BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 67, AFSCME, AFL-CIO,	Case 365 No. 45204 MA-6530
and	
CITY OF RACINE	

Appearances:
Mr. John Maglio, Staff Representative, Wisconsin Council 40, P.O. Box 624, Racine, Wisconsin 53401-1624, appearing on behalf of Local 67, AFSCME, AFL-CIO.
Mr. Guadalupe G. Villarreal, Assistant City Attorney, City of Racine, 730 Washingt

ARBITRATION AWARD

Local 67, AFSCME, AFL-CIO (hereinafter Union) and the City of Racine (hereinafter City or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission). On January 28, 1991, the Union filed a request to initiate grievance arbitration with the Commission. Said request was concurred in by the City. The Commission appointed James W. Engmann, a member of the Commission's staff, as the impartial arbitrator in this dispute. On May 6, 1991, the Union and the City met with the Arbitrator for the purpose of resolving this matter through mediation. Said effort was not successful. A hearing was held on September 5, 1991, in Racine, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. No transcript was made of the hearing. The parties made closing arguments and they waived the filing of briefs. By stipulation of the parties, the Arbitrator issued a preliminary award at the close of oral arguments. Full consideration was given to the evidence and the arguments of the parties in reaching this decision.

STATEMENT OF FACTS

The Union and the City stipulated to the following facts:

1. Keith Brault is an employe of the City of Racine and a member of the Local 67 DPW bargaining unit for more than 17 years.

2. Brault's wife's grandfather passed away in late October, 1990.

3. Brault attended the funeral of his wife's grandfather.

4. Brault did not receive eight hours of pay for attendance at the funeral, effectively losing eight hours of pay.

5. Wendy Brault, Keith's spouse, is employed by the City of Racine's Water Department.

Other facts will be stated in the Discussion section as needed.

PERTINENT CONTRACT LANGUAGE

ARTICLE IX
Paid Leaves of Absence

. . .

C. Sick Leave

. . .

6. Funeral Leave. The Employer shall grant employees pay for lost time up to three (3) days in case of death in the immediate family, defined as mother, father, sister, brother, husband, wife, son, daughter, mother-in-law, or father-in-law. In case of death to a sister-in-law, brother-in-law, son-in-law, grandmother, grandfather, or grandchildren, up to one (1) day will be allowed.

ISSUE

The Arbitrator frames the issue as follows:

Did the City violate Article IX, Section C (6), of the collective bargaining agreement when it denied paid leave to the Grievant to attend the funeral of his spouse's grandfather?

If so, what is the remedy?

POSITIONS OF THE PARTIES

Union

The Union argues that the City violated Article IX, Section C(6), when it denied paid funeral leave for the Grievant to attend his spouse's grandfather's funeral; that the Grievant had a close relationship, an "affinity", with his spouse's grandfather; that a strong family unit is part of our way of life; that to deny funeral leave erodes our system; that a long established past practice exists of granting paid funeral leave for a spouse's grandparent; that said past practice was violated by not granting paid funeral leave to the Grievant; that the Grievant should be made whole for any and all lost sages and benefits suffered as a result of attending the funeral; and that the City should be ordered to cease and desist from this practice.

City

The City argues that it did not violate the collective bargaining agreement when it denied paid funeral leave in this case; that it recognizes the affinity of the immediate family; that it grants specific number of days for funerals for various members of the family; that the contract is specific; that employes are allowed three days of paid leave for the funeral of a mother, mother-in-law, father, father-in-law, brother and sister; that employes are allowed one day for the funeral of brother-in-law, sister-in-law and grandparent; that if the Union wanted to include spouse's grandparent, it could have negotiated it as it did other in-laws; and that no past practice exists to the contrary.

DISCUSSION

In contract interpretation, past practice is called upon in two occasions: first, in the absence of a written agreement, in which case the past practice may be binding upon the parties if it is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties; 1/ and, second, with ambiguous language, in which case the past practice is viewed as the binding interpretation the parties themselves have given to the disputed term. 2/ But in contract interpretation, past practice will not be used to interpret language which is clear and unambiguous, 3/ even though the arbitrator believes, on the basis of equity, that past practice should govern. 4/

In this case, the language in dispute is the word "grandfather." The Union argues that under the past practice, the word incorporates a spouse's grandfather. Putting the past practice issue aside for the moment, the word "grandfather" is both clear and unambiguous. Grandfather means, "the father of one's father or mother." 5/ The Grievant is the "one" in this case. The definition does not include the father of "another's" father or mother. In this case, the grandfather at issue is the father of "another's" (that is, the spouse's) mother or father and, by definition, is not included in this language.

In addition, the City is correct that the contract clause at issue here is very specific, making distinctions between immediate and less immediate family members by the number of paid leave days granted, and between birth and marriage family members by use of the phrase "in-law". The death of either a father or father-in-law 6/ qualifies for three paid leave days. But while the death of a brother or a son qualifies for three paid leave days, the death of a brother-in-law and son-in-law qualifies for only one paid leave day. The parties were very specific in including both father and father-in-law under the language granting three paid leave days. The parties also were very precise in distinguishing between brother and brother-in-law and between son and son-in-law, granting three paid leave days for the death of a birth family member and one paid leave day for the death of a marriage family member (that is, in-law).

The death of a grandfather qualifies for one paid leave day. Nothing is said about the spouse's grandfather. Based upon the specificity and precision

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1/ Celanese Corporation of America, 24 LA 168, 172 (Justin, 1954).

2/ Eastern Stainless Steel Corporation, 12 LA 709, 713 (Killingsworth, 1949).

3/ See, i.e., Phelps Dodge Copper Products Corporation, 16 LA 229, 233 (Justin, 1951), and Tide Water Oil Company, 17 LA 829, 833 (Wyckoff, 1952).

4/ See, i.e., How Arbitration Works, Elkouri and Elkouri (4th Edition) at 455.

5/ The American Heritage Dictionary, Second College Edition (Houghton-Mifflin, 1985).

6/ As the position in dispute is male, I will use the male examples.

with which the parties drafted the language regarding parents, siblings and children, it must be assumed that the parties used the same drafting ability in allocating paid leave days for the death of a grandparent. Therefore, it must be inferred that nothing is said about a spouse's grandfather because the parties have not agreed to grant paid leave in that situation.

Even if the language was ambiguous, the Union has not shown the presence of a binding past practice in this case. Witness Scott Sharp testified that five years ago he received paid leave for the funeral of his spouse's grandmother and that the City knew it was for his spouse's grandmother. Witness Lee Schmidt testified that ten years ago he was given paid leave to attend his spouse's grandparent's funeral, but he could not testify as to whether he specified to the City that it was his spouse's, and not his, grandparent. At best, the Union showed one instance of the City granting leave in a situation comparable to the one at issue here. Certainly a single instance does not create a binding past practice under the definition cited above.

Therefore, it is clear that the language is clear on its face, that by definition it does not include the spouse's grandparent, that the parties were careful to distinguish between birth and marriage relative, that the parties took time to define specific titles of relatives and to assign each the appropriate amount of time, and that, even if the language was ambiguous, a binding past practice is not present here.

For the reasons stated above, the Arbitrator issues the following

AWARD

1. That the City did not violate Article IX, Section C (6), of the collective bargaining agreement when it denied paid leave to the Grievant to attend the funeral of his spouse's grandfather.

2. That the grievance is hereby denied and dismissed.

Dated at Madison, Wisconsin, this 10th day of October, 1991.

By James W. Engmann /s/
James W. Engmann, Arbitrator