BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BROWN COUNTY MENTAL HEALTH CENTER EMPLOYEES, LOCAL 1901 AFSCME, AFL-CIO

and

BROWN COUNTY (MENTAL HEALTH CENTER)

Case 614
No. 55344
MA-9988

(Grievance of Judy Pakanich)

Appearances:

Mr. Robert Baxter, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 1901, AFSCME, AFL-CIO.

Mr. Kenneth Bukowski, Corporation Counsel, and **Mr. James Kalny**, Director of Human Resources, on behalf of Brown County.

ARBITRATION AWARD

Brown County Mental Health Center Employees, Local 1901, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Brown County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on December 17, 1997, in Green Bay, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by March 16, 1998. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues, but were unable to agree on a statement of the substantive issues and have agreed the Arbitrator will frame the issues.

The Union would state the issues as follows:
Did the Employer violate the Collective Bargaining Agreement by requiring the use of accrued vacation benefits and/or personal days for leaves of absence under the Family Medical Leave Act? If so, what is the appropriate remedy?

The County offered the following statement of the issues:

Does the Collective Bargaining Agreement prohibit the Employer from requiring the substitution of accrued vacation benefits and personal days for Family Medical Leave Act leaves?

The Arbitrator concludes that the following adequately sets forth the issues to be decided:

Did the County violate the parties' Collective Bargaining Agreement by requiring the substitution of accrued vacation and personal days for a leave of absence under the Federal Family Medical Leave Act? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1995-1996 Agreement are cited:

ARTICLE 6. MAINTENANCE OF BENEFITS

A. The Employer agrees to maintain existing benefits that are mandatory subjects of bargaining and are not specifically referred to in this agreement.

. . .

The above stipulations are intended to cover normal conditions that occur or exist; however, should special conditions arise on matters that are mandatory subjects of bargaining, said matters are to be taken up with the Union to arrive at a satisfactory solution.

ARTICLE 10. HOLIDAYS

The following shall be recognized as paid holidays referred to in this article: New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, one-half (1/2) day on Good Friday, one-half (1/2) day on the day before Christmas, one-half (1/2) day on the day before New Year's Day, 3 personal holidays.

One personal holiday is to be taken in the first four (4) months of the calendar year, and the other personal holiday is to be taken in the second four (4) months of the calendar year, and the third personal holiday is to be taken in the last four (4) months, on a date which is mutually agreed upon between the employee and the supervisor.

. . .

ARTICLE 20. VACATIONS

All regular employees shall be entitled to a vacation. Each employee shall earn annual vacations based on the anniversary of employment in the following manner:

One (1) year of employment. . . . . .5 work days per year at 40 hours pay.

Twenty (20) years of employment. . . . 23 work days per year at 184 hours pay.

. . .

(f) WHEN VACATION MAY BE TAKEN: In determining vacation scheduled, the Employer shall respect the wishes of the eligible employees on a seniority basis as to the time of taking their vacation insofar as the needs of the hospital will permit. The hospital shall post vacation scheduling rules from time to time. Vacation allowance shall be taken during the vacation year, except that employees who are required to defer all or a part of their vacation for a given vacation period may be permitted to take it within the first six (6) months of the ensuing year, after which it shall be lost. Effective January 1, 1983, employees currently on the payroll cannot carry more than 30 days of vacation at the end of their anniversary date. Employees hired after January 1, 1983, cannot carry more than 10 days of vacation at the end of their anniversary date.

. . .

ARTICLE 26. GRIEVANCE PROCEDURE – DISCIPLINARY PROCEDURES

. . .

The parties agree that the decision of the arbitrator shall be final and binding on both parties to the Agreement. The Arbitrator shall not have the authority to add to, subtract from, change, alter, modify or delete any of the specific terms or provisions of this Agreement, and his/her ruling will be restricted to an interpretation of the contractual part of this Agreement only.

. . .

MEMORANDUM OF UNDERSTANDING

Enrollment Periods

The following memorandum of understanding is established between Brown County and Local 1901, AFSCME, AFL-CIO, representing the Brown County Mental Health Center employees.

It is agreed that the guidelines will be followed in respect to the Casual Day/Disability Plan:

1. Voluntary enrollment – all regular employees employed and holding a posting which was awarded prior to July 1, 1994, will be given the opportunity to elect a voluntary enrollment in order to transfer from the sick leave accrual provision of Article 18, Sick Leave, to the Casual Day/Disability Plan during the published enrollment periods and will be subject to the appropriate transfer upon the published effective qualification date. Such dates shall be:

	Enrollment Date	Effective Qualification Date
1996	5/16/96 through 6/15/96	7/1/96
	7/1/96 through 12/15/96	1/1/97

2. Employees hired before July 1, 1994 who are not enrolled in the Casual Day/Disability Plan will not be eligible for any provisions of the Casual Day/Disability Plan.

3. Employees who are enrolled in the Casual Day/Disability Plan, either by voluntary or automatic enrollment, cannot at any time elect to change to or revert back to the sick leave accrual provisions of Article 18, Sick Leave, nor utilize any provisions of Article 17, Worker's Compensation.

4. Employees who are enrolled in the Casual Day/Disability Plan and who have sick leave hours banked according to the provisions of the Casual Day/Disability article will be able to utilize Article 18, Sick Leave, only in respect to section(s): (e) eligibility for sick leave, (f) effect on termination of employment, and (g) sick leave on holidays, when using banked sick leave.

This memorandum of understanding will remain in effect through December 31, 1996.

For the County:		For the Union:	
Debra M. Keckeisen /s/	7-8-96	Ray Schmitt	6/25/96
Debra M. Keckeisen	Date	Ray Schmitt	Date

RELEVANT FEDERAL STATUTES AND REGULATIONS

Family and Medical Leave Act of 1993, 29 U.S.C. Sec. 2611

. . .

Sec. 2 Findings and purposes.

. . .

(b) *Purposes*. – It is the purpose of this Act-

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

. . .

Sec. 102. Leave requirement.

(a) *In General*. –

(1) *Entitlement to leave*. – Subject to section 103, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

. . .

(D) Because of a serious health condition that make the employee unable to perform the functions of the position of such employee.

. . .

(c) *Unpaid Leave Permitted*. – Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave.

. . .

(d) *Relationship to Paid Leave* –

. . .

(2) *Substitution of paid leave*. –

(A) *In general*. – An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

(B) *Serious health condition*. – An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this title shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

. . .

Sec. 402. Effect on existing employment benefits.

(a) *More Protective*. – Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) *Less Protective*. – The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

. . .

Sec. 405. Effective dates.

(a) Title III. – Title III shall take effect on the date of the enactment of this Act.

(b) Other Titles. –

(1) In general. – Except as provided in paragraph (2), Titles I, II and V and this title shall take effect 6 months after the date of the enactment of this Act.

(2) Collective bargaining agreements. – In the case of a collective bargaining agreement in effect on the effective date prescribed by paragraph (1), title I shall apply on the earlier of –

(A) the date of the termination of such agreement; or

(B) the date that occurs 12 months after the date of the enactment of this Act.

. . .

Final FMLA Regulations, 29 C.F.R. 825

ss. 825.207 – Is FMLA leave paid or unpaid?

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for FMLA leave.

(b) Where an employee has earned or accrued paid vacation, personal or family leave, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition.

. . .

(c) Substitution of paid accrued vacation, personal or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for a family member of the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose.

Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

. . .

(e) Paid vacation or personal leave, including leave earned or accrued under plans allowing "paid time off", may be substituted at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.

. . .

ss. 825.700 What if an employer provides more generous benefits than required by FMLA?

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (e.g., provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

> (c)(1) The Act does not apply to employees under a collective bargaining agreement (CBA) in effect on August 5, 1993, until February 5, 1994, or the date the agreement terminates (i.e., its expiration date), whichever is earlier. Thus, if the CBA contains family or medical leave benefits, whether greater or less than thos under the Act, such benefits are not disturbed until the Act's provisions begin to apply to employees under that agreement. A CBA which provides no family or medical leave rights also continues in effect. For CBAs subject to the Railway Labor Act and other CBAs which do not have an expiration date for the general terms, but which may be reopened at specific times, e.g., to amend wages and benefits, the first time the agreement is amended after August 5, 1993, shall be considered the termination date of the CBA, and the effective date for FMLA.
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> . . .

BACKGROUND

The County maintains and operates the Brown County Mental Health Center and the Union is the exclusive bargaining representative of all regular full-time and regular part-time employes of the Center except the Superintendent, the Assistant Superintendent, supervisors, craft employes, registered nurses, social workers, registered occupational therapists and confidential employes.

Judy Pakanich, hereinafter the Grievant, has been employed at the Center as a Licensed Practical Nurse for approximately twenty years. In early August of 1996 the Grievant discussed with Lorrie Blaylock, a Personnel Specialist in the County's Human Resources Department, her desire to take maternity leave beginning in February of 1997. Blaylock is responsible for processing Family Medical Leave Act (FMLA) requests and disability leave requests for the County. Blaylock sent the Grievant a packet including an information sheet on leaves under the state and federal FMLA's, and a form to be completed in that regard by herself and a form to be completed by her physician, and a copy of the County's "Family Medical Leave" policy. The following cover letter of August 5, 1996, accompanied that packet:

> Dear Judy:
>
> We have been notified that you will be absent for family reasons beginning approximately February of 1997. In order to accurately administer your leave benefits in a timely manner, we need you to complete and return the enclosed Family Medical Leave request packet to our office at least 30 days prior to your

family leave. The Family Medical Leave Act (FMLA) is intended to allow eligible employees to take unpaid leave under Federal and/or State law.

For Federal leave, you are required to substitute all vacation, personal leave, sick leave or casual days upon accrual of such leave during the leave period. If you receive Short-Term Disability (STD), this will count as your substitution for Federal leave purposes. For State leave, you have the option of substituting accrued benefits for your leave period.

Please complete the *employee* section of the enclosed Family Medical Leave forms (highlighted in GREEN) and have your *health care provider* complete the remainder of the information (highlighted in PINK). These forms can be returned to the Human Resources Department in the enclosed envelope. Please keep in mind that we cannot approve STD or FMLA benefits until appropriate documentation is received.

If you have any questions regarding your benefits or the amount of time counted against your Family Medical Leave entitlement, please do not hesitate to contact me at 448-4408.

Very truly yours,

HUMAN RESOURCES DEPARTMENT

Lorrie M. Blaylock /s/
Lorrie M. Blaylock
Personnel Specialist

The FMLA information sheet stated, in relevant part:

For *Federal* leave, you are required to substitute all vacation, personal leave, sick leave or casual days upon accrual of such leave during the leave period. If you receive disability leave, this will count as your substitution for Federal leave purposes. For *State* leave, you have the option of substituting accrued benefits for your leave period.

In 1996, County employes who had been employed prior to July 1, 1994, were given the opportunity to transfer from the being under the sick leave accrual provision of the Agreement into a Casual Day/Disability Plan. The Grievant did not do so.

The Grievant's estimated delivery date was February 16, 1997 and she intended to work up to that time. On January 13, 1997, the Grievant submitted her "Family Medical Leave Request" form which indicated she intended to work up to her delivery date and then take six weeks of medical leave and an additional six weeks of bonding leave. It was her intent to take such leave as unpaid leave. On that same date, Blaylock sent the Grievant a letter approving the request, which letter stated, in relevant part:

> Dear Judy:
>
> This letter officially documents your request for Family leave under the State and Federal Family Medical Leave Act (FMLA) entitlement. Your expected delivery date is February 16, 1997. You have requested leave beginning on or about February 16, 1997, and concluding on or about May 10, 1997, with a possible return to work date of May 11, 1997. Based on these dates, a total of sixty (60) days, the equivalent of twelve (12) work weeks, will be counted against your Federal and State Family Medical Leave Act entitlement.
>
> **Please contact the Human Resources Department at 448-4408 to confirm the actual date of delievery as the above-mentioned dates may change based on your delivery date.**
>
> Brown County will administer the Federal Family and Medical Leave Act (FMLA) of 1993 by using a "rolling" 12 month period for purposes of entitlement. The State leave will continue to be administered on a calendar year.
>
> **EXISTING AND ACCRUED BENEFITS/SUBSTITUTION REQUIREMENTS**
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> Under Federal leave, you are required to substitute all vacation, personal leave, sick leave or casual days upon accrual of such leave during the leave period. If you receive Short-term Disability benefits, this will count as your substitution for Federal leave purposes.
>
> Under State leave, you have the option of substituting accrued benefits for your State leave period.

BROWN COUNTY EMPLOYEES ELIGIBLE FOR SICK LEAVE

> Sick leave, given it meets the "Serious Health Condition" requirements, will automatically be counted against your Federal FMLA entitlement and your State Medical or Caretaking entitlement, depending on the circumstances.

The Grievant developed health problems and her physician notified the County that he was recommending she begin her maternity leave on January 31, 1997. The Grievant commenced her leave of absence on January 31, 1997 under the state FMLA and because it was due to a serious health condition, she used her accrued sick leave. It was the Grievant's intent to use one sick leave day per week in each pay period and to take the rest of the twelve weeks off as unpaid leave. The Grievant testified that she had discussed doing so with Blaylock by telephone on February 9, 1997 and was told that she could do so. The Grievant went to the Center on February 10, 1997 and filled out "Application For Payment of Sick Leave" forms for thirteen days covering the pay periods from February 5 to April 30, 1997.

On February 11, 1997, Blaylock received a call from the person who schedules the nursing staff at the Center, questioning the manner in which the Grievant was using her sick leave. Blaylock asked if the Grievant had also turned in vacation and personal holiday slips and was told there were none. Blaylock then called the Grievant and advised her that under the County's policy, she was required to substitute any accrued paid leave benefits for leave taken under the federal FMLA. The Grievant was upset and said she would not use her vacation time. According to Blaylock, although she had talked to the Grievant previously about using her sick leave in the manner she had requested, this conversation on February 11th was the first time she understood what it was the Grievant wanted to do as far as not using her accrued vacation and personal holidays.

The parties stipulated that the County applied the leave time against the Grievant's leave accounts as follows:

> From January 31, 1997 through February 15, 1997, (a period of 12 working days) Judy used sick leave. Ten (10) of these 12 days were substituted under the State Family Medical Leave Act for periods when she was under a serious health condition. Two (2) additional sick leave days were simply sick leave days granted because of Judy's serious health condition. It appears at that time Judy ran out of sick leave.
>
> On February 16, 1997, (Judy's next work day) Judy utilized a vacation day.

> On February 18, and February 19, 1997, (Judy's next two (2) work days), Judy used personal leave days.
>
> The County takes the position that the use of the vacation and personal leave days on February 16, February 18, and February 19 were justified inasmuch as she had exhausted her sick leave but was unable to attend work due to a serious medical condition.
>
> On February 20, 1997, the baby was born. From this time through April 2, 1997, Judy was entitled to six (6) weeks (30 work days) of State bonding leave. As mentioned above, the County does not assert a right to require substitution of benefits for that leave. In fact, upon this close review of the file, it has been realized that an additional three (3) work days were allowed to be used as unpaid leave for a total of 33 work days or 6.6 weeks of bonding leave.
>
> In regard to the Federal Family Medical Leave, the County takes the position that this leave commenced on January 31, 1997, and it went through April 7, 1997, for a total of 48 days or 9.6 weeks. This would leave 2.4 weeks available for Judy's use. However, as mentioned above, the County takes the position that the law is clear that the County may compel the substitution of accrued benefits for that leave.
>
> (Joint Exhibit No. 5).

The Grievant subsequently grieved the County's having required her to substitute one day of vacation and two days of personal holiday time for unpaid leave. The parties attempted to resolve their dispute, but were unsuccessful, and proceeded to arbitrate the matter before the undersigned.

POSITIONS OF THE PARTIES

Union

Citing Article 6, "Maintenance of Benefits", Article 20, "Vacations", Section F of the parties' 1995-96 Agreement, and a Memorandum of Understanding regarding personal holiday/vacation (attached to the Union's initial brief as Appendix 1 and not offered into evidence), the Union takes the position that the only limitations placed on employes scheduling vacation time is seniority and staffing needs of the facility, and the only limitation placed on employes scheduling a personal holiday is the staffing needs of the facility. Under the federal regulations for the FMLA, an employer may not diminish an employe's rights under the FMLA, but may provide more generous benefits. Further, an employer's obligation under a

collective bargaining agreement to provide greater rights to employes than those established under the FMLA is not diminished by anything in the FMLA. The Union therefore takes the position that based upon clear contract language, the parties' intent, and the intent of the FMLA, the grievance should be sustained.

The Union asserts that the language of the Agreement, as well as the Memorandum of Understanding, is clear and unambiguous, and that therefore the arbitrator is constrained to give effect to the intent of the parties as expressed by that language. Elkouri and Elkouri, How Arbitration Works, (Fifth Edition), p. 651. Article 20, "Vacations", (f), provides that the County shall respect the wishes of employes when it comes to scheduling vacation, subject only to the limitations of seniority and the staffing needs of the facility. Similarly, the language under the Memorandum of Understanding limits an employe's ability to take personal holidays only with regard to the staffing needs of the facility. There is nothing in the Agreement that provides for employes being required to apply accrued vacation or personal holiday time during a qualifying FMLA absence, and nowhere does the County retain the management right under the Agreement to require such.

The Union cites two arbitration awards involving the interplay between the FMLA and contractual paid time off under a collective bargaining agreement. Both cases involve the issue of whether the employer could require the employe to first utilize accrued paid leave under a qualifying FMLA leave before going on unpaid status. In UNION HOSPITAL, 108 LA 966 (Arbitrator Chattman), the Arbitrator addressed the identical issue as in this case, and a unilaterally implemented policy similar to that imposed by the County. Arbitrator Chattman focused on final regulation 29 C.F.R. Sec. 825.101(a), which sets forth the purpose of the FMLA, "to balance the demands of the workplace with the needs of families to promote the stability and economic security of families, and to promote national interest in preserving family integrity. . ." The Arbitrator also relied upon final regulation 29 C.F.R. Sec. 825.700 and Secs. 4.02(a) and 4.02(b) of the FMLA, concluding that an employer may not diminish an employe's FMLA rights, but may provide more generous benefits and that therefore, nothing under the FMLA diminishes an employer's obligation under a collective bargaining agreement to provide greater family or medical leave rights to employes than rights established under the FMLA, nor may the rights established under the FMLA be diminished by such collective bargaining agreement. Neither the parties' Agreement, nor their Memorandum of Understanding, reference the County retaining any right to require employes to substitute accrued paid leave on an FMLA leave of absence. As Arbitrator Chatman concluded, when an employe forfeits paid vacation time during a sick leave, he/she loses the ability to take vacation days, and when an employe retains the right to determine whether to substitute accrued paid leave during an unpaid leave, the employe has better benefits than those contained in the FMLA. Following the rationale of a prior award, Arbitrator Chattman concluded that the employer was precluded from forcing employes to apply accrued paid leave to an FMLA leave. The same rationale applies in this case.

The Union also disputes the County's claim that there is a past practice of requiring employes to use their accrued paid leave during an FMLA leave. A practice must be long-standing, consistent and mutually accepted by the parties in order to establish a binding practice. Here, the mutuality requirement has not been met. Testimony establishes that the Union's leadership was never notified of the County's implementation and administration of its FMLA policy. As there is no evidence of any grievances being filed over the issue of forcing an employe to take paid time off, there is no evidence that employes have been forced to take such time off; rather, it has been by the mutual agreement of the employe and the County. Even if such a practice exists, it must be discounted. In GRANDHAVEN, 107 LA 132, (Arbitrator Daniel) it was concluded that, notwithstanding a long-standing practice of requiring the use of accrued benefits for non-personal illness or injury leaves, the practice would not prevail over the rights provided in the collective bargaining agreement. The Arbitrator relied upon: (1) the FMLA is employe-friendly and there was no intention of disturbing beneficial aspects of existing contracts; (2) the only contractual limitations on choosing when to take vacation were seniority preference and avoiding hindering production; (3) the FMLA does not permit an employer to require the use of vacation days where it would be inconsistent with state law or collective bargaining agreement; (4) the collective bargaining agreement provided superior benefits over and above state and federal law, and (5) Sec. 825.101 (stating the purpose of the FMLA). For the same reasons, such a practice, even if proved to exist, must be discounted in this case.

Bargaining history also supports the Union's position. The County never notified the Union's leadership of its FMLA policy and neither party brought up proposals on that issue during negotiations. The pertinent language in the Agreement has not changed over the years; employes control when they take vacation, subject only to seniority and the staffing needs of the facility. The Union cites an arbitration award for the proposition that in order to control when employes would take vacation, an employer would have to negotiate express language that would give it the right to require an employe to take vacation against his/her wishes. As the County did not negotiate such language into the Agreement, the County has no right to require the use of vacation against an employe's will. The parties' intent should be derived from the plain meaning of the words they have used. The Union cites the definition of the term "vacation" as a "period of rest from work". Miriam Webster Pocket Dictionary, 1970. Requiring the Grievant to use vacation for a serious medical condition violates the meaning and intent of that term. Similarly, the definition of the term "holiday" is "a day of freedom from work". Miriam Webster Pocket Dictionary, 1970. Again, to require the use of personal holidays for a serious medical condition is contrary to the meaning and intent of the word "holiday". The Union concludes that its interpretation is correct and fulfills the intent of the parties, and therefore should be upheld.

In its reply brief, the Union asserts that the County's argument regarding federal law is misplaced. The Union's position is based upon clear contract language. The Article 26 - Grievance Procedure – Disciplinary Procedure, Step 4, of the Agreement, provides that "the Arbitrator shall not have the authority to add to, subtract from, change, alter, modify or delete any of the specific terms or provisions of this Agreement, and his/her ruling will be restricted to an interpretation of the contractual part of this Agreement only." Under the County's rationale, it could violate the parties' Agreement as long as it was acting in conformance with federal law, e.g., pay minimum wage instead of the contractual rates. The Union also disputes the County's contention that it is uncontroverted that over 3,000 leaves were preceded with notice that the County would require substitution. The only evidence presented by the County in that regard was an undated generic letter (Exhibit 1), letters to the Grievant and to Pam Spang-Schmit and Cheryl Jahnke, and a summary of Pam Spang-Schmit's family leave. The above letters are irrelevant to this proceeding, as the Union bases its position upon the employes' contractual rights. The Union also asserts that the County has miscited the FMLA regulations. Last, the Union asserts that the County's argument, that the Union never requested to bargain any issue regarding the FMLA, misses the point. As the Union bases its position upon the clear contract language, it does not have to negotiate anything in addition pertaining to this matter. The Union requests that the grievance be sustained and the Grievant made whole for a lost vacation day and personal holidays, and that the County be directed to cease and desist from requiring the forced use of vacation and personal holidays.

County

The County takes the position that resolution of this case must be centered on the Federal Family and Medical Leave Act of 1993 (FMLA). The essential issue in this case is whether the County was authorized, at its option, by the federal FMLA to require the Grievant to substitute vacation and/or personal days for federal FMLA leave time which she used after the expiration of her state FMLA benefits, a total of one vacation day and two personal holidays. The County cites 29 C.F.R. Sec. 825.207(a), as providing that the FMLA permits an eligible employe to choose to substitute paid leave for FMLA leave, but if the employe does not so choose, the employer may require the employe to substitute accrued paid leave for FMLA leave. Section 825.207(e) provides as follows:

> (e) Paid vacation or personal leave, including leave earned or accrued under plans allowing "paid time off," may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes. (Emphasis added).

That regulation provides in paragraph (f) that if neither the employe, nor the employer, elect to substitute paid leave for unpaid FMLA leave, the employe will remain entitled to all paid leave accrued under the terms of the employer's plan. Clearly, the FMLA authorizes the employer to substitute, at its option, vacation or personal leave for otherwise unpaid FMLA leave, just as the County has done in this case. The argument that the County did not bargain its FMLA policy before implementing it is not an issue in this case. It cannot be argued that the County did not provide notice to the employes, the Union's officers or its members of the Federal FMLA requirements for the substitution of leave. The record is replete with evidence that the notice was provided early and on numerous occasions to the Union and its members. The Union's President admitted receiving documentation, including the substitution rules, for an FMLA leave that she took prior to this instance. It is uncontroverted that each of over 3,000 leaves was preceded with notice that the County could require substitution. More importantly, the very provisions of 29 C.F.R. Sec. 825.700(c) state:

> Thus, if the CBA contains family or medical leave benefits, whether greater or less than those under the act, such are not disturbed until the act's provisions begin to apply to employees under that agreement. (Emphasis added).

That regulation clearly anticipated that collective bargaining agreements would be "disturbed" upon implementation of the Act's provisions. Employers' rights to require substitution are thus premised on federal statute, and not on the collective bargaining process or agreement. The County cites several Department of Labor opinions that are consistent with the premise that rights granted by the federal FMLA cannot be abrogated by a collective bargaining agreement. In opinion FMLA-33 (March 29, 1994), dealing with a union inquiry regarding required substitution at the employer's, rather than the employe's, option, the Deputy Assistant Wage and Hour Administrator opined that the Act and the regulations provided that an eligible employe may elect, or an employer may require, the employe to substitute any of accrued paid vacation leave, personal or family leave, or medical or sick leave for any of the 12-week FMLA period under certain conditions. That opinion explains that Section 402 of the FMLA does not preclude a union's right to collective bargain greater benefits than those provided under the Act, i.e. the union could have negotiated that substitution of accrued paid leave is at the election of the employe only. That situation is identical to the instant case. The Union could have negotiated that substitution of accrued paid leave was to be solely at the employe's option, but it is clear from the evidence that the Union never requested to bargain any issue regarding the FMLA, let alone an issue as specific as this. The County goes on to cite two other opinions noting that an Employer may require employe substitution of paid vacation leave or personal leave for any part of the 12-week FMLA leave period.

The County also cites opinion FMLA-52 (December 28, 1994), where it was found that an employer cannot require an employe to substitute any paid vacation or other leave under the FMLA during the absence that would otherwise be covered by payments from plans covering temporary disabilities. The County then cites the Memorandum of Understanding regarding enrollments for the casual day/disability plan provided under the Agreement as an alternative to the traditional sick leave plan. Even though she had the right to transfer into that disability plan in January of 1997, the Grievant did not avail herself of her right to do so. Had she done so, the Grievant would have been eligible for short-term disability benefits and the County would not have been able to require her to substitute her vacation and her personal days. Having not done so, the Grievant should not now be allowed to, in effect, obtain the benefits of transferring into the new plan when she opted to stay in the traditional sick leave plan.

The County notes that it is not only the regulations, but also the Federal statute that provides for substitution of paid leave which the employe may elect or which the employer may require. 29 U.S.C. 2612(b)2.

The County cites RICHLAND SCHOOL DISTRICT v. DILHR, 174 Wis. 2d. 878 (1993), in which the Wisconsin Supreme Court dealt with the issue of the substitution of paid leave under the State FMLA. The Court stated that when an employer provides leave, the statute does not restrict or limit the employe's power of substitution, rather the decision is left to the employe's discretion, nor does the statute state that the employe's right to substitute is limited by the terms of the collective bargaining agreement. This is a clear indication by the Court that bargaining unit employes were granted certain statutory rights without the necessity of bargaining those rights with the employer. It stands to reason that the same rationale would apply to statutorily-established employer rights, particularly with regard to a federal statutory scheme. To hold otherwise would be logically and legally inconsistent and arguably a denial of due process. The Court went on to describe how the substitution provisions apply to accrued benefits, even if the collective bargaining agreement requirements for use of substitute leave were not complied with, i.e. the state FMLA, not the collective bargaining agreement, prevails. In RICHLAND SCHOOL DISTRICT, the employer had argued that the "leave. . . provided by the Employer" under the statute, applied only to leave to which the employe is entitled because the employe has met the conditions of leave eligibility under the collective bargaining agreement. The Court rejected that argument and held that the State FMLA statue overrode any inconsistent collective bargaining agreement provisions. (At page 906). The County reasons that if State law supersedes inconsistent collective bargaining agreement provisions, as was found by the Wisconsin Supreme Court, certainly a stronger argument exists that a federal statute of similar import supersedes an inconsistent collective bargaining agreement provision.

The County also cites MILLER BREWING COMPANY, 210 Wis. 2d. (1997) as holding that an employe's asserted right to substitution is not founded on the collective bargaining agreement, but rather on the state FMLA. Similarly, in this situation the County's right to require substitution is not a right created by the collective bargaining agreement, but rather, is a right granted by the federal FMLA. In MILLER BREWING, the Court held that: "This right to substitution under the FMLA is a non-negotiable right which the Legislature has conferred upon individual employes." The Court cites its earlier decision in RICHLAND SCHOOL DISTRICT that where there is a conflict between a labor agreement and the FMLA, the latter prevails. The County concludes that its rights under the FMLA prevails, and that therefore the grievance should be denied.

DISCUSSION

It must first be noted that both parties appended exhibits to their initial post-hearing briefs that had not previously been offered. Neither party has offered an explanation, nor have they moved their admission, or otherwise requested that the record be reopened for the purpose of receiving those exhibits. As those exhibits were not offered at hearing and there is no apparent reason for that failure (both appear to have been readily available), they will not now be considered, nor will any arguments pertaining to those exhibits. See, Hill and Sinicropi, *Evidence in Arbitration* (BNA Books, 1980), p. 116; *Fairweather's Practice and Procedure in Labor Arbitration*, Schoonhoven, Ed., (BNA Books, Third Edition), pp. 362-367. This does not apply to the copies of federal regulations, interpretive opinions or arbitration awards the parties have cited and included in support of their respective positions.

Both parties assert that in deciding this case, it will be necessary for the Arbitrator to consider the interplay between their Collective Bargaining Agreement and the federal FMLA. The Union in essence argues that the parties' Agreement, with the exception of two restrictions that are not applicable (seniority and staffing needs), leaves it up to the employe to decide when to take vacation or personal holiday time and that there is nothing in the Agreement or the FMLA that authorizes the County to require an employe to first use such accrued paid leave time before going on unpaid status for an FMLA qualifying leave. Conversely, the County asserts that it has the right under the FMLA to require that accrued paid leave be used for an FMLA qualifying leave, that it has a consistent practice of doing so, and that its rights under the federal FMLA supersede the parties' Collective Bargaining Agreement at any rate.

Turning to the federal FMLA, the County relies primarily upon 29 U.S.C. Sec. 102(d) of the Act and 29 C.F.R. Sec. 25.207 of the accompanying regulations, both of which provide that if the employe does not elect to substitute paid leave for FMLA leave, the employer may require such substitution. The County also cites a number of published opinions of the Wage and Hour Division of the Department of Labor. The Union cites two arbitration awards where

arbitrators found that those federal statutory and code provisions had to be interpreted in light of the stated purposes of the FMLA and Sec. 402 of the Act, as well as the explanation in the Preamble published with the initial final regulations.

The arbitrators in the awards cited by the Union concluded that 29 C.F.R. Sec. 825.700 requires that an employer comply with rights and benefits provided under an existing collective bargaining agreement that are greater than those offered employes under the FMLA. This arbitrator concurs in that conclusion. That code provision complements 29 U.S.C. Sec. 402, which states:

. . .

Sec. 402. Effect on existing employment benefits.

(a) *More Protective*. – Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

(b) *Less Protective*. – The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

. . .

That statutory provision makes clear that the intent of the Act is that employes are to receive the greater of the benefits provided under the collective bargaining agreement or the FMLA. That conclusion is consistent with the opinions of the Wage and Hour Division of the Department of Labor in which it is concluded that a union may bargain greater benefits in a labor agreement than those provided employes by the FMLA, including the exclusive right of the employe to elect whether or not to substitute accrued paid leave for FMLA leave.

Both arbitrators went on to conclude that it was then necessary to review the parties' collective bargaining agreement to determine whether it precluded the employer from requiring employes to substitute vacation time and personal holidays for FMLA unpaid leave time. The same is true in this case. Looking then to the parties' Agreement, Article 10, Holidays, provides that an employe's three personal days must be taken at the rate of one day in each four month period of the calendar year. The parties also have a Memorandum of Understanding reached in the summer of 1996, and appended to their 1995-1996 Agreement,

that employes could use one of their personal holidays on a weekend date, but only during specified time periods. Article 20, Vacations, Section (f), of the Agreement, specifically deals with when vacations may be taken and provides, in relevant part, "In determining vacation scheduled, the Employer shall respect the wishes of the eligible employees on a seniority basis as to the time of taking their vacation insofar as the needs of the hospital will permit." That provision also requires employes to take their vacation "during the vacation year", unless they had been required to defer their vacation, in which case they would be allowed to carry it over to be used within the first six months of the ensuing year or thereafter lost. Those limitations are the extent of the contractual restrictions on the employes' ability to select when to use their personal holidays or vacation. None of those restrictions are susceptible to such a broad interpretation that would give management the right to require an employe to use a personal holiday or a vacation day against the employe's wishes. The closest it comes is requiring the use of one personal holiday in each four-month period. There is a reasonable presumption that except for those specific restrictions, an employe is free to choose when (and when not) to use personal holidays or vacation days. Given the language of the parties' Agreement, it was not necessary for the Union to negotiate additional language to preserve the employe's right to decide when and if to use vacation or personal holidays.

As did Arbitrators Chatman and Daniels in the awards cited by the Union, this Arbitrator finds that the parties' Agreement provides a greater benefit to employes than that provided under the FMLA, in that the Agreement does not permit the County to require employes to use their accrued vacation time or personal holidays in place of unpaid leave for a federal FMLA leave of absence, and leaves that election exclusively to the employe. As discussed above, pursuant to Sec. 402(a) of the Act, employes may not be required to relinquish their greater contractual rights in order to take federal FMLA leave.

As to the practice asserted by the County, while the evidence establishes that the County has consistently asserted in its FMLA information sheets that it requires substitution of accrued paid leave time for leave taken under the federal FMLA, it has stated it as though it is required by federal law. As discussed above, that is not the case. Further, as the Union notes, there is no evidence to indicate whether employes had themselves elected to substitute paid leave for federal FMLA leave, or whether the County had required them to substitute such paid leave against their wishes. Absent such evidence, it cannot be determined whether the County actually had exercised the right it claims and whether the employes and Union conceded that such a right existed. It is therefore concluded that even assuming *arguendo* that the parties' Agreement was silent or ambiguous on this point, a binding practice has not been established.

For the foregoing reasons, it is concluded that the County violated the parties' Agreement when it required the Grievant to substitute accrued vacation time and personal holidays for a leave of absence under the FMLA.

With regard to the appropriate remedy, the record indicates that the Grievant was required to substitute one vacation day and two personal holidays for unpaid leave during her leave covered by the federal FMLA. Those days are to be converted to unpaid leave days and the vacation day and two personal holidays restored to the Grievant, or they are to be left as they are (substituted), at the Grievant's option.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The County is directed to immediately give the Grievant the option of either converting the vacation day and two personal holidays she was required to substitute for her leave under the Family and Medical Leave Act into unpaid leave and restore those days to her vacation and personal holidays balances or leaving those days (February 18 and 19, 1997) as paid vacation and personal holidays.

Dated at Madison, Wisconsin this 4th day of September, 1998.

David E. Shaw /s/
David E. Shaw, Arbitrator

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