BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF GREEN BAY CITY HALL, TRANSIT AND PARKING UTILITY EMPLOYEES UNION LOCAL 1672-A, AFSCME, AFL-CIO	Case 249 No. 51217 MA-8532
and	
CITY OF GREEN BAY	

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO 936 Pilgrim Way, #6, Green Bay, Wisconsin 54304, appearing on behalf of City of Green Bay City Hall, Transit and Parking Utility Employees Union, Local 1672-A, AFSCME, AFL-CIO.

Ms. Judith Schmidt-Lehman, Assistant City Attorney, Room 300, City Hall, 100 North Jefferson Street, Green Bay, Wisconsin 54301, appearing on behalf of the City of Green Bay.

ARBITRATION AWARD

City of Green Bay City Hall, Transit and Parking Utility Employees Union, Local 1672-A, AFSCME, AFL-CIO, (hereinafter Union) and City of Green Bay (hereinafter City or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an impartial arbitrator appointed by the Wisconsin Employment Relations Commission. On June 29, 1994, the Union filed a request to initiate grievance arbitration of this matter with the Commission. The Employer concurred in said request. The Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on September 13, 1994, in Green Bay, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearing was transcribed, a copy of which was received on September 20, 1994. The parties filed briefs, the last of which was received on November 7, 1994, and they waived the filing of reply briefs on November 15, 1994. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF THE FACTS

The pertinent facts are not in dispute. Florence "Fluffy" Aerts was employed by the City of Green Bay in the Department of Public Works, Engineering Division, as a Clerk Typist III at all times relevant to this matter. Mark Aerts was employed by the City of Green Bay in the

Department of Public Works, Engineering Division, as an Engineering Aide III at all times relevant to this matter.

The Grievants are the parents of Tyler who, on June 13, 1994, was approximately ten-months old. On that date, Mark reported to work at 7 a.m. At approximately 8 a.m. on that date, Fluffy telephoned her supervisor and requested paid leave to care for Tyler who was ill. On that date, the secretarial staff was short staffed and faced on inordinate amount of work. The City believed it was critical for Fluffy to be at work on that date. Sufficient staff was available to substitute for Mark in his duties on that date. The Employer therefore sent Mark home and directed Fluffy to report to work.

Both Fluffy and Mark grieved these actions by the Employer. Said grievances were processed through the parties' grievance procedure without resolution. Since these grievances are flip sides of the same matter, the parties agreed to consolidate them into one grievance for hearing. That grievance is properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

ARTICLE 14

SICK LEAVE

(A) All employees shall be granted sick or emergency leave with pay of one (1) full working day for each month of service. Sick or emergency leave shall accumulate, but not exceed one hundred and thirty-five (135) days. An employee may use sick leave or emergency leave for absences necessitated by injury or illness of himself or a member of his/her immediate family.

In order to be granted sick leave or emergency leave an employe must:

(1) Report prior to the start of the work day to the department head or supervisor the reason for the absence.

(2) Keep the department head informed of his/her condition and the anticipated date of return to work.

(3) Be legitimately ill or attending a member of the immediate family who is ill and unable to care for themselves or make other arrangements for care.

(a) For purposes of this article, "immediate family" shall mean spouse, parent,

stepparent, child, stepchild, foster child, guardian or sibling.

. . .

ARTICLE 25

MANAGEMENT RIGHTS

(A) The union recognizes the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City, including the power of establishing policy to hire all employees, to determine qualifications and conditions of continued employment, to dismiss, demote and discipline for just cause, and to determine reasonable schedules of work and to establish methods and processes by which such work is performed. The City further has the right to establish reasonable work rules, to delete, positions from the Table of Organization due to lack of work, lack of funds, or any other legitimate reasons, to determine the kind and amounts of services to be performed as pertains to City government and the number and kinds of classifications to perform such services, to change existing methods or facilities, and to determine the methods, means and personal by which the City operations are to be conducted. The City may also contract out for goods and services as long as the contracting does not eliminate hours from existing employees.

ISSUE

The parties stipulated to framing the issue as follows:

Did the Employer violate the collective bargaining agreement by ordering Fluffy Aerts, who had called in because of a sick child, to report to work, and by sending her husband, Mark, home to watch the child?

If so, what is the appropriate remedy?

POSITIONS OF THE PARTIES

Union

The Union argues that Article 14 (A) clearly establishes the right of the employees to utilize sick leave for illnesses to either themselves or members of their families; that there are no additional qualifications or restrictions on sick leave usage to take care of a family member than there are on usage of sick leave for the employees themselves; that the crux of this case is whether the contract permits the City to determine which parent or other individual will take care of an ill child when an employe calls in to use family leave; that the contract language pertaining to family illness can not in any way be construed to provide management such a broad discretionary right since it simply lists conditions under which an employe may use sick leave for such a purpose; that the determination of whether other arrangements can be made rests entirely with the employe under this contract language; that the remaining language does not provide any mechanism for the City to make such a determination, nor does the language give the City the right to tell these employes how to cover the absence; and that the contract language simply does not back up the City's actions in this case.

The Union also argues that there is a big difference between how an employe receives direction once the employe has reported to work and how the employer treats an employe who is not at work; that the former surely falls under the scope of management rights while the latter includes not being scheduled or utilizing sick leave for him or herself or another member of the family; that what the City did was impose its own interpretation of the contract language and, in the process, created an entirely new meaning for the language; that the language does not give the City the right to impose the solution it sought in this case, regardless of whether a viable alternative is available or not; that the City may inquire as to this issue and ultimately deny the use of sick leave if it does not feel the reason given is valid, but nowhere is there established a right to determine which parent will take care of a child and which parent will be expected to work; and that what the City did was beyond the scope of the contract and any reasonable interpretation of it.

The Union asserts that there is no monetary remedy to these grievances because the parties stipulated that both grievants would receive pay or sick leave and that Mark would be paid for overtime he was scheduled to work that day. But the Union also asserts that there is a remaining issue: what is the remedy in similar circumstances in the future. The thrust of the remedies proposed in both grievances is that the arbitrator should issue a decision in the form of a "cease and desist" order. The Union stated it understood that such an order, if given, would be of a limited value since there is no direct means for it to be enforced.

Employer

The City argues that these particular circumstances are unusual and unlikely to arise

between the parties again; that, nonetheless, they did arise and the Employer made an employment decision concerning which of two married individuals in one department was more vital to that department's operation on that date; that while the Union wishes to characterize this occurrence as employer encroachment upon family rights and family privacy, that is clearly not the case; that the City makes no claim that it can determine who or what entity will be responsible for child care in the case of an ill child; and that it did not do so in this case.

The City asserts that no one disputes that Tyler was ill; that both Mark and Fluffy are capable of caring for Tyler, both when he is well and when he is ill; that it is undisputed that the secretarial division on that day was understaffed and deluged with work; that Fluffy's presence on that day was critical; and that while Mark testified that there were no alternatives other than Fluffy caring for the child, the City provided the availability of Mark on that date.

The City also argues that, because it had in its employ both capable care givers of a young child, it made the determination which of the two care givers was more essential at work and which could be freed up to perform the care-taking responsibilities; and that by permitting Mark to go home, the City provided to both Grievants the availability of the "other arrangements for care" provided for in the contract relating to sick leave usage.

In addition, the City argues that in the administration of the 1991-93 contracts, questions arose as to the new sick leave language and the Employer's enforcement and interpretation thereof; that a joint memo from the Employer and the Union attempted to define and give parameters to that new sick leave language; that neither party could testify that the situation giving rise to this grievance would occur; that this does not mean that the Employer could not act the way it did in response to this set of circumstances; that what was contemplated by the parties and made known to the affected employes was that the City was going to take a more aggressive approach to sick leave use, especially in light of caring for other ill family members; that while Article 25 - Management Rights does not mean that the City has the right to determine who will take care of a sick child, it does retain for the City the right to determine which of its two employes are the more critical employe on any given day; that in this case that employe happened to be Fluffy; that the job tasks and responsibilities performed by Mark were capable of being performed by someone else available on that day; that Fluffy's job tasks were not; and that, as such, the City had the right to make available as an alternative arrangement for child care the other parent of the sick child, namely Mark.

The City asserted that since it is apparent that it did not violate the agreement, the remedy at issue need not be discussed.

DISCUSSION

To begin, let me state what this case is not. It is not about the credibility of either Grievant. The City does not dispute that the child in this matter was ill and that one of the parents

needed to be home to care for him. It is not about the improper use of sick leave. The City does not dispute that Fluffy used the proper procedure to take sick leave to care for her child and, under normal circumstances, would have been allowed to take it. This is not a case about sick leave abuse. The City does not assert that either of these employes have misused sick leave. It is not about verification of sick usage. The City did not seek nor does it suggest that it needed verification that the sick leave was used as requested. This is not a case where the City did not have a legitimate concern as to which employe would be absent on sick leave. The Union does not dispute that the City had a urgent need for Fluffy to report to work the day in question. It is not about loss of overtime. The City has paid Mark the overtime he would have earned that day.

This case is about whether the contract permits the City to determine which of two employe parents will take care of an ill child when both parents work for the City and an employe calls in to use family leave. This is a case about whether the City can direct one parent employe to report to work and the other employe parent to go home to care for an ill child. This case is about whether legitimate staffing needs of the employer allows the City to direct a urgently needed employe to work while permitting a less needed employe to take sick leave to care for an ill child.

The Grievants complied with the contractual requirements to take sick leave or emergency leave to attend to their child who was ill. Fluffy reported prior to the start of the work day to her supervisor that she would be absent in order to care for Tyler who was sick. Both Fluffy and Mark kept the department head informed as to their need to be on leave and the anticipated date of return to work. No doubt exists that Tyler was ill and unable to care for himself or to make other arrangements for his own care.

The Employer points to the language "or make other arrangements for care" in Article 14 to support its actions in directing Fluffy to come to work and Mark to take sick leave. The City points to a joint memo issued by the Personnel Director and Union President as evidence in support of its interpretation of that language. Said memo states in part that employes:

> must make reasonable efforts to provide other arrangements for care, such as a baby sitter or other family member. In the last situation the City expects that responsibility for care will be shared within the family unit. In other words, City employees should not be solely responsible for such care simply because other working members of the family do not receive paid sick leave for such situations.

First, grammatically, the language "or make other arrangements for care" in Article 14 refers to the ill family member, not the employe. But putting that aside, the memo itself does not rise to the level of a contractual agreement and I will not read it as having the force of the contract.

Second, this is not a situation where "other working members of the family do not receive paid sick leave for such situations." Regardless of whether Fluffy or Mark is the "other working (member) of the family," both do "receive sick pay for such situations."

Third, since it is the City which "expects that responsibility for care will be shared within the family unit," it is the City that is put to the proof that such responsibility was not being shared in this situation. Nothing in the record shows whether child care has or has not been shared within the family unit in this type of situation. Indeed, I do not know if Mark has taken off most of the time to care for Tyler when he has been ill, in which case having Fluffy provide the care would be sharing that responsibility.

Finally, and related to the previous point, nothing in the record shows that Fluffy and Mark did not "make reasonable efforts to provide other arrangements for care." Indeed, Fluffy may have been the "other family member" arranged to provide for care.

Obviously, this is a unique situation. Hopefully, the work load crunch which pressured the Employer to direct Fluffy to come to work will not occur again on a day in which Fluffy calls in to take sick leave to care for her child. The problem, of course, is that the situation could be reversed next time: Mark could call in to take care of the ill child and the Employer could determine that he should work and Fluffy should take sick leave.

Indeed, Fluffy and Mark will never know which one of them will be allowed to stay home with Tyler if the Employer is allowed to make that determination. The decision would not be their's; in fact, it would become the Employer's burden to "make other arrangements for care." Taken to its worse extreme, the Employer could find that it needed both Fluffy and Mark at work one day, but not Employe X whom it could send home as babysitter.

Therefore, I agree with the Union that the City may inquire as to this issue and ultimately deny the use of sick leave if it does not feel the reason given is valid, but nowhere is there established a right to determine which parent will take care of a child and which parent will be expected to work.

The City also argues Article 25 Management Right allowed it to take this action because it retained the right ". . . establish reasonable work rules, . . . and to determine the methods, means and personnel by which the City operations are to be conducted." On brief, the City asserts that this does not mean that the City has the right to determine who will take care of a sick child. I agree.

The City argues, however, that it does retain the right for the City to determine which of its two employes are the most critical employe on any given day. First, no work rule is involved in this case. Second, this language does not negate the sick leave language agreed to by the parties. While it can determine that Fluffy will do certain work on any given day, it cannot

determine that Mark will take paid leave and care for the child.

In terms of remedy, no monetary award is sought and none is given. In the future, if the City denies one parent the use of paid leave, he or she can grieve that decision, as he or she can regardless of where his or her spouse worked. If the denial comes immediately, perhaps the other spouse will apply for leave, in which case the remedy for the grievance would be for the spouse to be reimbursed for those leave days. If the denial comes after the fact by the Employer's refusal to pay for that day, the grievant could seek the lost wages.

The Union does seek a cease and desist order. Such order is not part of this award. I have found a violation of the contract. The parties are encouraged to follow the agreement in the future, but the responsibility for enforcing the agreement remains with the Union.

For these reasons, based upon the foregoing facts and discussion, the Arbitrator issues the following

AWARD

That the Employer did violate the collective bargaining agreement by ordering Fluffy Aerts, who had called in because of a sick child, to report to work, and by sending her husband, Mark, home to watch the child.

Dated at Madison, Wisconsin this 8th day of February, 1995.

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