BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MANITOWOC COUNTY INSTITUTIONAL EMPLOYEES LOCAL 1288, AFSCME, AFL-CIO	Case 249 No. 46579 MA-7012
and	
MANITOWOC COUNTY (HEALTH CARE CENTER)	

Appearances:

Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing for the Union.

Lindner & Marsack, Attorneys at Law, by Lisa M. Leemon, appearing for the Employer.

ARBITRATION AWARD

Local 1288, AFSCME, AFL-CIO, herein the Union, pursuant to the terms of its collective bargaining agreement with Manitowoc County, herein the Employer, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and decide a dispute between the parties. The Employer concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Manitowoc, Wisconsin on May 20, 1992. A transcript of the hearing was received on June 12, 1992. Post-hearing briefs were received from the Employer on July 23, 1992 and from the Union on August 18, 1992.

ISSUE

The parties were unable to stipulate to an issue and agreed that the arbitrator would frame the issue.

The Union stated the issue as follows:

> Is the Employer violating the collective bargaining agreement and past practice by implementing the absentee policy formulated October 18, 1991?

The Employer stated the issue as follows:

> Is the Manitowoc Health Care Center's sick leave policy dated October 18, 1991, reasonable?

The undersigned frames the issue as follows:

> Does the Employer's sick leave policy dated October 18, 1991 violate the contract?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 - MANAGEMENT RIGHTS RESERVED

> Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively

in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

. . .

The Employer may adopt reasonable work rules except as otherwise provided in this Agreement.

ARTICLE 13 - SICK LEAVE

A. Accumulation: Employees shall earn sick leave at a rate of one and one-quarter (1 1/4) days per month for a total of fifteen (15) days per year. Unused sick leave shall accumulate to a maximum of one hundred and twenty (120) days. However, no sick leave benefits may be used during the first year of employment although they may be accumulated on the employee's record.

B. Notice of Sick Leave: In order to be eligible for sick leave pay, it is understood that on any work day when an employee is unable to perform his or her duties, he or she shall so advise his or her immediate supervisor, the Administrator or the Administrator's designee prior to the start of his or her work shift, if possible. In the event the employee calls in due to sickness one (1) hour or more prior to the start of his or her shift, the employer will make a good faith effort to obtain replacement personnel.

In the event of critical illness or required attendance upon an employee's father, mother, spouse or child, an employee shall be allowed to use accumulated sick leave.

C. Regulation: Any employee off work due to illness for three (3) or more consecutive days shall be required by the Employer to submit a physician's statement.

After five (5) occurrences, (funeral supplement not included), the Employer may require an employee to furnish a physician's certificate for the sixth (6th) sick leave occurrence and thereafter in a calendar year. It is understood that in counting occurrences for the requirement of bringing in a physician's certificate to return to work from sick days, no occurrence shall be counted if a physician's certificate is brought in for such occurrence. If there is any addi-tional expense for such physician's certificate, the Employer shall pay the cost of the same.

As to sick leave absences caused by a dependent's sickness, the County may if it has a reasonable basis for questioning the taking of such leave, require that after five (5) total absences covering all sicknesses during a calendar year, that the employee supply a physician's certificate covering the sickness of the dependent, provided that the County pays for the cost of the physician's certificate. Furthermore, it is understood that in counting occurrences for dependent's sickness, no occurrence shall be counted if it is accompanied by a physician's certificate.

Under this Article, the Employer may at its expense, designate a physician to provide a second physician's written opinion regarding the employee's illness and/or need for sick leave.

Should there be a contradiction between the first and second physician's opinion, either the employee or the Employer may request a third physician's written opinion regarding the employee's illness and/or need for sick leave. Such third written opinion shall be from the physician selected by mutual agreement of the first and second physicians, and at the Employer's expense. It is further understood that the practice of requiring a second or third physician's statement will not be required in every circumstance, but rather on a case by case basis.

Just progressive discipline may be implemented for a recognized pattern of absenteeism such as either the day before or the day after scheduled time-off from work including non-scheduled working days, holidays, vacations, etc. or absenteeism on scheduled working weekends or Mondays and Fridays, etc. These are examples only and do not limit the grounds for just progressive discipline for a recognized pattern

of absenteeism.

In addition, an employee claiming or obtaining sick leave benefits by proven fraud, deceit, or falsified statement shall be subject to just progressive discipline.

D. Annual Payout: Employees who have accumulated the maximum sick leave shall at the end of each succeeding year receive one-half (1/2) pay for all unused sick leave.

E. Retirement Payout: The employee attaining the age of retirement and upon his or her retirement shall receive one-half (1/2) pay for his or her unused sick leave accumulation at the contract rate of pay including longevity increments. An employee shall receive this retirement payout at the same time that he or she receives his or her final check. No sick leave shall accrue following receipt of the retirement payout, however, it is understood that retiring employees, may also be entitled to Section D benefits of this Article. No employee shall quality for or receive more than a total of sixty (60) days pay under the terms of this section.

F. Death Benefit Payout: The Personal Representative of an employee, upon the death of the employee, shall receive on behalf of the deceased employee, all of the pay for the deceased employee's unused sick leave.

BACKGROUND

The Employer's Health Care Center is a state-licensed nursing home facility with 290 beds, of which beds 241 are used for nursing home patients and 49 are used for developmentally disabled adults. On average, the Center employs 260 persons. Approximately 160 of those persons are employed in the nursing department. The Center is staffed on a 24 hour per day and 7 days per week basis.

In June of 1991, the Center implemented a sick leave policy. In response to concerns and objections raised by the Union, the Center rescinded the June 1991 policy and changed the policy to address some of the concerns. Those changes are contained in the policy dated October 18, 1991. The Union grieved said policy and the Employer agreed to hold implementation of the policy in abeyance pending a decision by the Arbitrator in this case.

POSITION OF THE UNION

The parties have a past practice of allowing the provisions of Article 13 serve as the basis for determining whether sick leave usage was appropriate. The Employer may require certification of illness and may withhold payment in those cases when certification is appropriate. Employes have been disciplined only when there was alleged fraud and no certification of sickness was provided. Employes have not been disciplined for use of sick leave when they or dependents were sick and they provided certification of the sickness. Therefore, the parties have established a past practice that certification of illness precludes discipline for the use of sick leave. Fraud, deceit and misuse are addressed. Discipline for just cause is available. The Employer may not have fully utilized the present language, but rather, is seeking to solve the alleged problem by instituting a severe policy which shifts more of the burden from the Employer to the employe. The Employer has failed to demonstrate the need for such a policy which could result in the termination of an employe simply for sick leave usage at a rate which is certain to occur.

The terms of the policy conflict by setting a pattern of progressive discipline based on episodes of sick leave and excessive absenteeism without defining those terms. Employes will be unable to anticipate which standard will apply. The policy cannot be administered since it fails to help the employes understand what is expected and what will happen if there is a violation.

The Employer can create or modify policy, but has gone too far in this case. The policy should be rescinded. Any and all discipline under this policy should be rescinded and all references to such discipline should be removed from the files of employes.

POSITION OF THE EMPLOYER

The Union failed to meet its burden of proof to demonstrate that the Employer is foreclosed from implementing the proposed sick leave policy or that the policy is unreasonable. The ability to regulate employe attendance is an inherent part of management rights, including the right to promulgate attendance policies. Further, Article 3 of the contract gives the Employer the right to implement reasonable work rules. The fact that the Employer did not exercise that right, with respect to employe attendance in the past, does not mean that the Employer either has waived the right or now is prohibited from exercising the right.

The Union failed to demonstrate that a binding past practice prohibits the implementation of the policy because there is no past practice in this case, only the unexercised right of management to formulate and implement attendance control policies. Further, practices which involve the direction of the working force are not ones which may become binding on the Employer. The proposed policy was designed to correct problems caused by excessive sick leave use and abuse which were adversely affecting the efficiency of the Center's operation. Thus, the policy constituted a basic management function involving direction of the work force. The policy was formulated only after other methods designed to reduce sick leave use failed. Finally, the policy is reasonable and in compliance with the provisions of the contract. Therefore, the grievance should be denied.

DISCUSSION

It is clear that, pursuant to Article 3 of the contract, the Employer has the specific right to adopt reasonable work rules, unless those rules conflict with other provisions of the contract. Certainly, that right includes the formulation and implementation of rules on attendance, as long as the rules are reasonable and do not conflict with another provision of the contract.

The Union argues that a past practice has been established, under which an employe will not be disciplined for using sick leave when the employe or a dependent is sick if certification of the sickness is provided, and bases its argument on the fact that the Employer has never disciplined an employe when such certification was provided, even though sick leave pay has been denied. Such an argument has no merit, since it ignores the specific contractual language in Section C., Article 13 which provides for discipline in certain situations and further it assumes that because the Employer has never disciplined under said language it somehow has waived or lost the ability to ever discipline in those situations. The fact that the Employer has not found it necessary in the past to discipline under said contractual provision certainly fails to create a past practice preventing such disciplinary action in the future.

The attendance policy is basically a no-fault plan, under which an employe can be disciplined for misuse of sick leave and/or excessive absenteeism. Certain absences, e.g., paid vacation and holidays, are not considered in calculating absenteeism. Absences which are subject to exemption under the Wisconsin Family & Medical Leave Act or which are due to disabling medical problems, hospitalization, childbirth or accidents may be considered exceptions to excessive use of sick leave. The policy contains a progressive discipline structure and allows an employe to interrupt the discipline procedure by working for twelve months without any additional disciplinary action. The numerical standards do not seem too harsh. Therefore, the attendance policy, on its face, is found to be reasonable. While the undersigned might use a different word than "required," such as "expected," in Section 1.C. of the policy, the real test of the reasonableness of the language will be in its application and the Employer's practice in dealing with deviations from the requirement.

The undersigned is not persuaded that the Employer has altered the contract by shifting to the employe the burden of justifying an absence due to illness. Rather, it appears that the Employer has provided more definitive guidelines for the employes as to what it will consider to be excessive absenteeism instead of developing those guidelines on an ad hoc basis by its handling of individual cases.

The undersigned does agree with the Union's assertion that Section 4.C. of the policy conflicts with Article 13, Section C. of the contract. Section C. of Article 13 sets forth the circumstances under which the Employer can require a physician's slip; (1) an absence for 3 or more consecutive days due to illness, or, (2) after 5 occurrences in a calendar year. Section 4.C. of the policy does not contain those limits and, consequently, is invalid as written. Such a conclusion does not prohibit the Employer from disciplining an employe for the misuse, fraudulent use, or excessive use of sick leave. Neither is an employe, when either disciplined or informed that discipline is forthcoming, prevented from obtaining a physician's slip, at the employe's expense or cost, in an effort to persuade the Employer that the discipline is not justified. Since the Employer is not requesting the physician's slip in such a situation, the employe, rather than the Employer, has to bear the cost of the slip.

The undersigned does not give much weight to the Union's arguments concerning the total sick leave usage over the period of 1987-1992. While there have been some fluctuation in the hours of sick leave used on an annual

basis, it is clear that the Employer has a concern about the levels of sick leave hours which employes have been using. The process for replacing employes who call in sick is cumbersome and time-consuming. also, the replacement employe frequently is in an overtime status. Thus, the history of sick leave usage supports the Employer's goal of seeking to reduce absenteeism. Since the disputed policy, with the exception of Section 4.C., has been found to be reasonable on its face, the Employer has the right to implement the disputed policy in an attempt to reduce what it believes to be an excessive use of sick leave.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That, except for Section 4.C., the Employer's sick leave policy dated October 18, 1991, does not violate the collective bargaining agreement; and, that the Employer can implement the sick leave policy dated October 18, 1991, except for Section 4.C., which either shall be deleted or shall be rewritten to conform to Article 13, Section C. of the contract.

Dated at Madison, Wisconsin this 30th day of October, 1992.

By _____
Douglas V. Knudson, Arbitrator