BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	Case 194 No. 45843 MA-6779	Case 197 No. 45846 MA-6782
MARATHON COUNTY DEPARTMENT OF SOCIAL SERVICES PARAPROFESSIONAL AND CLERICAL EMPLOYEES, LOCAL 2492, AFSCME, AFL-CIO	Case 195 No. 45844 MA-6780	Case 198 No. 45847 MA-6783
and	Case 196 No. 45845 MA-6781	
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 Office and Technical Employees, Local 2492-E, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant disputes 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 disputes. 11/ 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 matters 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.
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> . . .
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> 3.Cindy Myszka - 1/23/91 (Local 2492 - Soc. Serv. Para-Prof.)
> 4.Debbie Kurth - 9/26/90 and 12/19/90 (Local 2492 - Soc. Serv. Para-Prof.)
> 5.Margie Gibson - 9/24/90 and 1/21/91 (Local 2492 - Soc. Serv. Para-Prof.)
>
> If so, what is the proper remedy?

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

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

decided:

Is the current County Policy regarding the usage of sick leave for instances of illness in the employees' 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 department and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include, but are not limited to the following:

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

B. To establish reasonable work rules;

. . .

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

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B. Arbitration:

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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.
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> . . .

BACKGROUND

There are three grievants in these cases involving five separate instances where they were denied the use of sick leave under the Family Illness provision in the Agreement.

Myszka 12/

The Grievant, Cindy Myszka, is a Child Support Specialist in the County's Department of Social Services.

Myszka's husband was having problems with his knee and was advised to have arthroscopic surgery on the knee. The surgery was done on an outpatient basis on January 23, 1991 and the husband was given general anesthesia for the operation. He went into the hospital at approximately 7:30 a.m., was in the recovery room at approximately 12:30 p.m., and was discharged at approximately 2:15 p.m. Myszka drove her husband to the hospital, waited for him, and then drove him home and took care of him the rest of that day. The husband had to keep the leg elevated with ice on it and Myszka brought him the ice pack, helped him to the bathroom and fixed his meal for him.

Myszka had requested to use sick leave under the Family Illness provision and the request was denied by her supervisor and by the Director. Myszka then used vacation time to take the day off to accompany and care for her husband. A grievance was filed over the denial and was denied.

Kurth 13/

The Grievant in these cases, Deborah Kurth, is a Volunteer Coordinator in the Department of Social Services.

In the September 26, 1990 instance, Kurth was called at work by her eight year old son's babysitter, Kurth's mother, and informed that her son's ear was bothering him. The boy had not felt well the night before or that morning. When called by her mother, Kurth left work and took her son to the doctor where he was diagnosed as having an ear infection and treated with antibiotics. Kurth requested to use sick leave under the Family Illness provision. The request was denied and she used four hours of personal leave time instead. A grievance was filed based on the denial of her request to use sick leave under the Family Illness provision.

On December 19, 1990, Kurth's son did not feel well that morning and did not go to school. The boy's babysitter called Kurth at work that morning and she left work to take the boy to the doctor. The boy was not given any

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2/ Case 196.

3/ Case 197 (9/26/90) and Case 194 (12/19/90).

medication for pain that day. After taking the boy to the doctor, Kurth returned to work. Kurth requested to use two hours of sick leave under the Family Illness leave provision. Her request was denied and she used two hours of vacation time instead. A grievance was filed based on the denial of her request to use sick leave. In discussing her grievances, Kurth provided the County with a letter from her son's doctor dated March 15, 1991 that stated, "Christopher's illness on September 24, 1990 and December 19, 1990 were cause for concern."

Gibson 14/

The Grievant in these cases, Renee Gibson, is an Economic Support Specialist in the County's Department of Social Services. Gibson was a single parent at the time of the occurrences in issue.

On September 24, 1990, Gibson's eleven year old daughter complained of feeling achy, sore throat and fever and Gibson requested to use sick leave to take her to the doctor that afternoon. Her request was denied and she took two hours of vacation. The doctor diagnosed the child's problem as bronchitis and sinusitis and put her on medication. The denial of Gibson's request to use sick leave under the family illness provision was grieved and the grievance was denied.

In October of 1990, Gibson's daughter was still ill and on medication. The daughter complained of dizziness and severe headaches and Gibson was concerned that her daughter was experiencing an adverse reaction to the medication. She requested to use an hour of sick leave to take her daughter to the doctor. That request was denied and the denial was grieved and subsequently the request was granted in May of 1991 upon review of the grievances.

On January 21, 1991 Gibson's daughter showed symptoms of fever, sore throat, aches and ringing in her ears, similar to her earlier symptoms in September of 1990. Gibson made an appointment with the doctor and requested to use sick leave for 1 1/2 hours under the family illness provision. The request was denied and she used vacation time to take her daughter to the doctor. The child was diagnosed as having a viral infection. Gibson again grieved the denial of her request and that grievance was denied.

In the course of discussing her grievance, Gibson provided the County with a copy of a letter from her daughter's doctor which stated as follows:

> March 15, 1991
>
> RE: Margie Gibson
>
> To Whom It May Concern
>
> Margie Gibson is the mother of a patient of mine, Nicole Galante, and she had to bring Nicole to the office for sick visits. Nicole was seen by me on September 24, 1990, October 1, 1990, and January 21, 1991. All these three visits were sick visits. She had had bronchitis and sinusitis at one occasion, and on the next occasion child had severe headaches and dizziness and was extensively evaluated. On the last visit she had a

4/ Case 198 (9/24/90) and Case 196 (1/21/90).

> severe viral infection. I think mother needed to get off work to bring the child to the office, and she should be allowed to be with her child when the child is sick. If there are any questions, please do not hesitate to give me a call.
>
> Sincerely,
>
> Madhu V. Luthra, M.D.
> Department of Pediatrics

The County has a written policy on the use of sick leave for "family illness" which it 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 these same parties on the same issue, 15/ and need not be repeated. Arbitrator Burns issued her award on January 7, 1991 and after receiving the award the County modified its policy regarding family illness leave. The modified policy was placed in effect on March 4, 1991 and the instant grievances were subsequently considered in light of the changed policy and were denied.

Myszka's grievance was denied pursuant to the following letter of April 22, 1991 from Karger:

> Dear Mr. Salamone:
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> Re: Grievance No. 2-91 (Myszka)
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> On April 19, 1991 a meeting was held to review the matter cited above. The dispute involves a request for eight (8) hours of sick leave on January 23, 1991. On this day, Cindy Myszka's husband had knee surgery. She transported him to and from the hospital; once home she helped him keep his leg elevated, kept ice on the injury, and generally attended to his needs. The grievance cites Article 14(d) Family Illness as the area in the labor agreement of alleged violation. That section read as follows:
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> Employees will be allowed to use sick leave in the case of serious illness in the immediate family where the constant attention of the employee. (Emphasis Added)
>
> In making the decision to deny the use of sick leave, the Department of Social Services considered the nature of the illness and referred to the guidelines presented in the Statement Regarding Use of Sick Leave for Family Illness. In those guidelines, it states specifically that a routine outpatient surgery is not an appropriate use of sick leave. The statement goes on to indicate that a scheduled surgery of a life threatening nature would properly warrant the constant attention of the

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5/ Marathon County, Case 172, No. 44348, MA-6260 (Burns, 1/7/91).

employee and thus would represent an appropriate use of sick leave.

During the grievance meeting, Ms. Myszka pointed to another employee (Sherry Szymanski) who was allowed to use sick leave during a day when her husband had in-patient back surgery. While she is probably right that the back surgery was not life threatening, it does reflect a more complicated situation than the arthroscopic knee surgery in this case.

The County has recently been involved in two (2) grievance arbitrations involving family illness sick leave. One involved a ten (10) month old baby with persistent vomiting and the other involved a twelve (12) year old boy who experienced severe knee pain and was seen by a physician. In the first case, the arbitrator (Coleen Burns) ruled in favor of the grievant and in the second in favor of the County. This case, while not identical, is more reflective of the second case in which the employee (D. Kurth) was not provided family illness sick leave to take her son to see the physician.

In conclusion, I find that the request to use sick leave on January 23, 1991 was appropriately denied. Thus, Grievance No. 2-91 (Myszka) is denied.

Sincerely,

Brad Karger
Personnel Director

Kurth's grievances were denied pursuant to the following letter of April 22, 1991 from Karger:

Dear Mr. Salamone:

Re: Grievance No. 5-90 (Kurth) and No. 1-91 (Kurth)

On April 19, 1991 a meeting was held to review the matters cited above. The dispute involves two hours on February 19, 1991 (sic) and four hours on September 26, 1990. On both of these days, Deborah Kurth's eight year old son had an ear infection and the time was used to transport and accompany him on a visit to his physician. Ms. Kurth requested the use of sick leave for the time and that request was denied. (She was allowed to use vacation for the time.)

The grievance alleges a violation of Article 14(d) Family Illness in the labor agreement. This section reads as follows:

Employees will be allowed to use sick leave in the case of a serious illness in the immediate family where the immediate family member requires the constant attention of the

employe. (Emphasis Added)

In reaching the decision to deny the use of sick leave for these events, the Department of Social Services considered the nature of the family illness and relied upon the Statement Regarding Use of Sick Leave for Family Illness. This statement defines the term "serious illness" as circumstances in which a family member (sic) poor health, sickness, or disease gives rise to concern or which is a dangerous in nature.

During the April 19, 1991 grievance meeting, the Union presented a note from Dr. Robert Kaupie which indicated that "Christopher's illness on February 26, 1990 (sic) and December 19, 1990 were cause for concern." The date on that note from the physician was March 15, 1991.

Ms. Kurth was the grievant on another family illness dispute which was decided in February of 1991. In her award, Arbitrator Coleen Burns found that the County is contractually entitled to consider the nature of the family members illness when determining whether or not to grant an employee request for family illness leave. Further, the Arbitrator found that the son's injury did not constitute a serious illness and thus the grievance was denied. In another family illness dispute involving a different Marathon County bargaining unit, Arbitrator Burns awarded in favor of the grievant. That case involved a ten (10) month old baby who had experienced persistent vomiting. In determining that this particular health problem met the standard of a "serious illness," the Arbitrator considered the Union's argument that the vomiting could be symptomatic of a bowel obstruction. "Additionally, a ten month old child with persistent vomiting may quickly become dehydrated. If not treated promptly, such dehydration may have serious health consequences" reasoned the Arbitrator.

In arriving at a decision of this issue one needs to consider the nature of the illness (ear infection) and the old age of he child (eight years old). At the grievance meeting, Ms. Kurth indicated that the child was in severe pain but it seems evident that the illness was a rather routine childhood health matter. The note from Dr. Kaupie does not provide much support for the argument that his is in fact a serious illness. The awards of Arbitrator Burns suggests that each illness/ injury needs to be considered in relation to its possible health consequences. A simple one line note written months after the fact will not suffice.

In conclusion, I find that the requests for sick leave on September 26, 1990 and February 19, 1991 (sic) were appropriately denied and that there was no violation of the labor agreement. Thus, Grievance No. 5-90 (Kurth) and No. 1-91 (Kurth) are denied.

Sincerely,

Brad Karger
Personnel Director

Gibson's grievances were denied pursuant to the following letter of May 8, 1991 from Karger:

Dear Mr. Salamone:

Re:Grievances No. 4-90 and 3-91 (Gibson)

On April 19, 1991, a meeting was held to review the grievances cited above. The dispute involves the use of sick leave by Renee Gibson for family illnesses. The illnesses involved Ms. Gibson's nine year old daughter who was accompanied to the Wausau Medical Center as follows:

Date Involved	Nature of Illness	Work Hours
9/24/90	Bronchitis and sinusitis	2 hours
10/1/90	Headaches and dizziness	1 hour
1/21/91	Visual infection	1 1/2 hours

The grievance forms cite Article 14 (D) Family Illness as the area of alleged violation. The section of the labor agreement read as follows:

> Employees will be allowed to use sick leave in the case of a serious illness in the immediate family where the immediate family member requires the constant attention of the employee. (Emphasis Added)

In making the decision to deny the use of sick leave, the Department of Social Services referred to the Statement Regarding Use of Sick Leave for Family Illness. This policy defines the term "serious illness" as circumstances in which "a family member (sic) poor health, sickness or disease gives rise to concern or which is dangerous in nature." That policy statement goes on to exclude sick leave usage for uncomplicated matters such as sore throat or flu symptoms and indicates that the negotiated language is intended to allow the employee off without a loss in pay where the illness is of a serious health nature.

During the grievance meeting, the union presented a letter from Dr. Madhu V. Luthra. That letter confirmed the fact that Ms. Gibson had accompanied her daughter (Nicole) to see him on the days in question and went on to state that Renee should be allowed to be with her child when the child is sick.

In arriving at a decision on this matter, one needs to

consider the nature of the illnesses and the age of the child. Dr. Luthra's comment that he believes Renee should be allowed to be with her child when she is sick is irrelevant to this grievance in that the issue is not whether she was provided the time off or not, but rather whether the use of sick leave was appropriate under the terms of the labor agreement. In reviewing the information before me, I believe that the illnesses occurring on September 24, 1990 and January 21, 1991 are of routine childhood health matters and as such the use of sick leave is not appropriate. Thus, the grievances are denied to the extent that they involve these two days. On October 1, 1990 when the child is accompanied to her personal physician with symptoms of dizziness and severe headaches which were suspected to involve an adverse reaction to prescribed medications, I believe that this illness does meet the criteria of a serious health illness. Thus, I have asked that the Department of Social Services to modify their records to permit the use of sick leave on that particular day.

Sincerely,

Brad Karger
Personnel Director

The County's modified family illness 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. Attend to baby who is experiencing persistent vomiting and requires doctor's attention.

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, 16/ 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 an ambiguous one. 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

6/ (4th Ed. 1985) at p. 437.

> language in the context of the rest of the contract. If so, that meaning is to be applied." 17/
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> . . .

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 "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 questions the County's reliance on the "zipper clause" in the Courthouse Agreement and its application in a prior award in that unit and contends it is misplaced. In that case the contract was totally silent on the provision of the benefit in question. The case also involved the Courthouse Agreement, which does not contain a "Maintenance of Benefit" provision as do the agreements in the Social Services Department.

Also 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

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

no perceived need or desire on the County's part to second guess the judgments of 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 of 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 Myszka grievance, the Union asserts that Myszka believed that her presence was necessary to provide transportation as well as the necessary home care for her husband on the day he had arthroscopic surgery on his knee. Her husband was operated on under a general anesthetic and people have been known to have died as a result. It is also not terribly uncommon for there to be "crucial and/or immediate decisions" asked of immediate family members when something goes wrong while a patient is under a general anesthetic. Further, driving to and from the hospital after being under general anesthesia is strictly forbidden due to the drowsiness that results, and an injured knee itself would likely preclude driving. With regard to the County's argument that the husband could have called a cab, the Union questions how he would have been able to make it unassisted from the house to the cab. The Union asserts that it is just such circumstances as involved here that were envisioned by the contract language framers when they included "where the immediate family member requires the constant attention of the employe."

The Union asserts that almost any surgery is a serious matter and is certainly a cause for a loved one's concern. Here, there clearly was a family illness which meets the "cause for concern" standard cited by Arbitrator Burns in her award. The Union questions whether the parties must now "split hairs" with respect to the relative severity of the surgery. Both Arbitrator Burns and those who negotiated and historically have applied the respective agreements' language clearly intended that such instances be covered by the language in question.

The Union also contends that it is significant that on at least three occasions, two of which occurred after the receipt of the Burns Award, employes have been permitted to use sick leave under the family illness provision to care for family members who had outpatient surgery. First cited is the instance involving an employe named Tucker who was allowed to use sick leave to accompany her sixteen-year old daughter for plastic surgery in August of 1988. The two other instances occurred after the receipt of the Burns Award, and the first of those involved an employe named Drengler who accompanied his nine year old son for outpatient surgery on his leg. Although that involved the removal of a cancerous growth, the Union questions what would have been the outcome if it had not been malignant and questions whether the parties need to wait for the result of a biopsy to determine whether there was cause for concern. The second instance occurring after the receipt of the Awards involved identical circumstances as the Myszka case. There an employe in the Courthouse Unit, Henkelmann, was allowed to use sick leave under the family illness provision in late March of 1991 to attend to her husband who had arthroscopic surgery on his knee. That was shortly after the receipt of the Burns Award and two weeks after the Grievant, Myszka was denied usage for the very same illness. Although Karger, the Personnel Director, testified that was a "mistake", the

Union questions how such a mistake could have been made so soon after the receipt of the Burns Award and while the County was already heading to arbitration on an identical case.

In its reply brief, the Union questions the County's claim that arthroscopic knee surgery is a "fairly routine procedure", asserting there is no evidence to support that claim. The Union also notes the County's failure to address the Henkelmann circumstances which occurred two weeks after Myszka's request was denied.

With regard to the grievances of Deborah Kurth, the Union notes that both grievances involved Kurth's request to take time off from work to accompany her eight-year old son to the doctor when the child was suffering from the "severe pain of an ear infection." The Union notes that Kurth, having read Arbitrator Burns' award involving her previous unsuccessful grievance, provided the County with a letter from her child's physician stating that the illnesses suffered by the child on the days in question were a "cause for concern." That should have been the end of the dispute in these cases. In doing so, Kurth was attempting in good faith to apply the judgments of the Arbitrator and her doctor to aid her in the determination of whether she should be permitted to use sick leave in these instances. The County's conduct seems to indicate that it does not care what an arbitrator or a doctor says and that it will make all determinations. The Union questions the County's having medically untrained individuals second guess the judgment of the child's doctor and asserts there is no diagnostic or medical basis for the County's determination. The Union notes that it presented Union Exhibit No. 1, a medical document provided by the Pediatric Department of Wausau Medical Center, which labelled ear infections as a "potentially serious disorder". That document indicates that if an ear infection is left untreated, it can result in permanent hearing loss and impair a child's learning capacity. That document was offered during the grievance procedure as well.

The Union also asserts that in March and May of 1990, following the County's alleged repudiation of the past practices and the implementation of its original policy on the use of sick leave for family illness, the County allowed employe Boettner to twice use sick leave to care for children with ear infections. Thus, there is no basis for the County's refusal to grant the two grievances in Kurth's cases.

In its reply brief, the Union asserts that the County questions Kurth's allegations that the illness involved an emergency and asserts that there is no requirement in the contract language that family illness be for emergencies. The Union notes that the contracts involving the Social Services Department employes do not contain the "child breaks arm" example that could even arguably suggest an emergency situation. The Union also asserts that it's possible the doctor was unable to see the child until 12:30 p.m., as appointments are commonly difficult to schedule at such short notice. Further, the questions of whether this was an emergency and whether there was a delay in scheduling the appointment have not been raised until the County's brief.

With regard to the grievances of Renee Gibson, the Union notes that in the first instance, September 24, 1990, she requested to use two hours of sick leave and in the second instance, January 21, 1991, she requested to use 1 1/2 hours of sick leave for the purpose of accompanying her 11 year old daughter to the child's physician. In the first instance, the child was suffering from bronchitis and sinusitis and in the second instance she had a severe viral infection. The Grievant provided the County with communication from her daughter's doctor that indicated the viral infection was "severe" and that on both occasions the "mother needed to get off work to bring the child to the office and should be with her child when the child is sick."

The Union asserts that in determining whether the viral infection qualified as a "serious illness" deference must be accorded to the medical professional for making such determinations. If a pediatric physician describes the nature of a child's illness as "severe", there should be no doubt that such a determination qualifies the illness as "serious" and that it would also be of such a nature that it would be a "cause for concern" of the parent. The Union notes that the Personnel Director, Karger, is not a medical doctor. Karger inaccurately identified the illness in his denial of the grievance as a "visual" infection rather than a viral infection. This suggests that the County was not properly considering the true nature of the child's illness and that Karger underestimated the potential seriousness of the illness. People have died from viral infections. In this case, the doctor described the infection as severe. Thus, it was clearly a serious matter and appropriately a cause for the parent's concern.

County:

The County takes the position that its decisions to deny the use of family illness leave in these cases 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 Agreements by denying the use of family illness leave in these instances, the County first argues that the language of the Agreements 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 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 these disputes is 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 Grievants were not entitled to family illness leave. In that regard, the County cites dictionary definitions of the words "serious" and "illness" used 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 grievances in these cases, 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.

Regarding the Myszka grievance, the County asserts that she requested to use family illness leave to transport her husband to and from the hospital and to attend his needs after he was sent home. This hardly constitutes a "serious" illness" within the meaning of Article 14, Section D, of the Agreement, nor did it require her "constant attention". Arthroscopic knee surgery is "fairly routine" and does not fall under the realm of considerations for the appropriate use of sick leave. Hence, Myszka was not entitled to family illness leave under the Agreement. As to the Union's argument that people have died as a result of general anesthesia, and as a result of either hemorrhaging or infection relating to the most minor surgeries, the County asserts that the Union is not addressing the primary concern of the Grievant in this case. The request for family illness leave in this case was to transport

Myszka's husband to and from the hospital and to attend his needs at home. The County also takes issue with the Union's comparison with this situation to that of the employe Tucker, who was permitted to accompany her 16-year old daughter for plastic surgery, and to that of Lee Drengler, who was allowed to take his nine-year old son for surgery on his leg. Those cases concerned young children who needed the assistance of their parents. That is not the case with Myszka, who requested leave to be with her husband. The County, in considering whether to grant family illness leave, always takes the age of the family member involved into consideration.

With regard to Kurth's grievances, the County asserts that her requests for family illness leave in September and December of 1990 were based upon her statement that her eight-year old son had an ear infection. This hardly constitutes a "serious illness" within the meaning of Article 14, Section D, of the Agreement. The County questions the indication on Kurth's request form of September 26, 1990 that there was an emergency. If it were an emergency situation, as she indicated, why did it take her until 12:30 p.m. to take the child to see a doctor. The County opines that young children often develop earaches and infections and asserts that it would be inconceivable for an earache that started at 12:30 a.m. to develop into a "serious illness" by 12:30 p.m. The County also asserts that the note from Kurth's doctor dated March 15, 1991 stating that her child's illnesses on September 26, 1990 and December 19, 1990 were "cause for concern", provides no information that would lead one to believe he had a serious illness. In its reply brief, the County questions the effectiveness of such a belated note from the doctor and asserts that it is superfluous at best. The County also disputes the Union's comparison with the Boettner case in 1990 where the County granted family illness leave based on the fact that the child had a double ear infection and measles. That child was very ill and required the constant attention of the parent, while the same was not true in Kurth's case.

With regard to the Gibson grievances, the County notes that she requested the use of sick leave in September of 1990 when her child had bronchitis and sinusitis and again in January of 1991 when the child had a viral infection. She also requested to use leave in October of 1990 because her child was experiencing headaches and dizziness thought to be due to a reaction from medication and that request was eventually granted due to the severity of the apparent reaction. The County asserts that the other two occasions did not constitute a "serious illness" as provided in the Agreement. The County disputes any reliance on the doctor's statement that Gibson obtained as being "totally irrelevant in that the issue is not whether she should have time off to take her daughter to the doctor, but rather whether she should be allowed to use sick leave to take her daughter to the doctor in a situation that does not constitute "serious illness." It further asserts that there is nothing in the doctor's note that would lead one to believe that the child's illness was of a serious nature. Hence, Gibson was not entitled to family illness leave under Article 14, Section D, of the Agreement. In its reply brief, the County notes the typographical error of "visual" rather than "viral" in the denial and asserts that it was fully aware that Gibson's child had a viral infection.

The County states that it is not suggesting that employes should not be allowed to attend to their families' needs where circumstances warrant such assistance, rather the County is merely delineating those that qualify for family illness leave under its policy and those which do not. It notes that other personal time off is available to employes who feel the need to take that time from work.

With regard to the Union's contention that there is a binding past practice that requires the County to grant family illness leave in these instances 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 these instances 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. When the County and the Union in this case 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. 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. 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. When agreed to, a zipper clause nullifies 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. Citing, Elkouri and Elkouri, How Arbitration Works, 1985-87 Supplement, pages 93-94. The County asserts that the doctrine of res judicata applies in this case 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 illness leave provision requires that the grievances 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.

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 prior practice, it has no application or binding effect upon the Union or the employes. Similarly, it is management's actions that are subject to review by the Arbitrator in the context of compliance with the parties' Agreement, and not the County'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 these cases.

With regard to the stipulated issues, the first question that is raised is the effect to be given the Burns Awards. The Arbitrator is in agreement with the following statement from Elkouri and Elkouri 18/ that a prior award involving the same parties and the same issues will be controlling on those issues:

> Although prior labor arbitration awards are not binding in exactly the same sense that authoritative legal decisions are, yet they may have a force which can be characterized as authoritative. This is true of arbitration both by permanent umpires and by temporary or ad hoc arbitrators.
>
> Giving authoritative force to prior awards when the same issue subsequently arises (stare decisis) is to be distinguished from refusing to permit the merits of the same event or incident to be relitigated (res judicata). Where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration but it may be controlled by the prior award. The destiny of a party's claim thus may be governed by a prior award which either precludes the claim under res judicata concepts or controls the decision on the claim by stare decisis concepts. In some instances arbitrators likewise have made the prior award the governing factor by application of a third judicial concept, collateral estoppel, which stands somewhere between the concepts of res judicata and stare decisis (collateral estoppel also overlaps somewhat with res judicata and, in a sense, with the authoritative precedent area of stare

8/ How Arbitration Works (4th Ed.)

> decisis). However, regardless of whether the arbitrator speaks in terms of res judicata, collateral estoppel, or stare decisis, ordinarily the prior award by some procedure will have been the governing factor in the disposition of the present claim.
> (421-22)
>
> . . .
>
> 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."
> (425-26) (Citations omitted)

Hence, the Burns Award involving the County and Local 2492 is deemed to be conclusive both as to 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 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)

It will therefore be necessary to determine in each of these instances whether the immediate family member's illness or injury "gave rise to concern" or was "dangerous" to that person's continued health, so as to constitute a "serious illness". Arbitrator Burns went on to note that Article 14, Section D, of the Agreement also requires that it be a serious illness of an immediate family member that requires the constant attention of the employe. All of the situations in these cases involved members of the respective employe's immediate family, however it will be necessary to determine whether each situation involved a "serious illness" as defined above, that required the employe's "constant attention". In each case, the employe was permitted to take time off from work to deal with the situation, so that it is not a matter of deciding whether the employe may take off from work to care for an immediate family member, rather it is whether they are entitled to use sick leave for that purpose.

Considering first the Myszka case, the evidence indicates that Myszka requested to use sick leave under the family illness provision to take her

husband to and from the hospital and to attend to him at home on the day he had outpatient arthroscopic surgery on his knee. The Union points out that Myszka's spouse likely could not walk to and from the vehicle unaided or drive and the fact that he was put under general anesthesia for his surgery. The County asserts it is a "fairly routine procedure" and hardly constituted a "serious illness", nor did it require the employe's "constant attention".

Neither party cited any specific evidence to support their claims in those regards and both appear to rely on the general knowledge that what they say is widely known to be true. It seems appropriate to the undersigned in this instance to take notice of the fact that a person who has undergone arthroscopic knee surgery while under a general anesthetic would not be capable of walking to a vehicle unaided following the surgery that day or of safely driving home, as well as the fact that arthroscopic knee surgery has become a fairly routinized surgical procedure. The latter, however does not necessarily mean that such surgery is not to be considered "serious". The surgical procedure may be routine, but there are significant after-effects of such a surgery and the general anesthetic that leave the person temporarily unable to take care of him or herself - the resulting pain and shock to the body, as well as the inability to use the affected leg and the drowsiness and nausea from the general anesthetic that can take several hours to wear off.

The undersigned concludes that a surgical operation that requires that the person be put under a general anesthetic is "serious", both in terms of the potential danger and the after-effects of the anesthetic and the nature of the operation. It is further concluded that a person who has just undergone arthroscopic knee surgery and is recovering from the general anesthesia, is sufficiently in need of someone else's care that first day so as to require the employe's "constant attention". Having reviewed the instances where the County has granted the use of sick leave for a family illness since the practice was repudiated, the undersigned concludes that the parties have not intended or construed "constant attention" to mean it is necessary for the employe to keep a constant vigil by the family member's bedside. Rather, if the family member's condition is of a nature that the person is incapable of caring for himself or herself and leaving the person alone would present a danger to that person, that is sufficient. 19/

The Arbitrator notes the Union's reliance on the County's having allowed an employe in the Courthouse Unit to use sick leave under the same circumstances. Such reliance is misplaced, as the labor agreement covering that unit has an additional paragraph under the Family Illness provision, not found in the Agreement covering the two units of employes in the Social Services Department, that expressly provides "This provision shall apply to all other requests for sick leave involving requests relative to surgery." 20/

9/ This must, however, be distinguished from what might be termed "babysitting", where it is the family member's age, and not the illness or condition, that requires someone be present, e.g., a five-year old child with a cold vs. a five-year old child who is vomiting. A five-year old cannot be left alone due to the inability of a five-year old child to care for himself or herself, yet the child with the cold is able to go about most of its normal activities - sleep, play in the house, watch television, etc. - while the child with the flu requires attention and care. While age is a factor in considering the condition, it must be the condition, and not the family member's age alone, that occasions the need for the attention and care.

10/ Joint Ex. No. 1, Article XIII, Section E.

With regard to the Kurth grievances, both involve her taking her eight and a half year old son to the doctor. The first instance was due to his having an earache and the child was treated with antibiotics for an ear infection. In the second instance the child again had an earache and Kurth took him to the doctor and then returned to work. The Union cites the description and explanation of otitis media, i.e., inflammation of the middle ear caused by a bacterial or viral infection, provided by the Wausau Medical Center (Union Ex. No. 1) and the note from the child's doctor (Joint Ex. No. 5-I) as supporting its claim that an ear infection qualifies as a "serious illness", in that there was "cause for concern".

While an ear infection can be a "cause for concern", it appears it is due to the possible hearing loss that could result if left untreated. There are numerous conditions that might have a more serious result if left untreated or undiagnosed. However, as the Union argues, the initial granting of the sick leave cannot be dependent upon the final outcome or diagnosis. If the family member's condition is serious enough that the person needs to see a doctor and the doctor then is willing to confirm in writing that the condition is "cause for concern", the undersigned is hard put to second guess the doctor without more. 21/ If, on the other hand, the doctor finds that the condition is something minor, the employe must then return to work or take another type of leave. In other words, this may result in an employe being entitled to use sick leave to take the immediate family member to see a doctor due to the onset or increased severity of a condition, but then have to return to work or thereafter use other leave time if the employe chooses to stay with the family member after the condition has been diagnosed as not being serious. That may also be the case even if the family member's condition is "serious", where the condition is such that it will not require the employe's "constant attention", as that has been previously described in this award.

Applying the foregoing to the instances involving Kurth's son, it is concluded that Kurth was entitled to use sick leave in both instances to take her son to the doctor and back home or to the person caring for the child, but that given the child's age and the condition, the situations were such that they did not require her constant attention. An eight year old with an earache is usually able to carry on in a normal manner, especially once the pain has been treated. Further, in the first situation, Kurth's mother was already watching the child and it was not a situation where the school or care provider called the employe at work to come and get the child. The situation appears to be analogous to the case involving an employe in the "Office and Technical Employees" unit, Kriewaldt, who was permitted to use sick leave in February of 1990 to take her ten year old daughter to the doctor where she was diagnosed as having a sinus infection (Union Ex. No. 9). As here, the child had awakened during the night feeling ill and the employe made an appointment the next day for the child to see a doctor, but was allowed to use sick leave to take the child to the doctor and home and then return to work. 22/

Thus, it is concluded that Kurth was entitled to use two hours of sick leave in each instance for the purpose of taking her son to the doctor and back home. The County violated Article 14, Section D, of the Agreement to the

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11/ The undersigned is fully cognizant that there are numerous circumstances where a doctor would be willing to say that due to potential serious results if a condition is left untreated.

12/ The situation is not analogous to the Boettner cases cited by the Union, as they involved an infant with additional complications.

extent it denied her requests for that purpose.

The Gibson grievances essentially involve situations similar to those in the Kurth grievances. In each instance, Gibson took her eleven year old daughter to the doctor after she complained of aching, fever and sore throat. In the first instance, she was diagnosed as having sinusitis and bronchitis and in the latter instance as having a "severe viral infection." The child was prescribed medication in each case. In each instance, Gibson requested to use sick leave to take her daughter to the doctor and the requests were denied. Applying the same reasoning as in the Kurth grievances, it is concluded that the County violated Article 14, Section D, of the Agreement when it denied the requests.

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

AWARD

1. The grievance of Cindy Myszka is sustained. The County is directed to immediately grant her request to use eight (8) hours of sick leave under Article 14, Section D, of the parties' Agreement for January 23, 1991, and to immediately reinstate any other leave time she took in its place.

2. The grievances of Deborah Kurth are sustained to the extent she was denied the use of sick leave on September 26, 1990 and December 19, 1990 to take her son to the doctor and back home. Therefore, the County is directed to immediately grant her requests to use sick leave under Article 14, Section D, of the parties' Agreement on those dates, in the amount of two (2) hours each date, and to restore any other leave time she took in its place to that extent on those dates.

3. The grievances of Renee Gibson are sustained. Therefore, the County is directed to immediately grant her requests to use two (2) hours of sick leave on September 24, 1990 and one and one-half (1 1/2) hours of sick leave on January 21, 1991 under Article 14, Section D, of the parties' Agreement, and to restore any other leave she took in its place to that extent on those dates.

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

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