BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 95, AFL-CIO and PORTAGE COUNTY	Case 132 No. 54039 MA-9530

Appearances:

Mr. Gary Nuber, Business Agent, 1750 West Grand Avenue, Wisconsin Rapids, Wisconsin 54495, for Office and Professional Employees International Union, Local 95, AFL-CIO, referred to below as the Union.

Mr. Gerald E. Lang, Personnel Director, 1516 Church Street, Stevens Point, Wisconsin 54481, for Portage County, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Richard S. Williams, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on June 25, 1996, in Stevens Point, Wisconsin. The hearing was not transcribed, and the parties filed briefs by July 29, 1996.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the County violate the Labor Agreement when it denied the Grievant's request for paid time off to attend training on a Caribbean Cruise?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - PURPOSE

It is the purpose of this Agreement to promote and insure good and harmonious relations between the parties. The parties intend this Agreement to establish a basic understanding relative to wages, hours and conditions of employment as agreed to between the County and the Union.

ARTICLE 3 - MANAGEMENT RIGHTS

The Employer possesses the sole right to operate the County and all management rights repose in it except as expressly limited by this Agreement or memoranda of understanding. These rights include, but are not limited to, the following:

A. To direct all operations of the County;

. . .

F. To maintain efficiency of County operations;

. . .

ARTICLE 4 - NONDISCRIMINATION

Section 1: The Employer agrees that they will not discriminate against an employee because of their activity as a member of the Union.

Section 2: Neither the Employer nor the Union in carrying out their obligations under this contract shall discriminate in matters of hiring, training, promotions, transfer, layoff, discharge or otherwise because of race, creed, color, national origin, marital status, sex, disability, age, religion or political affiliations or activities.

. . .

ARTICLE 10 - GRIEVANCE AND ARBITRATION PROCEDURE

Section 1 - Definition of Grievance: A grievance shall mean a dispute concerning the interpretation or application of this Contract.

Section 2 - Subject Matter: Only one subject shall be covered in any one grievance. A grievance shall contain the name and position of the grievant(s), a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated, the signature of the grievant(s) or a Union representative, and the date. The Contract clause cited and the remedy requested in the written grievance are not to be considered a formal framing of the issue or remedy for purposes of arbitration so long as Section 7(B) of this Article is followed.

. . .

Section 6 - Arbitration:

. . .

D. 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 the interpretation of the contract. The arbitrator shall not modify, add to, or delete from the express terms of the Agreement.

. . .

Section 7 - General Provision:

. . .

B. Special Notice for New Facts: If the grievance has been processed beyond Step 2, and the grievant wishes to add new facts or information into the file, he/she shall immediately transmit notice to the Department Head, and shall indicate in said notice the nature and details of the new facts.

When such notice has been transmitted by the grievant, the grievance cannot progress through the arbitration procedures until the Department Head has had an opportunity to respond.

Within one day of receipt of such special notice, the

Department Head shall exercise one of the following options:

1) He/she may reopen the proceedings at Step 2 for the purpose of reconsidering the Step 2 decision;
2) He/she may acknowledge receipt of the facts and stipulate that the grievance proceed.

. . .

ARTICLE 27 - ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendment or agreements supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that, during the negotiations which resulted in the Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the areas of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. All existing ordinances and resolutions of the County Board affecting wages, hours and conditions of employment not inconsistent with this Agreement are incorporated herein by reference as though fully set forth. To the extent that the provisions of this Agreement are in conflict with the existing ordinances, resolutions, or rules, such ordinances, resolutions, or rules shall be modified to reflect the Agreements herein contained.

BACKGROUND

The Circumstances Surrounding the Grievance

The Grievant, currently classified as a full-time Mental Health Clinician 2, has been employed by the County since September of 1996. In addition to his clinical practice with the County, the Grievant maintains a private practice. To maintain the State of Wisconsin license necessary for his clinical practice, the Grievant must complete forty hours of continuing education every two years. On December 29, 1995, the Grievant completed a "TRAINING/ CONFERENCE/CONVENTION REQUEST FORM" seeking payment for five days of work time to be devoted to a Conference to be conducted from February 3 through February 10, 1996. The conference was entitled "Brief Therapy and Managed Care, A Solution Focused Approach."

The Grievant did not seek reimbursement for any expense other than "lost-time wages."

The conference was an "8 Day/7 Night Caribbean cruise with calls in San Juan, St. Croix, St. Kitts, Guadeloupe, St. Maarten, St. John, & St. Thomas." The Grievant submitted his request to his immediate supervisor, Rodger Ricketts. Ricketts approved the request and referred it to his supervisor, William McCulley. McCulley also approved the request and referred it to the Director of the Health and Human Services Department, Judy Bablitch.

In a memo to the Grievant, McCulley and Ricketts, Bablitch stated her denial thus:

> I'm so sorry - I cannot approve this request. The County Board could never understand it, if it became known -
>
> Perhaps in LA - not here -

The Grievant responded by filing a grievance with Ricketts.

The grievance, dated January 10, 1996, states:

> My request to attend this conference, at my expense, was denied by Judy Bablitch after having been approved by my immediate supervisor and coordinator. Denial was received by me on 1/9/96.
>
> This conference on Brief Therapy and Managed Care a Solution focus Approach is scheduled for February 3 - February 10, 1996 and is co-sponsored by the Family Therapy Institute of St. Louis and the Missouri Institute of Mental Health through the University of Missouri at Columbia. Total cost of conference is approximately $1,269. I am only requesting time off to attend this conference. All financial costs for this conference will be paid for at my own expense.
>
> This conference provides approximately 16 continuing education hours. Forty continuing education hours are required over a two year period for maintaining my license as a psychologist.
>
> There does exist recent precedents for approval of such a conference. A female clinic staff member was approved to attend a week long conference within the past year.
>
> I request to be treated in similar fashion to other employees who

have requested and been approved for similar training.

Ricketts' response to the grievance notes that he would support the granting of "four days of staff training/conference leave," and details his basis for the approval thus:

> My concern is twofold. (1) (The Grievant) be supported by the agency in his earning required CEU's for his psychologist license. (2) He recieve an equitable, standardized distribution of paid time off for such activities.

Bablitch repeated her denial of the request in a memo dated January 17, 1996, which states:

> I am denying the recent grievance that Richard Williams be allowed to attend the Brief Therapy and Managed Care -- A Solution Focused Approach Conference which is to be held on a Caribbean cruise from February 3 to February 10 on time paid by this agency.
>
> The topic matter is very appropriate. The amount of credits that he could earn toward maintaining his license would be helpful to him. He would be paying all conference costs.
>
> The reason I am rejecting this request is the location of the conference. I do not believe that the cruise is the only location where this education can be obtained. Therefore, I do not believe the tax payers of Portage County would approve of my allowing staff to be paid for working while on a cruise. If this were to be known by the community, I believe it would reflect negatively on the image of Portage County Health and Human Services Department.
>
> In addition, please note the agency policy is that all staff development requests must be authorized by me.

The Grievant attended the conference at his own cost, and used vacation time to cover his absence from work. Bablitch did not offer, nor did the Grievant request, approval for similar training at a different locale.

The Approval Process and Past Approvals

Bablitch approves all employe reimbursement requests for training conferences. This covers all departmental employes, whether represented by a union or not. The County Board maintains Fiscal Policy 12-89, which governs the approval of out-of-state training. Policy 12-89 states:

> STATEMENT OF PURPOSE: The objective of this policy to regulate employees attending out of state conferences/conventions and to develop an employee cost-sharing requirement.
>
> STATEMENT OF POLICY & PROCEDURES: A benefit to the County must be clearly shown in order to have an employee attend a conference/convention out of state. Employees shall obtain governing committee approval before submitting a request for funding an out of state conference/convention to the Finance Committee. Upon approval from the Finance Committee, the County shall fully reimburse the following documented expenses (include receipts):
>
> Registration - 100%
> Reasonable meals - 100%
> Reasonable lodging - 100%
> Transportation costs within a 250-mile radius of Stevens Point - this specifically includes Chicago and Minneapolis - 100%
>
> The employee will cost share the following documented expense:
>
> Transportation costs beyond a 250-mile radius of Stevens Point - 50%
>
> Reimbursement of travel costs will be established at the LESSER of the following:
>
> Standard mileage rate and related inroute lodging and meal costs
> -OR-
> Air transportation.
>
> . . .
>
> Individual employees will be eligible for reimbursement of out of state travel (beyond the 250 miles) only once during any two year

> budget period.
>
> Employees will use vacation time if additional days are taken beyond the specific meeting dates and travel time.
>
> Out of state expenses beyond the 250 mile radius of Stevens Point are NOT to be included in the department's annual budget request. A separate Out Of State Conference/Convention Budget will be established for funding these expenses. Self-sustaining departments, however will be expected to finance the county's share from their own department's funds. Governing committees should budget and approve all in state conferences/conventions.
>
> DEFINITIONS: "Out of state" refers to travel outside Wisconsin BOUNDARIES and beyond a 250 mile radius of Stevens Point. Chicago and Minneapolis are specifically included as being within the 250 mile radius and accordingly employees are not subject to the cost-sharing requirement . . .

Attached to this policy is the blank request form used by the Grievant for his December 29, 1995 request.

Bablitch periodically updates the procedures governing the approval of staff development costs in memos distributed to departmental personnel. Since at least 1982, those memos have noted that reimbursement requests are to be submitted through the departmental "chain of command" for approval. The department processes perhaps two to three hundred reimbursement requests per year. The vast majority of these requests are not for "out-state" travel within the meaning of Policy 12-89. Bablitch has, however, approved reimbursement for conferences in Omaha, Nebraska; Huntsville, Alabama; Holland, Michigan; Washington, D.C.; Cedar Rapids, Iowa; Cline, Iowa; New Orleans, Louisiana; New York, New York; Orlando, Florida; San Francisco, California; Portland, Oregon; Columbus, Ohio; Lincoln, Nebraska; Cleveland, Ohio; and in an unspecified city in Colorado. Management and other non-unit employes have participated in such out-state conferences. Unit members have also participated in out-state conferences, including Omaha, Huntsville, New Orleans, New York, San Francisco, Portland, Columbus and Lincoln.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union states the issues for decision thus:

> Did the Employer violate an existing past practice by refusing to provide lost-time wages for training in the present case? If so, what should the remedy be?

The Union argues initially that the parties share an understanding regarding the type of compensation sought in the grievance: "For at least the last seven years, and probably much longer, the Employer has financially supported and participated in the training of its professional employees." A review of the evidence establishes that County payment of "lost-time wages for attendance at conferences" is common; that the Grievant was unaware of any denials for such payment in his department; and that this was the Grievant's first request for such funds. Arbitral precedent, according to the Union, demonstrates that the evidence posed here is sufficient to establish a binding past practice, whether or not evidence regarding payment of lost-time wages is restricted to out-state conferences.

The Union notes that the practice posed establishes a valuable employe benefit, and that this type of practice, under arbitral precedent, cannot be unilaterally altered by the Employer. Beyond this, the Union contends that the benefit to the Employer of continuing education should not be overlooked. This mutual benefit to the parties establishes a binding condition of employment. As a binding condition of employment, the payment of lost-time wages cannot be altered without violating both the labor agreement and labor law: "(H)ence the Employer violates the Agreement, and the law, when it modifies said practice."

That the agreement does not expressly or specifically establish the benefit cannot detract from the merit of the grievance. Federal precedent and well-established arbitral precedent establish that a labor agreement is a living document which cannot be restricted narrowly to "the explicit words contained" in it. The provisions of Article 2 underscore this conclusion by noting the labor agreement establishes "a basic understanding" regarding working conditions:

> The inclusion of the word "basic" clearly indicates that both parties realized that the reality of their relationship could not be completely captured in the text of the Agreement.

Nor does Article 27 impact this conclusion. That provision, at most, only eliminates practices which would conflict with other provisions of the labor agreement.

The County's assertion that paying the Grievant for his lost time would have a negative impact on the Department is, according to the Union, not a substantial basis to justify the denial of his request. The training is "appropriate" and of benefit to the Department, and is not meaningfully distinguishable from already approved training in New Orleans or Florida. Noting

that the County has funded non lost-time costs to out-of-state training, the Union concludes that the denial of the Grievant's request is unjustifiable. That some Employer sponsored training was extended to non-unit employes has no relevance to the binding nature of the past practice. At a minimum, the County's treatment of non-unit employes bears directly on the persuasive force of its contention that granting the Grievant's request might tarnish its image. Any other conclusion would, the Union concludes, be discriminatory.

The Union concludes by making the following remedial request:

> In order to be made whole, the grievant should be paid lost-time wages for his training in (Brief Therapy), February 3-10, 1996. This should be accomplished by reinstating the vacation time he used in order to attend said training.

THE COUNTY'S POSITION

The County argues initially that Bablitch's denial of the Grievant's request did not violate the labor agreement whether viewed on procedural or on substantive grounds.

Procedurally, the County contends that the grievance "does not conform to the Grievance Procedure detailed in Article 10-Grievance and Procedure Section 2." More specifically, the County argues that the grievance failed to make a "clear and concise statement of the grievance," and failed to list the "specific section of the agreement alleged to have been violated."

Beyond this, the County contends that the "Director had the right to reject the Caribbean Cruise request." Noting that the governing Board Policy has been "in existence since at least 1982," and that the policy requires prior permission, the County concludes that there "should be absolutely no reason not to believe that training requests require approval by the Director."

The County then contends that the "Director's reason for rejection of the request was appropriate." The propriety of the denial is rooted in the fact that "training was available in other more suitable locations" and in the fact that "the taxpayers of Portage County would not approve of Human Services Staff being on the County Payroll while enjoying a Caribbean Cruise." The County notes that both Bablitch and the Grievant were aware of similar training opportunities within Wisconsin.

Noting that "there is always an attempt to treat employees equally," the County urges that Bablitch must ultimately make decisions based on the efficiency and best interests of her Department. To ignore the "fish bowl environment" Bablitch must be aware of when approving leave requests would, according to the County, be unrealistic. Whatever may be said of

departmental practices, the County argues that "approving paid time off to Local 95 employees to attend training in exotic locations" is not one of them.

More specifically, the County argues that the Union pulled its evidence of a past practice from "over 2700 staff training sessions . . . approved . . . over the course of 7 years." This evidence affords dubious support for the practice alleged by the Union, since a majority of those sessions were attended by "management and by employees who are members of AFSCME Local 348." To consider this evidence would, according to the County, fly in the face of Article 10, Section 6, D. That a fellow employe received compensation for a week long training session also fails to establish a practice, since Bablitch did not object to the time taken by the Grievant, but to his choice of a training site.

The County concludes that the grievance must be denied.

DISCUSSION

I have adopted the County's statement of the issues as that appropriate to the record. This should not be read to make the Union's focus on past practice inappropriate. Rather, I read the County's statement of the issues broadly enough to pose the Union's past practice arguments. To focus solely on the issue of past practice poses interpretive problems which need not be addressed to resolve the grievance. Interpreting a grievance on as narrow a basis as possible guards against unnecessary arbitral intrusion into the parties' agreement. Thus, the County's statement of the issues has been adopted.

The County states certain procedural arguments which need not be specifically addressed. It can be noted that the January 10 grievance fails to isolate "the specific section of the Agreement alleged to have been violated" required by Article 10, Section 2. The County does not, however, state this procedural point as a separate issue to be resolved. Rather, the County treats the point as a manifestation that the grievance can be given no contractual foundation. The procedural flaw will, then, be subsumed in the examination of the merits of the grievance.

A review of the evidence establishes that the grievance cannot be given a solid contractual foundation. Article 4 cannot be considered applicable to the facts posed. The Grievant's reimbursement request would not appear to reflect "activity as a member of the Union," since reimbursement of costs attributable to training is a common request, not one restricted to Union members. Thus, Section 1 cannot be considered applicable. Section 2 does, however, apply to "training," and thus potentially covers the Grievant's reimbursement request. Section 2, however, proscribes eleven specific forms of discrimination. The January 10 grievance points to disparate treatment by noting the approval of reimbursement for another week-long conference. The evidence does not, however, establish any link between Bablitch's denial and any of the eleven proscribed forms of discrimination. The Union's arguments highlight that discrimination based on a distinction between the public perception of a conference in Orlando, New Orleans or San Francisco as opposed to a conference in the Caribbean arguably lacks a rational basis. This argument, whatever its merit, fails to bring Bablitch's disapproval of the request under Section 2 of Article 4. Section 2 specifies actionable discrimination. That the distinction Bablitch drew

between Orlando and the Caribbean may not be persuasive does not make it actionable under Section 2.

The Union's focus on past practice can conceivably be viewed in isolation or in conjunction with an interpretation of Article 27. As the Union points out, Article 2 refers to "this Agreement" as the source of "a basic understanding" regarding conditions of employment. This implies practice can play an independent role in the establishment of benefits. The language of Articles 10 and 27, however, undercut this assertion. Sections 1 and 2 of Article 10 focus a grievance narrowly on issues of contract interpretation. Article 27 mandates that "agreements supplemental hereto" must be in writing to be binding. Article 27, however, also incorporates Board "ordinances and resolutions" into the Agreement. It is not apparent from the record if Policy 12-89 has been adopted as an ordinance or resolution. It is, however, apparent that treating Policy 12-89 and the practice flowing from it as part of the agreement fully poses the parties' dispute without calling the relationship of Articles 2, 10 and 27 into question. Thus, the applicability of Policy 12-89 under Article 27 will be presumed and the application of that policy and related practice will be treated as the core of the parties' dispute.

To assess the impact of practice on the grievance, it is first necessary to isolate the basis of Bablitch's denial of the request. Brief Therapy reflects a clinical approach to mental health issues which seeks to narrowly define behavioral goals which are achievable through a minimum of intervention by a psychologist. With the expansion of managed health care, the approach is gaining wider acceptance. Bablitch did not deny that the subject matter of the conference could yield a benefit to the Grievant and the County. Nor did Bablitch object to the length of training time devoted to the subject. Rather, Bablitch objected to granting training time to cover a Caribbean cruise. Her denial is rooted in her judgment that the adverse political perception of the training would outweigh any benefit to the department.

The practice pointed to by the Union cannot, on any view of the evidence, be considered to establish automatic approval of training requests. Policy 12-89 states two levels of County Board approval. The request form attached to that policy, and used by the Grievant to make his own request, reflects the need for express approval from each level of the departmental chain of command. Bablitch's staff development memos also underscore the need for supervisory approval. In short, the practice pointed to by the Union establishes not merely the granting of out-state reimbursement requests but also the need for preceding supervisory approval. The issue posed here must, then, turn on whether there is any basis to overturn Bablitch's denial of the Grievant's request.

The contract does not expressly address the level of oversight appropriate to a review of Bablitch's denial. Arbitrators have variously stated standards of review, ranging from "arbitrary and capricious" to "reasonableness." None of the standards seek to substitute an arbitrator's view for a supervisor's. 1/ Rather, the standard is established to set the level of scrutiny a supervisory

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1/ "(A)n arbitrator is confined to interpretation and application of the collective bargaining

determination must withstand. It is not necessary to speculate on the appropriate standard in this case, since Bablitch's denial can withstand a reasonableness review, which is the highest level of arbitral scrutiny.

The Grievant's request, as manifested by Ricketts' and McCulley's approval, cannot be dismissed as unreasonable. He assumed all training costs except lost time. His assumption of costs put his request on the same financial footing as any request for a week of training leave. The substance of the training met the scrutiny of each level of departmental supervision.

No less reasonable, however, is Bablitch's concern that approval of his request might have adverse political fallout. Orlando, New Orleans or New York may afford a conference participant more opportunity for off-training activities than a Caribbean cruise. A cruise, however, is not the same as a conference set in a fixed location. Whatever is said of a conference in Orlando or New Orleans, attendance at a convention center or hotel in that location is not typically the primary source of the location's appeal. A cruise ship touring the Caribbean is a primary source of the appeal of the conference. Bablitch's concern that County payment for time spent at the conference could be viewed as masking vacation pay as training pay cannot be dismissed as unreasonable. The cruise is more open to that criticism than the same conference placed in Orlando would be. Beyond this, the potential difficulty of fitting a conference which is outside of the United States into Policy 12-89 should not be overlooked. Policy 12-89 deals with "out of state" reimbursement requests. The Caribbean is certainly out of state, but the stretch from "out of state" to "out of country" should not be minimized. Bablitch could well be concerned with what reimbursement request could be denied if the Grievant's was granted. It is a fair assumption this concern would not be lost on County Board members.

The Union's attempt to minimize the persuasive force of Bablitch's perception of the political impact of granting the request is forceful, but is ultimately belied by the Grievant's conduct. The Grievant attended the conference in spite of Bablitch's denial. This is, in a limited sense, meaningful here. The County points out that similar training was offered in Philadelphia and in Wisconsin. Since the County did not communicate this to the Grievant prior to his cruise, this fact has limited significance. The Grievant acknowledged, however, that he did not seek to find similar training in another location. This acknowledgement states no more than the obvious. A Caribbean cruise is not a bad place to attend a conference. It underscores, however, that the pull of this locale is as compelling to the Grievant as it might be to a County Board member. The assessment of the pull of that locale could reasonably be expected to vary between the person who

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agreement; he does not sit to dispense his own brand of industrial justice . . . (H)is award is legitimate only so long as it draws its essence from the collective bargaining agreement." Steelworkers v. Enterprise Wheel & Car Corp., 46 LRRM 2423, 2425 (1960).

experiences it and the person who represents those who may not get to experience it, but do get to fund it.

Beyond this, the Union's argument seeks more from an arbitrator than is appropriate under Article 10. Bablitch, as a department head, is closer to County Board politics than an arbitrator or a unit employe. This fact underscores the difficulty of overturning her assessment of Board political perceptions, or enforcing the Union's view of approving reimbursement requests. The encouragement of Policy 12-89 for in-state training may be ill-advised, if better training is available at similar or lesser cost elsewhere. The difficulty is that Policy 12-89 is a political judgment potentially given contractual significance under Article 27. Article 10 restricts an arbitrator's view to the contract. Sections 1, 2 and 6, D of Article 10 establish that the labor agreement neither contemplates nor tolerates arbitral policy judgments independent of the terms of the agreement. It is not necessary to brand the Grievant's request unreasonable to note both that the record affords no basis to brand Bablitch's denial of the request unreasonable and that the parties' agreement, even as augmented by past practice, affords no basis to overturn that denial.

AWARD

The County did not violate the Labor Agreement when it denied the Grievant's request for paid time off to attend training on a Caribbean Cruise.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 25th day of November, 1996.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator