BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BAYFIELD COUNTY EMPLOYEES
LOCAL UNION 1731, AFSCME, AFL-CIO

and

BAYFIELD COUNTY (DHSS)

Case 72
No. 56148
MA-10190

(Grievance of Nancy Brown)

Appearances:

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by **Ms. Kathryn J. Prenn**, on behalf of Bayfield County.

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Bayfield County Employees Local Union 1731, AFSCME, AFL-CIO.

ARBITRATION AWARD

Bayfield County Employees Local Union 1731, 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 Bayfield 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 August 13, 1998, in Washburn, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by November 2, 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 stipulate to a statement of the substantive issues and agreed that the Arbitrator will frame the issues to be decided.

The Union would state the issues as follows:

Did the Employer violate the terms of the Collective Bargaining Agreement and the long standing past practice when it denied the Grievant the use of sick leave to attend to the medical needs of the Grievant's adult child?

And if so; the appropriate remedy is for the Employer to allow employees the use of sick leave for the care of their adult children.

The County proposes the following statement of the issues:

A. Did the County violate Article 24, Section H, of the parties' collective bargaining agreement when it denied the grievant's request to use sick leave for the purpose of accompanying her adult daughter to a medical appointment?

B. If so, what is the appropriate remedy?

The Arbitrator frames the issues to be decided as follows:

Did the County violate Article 24, Section H, of the parties' Collective Bargaining Agreement and/or a binding past practice when it denied the Grievant the use of sick leave for the purpose of accompanying her adult daughter to a medical appointment? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited, in relevant part:

ARTICLE 4 – GRIEVANCE PROCEDURE

. . .

A. A grievance is defined to be controversy between an employee and the Employer as to:

1. A matter involving the interpretation of this Agreement;

2. Any matter involving an alleged violation, of this Agreement in which the employee or the Union maintains that any of their rights or privileges have been impaired in violation of this Agreement, or

3. Any matter involving wages, hours, or conditions of employment.

. . .

C. Decision of the Arbitrator

1. The decision of the arbitrator shall be in writing and set forth his/her opinions and conclusions on the issues submitted to her/him, in writing, and/or at the hearing.

2. The decision of the arbitrator shall be binding for both parties, shall be final, and is limited to terms and conditions set forth in this Agreement.

3. The arbitrator shall not have any authority to make any decision amending, changing, subtracting from or adding to the provisions of this Agreement, and shall be limited to the subject matter of the grievance.

ARTICLE 24 – SICK LEAVE

. . .

H. Sick leave shall be defined as time off the job with pay because of illness, bodily injury, exposure to a contagious disease requiring quarantine, attendance upon members of the immediate family, diagnostic treatment, dental procedures and services of opticians when such services are performed by duly licensed practitioners. An employee's immediate family for sick leave shall be the spouse, children and parents.

BACKGROUND

The contract language in issue, presently Article 24, Sec. H, of the parties' Agreement, was first included in their 1991-92 Agreement and has not been changed in any way since then. Prior to its inclusion, the Agreement did not reference the use of sick leave for other than an employe's own illness or injury.

In May of 1996, the Chair of the County Board issued the following memorandum to County employes:

> TO: All County Employes
>
> FROM: Fred Janz, County Board Chair
>
> DATE: May 20, 1996
>
> RE: Use of Sick Leave for Adult Children
>
> Within the last few months, the County has received requests for the use of sick leave for adult daughters who have recently given birth to children. While the County has had the longstanding practice of limiting the use of sick leave to minor children, the more recent requests have been received under the state and federal family and medical leave laws.
>
> Under Wisconsin's law, two weeks of leave for the care of a child who is eighteen years of age or older is allowed provided the adult child cannot care for himself or herself because of a serious health condition. State law defines a "serious health condition" as a "disabling physical or mental illness, injury, impairment or condition involving any of the following: (1) inpatient care in a hospital, nursing home or hospice; (2) outpatient care that requires continuing treatment or supervision by a health care provider."
>
> Similarly, under the federal family and medical leave law, the use of the law for the care of an adult child is limited to an adult child who is incapable of self care because of a mental or physical disability.
>
> As indicated, state law allows up to two weeks of leave for this purpose. Further, state law allows employees to substitute accumulated sick leave to transform the otherwise unpaid leave into paid leave. Under federal law, employees may utilize up to 12 weeks for this purpose. However, under federal law, the employee is not entitled to substitute paid sick leave.

> Thus, in order to utilize either the state or federal family and medical leave law in instances where an adult daughter has recently given birth, the adult daughter must have a serious health condition which renders her mentally or physically disabled and unable to care for herself. Furthermore, both the state and federal laws require that the presence of the employee is necessary in order to provide care for the adult child. In addition, both the federal and state laws allow the employer to require certification from a health care provider that the adult daughter has a serious health condition and that the employee is needed to care for the adult child. The health care provider may also be required to provide an estimate of the amount of time that the employee's care is needed.
>
> The County has adopted a certification form for its use in approving leave requests under the state and federal family and medical leave laws. A copy of the form is attached for your information. Any future requests for leave for purposes of the care of an adult child will require the submission of the certification form prior to the County's review and action on the request.

Union Steward Bill Gahnz testified that he had no knowledge of the practice referred to in the memorandum and that when he received it, he looked at the contract language and felt it was clear and that no further action was necessary. The County's Administrative Coordinator, Tom Gordon, testified that he actually drafted the memorandum for the County Board Chair, and that other than a brief discussion with Gahnz, it was not discussed with the Union and it was not challenged by the Union.

In the fall of 1996, during negotiations for the parties' 1997-1998 Agreement, the County proposed the following regarding the contract language in issue:

> For clarification purposes, revise the last sentence to read: "An employee's immediate family for sick leave shall be spouse, minor children living in the same household, and parents."

The proposed language was not included in the parties' 1997-98 Agreement.

The Grievant, Nancy Brown, has been employed in the County's Department of Human Services for approximately seven years. At the time in question, the Grievant's daughter was 18 years old and was home from college. The daughter had an appointment to have allergy tests performed at a clinic in LaCrosse, Wisconsin. On January 12, 1998, the Grievant requested to use sick leave on January 16th to accompany her daughter and bring her home after the appointment. The Grievant's supervisor, Elizabeth Skulan, asked the Grievant the age of her daughter and when she was informed, told the Grievant that she did not think

the Grievant could use sick leave, but that she would check on it. Skulan checked with her supervisor who advised her that sick leave could not be used for adult children. Skulan advised the Grievant the next day that her request to use sick leave to accompany her daughter to the appointment was denied due to the daughter's age. Skulan also told the Grievant that she could use vacation time or that they would make some other arrangement to allow her to go if she did not have any time off left. The Grievant changed her request to vacation, but also asked the clinic in LaCrosse to confirm that it was necessary for someone to drive for the daughter due to possible reactions she could have due to the allergy tests. The clinic FAXed the Grievant such a confirmation, which the Grievant then gave to Skulan and asked if that made a difference. Skulan responded that it did not make a difference. Skulan also provided the Grievant with a copy of an excerpt from the Family Medical Leave Act (FMLA) and advised her that it did not qualify under that Act. The Grievant's daughter had a friend drive her to her appointment as she did not want her mother to use vacation time.

The Grievant grieved the denial of her request to use sick leave. The parties attempted to resolve their dispute through the grievance procedure, but were unsuccessful and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union asserts that the language of Article 24, Sec. H, of the Agreement, is clear and unambiguous that it may be used for members of the immediate family for diagnostic treatment, and that "immediate family" includes "children". Nowhere does it limit an employe's right to use sick leave only for the care and attendance of minor children. The Union cites a number of arbitration awards which have interpreted sick leave provisions allowing for the use of sick leave for "children" to include adult children.

The Union also asserts that there is a long-standing past practice of permitting the use of sick leave for an employe's adult child. The Union presented a number of witnesses, all of which testified that they have been granted the use of sick leave for the care of their adult children. In addition, a document prepared by the Union's steward, Gahnz, detailed the history of the practice of permitting numerous employes from various County departments to use sick leave for the care of their adult children over a time period ranging from 1988 to 1997 and covering the span of several collective bargaining agreements. Several of those employes testified at the hearing as to their use of sick leave for the care of their adult children, and that it was never challenged by anyone in management. While it may be argued that the employes' supervisors did not know the age of the child in question, the factor of the child's age was never an issue in any of these departments. Further, there is no testimony that any of the

employes other than the Grievant have ever been denied the use of sick leave for the care of their adult children. Thus, the criteria for recognizing a past practice has been well established. The argument that the County's memorandum dated May 20, 1996 limits employe's rights to use sick leave for the care of adult children is rebutted by the evidence that employes continue to use sick leave for adult children after that date, e.g. Stauffer, Deragon and Ochsner.

The Union also disputes the relevance of the State and Federal Family and Medical Leave Acts. It is the clear language of the Agreement and the long-standing past practice that are the operative and controlling factors in this case.

The Union also disputes that the use of sick leave was negotiated away at the bargaining table. Leaders of the Local who have been involved in the negotiations over the years testified that no change or limitation on an employe's right to use sick leave for adult children was ever negotiated.

Lastly, the Union asserts that the act of unilaterally taking employes' right to use sick leave to care for adult children is unfair and fundamentally anti-family.

In its reply brief, the Union disputes the assertion that the language of the agreement is ambiguous. The claim that the Union never challenged the County's interpretation that "children" only means minor children is rebutted by the testimony of the Union's witnesses that they have been using sick leave for the care of both minor and adult children for years. It is only when the Grievant was denied the use of sick leave for an adult child that the issue arose, and the Union promptly filed a grievance contesting the denial. The County's assertion that the bargaining history supports its position is also disputed by the Union. Had the parties intended to cover only minor children, it would have added that restriction to the Agreement, and no such restriction limiting the use of sick leave to only minor children is referenced in the contract. Finally, past practice also does not support the County's position, as the practice has been that employes have always used sick leave for the care of adult children, and the County clearly knew about it and allowed it until the Grievant was denied sick leave for her adult child. The County attempts to discount the testimony of the Union's witnesses in that regard by relying upon various supervisors who claim they were aware of the County policy limiting the use of sick leave to adult children, however, they never challenged employe use of sick leave for adult children. The County, in turn, relied upon the testimony of those employes' supervisors that they either did not know what type of leave was being used by the employe, or were unaware that sick leave was being used for the care of an adult child. The practice, however, has been that employes did use sick leave for the care of adult children without challenge by the County, and that was consistent with the employes' understanding of the Collective Bargaining Agreement. The Union requests that the grievance be sustained.

County

The County first asserts that the language of Article 24, Sec. H, of the Agreement is ambiguous in that the term "children" is not defined. That provision was added in the 1991-92 Agreement, and the County has always interpreted "children" as minor children. The County's interpretation has never been challenged by the Union and the fact that it now seeks a different interpretation underscores the ambiguity of the provision.

The County also asserts that the bargaining history supports its position. The Director of Social Services, Cheryl Huenink, testified that the County's negotiator for the 1991-92 Agreement was Mike Puksich, then the County's Administrative Coordinator/Personnel Director, and that Puksich frequently consulted with her regarding the negotiations for that agreement. Huenink testified that prior to the 1991-92 agreement, the practice was that sick leave could not be used for children. During negotiations for the 1991-92 agreement, she and Puksich were aware that the already-enacted Family and Medical Leave law had expanded the rights of employes regarding the use of sick leave. She testified that there still remained a concern regarding minor children, since they cannot receive medical services without a parent's signature, and thus a parent's attendance at medical appointments for minor children is required. She further testified that it was, and is, her understanding that "children" meant minor children. There was no testimony to refute Huenink's testimony on this point.

Past practice also supports the County's position in that the record establishes there is no practice of permitting employes to use sick leave for adult children beyond that allowed by the State and Federal FMLA's. There are approximately 60 to 70 employes covered by this Agreement, and the Union could only find eleven examples of sick leave having been used for adult children. One example predated Section H (Banta), the only evidence involving two examples was hearsay evidence (Kannenberg and Deragon), one example did not indicate the leave was for the employe's son (Mertsching), two or three examples involved the supervisor not being aware the child was 18 or older (Mertsching, Stauffer and Brown), and in three of the examples the County had no discretion, since the requests met the criteria for leave under the FMLA and had to be granted (Jacobson, Tutor and Ochsner). This falls far short of establishing that there is an unequivocal, clearly enunciated and acted upon, past practice of permitting the use of sick leave for adult children which is readily ascertainable over a period of time as a fixed and established practice by both parties. In fact, Union Steward Gahnz admitted that he had "no knowledge either way" as to whether there was such a practice. Further, the FMLA provides leave for an adult child in the event the child has a "serious health condition" and after its enactment employes began filing requests for the use of sick leave for adult children with serious health conditions. In early 1996, it became apparent to the County that there was some confusion regarding the use of sick leave for adult children who had recently given birth. As a result, the County Board Chair issued a memo to employes reminding them of the long-standing practice that sick leave was limited to minor children, but

informing them of the circumstances under which sick leave could be used for adult children under the FMLA. The Grievant, Union Steward Gahnz, former Union President Cederberg and employe Mertsching all admitted they received the memo in May, 1996. There was no challenge of any sort by the Union regarding the statements in the memorandum. Given the broad definition of a "grievance" in the Agreement, the Union could have grieved the memo if it believed the County had misstated or misrepresented the parties' practice and understanding regarding the use of sick leave for children. The fact that the County was required to grant certain leave requests in light of the FMLA does not bear on the interpretation or application of Article 24, Section H. Absent a medical condition meeting the criteria of a "serious health condition" under the FMLA, the use of contractual sick leave has always been limited to minor children. That is not changed by the fact that a few requests may have "slipped through the cracks." In fact, the paucity of requests which did slip through the cracks demonstrates that most employes knew and understood sick leave could not be used for adult children.

Finally, the County notes that the issue is not whether the Grievant would have been allowed to accompany her daughter to the doctor's appointment, as she was told by her supervisor that she could use any other leave such as vacation or a floating holiday.

In its reply brief, the County asserts that a careful reading of the arbitration decisions cited by the Union reveals that they are not on point and in the case of one of the decisions, actually supports the County's position. In the MANITOWOC decision cited by the Union, the Arbitrator concluded that the term "child" could not be considered clear and unambiguous. In discussing the appropriate means for resolving the ambiguity, the Arbitrator stated that in considering the dictionary definition, past practice or bargaining history, the latter two are the most reliable, since each focuses on the conduct of the bargaining parties who are the source of meaning for the terms of the labor agreement. Each case of this sort is fact-specific, and the Arbitrator in MANITOWOC determined that, based upon numerous examples, the parties had established a past practice which supported the grievance. The facts in MANITOWOC are significantly different from the facts in this case. The Union's reliance upon the CITY OF RHINELANDER and WEST BEND decisions is also misplaced, as the definition of "children" was not an issue in either case. Each case must be analyzed based on its own set of facts and must rise or fall based on its own merits. Since no two cases are ever exactly alike, the result cannot be presumed to be the same in both cases. As in the MANITOWOC decision, the instant case turns on the parties' bargaining history and past practice. As to past practice, contrary to the Union's assertion that the State and Federal FMLA are not relevant, since many of the examples cited by the Union are leave requests which were required to be granted under the FMLA, the application of these laws is relevant. Further, the Union could only come up with 11 examples, even though the language of Section H has been in the Agreement for nearly seven years. After deleting the requests which the FMLA required to be approved, the requests that predated Section H, the requests which did not specify that the leave was for a

child, the requests for which the only evidence was hearsay testimony, and the request for which there is no evidence of underlying facts, one is left with three examples, two of which the supervisor approved thinking the child was under 18, and in the third the employe admitted that she did not know whether the supervisor knew that her son was 18. While the Union faults the County for not challenging the requests of Stauffer, Banta, Jacobson and Ochsner, two were required to be granted under the FMLA, Banta's request predated Section H and in Stauffer's case, the supervisor mistakenly assumed the child was under 18.

While the Union faults the County for not proving a negative (i.e. that it has denied the requests for the use of sick leave for adult children) requests not made cannot be denied. The burden is on the Union to demonstrate that Section H applies to adult children, and the basis for their alleged past practice dissolves when it is revealed that it is based solely on two, or possibly three, requests which were approved by mistake over the course of seven years. Under no interpretation do the facts in this case rise to the compliance with the standard for finding of past practice. That standard contemplates a course of conduct knowingly and voluntarily engaged in by the parties, and not actions dictated by a statute. The County also disputes the Union's claim that it has never accepted any change regarding limiting employes' ability to use sick leave for adult children. Failure to act upon a right given by a contract may be considered by the arbitrator to help establish the intent of the parties. Elkouri and Elkouri, *How Arbitration Works*, Fifth Edition, at p. 577. Here, the Union was given express and clear written notice in May of 1996 of the County's position that sick leave was limited to minor children. At no time following the issuance of that memo, and prior to the instant grievance, did the Union challenge that position. The Union's acquiescence with the County's stated position in 1996 is further evidence that the intent of the parties was that Section H applies only to minor children. Finally, the County asserts that whether the Grievant is a sick leave abuser or not is not in issue, nor is the assertion that the County's interpretation of Section H is "anti-family" relevant. The Union is attempting to expand the interpretation to cover adult children, contrary to the parties' intent and practice. The County requests that the grievance be dismissed in its entirety.

DISCUSSION

The Union's assertion that the term "children" in Article 24, Section H, of the Agreement is clear and unambiguous is not persuasive. Wording is not clear and unambiguous if it is susceptible to reasonable differing interpretations. The term "children" may accurately be used to describe both adult and minor offspring of human parents. That said, however, it is the County that is asserting that the term is to be given the more limited meaning of only minor offspring in this case. As such a limitation is not set forth in the wording of Article 24, Sec. H, if it is to be found, it must be inferred. In that regard, the County relies upon both past practice and bargaining history to support its position, as does the Union.

With regard to past practice, the County asserts that the parties have interpreted Article 24, Sec. H to apply only to minor children since its inception and cites as evidence of that practice the lack of any challenge to the County Board Chair's memorandum issued in May of 1996. As noted previously, the County also takes issues with the examples offered by the Union of instances employes have used sick leave for adult children. The County discounts those examples where the child's condition would have been covered by the FMLA – Tutor, Deragon, Jacobson and Ochsner. Both Jacobson and Ochsner testified they requested and used sick leave in 1997 to assist or accompany an adult child with the knowledge of their supervisors. While both agreed that their child's medical condition could qualify as a "serious health condition" under the FMLA, both also testified that they only requested to use sick leave and could not say if the FMLA was considered by their supervisors. However, the County's May, 1996 Memorandum states:

> The County has adopted a certification form for its use in approving leave requests under the state and federal family and medical leave laws. A copy of the form is attached for your information. Any future requests for leave for purposes of the care of an adult child will require the submission of the certification form prior to the County's review and action on the request.

Gordon testified that Tutor had in fact filled out the certification form and had it approved, but then waited a month, when there was no longer a serious condition in the County's estimation, to go to her daughter and that is what prompted the memo. There is, however, no evidence Jacobson or Ochsner submitted such a certification form with their requests and according to their testimony, they would not have. Presumably then, their requests to use sick leave in these instances were granted for reasons other than the mandates of the state or federal FMLA's. Other than testimony from Gahnz that Deragon's child's condition involved a serious injury in 1997, there is no evidence that an FMLA certification form was submitted or approved. With regard to the May 24, 1994 request of Mertsching, it states it is for "son's Dr. appt." and she testified that her son was 19 at the time and that both supervisors who initialled her request, Smitten, her immediate supervisor and Huenink, the Director of Social Services, were aware her son was out of high school. Mertsching testified that Huenink was aware of her son's age because she had a son the same age. While Smitten testified that she was not aware Mertsching's son was over 18 at the time, Huenink did not dispute knowing the boy's age. Huenink testified that her initialling the request was only a matter of reviewing time taken off and not of reviewing the supervisor's approval. It would seem, however, that Huenink, being aware Mertsching's son was over 18, would have indicated in some manner that approval of Mertsching's request was improper if she felt the use of sick leave for a child that age was not permitted.

Of the other examples offered by the Union, one predated the contract language (Banta), one was not clear the employe was using sick leave (Kannenberg), one was not clear the sick leave request involved the employe's child (Mertsching's June 24, 1994 request) and two were not clear the employe's supervisor knew the employe's child was age 18 or older (Brown's January 18, 1995 request and Stauffer). Those examples are not helpful in determining whether there has been a practice.

The County notes the difficulty in proving it has denied requests to use sick leave for adult children if such requests have not been made. While there is some merit to that argument, there is no indication in the record that employes have ever been asked about the age of the child for whom they have requested to use sick leave prior to Skulan asking the Grievant in this case. The only evidence of the County's concern in that regard prior to this situation is the May, 1996 memorandum. In sum, other than the testimony of Skulan, Smitten and Huenink that it was their understanding that sick leave could not be used for an employe's adult child, there is no evidence of a practice in that regard other than the memorandum asserting it has been a "longstanding practice." Although there was no formal challenge to that memorandum at the time by the Union, there was some discussion on the point between Gahnz and Gordon. The evidence of a practice, albeit not overwhelming, favors the Union's position that employes have been permitted to use sick leave for their adult children.

The evidence with regard to bargaining history consists of the County's proposal in the negotiations for this Agreement to revise the last sentence of what is now Article 24, Sec. H, "for clarification purposes" to expressly provide that sick leave may only be used for "minor children living in the same household." While that evidence does not conclusively establish that without such a revision the provision provided otherwise, it is an acknowledgement that such a limitation is not implicit in the wording of the provision. That the parties reached agreement on the contract without the County's proposed revision at a minimum indicates that the Union did not agree to the limitation and that the County was aware of the Union's position when it agreed to this Agreement without that revision.

In conclusion, the term "children" may be used to accurately describe both minor and adult offspring and the County has failed to establish that the parties intended the term be given the more narrow definition of only minor children. The evidence as to the parties' practice and bargaining history, while not overwhelming, favors the Union's position that the term is to be given its broader meaning. Therefore, it is concluded that the County violated Article 24, Sec. H, of the parties' Agreement when it denied the Grievant's request to use sick leave to take her 18 year old daughter to a medical appointment. As the Grievant did not accompany her daughter after her request was denied, no remedy is available beyond ordering the County to stop violating the Agreement in this regard, and that is the relief granted.

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 cease and desist from violating the parties' Agreement as set forth in this Award.

Dated at Madison, Wisconsin this 9th day of February, 1999.

David E. Shaw /s/

David E. Shaw, Arbitrator

DES/gjc
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