BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF OCONOMOWOC	Case 60 No. 49415 MA-7939
and	
OCONOMOWOC CITY EMPLOYEES UNION, LOCAL 1747, AFSCME, AFL-CIO	

Appearances:
Mr. Ronald S. Stadler, Schober & Radtke, S.C., Attorneys at Law, 15525 West National Avenue, PO Box 51065, New Berlin, WI 53151-0065, appearing on behalf of the City.
Mr. Laurence S. Rodenstein, Staff Representative, AFSCME Council 40, 583 D'Onof

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and decide a dispute concerning the above-noted grievance under the grievance arbitration procedures contained in the parties' 1992-93 Agreement (herein Agreement).

The parties waived hearing and submitted their evidence by means of a stipulation received by the Arbitrator on September 24, 1993. By mutual agreement, initial briefs were exchanged through the Arbitrator. Only the City submitted a reply brief. Briefing was completed on November 2, 1994, marking the close of the record.

ISSUES

Based on the parties' Stipulation and briefs, the Arbitrator finds that the issues for determination in this case can be stated as follows:

> 1. Did the City violate Agreement Sec. 12.03 when it prohibited sick leave use for routine medical and dental appointments?
>
> 2. If so, what shall the remedy be?

FACTUAL BACKGROUND

The parties' Stipulation summarizes the facts of this case, in pertinent part, as follows:

> 4. In March of 1993 the City Administrator/Treasurer, Richard Mercier, became aware that Local 1747 bargaining unit members were utilizing sick leave for routine medical and dental appointments, contrary to his understanding of the parties' collective bargaining agreement.
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> 5. For the last several years bargaining unit members have been permitted by their department head to utilize sick leave for routine medical and dental appointments.

6. On April 21, 1993 the City issued a memorandum to all union employees in regard to the use of sick leave. . . . That memo specifically advised all union employees that pursuant to the collective bargaining agreement sick leave was to be used when an employee is too ill to report for work, and that sick leave was not to be used for routine medical and dental appointments.

7. On April 23, 1993 the Union filed a grievance in regard to the April 21 memorandum, stating that past practice permitted the employees to use sick leave for routine medical and dental appointments . . . .

8. On May 5, 1993 the Union and the City met to discuss the grievance.

9. On May 11 1993 George Langohr provided a written response to the Union's grievance, stating in part:

> It is management's interpretation of the clear language of the contract that sick leave can only be used when you are too sick to report for work because of an illness or injury. If you must visit a doctor because of an illness or injury, you may use sick leave. Sick leave is not available to use for routine appointments with your doctor or dentist if it does not involve an illness or injury that prevents you from working. . . .

ARTICLE XII - SICK LEAVE

. . .

12.03 - Use of Sick Leave. An employee may use sick leave for periods of absence due to illness or injury. Time off due to compensable injury (worker's compensation) shall not be charged to sick leave until benefits provided for in Article XIII are exhausted. Repeated abuse of sick leave benefits may result in disciplinary action. If a Water Utility employee is receiving worker's compensation or benefits under any disability plan to which the City makes contributions, premium payments or self-funds on behalf of employees, such employees may receive sick leave benefits under this section only as a supplement up to, but not in excess of, the employee's normal gross pay.

. . .

ARTICLE XXII - GRIEVANCE PROCEDURE

. . .

22.02 - Arbitration . . . In rendering his decision, the Arbitrator shall have no authority to add to, subtract from, or modify the provisions of this

Agreement.

POSITION OF THE UNION

The Agreement Sec. 12.03 language, "An employe may use sick leave for periods of absence due to illness or injury," provides a general statement of when sick leave may be used. It does not specify precisely when sick leave can or cannot be used. The limits of that benefit are therefore governed by mutually-recognized past practices of the parties regarding its implementation.

For the last several years, the City's Department Head and the Union have consistently interpreted Sec. 12.03 to mean that routine medical and dental appointments are covered under Sec. 12.03. The City has thereby knowingly permitted employes to leave work for various periods of time upon the employe's request, and to utilize sick leave so that their normal compensation would not be affected. The fact that the City's Administrator claims ignorance of this longstanding practice is immaterial because the City is bound to maintain the longstanding practice followed by its agent, the Department Head. By unilaterally restricting the general language of Sec. 12.03, the City Administrator, in his April 21, 1993 memorandum, has violated the mutually accepted meaning given this provision by the parties. There is no record evidence of abuse or of legitimate business necessity that could obviate the past practice. In addition, the City's attempt to permit sick leave use for medical and dental appointments only when the employe is too sick to report to work is ambiguous, unworkable and unenforceable. Unilateral action and grievance arbitration are not the correct means for the City to attempt to change the parties' mutually recognized practice.

The Arbitrator should therefore conclude that the City's new policy of April 21, 1993 is a unilateral change in the terms of the Agreement, and the Arbitrator should order the City to cease and desist in its policy and restore the past practice of permitting bargaining unit members to utilize sick leave for routine medical and dental appointments.

POSITION OF THE EMPLOYER

The meaning of Agreement Sec. 12.03 is clear and unambiguous. It provides sick leave only for absences due to illness or injury. Common sense and the dictionary definitions of those terms limit them, respectively, to being "not healthy . . . having a disease; sick" and to being "hurt" or physically damaged. There are no other meanings that one can realistically claim to be encompassed within those two terms. By expressing only those two situations in which an employe can utilize sick leave, the parties manifested their intent that there are no other situations for which an employe can use sick leave. The Union cannot be permitted to obtain through this grievance arbitration a benefit that it has never obtained through the bargaining process.

There is therefore nothing ambiguous or vague or silent about the contractual standard that would warrant looking beyond the language of the Agreement to evidence concerning past practice. Under established arbitral principles and the limitations on the Arbitrator's authority in Agreement Sec. 22.02, clear and unambiguous contract language controls as the exclusive indicator of the parties mutual intentions notwithstanding any practice that may have arisen that is inconsistent with that clear language.

Once the City put the Union on notice that it would adhere to the language of the contract, the Union could not require the city to follow a practice inconsistent with the clear language of the contract. Accordingly, the grievance must be denied.

DISCUSSION

Given the parties' undisputed, longstanding and mutual practice, this case turns on whether the Sec. 12.03 phrase "periods of absence due to illness or injury" clearly and unequivocally excludes periods of absence for the purpose of routine medical and dental appointments. The City asserts that it does, and the Union asserts that it does not.

While the Employer's proposed interpretation in that regard is surely the more readily-derived meaning of the quoted phrase, it is not obvious beyond question that the Union's broader interpretation could not have been mutually intended. Absences due to medical and dental appointments to address existing illnesses and injuries fit reasonably comfortably under the term "absences due to illness or injury," even if the illness or injury is not such as would otherwise have prevented the employe from working. Routine medical or dental appointments (such as an annual medical check-up or a semi-annual dental prophylaxis) unrelated to a specific illness or injury are further removed from the "illness or injury" touchstone. Nonetheless, they too bear a meaningful relationship to "illness or injury" because the purpose of such appointments is the detection and/or prevention of illness or injury. For that reason, the Arbitrator finds the meaning of the quoted phrase to be ambiguous, making resort to past practice as a guide to the parties' mutual intentions both appropriate and within the scope of an arbitrator's authority as defined in Sec. 22.02.

Upon consideration of the undisputed past practice over several years, the Arbitrator further concludes that the practice manifested a mutual understanding between the City's Department Head and the bargaining unit employes and Union that the term "absences due to illness or injury" in Agreement Sec. 12.03 includes absences for the purpose of routine medical and dental appointments and is not limited to situations in which the employe is too sick to report for work because of an illness or injury.

Therefore, if the City wants a more restrictive standard to become applicable, it will need to pursue such a change through collective bargaining. Until the language is changed to that effect, the City is bound to apply Sec. 12.03 consistent with its previously-existing practice.

The Arbitrator has therefore directed the City to permit employes to use sick leave for routine medical and dental appointments even if the employe is not too sick to report to work because of an illness or injury, until such time as a material change in the applicable sick leave provision in the parties' agreement takes effect.

DECISION AND AWARD

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

1. The City violated Agreement Sec. 12.03, properly interpreted in accordance with the parties' established past practice, when it prohibited sick leave use for routine medical and dental appointments.

2. Unless and until Agreement Sec. 12.03 is materially changed, the City shall:

a. immediately reinstate the previously-existing practice of permitting employes to use sick leave for routine medical and dental appointments even if the employe is not too sick to report to work because of an illness or injury; and

b. immediately notify all bargaining unit employes of that change from the policy set forth in the City's April 21, 1993 Sick Leave Policies memorandum.

Dated at Shorewood, Wisconsin
this 2nd day of February, 1994.

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