BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DANE COUNTY, WISCONSIN, MUNICIPAL EMPLOYEES, LOCAL 60, AFSCME, AFL-CIO

and

CITY OF MIDDLETON

Case 34
No. 53646
MA-9411

Appearances:

Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker, appearing on behalf of the City.

ARBITRATION AWARD

Dane County, Wisconsin, Municipal Employees, Local 60, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Middleton, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Middleton, Wisconsin, on February 26, 1996. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on April 3, 1996.

BACKGROUND:

The basic facts underlying this case are not in dispute. The grievant has been employed by the City as a full-time dispatcher in the Police Department for almost 15 years. For approximately the last five years, the grievant has worked the third shift from 10:30 p.m. to 7:00 a.m. There is only one dispatcher for each shift. On Sunday, October 8, 1995, the grievant chipped a tooth but suffered no pain at that time. On Monday, October 9, 1995, the grievant called her dentist who offered her an appointment on Wednesday, October 11, 1995, at 12:30 p.m. or Friday, October 13, 1995, at 10:30 a.m. The grievant selected the Friday appointment. On October 9, 1995, the grievant requested 3 1/2 hours of sick leave from 3:30 a.m. until 7:00 a.m. on Friday,

October 13, 1995. The request was denied on the basis that the dental appointment was not during her working hours. The grievant cancelled her October 13, 1995 appointment and rescheduled it for a day that the grievant had scheduled off. The grievant filed a grievance over the denial of her sick leave which was processed through the grievance procedure to the instant arbitration.

ISSUE:

The parties stipulated to the following:

> Did the City violate the collective bargaining agreement when it did not grant Barbara Van de Loo the use of sick leave for a portion of her work shift which ended October 13, 1995?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

> **ARTICLE XIII - SICK LEAVE WITH PAY - LEAVE OF ABSENCE WITHOUT PAY**
>
> 13.01 Sick leave shall include absence from duty because of illness, including but not limited to pregnancy and for visits to the doctor, dentist, or other recognized health care/examinations; bodily injury, when not a Workers' Compensation case; exposure to a contagious disease; and serious illness or death in the immediate family of the employee.

UNION'S POSITION:

The Union contends that this is a simple matter and the City violated Article XIII when it denied the grievant's use of sick leave for a portion of her work shift which ended on October 13, 1995. It argues that the City's claim that sick leave associated with health care examinations applies only to appointments occurring during the work shift is contrary to the contract language and the clear and unambiguous practice of the parties. It submits that bargaining unit employes with two exceptions work a Monday through Friday day shift schedule and schedule health care appointments during the work day and use sick leave for such time. It notes that the grievant works the night shift when health care providers are usually not available. It alleges that the City has in the past allowed her to use sick leave so the grievant could sleep prior to her, or her family member's, doctors' appointments. It notes that on May 25 and 31, 1995, the City granted her four (4) hours sick leave on each day so her son could be examined by a doctor. In 1992, the

Union notes the grievant was given eight (8) hours sick leave so she could accompany her husband to an examination during the day her shift ended. It maintains that the grievant has not been denied the use of sick leave prior to October, 1995.

The Union points out that the parties' agreement provides that sick leave can be used for absences associated with health care examinations. It submits that the grievant was forced by her schedule to see the dentist during hours when she was not working and has been allowed to use sick leave in the past so she could sleep prior to such appointments. It notes that police officers working the night shift have had such appointments approved, so the grievant's case is not unique. It urges similar application of benefits to the grievant. It believes the City violated the contract when it denied the grievant the use of sick leave on October 13, 1995, and requests an order that the City cease and desist from such violations in the future as well as any other remedy deemed appropriate.

CITY'S POSITION:

The City contends that Article XIII, Sec. 13.01 only requires it to grant sick leave when an employe is absent from duty because of an illness or for visits to the doctor, dentist or other recognized health care/examinations. It submits that the grievant's request in this case was not for either purpose. It notes that her appointment was not until 10:00 or 10:30 in the morning and she did not need to be absent from duty for the appointment. The City states that it can appreciate the grievant's desire to be well rested for her appointment but the contract does not allow the use of sick leave to obtain this rest. It notes that the grievant could have had an appointment on Wednesday at 12:30 p.m. so her wanting 3 1/2 hours on Friday for an earlier appointment makes no sense as she could have gotten the same amount of sleep either day without taking any sick leave. It submits that the grievant scheduled her appointments when things were most convenient for her.

The city contends that bargaining history supports its interpretation of the sick leave provision. It points out that in the initial negotiations for the 1977-1978 contract, the Union proposed that sick leave could be used for any bona fide illness or injury or in case the employe must be absent. It submits that this provision was rejected and language requiring sick leave be limited to an absence from duty was included and remains in the contract at present.

The City claims that past practice supports its interpretation. It argues that the overwhelming evidence shows that when employes make a request to use sick leave for a doctor appointment, they do so only for the duration of the appointment, typically one to two hours. It takes the position that if the City allowed employes to take time off prior to or after doctors' appointments to rest, change clothes or for time not directly related to attending or traveling to and from the doctor, there would be few if any limits on sick leave. The City anticipates that the Union will claim that the City's sick leave interpretation works a hardship on third shift employes

because it is more difficult to make doctor or dental appointments but it urges that the Union can attempt to negotiate language to account for this. The City also states that the Union will point to three instances where the City's interpretation was not followed. It urges that the case of Officer Barry Reynolds is not the same because he had diagnostic tests from 6:00 or 7:00 in the morning until 4:00 or 5:00 in the afternoon and he is covered by a different contract which has different language covering his situation and the Chief of Police made a special exception which did not create a past practice. The City alleges that the grievant took sick leave to take her husband to the doctor to have tests performed and states that this situation was very similar to that of Officer Reynolds. The City argues that the two occasions when the grievant took sick leave for her son's doctor's appointments were approved by Sergeant Kromm who believed that the appointments were to have tubes surgically placed in the son's ears and then a follow up visit to that surgery. If the City had been aware of the true situation, it claims it would not have approved the sick leave. The City insists that the Union's effort to show a past practice of paying sick leave when a person was not required to be absent from duty is irrelevant because the Union must show a violation of an express provision and no contract clause was violated. It further claims that the improper use of sick leave does not create a binding past practice and an isolated instance is not sufficient to create a past practice. It argues that the alleged "past practice" is the result of the grievant's reaching, i.e. stretching the use of sick leave where it is not contractually required to be given and the City now has become aware of and contained that stretching. The City contends that the Union has the burden of proof that the contract allows employes to use sick leave to rest before medical appointments and has failed to meet its burden. It asks that the grievance be denied.

DISCUSSION:

Section 13.01 of the parties' agreement provides, in pertinent part, as follows:

> Sick leave shall include absence from duty because of illness, including but not limited to pregnancy and for visits to the doctor, dentist, or other recognized health care/examinations, . . .

Where the language of the contract is clear and unequivocal, the language must be given effect. The parties' agreement provides that the arbitrator cannot modify or change any of the terms of the agreement. A plain reading of this language is that sick leave may be used to cover an absence from duty for a visit to the dentist. To conclude that sick leave can be used for a visit to the doctor or dentist which does not include an absence from duty would lead to an absurd result. For example, an employe who visits his doctor on his day off, say Saturday morning, could not charge the time off on Friday morning or some other day. The visit must require an absence from duty, otherwise there would be no need for sick leave as sick leave essentially is pay for time when one should be working but can't due to illness or a doctor's visit, etc., under

Sec. 13.01. There may be cases where preliminary procedures before a doctor's appointment might justify the use of sick leave outside the actual visit such as taking medication, not taking certain medication, fasting and so on.

A review of the grievant's particular case demonstrates that she chipped a tooth and at first suffered no pain and later the tooth became sensitive to cold. She had a choice of appointments, neither of which required her absence from duty and selected a later date suggesting that this was not an emergency. The later date was postponed to even a later date confirming that this was no emergency. This is not a case where the tooth began throbbing during her shift such that she required sick leave. It is undisputed that the grievant wanted sick leave so she could get some sleep before the appointment. 1/ The plain language of the contract does not allow sick leave for this purpose. The grievant expressed a concern that it is unfair for third shift employes because doctors and dentists don't work the third shift so sick leave cannot be used by third shift employes for their appointments. 2/ It may not be fair but the parties can address this in negotiations as the undersigned must give effect to the language of the contract as written.

Where the language of the contract is plain and unambiguous, the arbitrator cannot resort to contract negotiations and/or past practice because these are unavailable to modify the clear meaning of the contract. Thus, the undersigned cannot consider the evidence of negotiating history and/or past practice. Under the plain language of the agreement, the grievant's dentist visit did not require an absence from duty and she was not entitled to sick leave under Sec. 13.01.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The City did not violate the collective bargaining agreement when it did not grant Barbara Van de Loo the use of sick leave for a portion of her work shift which ended October 13, 1995, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 3rd day of June, 1996.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

1/ Exs. 4, 5 and 7.

2/ Id.

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