BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES PROFESSIONAL EMPLOYEES UNION, LOCAL 2492-A, AFSCME, AFL-CIO	Case 193 No. 45652 MA-6692
and	
MARATHON COUNTY	

Appearances:
Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI
Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, and Mr

ARBITRATION AWARD

Marathon County Department of Social Services Professional Employees Union, Local 2492-A, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Marathon County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned was designated to arbitrate in the dispute. 3/ A hearing was held before the undersigned on August 15, 1991 in Wausau, Wisconsin. There was no stenographic transcript made of the hearing and both parties submitted post-hearing briefs in the matter by October 7, 1991. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated to the following statement of the first issue:

> Did the County violate the respective collective bargaining agreements when it denied sick leave usage for the following instances of family illness.
>
> . . .
>
> 2. Doug Thomas - 1/22-23 (Local 2492-A - Social Services Professionals)
>
> If so, what is the proper remedy?

The Union would also raise the following as an additional issue to be decided:

> Is the current County Policy regarding the usage of sick leave for instances of illness in the employees'

3/ The parties agreed to consolidate this grievance with similar grievances in other bargaining units for purposes of hearing the matters.

family a violation of the respective collective bargaining agreements of Locals 2492, 2492A and 2492E.

If so, what is the proper remedy?

The County objects to any consideration of the additional issue.

CONTRACT PROVISIONS

The following provisions of the parties' 1989-1990 Agreement are cited:

ARTICLE 2 - MANAGEMENT RIGHTS

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

A. To direct all operation of the Social Service Department;

B. To establish reasonable work rules;

. . .

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;

. . .

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

A. Rate of Earning: Every employee shall be entitled to accumulate a total of not to exceed nine hundred and sixty (960) hours of sick leave. Employees hired after June 1, 1977, shall earn sick leave at the rate of eight (8) hours per month (3.6923 hours biweekly) for the first five (5) years of employment and twelve (12) hours per month (5.5385 hours biweekly) thereafter. Employees hired prior to June 1, 1977, shall earn sick leave at the rate of twelve (12) hours per month (5.5385 hours biweekly). In order to qualify for sick leave, an employee or his/her representative must report that the employee is sick no later than one-half (1/2) hour after the earliest time which the employee is scheduled to report for work except in case of emergency or when the employer is fully aware the employee will be on sick leave for an extended period.

. . .

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

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 members of the employee's household.

. . .

ARTICLE 29 - ENTIRE MEMORANDUM OF AGREEMENT

The foregoing constitutes the entire memorandum of agreement between the parties by which the parties intend to be bound, and the 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

The Grievant in this case, Doug Thomas, is a Social Worker employed in the County's Department of Social Services and is a member of the bargaining unit represented by Local 2492-A. The Grievant's spouse, Lisa Thomas, is employed in the Clerk of Courts office and is the grievant in the case involving Local 2492-E.

The Thomases' two and a half year old son became ill while the family was at the home of the Grievant's supervisor for a party on Sunday evening, January 20, 1991. The child had vomited while there and the parents were up with the child Sunday night. The child continued to vomit, was running a fever of approximately 102 degrees and was lethargic and wanted to be held. They gave the child Liquiprin, but he vomited it up.

The Grievant had previously arranged personal plans on Monday, January 21st and was off work and away from home that day. The child's mother stayed home with him on that Monday. The Grievant stayed home with him on Tuesday and Wednesday, January 22nd and 23rd, and called work to advise them he would not be in. The Thomases had contacted the child's grandmother to have her watch him, but she was not available.

On Thursday, the boy felt better and returned to the babysitter and the Grievant returned to work.

The Thomases did not take their son to a doctor for the symptoms. The family lives approximately one-half hour from town and did not want to take the child out in the then sub-zero weather. They had previously been told by the child's doctor that they should bring him in if a fever persisted for five days. The child had seen the doctor on the previous Friday for an unrelated problem involving his hip.

When the Grievant returned to work on Thursday, January 24, 1991, he requested family illness leave for the previous two days. His request was subsequently denied and the instant grievance was filed based on that denial.

The County has a written policy on the use of sick leave for "family illness" which it had placed in effect early in September of 1989 prior to the parties executing their 1989-1990 Agreement. The events leading up to the implementation of that policy are set forth in detail in Arbitrator Burns' prior award involving the County and the other two AFSCME locals on the same issue and are set forth as follows:

> On November 22, 1988, during the term of the parties' former collective bargaining agreement, County Personnel Director Brad Karger issued the following letter to Union Representative Philip Salamone:
>
> > Re: Interpretation of Family Illness Article
> >
> > At the bargaining sessions with the various AFSCME locals, the parties agreed to set aside proposals to modify the language on family illness. This was done in anticipation that an agreement would be reached to clarify the principles to be applied when reviewing a request to use sick leave for family illness. For your consideration, I have enclosed a document which I feel clarifies the principles which are to be applied for use of family illness and sets forth some specific examples of incidents that would or would not qualify for family illness leave.
> >
> > It was pointed-out at the last bargaining session with the Social Services Para-Professional Unit that some supervisors in that department may have authorized family illness leave for certain uncomplicated illnesses of a child (flu, sore throat). I have not investigated the accuracy of the statement as of yet. However, should this be the

practice within this or any other bargaining unit within Marathon County, the County is with this letter repudiating this practice upon the termination of the current labor agreement. It is the County's intention to apply the language on family illness in a manner consistent with the specific wording and intent of that language.

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

The following statement was enclosed with the letter:

STATEMENT REGARDING USE OF SICK LEAVE FOR FAMILY ILLNESS

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

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

B. Sick leave is only to be used in cases of serious illness. Again, the example of child breaking an arm shows the seriousness of the illness. The sick leave usage is not to be

allowed for uncomplicated matters such as sore throat or flu symptoms. The language is intended to allow the employee off without loss of pay in those instances where constant attention is required and the matter is of a serious health nature.

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

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

1. Attend wife in hospital for birth of child.

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

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

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

5. Incident where child contracted serious illness following birth.

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

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

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

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

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

The following incidents should not receive family illness sick leave:

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

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

3. Take daughter to doctor to have stitches removed.

4. Take daughter to dentist for tooth filling.

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

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

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

. . .

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

> RE: Use of Sick Leave for Family Illnesses
>
> During the last round of bargaining with all AFSCME units, the County presented a policy statement regarding the interpretation of the sick leave article and in a separate communication repudiated practices not in conformance with the language or intent of the parties. Marathon County is now proceeding with the implementation of the Statement Regarding the Use of Sick Leave for Family Illness on Monday, September 5, 1989, in all County departments (Statement enclosed). The goal of this Policy Statement is to bring consistency within the County's structure in the handling of requests for the use of sick leave for family illnesses.
>
> In order to facilitate the transition called for in the Statement, the County has liberalized the Ordinance which applies to non-represented employees in two areas: Minimum usage periods and advance notice for vacation requests (see Resolution No. R-67-89 enclosed). We would be willing to discuss similar adjustments in the Labor Agreements with the Office-Technical, Courthouse Pro, DSS Para-Pro, DSS Pro, and Health Pro employee unions in order to facilitate the transition to the procedures outlined in the Policy Statement.
>
> I would appreciate it if you would review this letter with the leadership of the Courthouse, Health Department and Social

Services units, and let me know if there is interest in making adjustments similar to those made to the County Ordinance.

The attached policy stated as follows:

STATEMENT REGARDING USE OF SICK LEAVE FOR FAMILY ILLNESS

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

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

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

required and the matter is of a serious health nature.

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

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

1. Attend wife in hospital for birth of child.

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

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

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

5. Incident where child contracted serious illness following birth.

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

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

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

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

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

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

The following incidents should not receive family illness sick leave:

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

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

3. Take daughter to doctor to have stitches removed.

4. Take daughter to dentist for tooth filling.

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

child at home.

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

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

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

> RE: Liberalization of Vacation Usage Policy
>
> I have notified all of the AFSCME Local Unions of the County's desire to liberalize the vacation usage policy as indicated in Resolution #R-67-89 as well as the new Family Illness sick leave policy.
>
> No AFSCME locals have problems with the new vacation usage policy.
>
> If you have further questions, please advise.

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

> The new policy on Family Illness (attached) is scheduled to go into effect on Tuesday, September 5, 1989. If questions arise regarding the proper interpretation of the policy statement, please contact our office.
>
> The attached policy was identical to the Statement Regarding Use of Sick Leave for Family Illness which had been provided to Union Representative Salamone in Personnel Director Karger's letter of July 24, 1989.

On March 27, 1990, the parties signed their 1989-1990 Agreement.

Arbitrator Burns issued her awards on January 7, 1991, and after receiving the awards the County modified its policy regarding family illness leave. The modified policy was placed in effect on March 4, 1991 and the instant grievance was considered in light of the changed policy and was again denied on March 18, 1991, as indicated in the following letter from Karger:

Dear Mr. Salamone:

Re: Grievance No. 1-91 (D. Thomas)

On March 15, 1991, a meeting was held to review the grievance cited above. This letter will summarize my findings and conclusions on this matter.

The grievance alleges a violation of Article 14(D) Family Illness which reads as follows:

> 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. (Emphasis Added)

The two day (sic) in dispute are Tuesday and Wednesday, January 22 and 23, 1991. Mr. Thomas explained that his 2 1/2 year old son had the flu on Saturday, January 19, 1991 and it continued until January 23, 1991. This combined with below zero temperatures outside formed the basis for his decision to stay home with the child. (Lisa Thomas stayed home with the child on Monday, January 21 while Doug Thomas used a personal holiday.)

In reviewing the request for sick leave, the Social Services referred to the Statement Regarding Use of Sick Leave for Family Illness and made a decision not to approve the use of sick leave for the days of January 22 and January 23. That document states "...sick leave usage is not allowed for uncomplicated matters such as sore throat or flu symptoms. . ." Arbitrator Coleen A. Burns in a 1991 decision gave support to the County's ability under the language of the labor agreement to consider the nature of the family illness when determining whether or not to grant a request for family illness leave. In this case, the Department referred to the County's policy statement and decided that the nature of the illness did not qualify as a serious illness requiring the constant attention of the employee, and thus concluded that the use of sick leave was not appropriate.

The denial of sick leave for these same days (January 22 and 23, 1991) was also at issue in an Equal Rights charge filed by Mr. Thomas. In that case, Ms. Pamela Meulemans, Equal Rights Officer, concluded that the nature of the child's illness did not meet the definition of a serious illness condition under the Wisconsin Family and Medical Leave Law, and thus a finding of no probable cause was issued.

In conclusion, I find that the request for sick leave on January 22 and January 23 was appropriately denied and that there was no violation of the labor agreement. Thus, Grievance No. 1-91 (D. Thomas) is denied.

Sincerely,

Brad Karger /s/
Brad Karger
Personnel Director

The modified policy is set forth below, with the modifications indicated:

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 Department Heads in interpreting this language and allowing 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 may be used in cases of serious illness. The term "serious illness", has been defined as circumstances in which a family member's poor health, sickness or disease gives rise to concern or which is dangerous in nature. 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 have arisen 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.

12. <u>Attend to baby who is experiencing persistent vomiting and requires doctor's attention.</u>

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 or 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.

8. Take child to doctor after suffering known injury but continuing to attend school.

POSITIONS OF THE PARTIES

Union

With regard to the issue of whether the County's present policy regarding the use of sick leave for family illness violates the provisions of the Agreement, the Union asserts that there have been two grievance arbitration proceedings in the last year involving nine grievances and all have dealt with alleged breaches of the family illness leave language in the agreements covering the bargaining units represented by the Union. The Union contends that the language in the agreements has worked well for the parties for the many years prior to the implementation of the new County policy regulating usage. There was no evidence of abuse or problems under that language until the County instituted its new policy in 1989, and there still remains no evidence of abuse. However, problems with the application of the policy to the language has resulted in numerous denials and hence, numerous grievance arbitrations. The Union contends that although the County revised the policy in March of 1991 in order to make it consistent with the outcome and rationale of the Burns Awards, there continues to be problems with the implementation of the policy. The Union believes that the policy is the cause of the problems. It asserts that the County is attempting to renegotiate the language of the family illness/sick leave provisions through the grievance procedure. The Union seeks to bring closure to the issue so as to avoid further abuse of the arbitration procedures and the use of Commission staff arbitrators as permanent umpires to settle disputes that did not occur prior to the implementation of the policy. As there were no problems under the contract language prior to the implementation of the new policy, the problem is the policy and not the contract language. Hence, it should be disallowed as a violation of the respective agreements.

In its reply brief, the Union disputes the County's claim that the implementation of the policy was to ensure uniform application among all County

employes. The record clearly demonstrates that the language was uniformly applied before the adoption of the policy and that since its adoption, there has been inconsistent and unequal application resulting in numerous grievances. The Union concludes that the County is simply attempting to reduce a contractually-provided fringe benefit.

With regard to the County's assertion that it has repudiated any past practice of granting sick leave for "certain uncomplicated illnesses of a child (flu, sore throat)", the Union asserts that the County is either inappropriately applying well-accepted principles of labor relations or knowingly attempting to negotiate new language through arbitration. The Union notes that there are two principal applications of past practices accepted in labor relations. The first is where the contract is silent on a particular issue and a benefit has accrued to employes through a mutually-acceptable, long-standing and unequivocal practice. That type of practice may be terminated by an employer by notice to the union during the course of negotiations on a new contract. The benefit must be incorporated in the new agreement or it is lost. The second application of past practice is where the contract language is ambiguous, but has been consistently interpreted in a particular way by the parties. That is the case in this instance. The Union asserts that type of past practice cannot be simply erased by mere repudiation during the course of negotiations. According to the Union, it is universally recognized that in that case a party seeking to alter the meaning of the ambiguous language will have to obtain language clarifying it in negotiations. Repudiation alone will not change the meaning of the ambiguous provision, nor would it detract from the effectiveness of the practice. Citing, Mittenthal, Past Practice In the Administration of Collective Bargaining Agreements, Proceedings of the 14th Annual Meeting of the NAA, 30, 56 (BNA Books, 1961). The Union also cites Elkouri and Elkouri, How Arbitration Works, 4/ for the principle that arbitrators use custom or past practice of the parties to interpret ambiguous contract language and that that purpose is so common that no citation of arbitral authority is necessary.

The Union asserts that the term "serious illness" is ambiguous. The Union cites the following definition of ambiguous contract language:

> "The test most often cited is that there is no ambiguity if the contract is so clear on the issue that the intentions of the parties can be determined using no other guise than the contract itself. The test borders on tautology, however, for it comes perilously close to a statement that language is clear and unambiguous if it is clear on its face. Perhaps a better way of putting it would be to ask if a single obvious and reasonable meaning appears from a reading of the language in the context of the rest of the contract. If so, that meaning is to be applied." 5/

. . .

In that regard, the Union takes issue with the County's assertion that the language is clear and unambiguous. Arbitrator Burns concluded that the language was "neither clear nor unambiguous". She stated that she was

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4/ (4th Ed. 1985) at p. 437.

5/ Hill and Sinicropi, Evidence in Arbitration, 52-3 (BNA) quoting Nolan, Labor Negotiation Law and Practice, 163 (West, 1979).

"persuaded that the term 'serious illness' is ambiguous". Further, the County contradicts itself in this regard when it argues that during the 1988 contract negotiations "both the County and the Union had recognized the need to clarify the existing contractual language." There was no change made in the language in 1988 or since. Hence, the language is no more clear now than it was then.

The Union also contends that the County ignores the impact of the Burns Awards interpreting this very same contract language, even though these are clearly the most precedental awards impacting on these cases. It also asserts that the County selectively cited from Mittenthal with regard to past practice and failed to cite the situation applicable here, i.e., where past practice is used to clarify ambiguous contract language. The Union also contends that the County's reliance on the "zipper clause" in the Agreement and its application in a prior award is misplaced. The Union asserts that in that case the contract was totally silent on the provision of the benefit in question. Also, that case involved the Courthouse Agreement which does not contain a "Maintenance of Benefit" provision as do the agreements in the Social Services Department.

With respect to the Burns Awards, the Union asserts that the parties are asking the Arbitrator in this case to better-define the term "serious illness". Although some direction was afforded in the Burns Awards, the fact that so many unresolved cases have arisen since suggests that further problems remain. The Union notes that Arbitrator Burns found that there were past practices which were applications of the contract language and practices that were contrary to what she termed the "plain language" of the Agreement. The Union asserts that the past applications of the contract were left up to the employe with the understanding and expectation that the benefit would not be abused. That such confidence and trust was assumed in a responsible manner by the employes is demonstrated by the fact that there is no evidence of abuse. The Union also asserts that in the prior award, the Arbitrator, while finding application of the language was liberal, still chose to accept the use of dictionary definitions to aid in the interpretation of the language. She concluded that the term "serious illness" was intended to be applied in "circumstances in which a family member's poor health, sickness or disease gave rise to concern or which is dangerous." The Union questions which illnesses will be considered a "cause for concern". It notes that a parent would have cause for concern about almost any health matter involving their children or a spouse. It also questions who is to make that determination. Historically, it has been the employe. The Union accepts the reasoning that the County's repudiation would cover illnesses that were clearly not "serious", such as a runny nose, hangnail, or other such clearly minor ailments. Citing Arbitrator Burns' "cause for concern" standard, the Union concludes that Arbitrator Burns intended that the liberal application of the language continue, but without the "automatic" approval that was the case in the past. The fact that the language was applied in the past as to make it rather automatic, suggests that there was no perceived need or desire on the County's part to second guess the judgments of the employes concerned about the health or well-being of their families. There was instead clearly a bias in favor of the reasonable judgments of the employes. The Union contends that Arbitrator Burns did not intend to change that application; rather, she was concerned with the "automatic" approvals that have been granted in the past and which were inconsistent with any reasonable interpretation of the language, regardless how ambiguous it might be.

The Union concludes that the situations involved in these cases clearly met and exceeded Arbitrator Burns' "cause for concern" standard. The Union does not dispute that one impact of the Burns Awards is that the County can now request and consider information regarding the nature of the particular illness, however, it asserts that Arbitrator Burns intended that the benefit of the doubt should still strongly be inclined towards the best interests of the

health and welfare of the employes' families.

With regard to the instant case involving the Grievant, Doug Thomas, the Union notes that the Grievant is a member of the Social Services Professional Employees bargaining unit and that his spouse is in the bargaining unit represented by Local 2492E. Their child became ill in January of 1991 and due to the extremely cold temperatures their doctor recommended that they not bring the child in for an office visit, but that they stay home and monitor the illness. Based on the recommendation of their doctor and common sense, the Thomases chose to alternately stay home to care for their ill child.

The Union asserts that the case bears a striking resemblance to the facts in the prior Mayer case in which Arbitrator Burns decided in favor of the Union, and believes that the doctrine of res judicata should determine the merits of the grievances of Lisa and Doug Thomas. The same issues are involved for the Thomases as in the prior decision. The contract language is identical or nearly identical in both cases. Both cases involve parents attempting to use family illness sick leave to care for extremely young vomiting children. The prior case involved a ten-month old child who had been continually vomiting over a number of days. This case involves a two-year old child who had been vomiting. The Union notes that Arbitrator Burns concluded that persistent vomiting can be symptomatic of a serious illness; that when it involved a ten-month old child the child could become quickly dehydrated. Both children were at ages where they could not adequately communicate their symptoms or discomforts to the caregiver. Parents are best suited to understand and respond to such limited verbal communication.

The Union also contends that the County has exhibited "a degree of indecision and confusion" when faced with the question of whether to grant leave in situations similar to the one in this case. This is illustrated by two examples of where the County first denied the request and then later granted it. One case involved an employe named Leonard, which occurred the end of February, 1991. That case involved a seven-year old child suffering from a 102-degree fever and vomiting. Less than three weeks after receiving the Burns Award, and well after repudiating the past practice implementing its new County policy, the leave was granted in that case. In March of 1991 leave was again initially denied, and then later granted during the grievance procedure for Mary Reynolds. That case involved a seven-year old child suffering from flu symptoms including a high fever and strep throat. The Union questions why sick leave was granted in those cases involving similar symptoms but older children, and not allowed in this case involving a much younger child under similar circumstances. The Union also asserts that it was the unchallenged testimony of the Thomases that their child frequently had breathing problems when the vomiting occurred. The Union asserts that such health problems are intended to be covered under almost any interpretation of the language in question.

In its reply brief, the Union notes that the County ignores the persistent vomiting by the child. It posits that the County did so in order to assert that the grievance does not meet the conditions of the contract language as outlined by the prior awards and prior definitions. The Union also takes issue with the County's pointing out that the Grievant's spouse took a personal day on the same day that the Grievant took off to care for her child. The Union asserts that is totally irrelevant and that further, the County has never raised that issue prior to submitting its brief.

County:

The County takes the position that its decisions to deny the use of family illness leave in this case and the others before the Arbitrator were properly made under the contract language in the agreements and under the

policy adopted by the County to ensure uniform application of the family illness language to all County employes. It is also the position of the County that the prior arbitration awards (Burns Awards) constitute res judicata on the issue of the termination of the past practice regarding the granting of the use of sick leave to employes' off due to a family illness.

In support of its position that it did not violate the Agreement by denying the use of family illness leave in these instances, the County first argues that the language of the Agreement pertaining to family illness leave is clear and unambiguous, and that the Grievants were not entitled to use family illness leave under that clear contract language. In that regard, it is well-established under arbitral precedent that clear and unambiguous contract language must be given effect. Past practice cannot be used to modify or amend such clear language. The County also cites case law for the proposition that an arbitrator is without authority to ignore or amend clear and unambiguous contract language. Also cited is Article III, Grievance Procedure, which provides, in relevant part, that the "Arbitrator shall not modify, add to or delete from the express terms of the Agreement." In addition to that limitation on the Arbitrator, the County also cites in this case Article 29, Entire Memorandum of Agreement, of the Agreement, which expressly states that any amendment to the Agreement must be made in writing and executed by both parties. In light of the arbitral law and contractual provisions, the language of the family illness leave provisions applicable to this dispute are clear and unambiguous and the past practice is totally irrelevant.

Next, the County asserts that under the clear language of the family illness leave provision the Grievant was not entitled to family illness leave. In that regard, the County cites dictionary definitions of the words "serious" and "illness" in that contractual provision as establishing that the parties intended that employes would only be entitled to utilize family illness leave in cases where a family member's "poor health, sickness or disease. . .(is of). . . concern or (poses a danger) to the family member's continued health." That conclusion is supported by the example given in Article 13, Section E, of the Courthouse Agreement, of a child breaking an arm on the playground. Minor ailments and conditions are not covered by the provision and all of the grievances, including the grievance in this case, consist of minor, routine ailments. Clearly, none of them are serious. The County also asserts that another element to be satisfied in order to qualify for family illness leave is that the family member must require the employe's "constant attention". The prior decision of Arbitrator Burns is cited in that regard.

The County describes the circumstances in this case as involving a two-and-a-half year old child who had the flu and asserts that there was nothing to indicate that the flu condition was anything other than a routine childhood illness. Thus, it was not of a serious nature requiring the constant attention of the Grievant and therefore, he was not entitled to family illness leave under Article 14, Section D, of the Agreement.

With regard to the Union's contention that there is a binding past practice that requires the County to grant family illness leave in this instance and the others, the County contends that arbitral principles and the evidence in this case demonstrate that no such binding past practice exists. It is well established under arbitral principles that in order to constitute a binding past practice the practice must be "(1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." Of those elements, arbitrators have consistently recognized that the most essential is "mutuality". Both parties must have mutually agreed to the practice and it must have been understood by them that the practice would be continued without change. A procedure unilaterally and voluntarily implemented

by an employer as a result of mere happenstance, operational necessity at the time, or generosity, is not binding. The County also reviews the testimony of various witnesses and concludes from that testimony that the reasons for granting sick leave to the employes in those cases were all far more serious than those identified in the instant grievances. There is not a general pattern that shows employes were allowed to take a day off on any occasion to attend to a sick child. Rather, testimony shows that the employes were allowed to use sick leave to attend a family member in instances where that member was experiencing serious illness or injury that required consideration by the employer of the needs of the family member or instances where the employe was given sick leave time off to pick up a child from a child care provider because the child was sick and should not be with other children. Such is not the case in this instance or the other grievances. The County also asserts that the instances testified to by the Union's witnesses that occurred prior to the termination of any alleged practice by the County on September 5, 1989, cannot be relied upon to find a past practice.

The County also contends that it terminated any alleged past practice with regard to usage of family illness leave. Citing Elkouri and Elkouri, How Arbitration Works (Fourth Ed. 1985) the County asserts that under arbitral principles, it is well recognized that an employer may properly repudiate a past practice by giving notice to the union of its intentions not to carry the practice over to the next agreement. After such notice is given, it is incumbent upon the union to have the practice written into the agreement in order to prevent its discontinuance. The County asserts that it has properly repudiated any past practice by providing such notice to the Union prior to the expiration of the parties' 1988 Agreement. This occurred during the parties' negotiations for a successor agreement. The Union had not requested a revision to the agreement or assurances that the alleged past practice would continue under the new agreement. In July of 1989 the County's Personnel Director notified the Union's representative that effective September 5, 1989, the County would implement its new policy regarding family illness leave usage. The Union took no action in regard to the notice other than to accept the County's liberalization of its vacation usage policy that accompanied the change in the family illness leave usage. When the County and Local 2492-A signed their 1989-90 agreement the Union was aware at the time of the County's repudiation of the alleged past practice in November of 1988, as well as the County's implementation of its new family illness leave policy in early September of 1989. In that instance as well, the Union did not request a revision of the applicable contract language or an assurance that the alleged past practice would continue. Thus, the County properly repudiated the alleged past practice. The Union was given notice of the repudiation prior to expiration of the prior agreement and at that time had the duty to negotiate the practice into the successor agreement if it was to continue.

The County also cites Article 29, Entire Memorandum of Agreement, in the Agreement, normally referred to as a "zipper clause", and asserts that under arbitral principles it is well established that such clauses are enforceable and, when agreed to, nullify any past practice existing outside the written agreement. In that regard, the County cites Elkouri and Elkouri and various arbitration awards where practices were found to be unenforceable in light of such clauses. The County also cites a prior arbitration award involving Article 29 where the arbitrator held that its existence nullified an alleged past practice existing outside and prior to the execution of the agreement. Thus, by agreeing to Article 29, the parties intended to nullify any prior practices existing outside the Agreement, and intended that their entire Agreement as to the terms and conditions of employment of the employes in the bargaining units was to be embodied within the written agreement. That provision nullifies any past practice existing outside and prior to the execution of the respective agreements, including the family illness leave

usage, upon which the Union relies.

In its reply brief, the County contends that the doctrine of res judicata precludes the Unions from relitigating those issues previously determined by Arbitrator Burns in the prior awards involving family illness leave usage. Under that doctrine, once a claim or cause of action has been adjudicated and a judgment rendered on its merits, the same matter cannot be raised in a subsequent action between the same parties. Citing, Restatement (2nd) of Judgments Sections 24, 25 and 27 (1982). The County also cites case law as holding that the doctrine of res judicata bars arbitration of a second grievance concerning the same parties, issues, and material facts as the prior award. The County asserts that the doctrine of res judicata applies in these cases, as there is an identity of parties, issues and material facts with the prior awards. In fact, the Unions introduced the same evidence in the hearing in these cases as was submitted to Arbitrator Burns in the prior arbitration proceedings in an attempt to relitigate the same issues determined adversely to the Union by Arbitrator Burns. Those issues include the existence of an alleged past practice under the family illness leave provision pursuant to which employes were "automatically" entitled to family illness leave regardless of the severity of the family member's illness. Those issues were determined in the prior awards, and the Union should not be permitted to relitigate those issues now. The County also cites Article 3, Grievance Procedure, Section B, Arbitration, subsection 3, of the Agreement as providing that an arbitrator's award is to be "final and binding on both parties." Thus, the Arbitrator should abide by that language and proper precedent to hold that the Burns Awards are binding as to the status of any alleged past practice in this regard.

The County reiterates many of its initial arguments including its assertion that the clear language of the family leave provision requires that the grievance be denied, and that the Union cannot rely on past practice to support its interpretation of the agreements, since that practice was properly repudiated by the County. The County also contends that the prior Burns Awards support its interpretation of the Agreement by holding that "the County could now consider the nature of the particular illness in order to determine the relative severity of the affliction." It asserts that the Union's reliance on the term "cause for concern" excerpted from the prior Burns Awards cannot be the sole criterion used to determine eligibility for family illness leave. The term is simply too broad and subject to employes making boldface statements that any illness is cause for concern.

The County also contends that the Union's challenge to the County's policy fails when considering the Agreement as a whole. The County cites the Management Rights Clause in the Agreement which provides in Section B that the County has the right to "establish reasonable work rules." Similarly, the Arbitrator does not have the authority to direct the County to abolish its policy as requested by the Union. The County cites the grievance procedure which specifically provides that "the Arbitrator shall not modify, add to or delete from the express terms of the Agreement." The County asserts that it is not attempting to circumvent the negotiation process, but is rather trying to establish a uniform method of handling requests for family illness leave that will be fair to all employes.

The County also disputes the Union's interpretation of the Burns Awards, asserting that the Union inaccurately analyzes those prior decisions and inappropriately attempts to "second guess" the Arbitrator. The County then quotes the following from Arbitrator Burns' Award:

> Had the parties intended family illness leave to be available for all family illnesses, the parties would

> not have used the modifier "serious". Clearly, the County is contractually entitled to consider the nature of the family member's illness when determining whether or not to grant an employe request for family illness leave. To require the County to continue the past practice of granting family illness leave automatically without any consideration of the nature of the illness would be to deny the County a clear contractual right. (Emphasis added).

The County concludes from the above that it has the authority to consider the specific nature of each illness in determining whether to grant family illness leave.

Finally, the County disputes the Union's recollection of the facts in this case. It asserts that the Union's characterization that the Grievant's child had "become ill with a high fever and persistent vomiting" is not supported by the evidence. The record indicates that the child was simply ill with the flu. The County also takes issue with the Union's attempt to compare the Grievant's case with a prior case involving a ten-month old child. There is a "marked difference" in the degree of attention required of an ill ten-month old child versus a two-and-a-half year old child with the flu. There is also no mention in the record that the Grievant's child was experiencing persistent vomiting as was the ten-month old child in the prior case. The Union also contradicts itself in first comparing this case to the prior case, claiming that the Thomases contacted a doctor, and then comparing it to another prior case where the Union stated they did not bring their child to a doctor, but rather stayed home and monitored the child's condition. The County asserts that the truth is that the Thomases never contacted their physician regarding the child's flu.

DISCUSSION

The Union has raised the issue of whether the County's policy regarding the use of sick leave for a family member's illness violates the parties' Agreement. The County asserts the Arbitrator has no authority to order the County to change or abolish its policy. While the County indeed has the right, under the Management Rights provision, to establish "reasonable work rules", it is noted that right must be exercised "consistently with the other provisions of the contract." The undersigned, however, has reviewed the County's "Statement Regarding the Use of Sick Leave For Family Illness" and notes that the opening paragraph includes the statement that "The following principles are to be used by Department Heads in interpreting this language and allowing the use of sick leave for family illness." It appears from that statement that the "policy" is intended as a directive to management as to how the family illness leave provision is to be interpreted and applied. Thus, beyond being a guide to management, and putting the Union on notice that management is now interpreting the provision contrary to the past practice, it has no application or binding effect upon the Union or the employes. Similarly, it is the Employer's actions that are subject to review by the Arbitrator in the context of compliance with the parties' Agreement, and not the Employer's internal policies reflecting its view of what the Agreement provides. For those reasons, the Arbitrator declines to review the policy beyond how management applied it in this case.

With regard to the stipulated issue, the first question that is raised is the effect to be given the Burns Awards in this case.

The following is a statement from Elkouri and Elkouri 6/ regarding the use of prior awards in somewhat similar circumstances:

> Prior awards may also have authoritative force where temporary arbitrators are used. An award implementing a collective agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereafter.
>
> This was emphasized by Arbitrator Whitley P. McCoy, who declared that where a "prior decision involves the interpretation of the identical contract provision, between the same company and union, every principle of common sense, policy and labor relations demands that it stand until the parties annul it by a newly worded contract provision. Moreover, Arbitrator McCoy expressed the view that where identical contractual provisions are adopted by joint negotiations of a union with a number of competing companies, an award construing the provision should be given great weight in like cases involving any of the companies.
> (425-26) (Citations omitted)

The latter situation described by Arbitrator McCoy is sufficiently comparable to the situation in this case where identical contract provisions are adopted by the same employer and two locals of the same union, and the locals are represented by the same staff representative. While it is not a case of res judicata, the Burns Award involving Local 2492 is to be given great weight, both as to the alleged existence of a binding past practice and as to the meaning of the term "serious illness" in the Family Illness provision.

With regard to a past practice, the Union reiterates its claim that there is a binding past practice that the family illness leave provision is to be liberally applied. The Union makes a number of clever arguments regarding the proper interpretation of the Burns Award to support its claim. The arguments are not convincing, however, in light of the express statements in the Burns Award. Arbitrator Burns found that, although the term "serious illness" was ambiguous, the County had successfully repudiated the past practice regarding the use of sick leave for family illness:

> 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

6/ How Arbitration Works (4th Ed.).

> nature of the family member's illness when determining whether or not to grant an employe request for family illness leave. To require the County to continue the past practice of granting family illness leave automatically without any consideration of the nature of the illness would be to deny the County a clear contractual right. As discussed supra, the County's conduct was sufficient to repudiate any past practice which was contrary to the clear contract language. (pp. 16-17)

Thus, although she held that the term "serious illness" is not clear and unambiguous, Arbitrator Burns concluded that the contract was clear that sick leave was not available for all types of family illness, and that the past practice was contrary to the County's contractual right to consider the nature of the illness and, as such, was not indicative of a mutually-accepted interpretation of the term "serious illness".

In defining the term "serious illness", Arbitrator Burns concluded the following:

> As the County argues, in the absence of evidence to the contrary, an arbitrator may reasonably assume that parties to a collective bargaining agreement intended a word to be construed in a manner which is consistent with the word's common and ordinary definition as established in a reliable dictionary. The County, relying upon the Webster's New World Dictionary definition of the word "serious", i.e., "giving cause for concern, dangerous" and of the word "illness", i.e., "the condition of being ill, or in poor health, sickness, or disease", argues that the application of the common and ordinary definition of the phrase "serious illness" leads to the conclusion that the parties intended family illness leave to be used in circumstances in which "a family member's poor health, sickness or disease is of vital concern or poses a danger to the family member's continued health."
>
> The undersigned notes that the definition of the word "serious" relied upon by the County is "giving cause for concern, not "giving cause for vital concern". Thus, if one were to define the term "serious illness" by combining the definition's relied upon by the County, one would conclude that family illness leave was intended to be used in circumstances in which "a family member's poor health, sickness or disease gave rise to concern or which is dangerous". By inserting the word "vital", the County has exaggerated the nature of a "serious illness". (p. 17)

Therefore, it is necessary in this case to determine whether the child's sickness "gave rise to concern" or was "dangerous" to his continued health. The evidence indicates that the Grievant's two and a half-year old son became ill on Sunday evening with a fever and vomiting. Those symptoms continued through Wednesday. The Grievant's spouse stayed home with the child on Monday and he stayed with the child on Tuesday and Wednesday. Both the Grievant and his spouse testified that they did not call a doctor regarding the symptoms or take the boy to the doctor. The Grievant's spouse also testified that her

decision not to take the child to the doctor was based on a prior conversation with their doctor in which he told her that in the case of a fever, they should bring the child in if it persisted more than five days. The Union contends that the circumstances are practically the same as in the earlier Mayer case where Arbitrator Burns held that the employe was entitled to use sick leave for her child's illness. Karger, the Personnel Director, testified that he bases the decision on whether to grant a sick leave request for family illness on the age of the child, the nature of the illness and the facts known at that time. Karger also testified that in both the Grievant's and his spouse's cases, nothing was stated regarding the nature of their child's illness beyond what would be considered flu symptoms.

It appears then that the differences in the Grievant's case from the Mayer case were the age of the child (2 1/2 years as opposed to 10 months), and the fact that the Grievant did not contact a doctor regarding the illness. Although Arbitrator Burns cited Mayer's calling the doctor in that case and the doctor's recommendation that she bring the child in, she relied primarily on the symptoms and the age of the child in concluding that the case involved "(1) an immediate family member (2) with a serious illness (3) which required the constant attention of the employe." The Arbitrator concludes that the symptoms were for the most part identical. It is noted that the symptoms may be of sufficient cause for concern to qualify as a "serious illness" depending upon the age of the afflicted person. It is concluded that a vomiting two and a half year old is not sufficiently better able to care for himself than a ten-month old. In the Arbitrator's experience, either a ten-month old infant or a two and a half year old child afflicted with a fever and vomiting will require about as much constant attention as one is likely to find in the home setting with regard to comforting and caring for the child. 7/ This is to be distinguished from "babysitting", where the child's condition is such that it is able to more or less carry on its normal routine at home.

For these reasons, it is concluded that the child's illness met the requirement of Article 14, Section D, Family Illness, so as to entitle the Grievant to use sick leave under that provision to care for his child. Therefore, the County violated the parties' Agreement when it denied the Grievant sick leave for January 22 and 23, 1991.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

7/ It is also noted that the use of sick leave for family illness was granted in a similar situation involving another employe in this bargaining unit (Leonard) which occurred after the County had repudiated the past practice. (Union Ex. No. 15). There, the employe called the doctor, but the child was not taken to the doctor.

The grievance is sustained. Therefore, the County is directed to immediately grant Doug Thomas' request to use sixteen hours of sick leave under Article 14, Section D, Family Illness, of the parties' Agreement for January 22 and 23, 1991, and to restore other leave he took in its stead, if any.

Dated at Madison, Wisconsin this 26th day of March, 1992.

By David E. Shaw /s/
David E. Shaw, Arbitrator

gjc
DAVE'S