackesey. Grievant stated that Palmer later told Grievant that Mackesey had denied the request saying it was "subject to policy." Mackesey testified that he made the decision to deny the request himself after having previously received St. John's correspondence to Grievant concerning her earlier written Sec. 15.06 and after consulting with St. John about the verbal request, as well.

It is undisputed that no one from the County asked Grievant to supply a medical certification form concerning that verbal request.

Grievant's time records show that, pursuant to her earlier May 15 leave request, Grievant was allowed 80 hours of Sec. 15.06 sick leave after which she was allowed to take additional leave to care for her mother only from her vacation and compensatory time balances. Grievant used the following amounts of vacation and compensatory time to care for her mother following their return to Wisconsin. (For the weeks beginning June 4, the following listing includes only part-days of vacation or compensatory time taken since it was only part-days of Sec. 15.06 sick leave that Grievant had requested and been denied during those weeks.)

week of May 28-June 1:
Tue: 8 hr comp time
Wed: 8 hr comp time
Thu: 2.5 hr vac; 5.5 hr comp time
Fri: 8 hr vac

week of June 4-8:
Mon: .5 hr vac
Tue: 2.0 hr vac

week of June 11-15
none

week of June 18-22
none

week of June 25-29
none

week of July 2-7
none

week of July 9-13
none

week of July 16-20
none

week of July 23-26
none

Grievant testified that after she exhausted her available vacation and compensatory time balances, she arranged for her 88 year old aunt to come over early enough to help Grievant's mother begin her day in Grievant's absence.

Grievant's mother's condition worsened in July and she was hospitalized on July 16 and ultimately died on July 19. Grievant requested and was granted three eight hour days of sick leave on July 16-19 to be with her mother in the hospital. The succeeding three work days were granted under the Agreement provisions for funeral leave. Grievant testified that Palmer told Grievant that even if an extension of her earlier family sick leave request were not approved as regards July 16-19, Palmer considered Grievant to be entitled to take sick leave on those days because her personal emotional condition was such that she could not be expected to come to work. Mackesey testified that he was aware of Grievant's emotional condition when he approved the sick leave for July 16-19 and that he approved that leave without determining how much, if any, was family illness leave and how much, if any, was personal illness sick leave, and without calling upon Grievant to provide a medical certification in support of her request for sick leave for those three days.

On June 25, 1990, Grievant filed the subject grievance. As noted, it specified the "Date of alleged infraction" as June 5, 1990; alleged that the County was violating Sec. 15.06; and further stated, in pertinent part,

> I took 2 weeks sick leave due to my mother being in the hospital, critically ill. When she was discharged I made arrangements to bring her home with me as she could not stay alone. I planned to use accrued sick time to care for her in early mornings and come to work at 9:00. My supervisor approved.
>
> Personnel has refused use of sick leave - stating that 80 hours is all that can be used for family. This is not the way I read the contract.

> [I request] The continued use of my sick leave for care of mother as stated in ouwr contract with the County.

Grievant testified that statements attributed to "Personnel" in her grievance referred to the contents of St. John's above-noted letters to Grievant rather than to anything that had been said to Grievant by someone in the Personnel Department. Grievant also testified that the "supervisor" she referred to as approving of her request was Palmer and not Mackesey.

When the grievance was denied at Step 1, Grievant submitted a June 26, 1990 appeal, stating in part,

> I have been refused use of my accrued sick leave for the care of my mother. Personnel states that only 80 hours may be used in this manner; the contract, however, states no limitations on amount to be used. I have asked for 1- 1 1/2 hours each morning to assist my mother, who at this point is semi-invalid and living in my home. I also requested use of sick leave for this purpose.

Following denial of the grievance the by the Department Head at Step 2, a Step 3 hearing was held before the County's Personnel Committee. The minutes of that Step 3 meeting read, in pertinent part, as follows:

> John Maglio presented the position of the Union in the matter of grievant Doris Peter's request for family leave and use of sick leave to care for her mother. John stated that he believed the County's reliance on state statute 103. 1 0 (Family leave or medical leave) was in error. He argued that the statutes are minimums not maximums. He also argued that contract section 15.06 contains no restrictions on the amount of sick leave that an employee may use for a spouse, child or parent. Further, that the sick leave language for personal use by the employee is the same as sick leave use for a family member.
>
> Doris stated that her elderly mother was now living with her. She provided daily care. When she was at work, her mother's sister who is age 88 cared for the employee's mother. No home health care was used.
>
> The Personnel Director stated that the County had approved the use of 80 hours of sick leave for Doris to attend to the care of her mother. Following the 80 hours the employe requested additional

> use of sick leave for 1 to 1 1/2 hours per day to care for her mother. The County denied any additional use of sick leave, but offered Doris the opportunity to work an alternative work schedule which would accommodate her personal needs. Doris was not interested in any change in schedule.
>
> It is management's position that the statute only requires approval of 80 hours of family leave per calendar year. The county permitted the employee to use sick leave during that 80 hours period. Any use of sick leave above 80 hours is at the discretion of the county department head. Section 15.06 (Sick leave for certain family members) has language stating that use under that section must be approved. Use of sick leave for personal reasons does not contain similar language. Motion by Bouhl/Ploch to deny the grievance. Motion carried 5-0.

The grievance was thereafter submitted to arbitration as noted above.

At the hearing, both parties presented evidence concerning the bargaining history of Sec. 15.06. That evidence establishes that Sec. 15.06 in its current Agreement form was initially negotiated in the parties' first agreement following the creation of the Human Services non-professionals unit in or about 1988. That agreement was for 1988 and 1989. It was negotiated in a context in which some of the employes in the newly formed unit could use sick leave for family member illnesses but most could not.

The Union proposed inclusion of language from one of the Lakeland Counseling Center units' agreements which read as follows:

> 15.06 Illness - Immediate Family An employee may use sick leave to take care of a member of his or her immediate family. The employee may be required to furnish proof of such illness, if requested by the County.

The County's initial proposals contained no language on that subject and so would have provided no sick leave for other than the employe's personal illness. As bargaining proceeded, however, the County countered with the following language on that subject:

> 15.06 Sick Leave for Certain Family Members
>
> (A) An employe may use sick leave for the illness or injury of the spouse or dependent child when care and attendance by the employee is medically required. Sick leave under this subsection

> shall be approved by the Department Head and the employee may be required to fumish proof of medical need, if requested by the County. Sick leave under this subsection shall be limited to 40 hours per calendar year.
>
> (B) The Personnel Director may approve the use of an additional 40 hours of sick leave when an employee must care for and attend to their spouse or dependent child who has a serious health condition as defined in section 103.10(g) WI Statutes.

The Union responded that it would agree to the County's language without the last paragraph and without the last sentence of the first paragraph, and the 1988-89 agreement ultimately included Sec. 15.06 in that modified form except for a later agreement to include "parent" in addition to spouse and dependent child. The 1988-89 language of Sec. 15.06 was then carried forward in the Agreement with the only change being elimination of the word "dependent" before "child."

Mackesey testified that during the 1988 bargaining he stated to the Union across the table that management's approval was not to be interpreted as automatic. St. John testified that the County told the Union during the 1988 bargaining that under the County's "medically required" language (which was ultimately agreed upon), sick leave would be provided to the employe when the employe had to actually be absent from work and provide immediate care to the specified family member but not in situations where the family member happened to be sick but the employe was not needed to attend or care for the sick individual and not in situations where the employe's babysitter was not available and the employe was absent from work in order to simply babysit.

The Union offered the testimony of 1988 bargaining team member Maureen Lapicola to the effect that the Union told the County's bargainers it was unwilling to have a limit set on the number of hours per year of Sec. 15.06 that an employe could take and unwilling also to require Personnel Director approval of leave under that Section, and that the Union ultimately succeeded in both respects. Lapicola stated that if she were seeking a leave under Sec. 15.06 she would make her request to her immediate supervisor who, in turn, would convey it to the Department Head.

The Union established that on October 22, 1990, well after the filing of the instant grievance, St. John issued a memorandum to all County Department Heads on the subject of "Payroll Coding -- SICK LEAVE FOR FAMILY MEMBERS," which read, in pertinent part, as follows:

> Specified bargaining units. Certain bargaining units permit use of sick leave for an employee's spouse, child, or parent, when care and attendance by the employee is medically required. Sick leave must be approved by the Department Head and the employee may

be required to fumish proof of medical need. This policy applies in the following bargaining units:

> Courthouse Local 1925B
> Human Service Non-professionals, Local 1925C
> Human Services Professionals

Imposed limit. It is the County's position that sick leave for family members under the above contracts may be limited by the County, since use is subject to approval of the Department Head. It is expected that Department Head's consistently limit use to 80 hours per calendar year.

. . .

Mackesey testified that had received that memorandum and that he understood it to direct that Department Heads limit employe use of sick leave for family members to 80 hours per year.

POSITION OF THE UNION

The evidence shows that the Personnel Department has imposed a firm limit of 80 hours on sick leave to be allowed for family member illnesses and that Grievant's written and verbal requests for Sec. 15.06 sick leave were denied because she had exceeded 80 hours of Sec. 15.06 sick leave during the year. The 80 hour standard derives from a statutory minimum that has no effect on the proper interpretation of Sec. 15.06, since the Agreement contains no such limit. By limiting Grievant to 80 hours of sick leave, the County violated Sec. 15.06.

The bargaining history of Sec. 15.06 clearly establishes both that the parties intended that there would be no limit on the number of hours per year of sick leave employes could take under that section and that the Personnel Department was not to be approving or disapproving such leaves. The County unsuccessfully attempted to include language in Sec. 15.06 that would have set a limit of 40 hours on the number of hours of such leave employes could take each year and that would have allowed the Personnel Director's to approve up to an additional 40 hours of sick leave that met the statutory standard. The Union rejected the County's proposal in both of those respects.

Grievant's verbal request for daily part-day sick leave met all of the eligibility requirements set forth in Sec. 15. Grievant's Department Head was aware of that request, even though it was never reduced to writing. Grievant testified that there was a need for Grievant to care for her critically ill elderly mother each morning as regards such matters as her feeding, bathing, dressing and other related care. It was not possible for Grievant to start and end her shift later and still meet her mother's needs because her mother needed her during hours following her normal

quitting time, just as she did in the early morning hours of each shift. Grievant provided the County with a completed medical certificate on the form the County asked her to supply. That physician's statement certified that Grievant's mother had a serious health problem that was "permanent" in nature. The County accepted that certificate as valid and never called upon Grievant to provide additional verification of the mother's medical condition or of the medical requirement for Grievant to care for her when Grievant requested additional Sec. 15.06 sick leave regarding her mother's illness. At no time (until the arbitration hearing) did the County claim either that Grievant's request did not meet the Sec. 15.06 "medically required" standard or that Grievant's request was not reasonable in the circumstances. It should therefore be concluded that Grievant's request was both reasonable and medically required.

Until the arbitration hearing, the County's sole stated basis for denying the disputed request was that Grievant had exceeded 80 hours of family illness sick leave in a calendar year and that the Department Head had a right to deny all hours in excess of 80. The Personnel Director issued an October 22 memorandum subsequent to the incident giving rise to this arbitration, stating that Department Heads were to consistently limit sick leave for family members to 80 hours per year. Although Grievant's Department Head testified that he could make independent determinations as to the number of hours he could authorize under Sec. 15.06, he admitted on cross-exwmination: that he consulted with the Personnel Director before deciding to deny Grievant's disputed request that he was aware of Personnel Director's responses to Grievant's initial family medical leave request and that he now feels obligated to comply with the 80 hour limit stated in the October 22 memorandum. The Personnel Director had previously expressly imposed an 80 hour limitation on sick leave use on the Grievant's open-ended May 15 leave request for family medical leave, despite Department Head Mackesey's signed approval of that request. It can also be noted that the Personnel Director reversed in part the Department Head's approval of Grievant's request for Sec. 15.06 leave for the period May 29 through June 1, 1990, again showing the County's disregard for the express Sec. 15.06 designation of the Department Head rather than the Personnel Director as the County's decision-maker in such matters.

The evidence shows, therefore, that the County has improperly imposed an 80 hour limit and that the Personnel Director exercised effective decision-making control over all of Grievant's Sec. 15.06 sick leave requests. In both respects, the County is in direct violation of the express provisions of that Agreement Section.

By way of remedy, the Arbitrator should declare that the County violated Sec. 15.06 and order that all vacation and compensatory time utilized by the Grievant after June 1, 1990 through July 19, 1990 be credited back to the appropriate leave accounts and deducted, instead, from her sick leave bank. The Union further requests that the Arbitrator order the County to cease and desist from limiting employes to 80 hours of sick leave in cases such as this and from having the Personnel Department approving or denying such requests.

POSITION OF THE COUNTY

It is true that sick leave under Sec. 15.06 expressly requires the approval of the employe's Department Head, and not the approval of the Personnel Department. However, where the employe is requesting Sec. 103.10 Wis. Stats., the Family and Medical Leave Act, the approval of the Personnel Department rather than the Department Head is required because that determination involves an application of the somewhat different statutory criterion (a "serious health condition") as compared to the Sec. 15.06 requirement (an illness where "care and attendance by the employee is medically required.") The County does not contend that sick leave under the Agreement is limited to 80 hours per year. On the other hand, family (or personal) medical leave under Sec. 103.10, Wis. Stats. is limited to the statutory 80 hours per year maximum.

Under Sec. 15.06 an employe must obtain the approval of the Department Head, which approval can be discretionarily withheld for reasons which are not arbitrary or discriminatory. If the Union contends that Sec. 15.06 requires automatic Department Head approval of any leave request meets the other criteria set forth in that Section, that contention must be rejected because: the Union did not make that argument in the pre-arbitral grievance steps; because the bargaining history evidence establishes that both the Union and County understood that the agreed-upon language of Sec. 15.06 would mean that prior discretionary approval of the employee's Department Head was necessary; and because the agreed-upon Department Head approval requirement would serve no purpose if it were interpreted to mean that the Department Head's approval was to be automatic.

Arbitrators unanimously recognize that where the contract is silent on the subject, management has the reserved right of discretionary approval of employe leaves of absence. The County sought to make it clear to the employes that management had such a reserved right by proposing to include a reference to the requirement of Department Head approval in the contract rather than merely relying on its inherent rights in that regard. The importance to the County of doing so is highlighted by the facts that there is no contractual cap on sick leave accumulation and that many employes have very substantial numbers of sick leave hours banked, making control of such full paid leaves an absolute necessity.

In the circumstances of this case, the County's refusal to grant the requested part-day sick leaves from and after Grievant's return to work on June 4 was not arbitrary or discriminatory. There are no other instances of record in which such leave has been granted or denied so that no attention need be given to the discriminatory aspect of that test. Denial of Grievant's request was not arbitrary because: Grievant had already been off the job for almost three weeks just prior to her request, with two of those weeks having been approved as Sec. 15.06 sick leave; Grievant's request involved her working partial days which is always difficult to cover; her request was open-ended as to how long she wanted the leave to continue, potentially extending many months given Grievant's sick leave balances in the 170+ day range; finding a replacement for a specially-trained van driver is more difficult than finding a substitute for, e.g., an absent secretary; and Grievant refused to consider his supervisor's offer to change Grievant's work schedule to accommodate

Grievant's need to be home in the early momings.

In any event, the grievance must be denied because Grievant's request did not meet the Sec. 15.06 requirement that "care and attendance by the employe is medically required." There was no medical requirement for Grievant to be with her mother each morning for one and one half to two hours. Grievant admitted that she rendered no medical assistance to her mother and that no home health care was used. While Grievant's mother probably did need help with some aspects of daily living, her situation was no different than a small child who must be watched, fed and helped to dress--a situation clearly not covered by Sec. 15.06 sick leave. The only medical evidence Grievant submitted to the County was the certificate of her mother's California physician concerning Grievant's need to come to California to be with her mother there. While a relative was necessary to accompany the Grievant's mother on the long trip back, it was not medically required that the Grievant continue on as a 'mother sitter' each monring. Other persons quite obviously could handle that task in Grievant's place.

The Union's contention that the Personnel Director rather than the Department Head made the decision to deny Grievant's request is contradicted by both of those officials' testimony and by the position of the County as set forth in the Personnel Director's Step 3 answer to the effect that the first 80 hours of sick leave granted to Grievant as regards her mother's illness was under the Family and Medical Leave Act and that, "any use of [Sec. 15.06] sick leave above 80 hours is at the discretion of the county department head." Similarly, given its reference to the requirement for Department Head approval, the "Imposed Limit" paragraph of the Personnel Director's October 22, 1990 memo to all departments appears to have meant that in addition to the leave provided by law, Department Heads should consistently limit use of sick leave for family members to 80 more hours. The Union's arguments on this and many other points are
mooted by the County's clear statement in this arbitration that sick leave in excess of 80 hours can be taken if it is medically required and the Department Head gives his discretionary approval. It should also be noted that Mackesey has exercised discretion to grant Grievant greater than 80 hours of Sec. 15.06 as regards the three eight hours days of sick leave he approved for July 16-18.

Any claimed irregularities in the processing of Grievant's written requests leave requests dated May 15 and May 29 are irrelevant to the subject matter now before the Arbitrator which is the Grievant's verbal request for daily part-day family sick leave on and after June 5.

For those reasons, the Arbitrator should find that Sec. 15.06 has not been violated and that neither Grievant nor the Union are entitled to any remedy in this matter.

DISCUSSION

Claimed Violation of Sec. 15.06

As earlier noted, to answer ISSUE 1 the Arbitrator is called upon only to determine

whether the County violated Sec. 15.06 of the Agreement in processing the Grievant's request for part-days of sick leave at the beginning of each shift on and after June 5, 1990. The Arbitrator will interpret Sec. 15.06 to the extent necessary to resolve that issue, but only to that extent. Questions about the meaning and application of Sec. 15.06 that remain unresolved by this Award will be the possible subject of subsequent contract administration or negotiation between the parties.

As the Union pointed out at the hearing, Section 15.06 states that sick leave under that Section "shall be approved by the Department Head……" On its face, that language could mean that the Department Head must approve any leave that meets the eligibility requirements set forth in the first sentence, or it could mean that the Department Head has a right to exercise discretion to deny leave requests that meet the requirements of the first sentence so long as that right is not exercised in an arbitrary, discriminatory or bad faith manner.

The Arbitrator finds it unnecessary to (and does not) decide that question, however, because even under the second of those interpretations of Sec. 15.06, the County has been shown to have violated that Section in this case.

The evidence overwhelmingly shows that Grievant's request for part-day sick leave was denied solely because she had previously utilized 80 hours of family medical leave during the calendar year involved. St. John's May 24 letter enclosing her handwritten statement on Grievant's May 15 application shows that the policy St. John was imposing was a general one in which the 80 hours guaranteed by statute would be permitted but no additional contractual sick leave for family illness would be approved. The subsequent October 22 memorandum only confirms that such was the "Imposed limit." County Counsel's effort to explain the 80 hour reference in that memorandum as in addition to rather than inclusive of statutory family leave is contrary to the plain meaning of the words of the memorandun, contrary to Mackesey's testimony as to how he understood it, and wholly unpersuasive. The County's contention that Mackesey granted Grievant three days of Sec. 15.06 leave beyond 80 hours in the year is far from clear on the testimony of Grievant and Mackesey, and it pales in comparison to the wholly unqualified nature of St. John's writings noted above. While St. John and Mackesey sought to describe theirs as a process of approval by the Department Head that would take reasonable account of all of the relevant factors and both offer and expect reasonable accommodation of the interests of employer and employee, the record contains no evidence that Grievant was ever told that her verbal request was unreasonable or that some more limited sick leave arrangements would be possible if Grievant were to make some accommodation to the employer's needs in the circumstances. The evidence satisfies the Arbitrator that the County's policy and its mode of implementation thereof did not make any sort of provision for Sec. 15.06 sick leave in excess of 80 hours in a year.

While the testimony establishes that Mackesey made the final decision regarding Grievant's verbal request for daily part-day sick leave, he admitted that he was aware of St. John's above-noted May 24 correspondence including the handwritten limitation "May Use Sick Leave Up to 10

days. Vacation thereafter" on the copy of the processed leave request form that was enclosed with that letter. St. John admitted that she should not have made that approval decision and should not have made the entries she did on that form. She explained that because the County uses a single form for all leave requests and because she processes many such forms each week, she overlooked the fact that the approval decision regarding Grievant's May 15 request form should have been left to the Department Head. St. John also testified that while she generally approves Department Heads' family medical leave approval recommendations there are instances in which she, disapproves them but only after conferring with the Department Head involved. While the Personnel Director's established procedures appear well-designed to afford County-wide uniformity, accountability and conformity to statutory requirements and to the requirements of Art. XX regarding personal leaves, those procedures simply do not take account of the language the County agreed to in Sec. 15.06 of the Agreement.

The language of Sec. 15.06 does not impose an 80-hour or any other numerical limit on the hours of Sec. 15.06 leave an employe may take in a year. The bargaining history shows that the County sought language that would impose just such a limit and the Union successfully rejected it. By imposing an arbitrary 80 hour limit in its administration of Sec. 15.06, the County has acted arbitrarily and in bad faith and in violation of Sec. 15.06 under either of the possible interpretations of the Department Head approval language posited above.

Similarly, by imposing an 80 hour policy limit on Sec. 15.06 sick leave, the Personnel Director has effectively stripped the Department Head of any meaningful decision-making role as regards requests such as that at issue herein for hours in excess of that 80 hour per year limit. The language of Sec. 15.06 speaks only in terms of Department Head approval, not Personnel Director approval. The County sought unsuccessfully to include language giving the Personnel Director a decision-making role under Sec. 15.06. By effectively stripping its Department Heads of authority to grant Sec. 15.06 sick leave in excess of 80 hours per year, the County has further acted arbitrarily and in bad faith, violative of Sec. 15.06 even under the interpretation thereof urged by the County.

Accordingly, the answer to ISSUE 1, above, is "yes."

Remedy

The County argues, however, that Grievant ought not obtain any relief in this proceeding because her verbal request for daily part-day sick leave beginning on June 5 did not meet the Sec. 15.06 requirement that "care and attendance by the employee is medically required." In the context of the typical case, this could be a question requiring a careful interpretation and application of the abovequoted language. Here, however, the Arbitrator finds it inequitable for the County to make the above-noted argument at all. As the Union points out, the County at no time raised the question of care and attendance by the Grievant was medically required. The County's written responses to Grievant's May 15 and May 29 requests spoke only in terms of the legal Unit

and not at all in terms of the absence of medical justification. Furthermore, Grievant had previously supplied the County with a statement by Grievant's mother's physician characterizing her medical condition as "permanent," and the County at no time asked for an updated or additional medical certification form. In these circumstances, the County led Grievant reasonably to rely to her detriment on the sufficiency of the previously submitted certification form rather than to take steps to secure and submit an additional certification that Grievant's care and attendance on the daily part-days she was requesting on and after June 5 was medically required within the meaning of Sec. 15.06. For those reasons, the County is equitably estopped from arguing that Grievant failed to meet the abovequoted standard.

The County also argues that Grievant ought not obtain any relief in this proceeding because its denial of her verbal request for daily part-day sick leave was reasonable when the nature and need for the requested leave is compared with the difficulties granting it would have created for the County. Again, the Arbitrator finds the County equitably estopped from pursuing such a line of argument. The County's denial of the Grievant's verbal request has not been shown to have been expressed in terms of the reasonableness considerations the County now asking the Arbitrator to apply. Had the County made known its concerns in the manner it has in this proceeding when it denied the request, it is possible that Grievant would have modified her request to accommodate them. While Palmer deserves credit for offering to schedule Grievant's hours later in each day, that offer provided no additional Sec. 15.06 sick leave beyond the 80 hour limit the County had so clearly imposed on Grievant. In the face of St. John's correspondence, Grievant could reasonably conclude that the County was not going to grant her more than 80 hours of Sec. 15.06 sick leave, making efforts on her part to reach some compromise appear quite futile. In such circumstances, the County cannot fairly be heard to complain that Grievant failed to accommodate the County's needs in the circumstances of this case.

The Arbitrator is not deciding whether the Department Head approval language in Sec. 15.06 means that requests for leave under that section must be reasonable, or whether the Grievant's request in this case was or was not reasonable. Rather, the Arbitrator is concluding that it is not appropriate to turn Grievant's right to relief in this particular case on a determination of the reasonableness of her request.

In the Arbitrator's opinion, Grievant is entitled to the fringe benefit account adjustment relief requested by the Union for the time period June 5 through July 19, inclusive. The evidence, as summarized toward the end of the FACTUAL BACKGROUND, above, shows that during that period, Grievant used only 2.5 hours of vacation and no hours of compensatory time in order to take the early morning part-days off she had been denied the right to take in the form of Sec. 15.06 sick leave. The Arbitrator has ordered Grievant to be credited with those amounts of vacation and to be correspondingly charged for sick leave in those amounts.

The Arbitrator also finds it appropriate to order that the County cease and desist from the arbitrary and bad faith conduct that has characterized its administration of Sec. 15.06 in the instant

case. The County's contention that its acknowledgements at the Step 3 hearing and in this arbitration makes such relief unnecessary is unpersuasive. The County's leave request processing procedures remain tainted by the 80 hour limit, and the Union is entitled to relief from that limit in the form of an arbitral order that the County cease and desist from imposing that or any other numerical limit on Sec. 15.06 sick leave. A separate cease and desist order concerning the locus of Sec. 15.06 approval decisionmaking as between the Department Head and the Personnel Director is not warranted because: the Department Head technically made the denial decision with regard to the verbal request at issue; the County has acknowledged that the Agreement makes reference to Department Head approval not Personnel Director approval; and the Arbitrator has fashioned cease and desist relief regarding the imposition of a numerical hours limit on Sec. 15.06 sick leave so as to address the means by which the Personnel Director was found herein to have snipped the Department Head of meaningful approval authority.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. Yes, the County did violate Sec. 15.06 of the Agreement by its processing of Grievant's verbal request for part-days of sick leave at the beginning of each shift on and after June 5, 1990.

2. By way of remedy for that violation, Walworth County, its officers and agents, shall immediately:

a. restore 2.5 hours to Grievant's vacation account and deduct 2.5 hours from Grievant's sick leave account; and

b. cease and desist from imposing a limit of 80 hours per year (or any other numerical limit) on Sec. 15.06 sick leave.

Dated at Shorewood, Wisconsin this 5th day of June, 1991.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator