BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ST. FRANCIS EDUCATION ASSOCIATION

and

ST. FRANCIS SCHOOL DISTRICT

Case 77
No. 58698
MA-11037

Appearances:

Ms. Valerie Gabriel, Executive Director, Council #10, on behalf of the St. Francis Education Association and the Grievant, Deborah Legwinski.

Davis & Kuelthau, S.C., Attorneys at Law, by **Ms. Mary L. Hubacher**, on behalf of the St. Francis School District.

ARBITRATION AWARD

The St. Francis Education Association, hereinafter the Association, and the St. Francis School District, hereinafter the District, jointly requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator, David E. Shaw, to hear and decide the instant dispute between the Association and the District. The undersigned was designated to arbitrate in the dispute. A hearing was held before the undersigned on October 4, 2000, in St. Francis, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by December 27, 2000. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated to the following statement of the issue:

Did the District violate the collective bargaining agreement when it denied Grievant Deborah Legwinsky, ten (10) days of paid sick leave for elective surgery?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

Article I – Recognition

. . .

. . .District and Union agree to abide by policies and procedures adopted by District. Decisions of District impacting mandatory subjects of bargaining shall be subject to collective bargaining with Union.

. . .

Article IV – Leaves

Section A. Sick Leave

Ten days of sick leave with pay shall be granted to each unit employee each year.

. . .

Sickness is defined as personal illness or emotional upset by accident or illness in the immediate family, or similar circumstances which render the unit employee incapable of carrying on his/her regular assignment.

. . .

Abuse of sick leave shall result in loss of sick pay.

. . .

Article VIII- Grievance Procedure

Section B. Steps

5. . . . The arbitrator shall determine the meaning, interpretation and application of the terms of this agreement and shall have no power to add to, or subtract from, or modify any of the terms of this agreement.

. . .

Article X – Savings Clause and Duration

Section A. Dates and Conditions

. . .

. . .All terms and conditions of employment not covered by this settlement shall continue to be subject to District's direction and control; provided, however, that Union shall be notified in advance of any changes affecting Union and its members, be given the reasons for such changes, and be provided an opportunity to discuss the matter.

BACKGROUND

The Grievant has been employed by the District as a full-time teacher in the elementary grades since 1989. At the time in question, she was teaching third grade.

Early in 1999, the Grievant was considering having breast augmentation surgery. While the Grievant testified she was very self-conscious of her condition, she conceded she did not seek or receive therapy or advice from a mental health professional in that regard. After considering surgery for some time, in January of 1999 she asked her Association building representative, Jane Perkins, if she could use paid sick leave for elective surgery. Perkins said she was not sure and recommended that the Grievant ask the Association's representative, Val Gabriel, and also said she would ask the Association's chief negotiator, Milton Bretzel. Perkins subsequently advised the Grievant that Bretzel said that was what sick days were for. The Grievant also contacted Gabriel to ask if she could use sick leave for her surgery and was subsequently told that she could. The Grievant asked Gabriel what she should put in her letter to the District requesting the time off. Gabriel advised her to state that she was requesting time off for surgery for those days and that she would be sure to be prepared for her substitute. Gabriel told the Grievant not to lie if she was asked if the surgery was elective and that if asked about the nature of the surgery, to do what she could to maintain her privacy.

On February 3, 1999, the Grievant handed her building principal, Elayne Stover, her letter notifying Stover she would be requesting time off, which letter read, in relevant part, as follows:

> The purpose of my letter is to inform you that I will be having surgery on Monday, March 1, 1999. Through consultations with my doctor, he anticipates the amount of time I will need to recover from the surgery is two weeks.
>
> The days that I will be off from school are March 1-March 5 and March 8-March 12, 1999. It is my understanding that this recovery time falls under the provisions of sick leave. I understand that 10 days of my sick time will be used for this purpose. I will have everything prepared for the substitute teacher well in advance of my absence. I will be able to resume my normal teaching duties on Monday, March 15, 1999.

Stover read the letter and said something to the effect, "I hope it isn't serious", and the Grievant said, "No, it is not." The Grievant testified she felt Stover was "just being nice" and not really questioning her about the surgery. 1/

1/ The Grievant testified that approximately a year earlier, Stover had questioned her about her use of sick leave. The Grievant had taken sick leave for a doctor's appointment and while waiting for the doctor, had run an errand at the courthouse and then returned to continue to wait for the doctor. Stover had learned of the Grievant's having been at the courthouse and subsequently called the Grievant into her office to warn her that it was not appropriate to go anywhere but to and from the doctor's office in such a situation when using paid sick leave for the appointment.

The Grievant subsequently submitted her request for sick leave for the dates of March 1-5 and March 8-12, 1999, on the District's form, which included, in relevant part:

> I request that leave be granted (with/<u>without</u>) salary deduction for the following reason(s):
>
> I'm having surgery March 1, 1999. According to my doctor, I will need to be off of work for the above mentioned dates.

The request was subsequently approved by Stover and by the District's Superintendent, J.P. Campion.

The Grievant testified that the surgery was scheduled based on her doctor's and her availability, and that she wanted to avoid being off when parent-teacher conferences (March 24 and 31) and the third-grade reading test were to be held. She testified that she could not schedule the surgery to occur during spring break (April 2-11) as she had booked and paid for a trip to Jamaica for that time. She didn't want to do it during the summer because she teaches summer school and did not want to lose that income. Although summer school is only six weeks, her youngest child would be starting school that fall and she wanted to spend the rest of that summer with him. The Grievant denied she scheduled the surgery when she did because of her marriage plans, having later got married on her trip to Jamaica.

The Grievant had the surgery on March 1, 1999 and was off work the ten days she had requested. She returned to school on March 15, 1999. During the Grievant's absence, Stover learned the nature of her surgery from other teachers at the school, and subsequently passed that information on to Superintendent Campion. After her return to work, Campion informed the Grievant that she needed to submit a return to work authorization from her doctor. The Grievant complied; however, in the interim, Campion sent the Grievant a letter asking that she have her doctor provide a "certification of illness", if the return to work authorization did not contain such certification. The Grievant's doctor subsequently provided a statement that she was under his care from March 1 through March 12, 1999 and "was incapable of caring (sic) on regular work duties."

The Grievant was subsequently denied the use of sick leave for her absence of March 1 through March 12. Although there were some allegations that the Grievant had "misrepresented her needs" for the surgery when requesting to use sick leave for the surgery and recovery period and mention of discipline, the parties stipulated there was no discipline rendered and that the Grievant was denied the use of sick leave on the basis that her absence was for elective surgery.

The denial of the use of paid sick leave for the Grievant's absence was grieved. The parties attempted to resolve their dispute, but were unsuccessful and proceeded to arbitrate the matter before the undersigned.

POSITIONS OF THE PARTIES

Association

The Association first asserts that the definition of "sickness" in the Agreement is ambiguous and subject to interpretation. The assertion that the contractual definition of "sickness" is strictly limited to personal health conditions over which the employee has no control is not supported by either the language of the Agreement or past practice. Inclusion of the phrase "or similar circumstances which render the unit employee incapable of carrying on

his/her regular assignment" and the definition of "sickness" by Superintendent Campion's own acknowledgement, leaves room for interpretation. (Tr. 195). Campion not only acknowledged that there is room for interpretation, but that he also has attempted to apply his own interpretation(s) to the language, an interpretation not clearly defined beyond a generally-vague notion that elective surgery is not covered. Campion expressed uncertainty as to what constitutes necessary, versus elective, medical attention or what he would do if confronted with a given situation. Neither Campion, nor Principal Stover, denies that doctor appointments, whether or not necessitated by underlying personal illness or emotional upset, are an appropriate use of paid sick leave. Campion reiterated that he has never challenged doctor's appointments. The "interpretive approach" adopted by the Superintendent and the expansion of "sickness" definition to include appointments, belies the assertion that the language is clear on its face and must be so narrowly construed as to preclude use of paid sick leave for elective surgery and subsequent recovery. Given the foregoing, it is appropriate to turn to past practice.

The unrefuted testimony of the primary Association representative, Milton Bretzel, was that employees have had the option of using paid sick leave for elective medical procedures for almost 30 years. There is no evidence that would lead one to believe that there is any individual in the District with greater expertise in contractual matters than Bretzel. Not only Association members, but also administrators, including Campion, have turned to Bretzel for an interpretation of contractual ambiguity, valuing his awareness of past practices. It was Bretzel's understanding that the sick leave benefit has covered elective procedures for at least the past 28 or 29 years. District witnesses offered no testimony to rebut Bretzel's historical perspective, nor were any documents produced to contradict his testimony that employees have requested, and been granted, paid leaves for such things as tubal ligations, vasectomies, eye surgery to correct nearsightedness, removal of bunions, or removal of moles. While the Association did not demonstrate that over that period of time previous administrators knew that sick leave was being used for such procedures, the District did not show that they did not know. It can only be assumed that if they did not know, it was because employees were not required to offer the information. Regardless, whether previous administrators were aware or not, a practice was established, either that paid sick leave was knowingly granted for elective procedures, or, in the alternative, over an extended period of time employees were allowed to believe that they could use sick leave for such purposes without providing personal medical information to the supervisors approving their request.

The District claims, but has not established, that the Grievant's elective surgery is a case of first impression. Bretzel's credible testimony shows that clearly is not the case. The most the District has shown is that Campion, in the relatively few years he has served as Superintendent, had not previously addressed the issue with anyone. Denial of awareness on the part of the current superintendent does not defeat the existence of an established practice that predates him.

The Association disputes that the Grievant misrepresented her request for paid sick leave. In her desire to preserve her privacy, the Grievant offered as little information as she had been advised was necessary and elected not to give specifics in the very public office setting where she submitted her original request to Stover. However, two individuals passed the information along to the building principal, apparently out of concern that the Grievant planned to return to work too soon. What is important is that Stover learned about the nature of the surgery incidentally and passively. Stover made no *bona fide* attempt to clarify whether the surgery was either required at all or at that particular time. Given the prior incident with Stover regarding her use of sick leave, the Grievant had reason to believe that if Stover wanted information, she knew how to obtain it. Stover testified that she was intentionally not seeking information. Further, the Grievant testified that had she been asked whether the surgery was elective, she was prepared to respond that it was.

To now cast the Grievant's desire for privacy under silence as deliberate misrepresentation is to misallocate the responsibility away from the administrators' obligation to ask for the information, especially when employees were never required to provide such information previously. Campion testified that when he receives the request form and if he questions it, he goes to that employee and asks if it is necessary and what the situation is, and that employees are almost universally forthcoming. It is apparent from those questions that he says he asks of others that those others did not expressly state on their form what the procedure was, or whether the procedure was elective or necessary. There is no evidence as to what the other forms stated that triggered Campion's follow-up inquiry. Thus, an analysis of the Grievant's form, by itself, does not support an accusation that she misrepresented the necessity of the surgery. Further, the Grievant had earlier submitted a written notice on February 3 that clearly states that the "need" is attached to the subsequent recovery time and does not reference the surgery. Responsibility for the confusion in that regard belongs with the administration. It is clear that more than one standard has been applied by Campion. Even if the Association were to concede that the administration has the right to question the intended use of sick leave for surgery, the District must at least actually do so. In the Grievant's case, they did not.

The Association also asserts that the decisions made in the Grievant's case may have been based on wholly inappropriate criteria. Despite the Grievant's highly personal and credible explanation of why the surgery was important to her, something about the nature of breast augmentation elicits a value judgment. The Superintendent was completely unable to articulate a reliable definition of elective surgery for which paid sick leave would be disallowed, yet he determined that breast augmentation, absent actual illness, is somewhere on "that" side of his line. Further, there is some evidence that the case arose at a time when the District was particularly sensitive to public opinion, having received reports that a teacher on disability leave had been seen at the airport carrying suitcases and boarding a plane.

The Association concludes that the District's conduct in this dispute represents a unilateral reinterpretation of a significant contractual benefit, as well as a unilateral change in implementation. A relatively new superintendent has determined that he has the sole right to interpret a significant contractual benefit without engaging in any discussion with the Association, without investigating past practices, without sharing with anyone what his new interpretation was to be, and without having articulated a fair and consistent policy regarding surgeries. Further, although no prior restrictions on use of paid sick leave for elective surgery were known to have been imposed, no advance warning was given in imposing such restrictions on the Grievant. While in disputes involving past practice parties often argue over the existence of the practice itself or whether if such a practice has been found to exist, a party can change the practice by a simple notice of expiration or must actually negotiate the change, the latter question is essentially answered in the parties' Agreement in two places. The Recognition Clause, Article I, ends with the phrase, "District and Union agree to abide by policies and procedures adopted by District. Decisions of District impacting mandatory subjects of bargaining shall be subject to collective bargaining with Union." The unilateral decision to adopt new policies regarding sick leave certainly impact a mandatory subject of bargaining. Also, the language of Article X, Savings Clause and Duration, includes "All terms and conditions of employment not covered by this settlement shall be continue to be subject to District's direction and control; provided, however, that Union shall be notified in advance of any change affecting Union and its members, be given the reasons for such changes, and be provided an opportunity to discuss the matter." Whether those provisions are entirely on point is not important. What is important is that the parties clearly contemplate that changes in the *status quo*, by either practice or policy, will not be implemented by stealth, but will be discussed openly, with an effort to reaching a bi-lateral agreement. The conduct of the District in this matter has been wholly inconsistent with both the spirit of the intended relationship between employer and union and with the well-established principles of labor law.

In its reply brief, the Association again disputes the District's assertion that the contract language is clear on its face. The assertion ignores the wording "or similar circumstances which render the unit employee incapable of carrying on his/her regular assignment." Unless that wording is rendered utterly meaningless, its impact on the definition of allowed sick leave must be considered. As the arbitrator is constrained from rewriting contract language by addition, so is he/she similarly restrained from rewriting it by deletion. The use of a non-specific term "other" is clear indication the parties intended to allow for additional circumstances beyond the two more definite criteria of personal illness or emotional upset. While it is not clear from the language itself what those additional circumstances might be, if the language were as clear as the District asserts, the Grievant would never have had to ask the Union representative in her building about elective surgery and that person, in turn, would never have sought additional interpretation. Since the express language is deliberately open to a built-in level of subjectivity, its meaning must be ascertained by the behavior of the parties over time. In that regard, the testimony of the only witness with knowledge of the parties'

behavior is not rebutted, and must be accepted as credible. While the District makes much of the fact that the Association offered only one "uncorroborated" witness with any knowledge of the history of the disputed contract provision, that is one more than was called by the District. Further, the Association elicited testimony from a second witness with regard to Bretzel's widely-recognized expertise in matters related to the Agreement. Campion himself readily acknowledged his regard for Bretzel's base of information and understanding of how the contract has worked.

The District argues that the Association failed to establish that the practice of authorizing paid sick leave for medical procedures not made necessary by personal illness or emotional upset has been mutually-ascertainable over time and accepted by both parties. While Bretzel was unable to testify as to exactly what the District knew about the examples he offered, the District offered no evidence whatsoever that over almost 30 years it knew nothing of the practice. All it showed was that Campion was unaware of the practice from the beginning of his tenure in January of 1997 through the time in question. It cannot be overlooked that the Grievant's leave was the first time he personally confronted this precise question. It is interesting to note that Campion has sought Bretzel's opinion in other contract matters, but opted not to do so with regard to the ambiguous language defining sickness. Yet he attempts nonetheless to tarnish Bretzel's credibility in this dispute. Absent any actual rebuttal of Bretzel's testimony, it must be given considerable weight.

The Association reiterates that the District failed to give notice that it was seeking to change the established practice. Contrary to the assertion that Campion has been denying requests for sick leave in cases of elective surgery, his actual testimony is that "I've never approved one of those, and I've never had one of those come to me like that." (Tr. 189). He further testified that he has not discussed the restriction on the use of sick leave for elective surgery with employees and has never sent any communication to employees informing them of such a restriction. Without at least a notice of intent to change an existing practice, the practice stands until mutually negotiated otherwise.

The District seeks to impugn the Association's motives in advising the Grievant on the wording of her request by noting that the term "elective" is omitted. Nowhere is it shown that this information is required by the form or has been previously expected of employees. To the contrary, Campion testified that in other situations he has taken the initiative to question employees who have sent in the request forms. It is unclear why he expected the Grievant to be more exact or expansive in this case than what he has demanded from others. In this case, the Association representatives were merely answering the Grievant's questions, and she simply sought and was entitled to greater privacy than she has been able to maintain regarding the nature of her surgery.

In conclusion, the Association asks that the Arbitrator take notice of the lack of enthusiasm from both Bretzel and Association President Gyland for the use of two weeks' sick leave for elective surgery, and the commentary in the Association opening statement that it "wouldn't be opposed to a policy restricting the use of sick leave in cases of an elective surgery if one existed." Contrary to the District's assertion, the Association is not seeking to expand contract language to cover a circumstance not previously covered. The Association has never disputed that some greater restriction on the use of sick leave than now exists would be reasonable. The Association's position is, however, that a restriction against elective surgery did not exist prior to the Grievant's leave of absence, and the District has done absolutely nothing since then, other than denying the Grievant her pay and benefits, to mutually institute a reasonable restriction. Thus, the fears that the Association seeks to open the flood gates to "unfettered" discretion are unfounded. The Association requests that the grievance be sustained and the Grievant paid ten (10) days of paid sick leave.

District

The District initially asserts that it is well-established arbitral precedent and expressly stated in the Agreement between the parties, that the arbitrator's function is not to rewrite the terms of the Agreement, but rather to tell the parties what they can or cannot do within the bounds of their Agreement. In doing so, the arbitrator must first look to the language itself. If the language is clear and unambiguous, that language cannot be ignored, but must be given the meaning expressed by the parties. Here, the express language of the Agreement does not provide for the use of paid sick leave to cover absences due to elective surgery. The language could not be clearer that the use of sick leave is limited to those instances when an employee is suffering from a personal illness or emotional upset which renders the employee incapable of carrying on his/her regular assignment. It is undisputed that there was no physical illness or emotional upsets which required the Grievant to be absent from work for ten days in March of 1999. Her absence was caused by her choice to have cosmetic, elective surgery at that time – surgery that had not been determined to be medically or psychologically necessary. The Grievant conceded that the surgery was something she had been considering doing for several years. Delaying the surgery until summer was unacceptable to the Grievant because it interfered with her personal plans, including taking a cruise and getting married, her interest in teaching summer school, and her wish to spend family time with her children in the summer. While all of those considerations may have been important to the Grievant, none of those overrides the express language of the Agreement that sick leave is to be used to cover absences due to personal illness or emotional upset.

The Association's contention that personal illnesses has broad application and that any absence related in any way to the body or mind warrants the use of paid sick leave, if accepted, would result in the needs of the District and its students taking a back seat to a staff member's personal desire to schedule paid time off for elective surgery at any time during the school

year. The clear language of the Agreement does not allow this unfettered discretion in using sick leave. Association witness Bretzel acknowledged that the express language of the Agreement does not include elective surgery as an acceptable use of sick leave. While he interpreted the sick leave provision to cover absences due to elective surgery, he acknowledges that he never discussed with Campion whether the administration believed that sick leave could be used for elective surgery. Thus, the language must be applied as it is currently written.

An assertion that even if the Grievant was not suffering from a personal illness on the first day of her leave, the day of her surgery, she was suffering from a personal illness on the remaining nine days, must be rejected. While the Grievant may have been in physical discomfort on those days, there is no evidence that she was suffering from a "personal illness" which caused the discomfort. The discomfort was instead caused by an elective procedure not required to be performed at this time. If even that narrow position is accepted, the end result would be the same as described above, except for the minor revision that the first day of sick leave on which the elective surgery takes place would not be covered. Such an outcome is clearly not within the scope of the Agreement.

As further "evidence" of its contention that the language of the Agreement means something broader than what is stated, the Association notes that neither Stover nor Campion ever asked the Grievant whether or not the surgery was elective. From this, they contend that the District does not distinguish between such use of sick leave. Such an argument puts the District in a "damned if you do, damned if you don't" position. The Association noted testimony that Stover had previously questioned the Grievant's use of sick leave and the Grievant stated she believed this prior conversation over the use of sick time as evidence of the lack of trust by Stover towards her. Thus, the Association says "Trust us, and don't ask questions" and on the other hand says, "You should have asked questions regarding the use of sick time." This conundrum was noted by Stover when she was asked on cross-examination why she did not question the Grievant further regarding the sick leave request, noting that it was a "very fine line" that the administration has to walk in this regard and a no-win situation for administrators. It was not until after the Grievant was out on leave that Stover had any information suggesting the surgery was not due to personal illness. Stover testified that she had "assumed that it was something she had to have done at that particular time." Campion explained on cross-examination why he did not question the Grievant regarding whether or not the surgery was elective. He stated that because the Grievant stated on the form "I am having surgery and I will need. . ." he presumed that she was addressing a personal illness. That the District trusted the Grievant's statement as to her need to be off due to surgery and did not ask additional questions is <u>not</u> evidence the District has given a broad definition to the language. Because the language is clear on its face and because the Grievant did not meet the conditions necessary to use sick leave, the grievance must be denied.

Next, the District asserts that, even assuming *arguendo* that the language is ambiguous, the Association has offered no credible evidence to support its interpretation of the language. The only "evidence" offered is the testimony of Bretzel. Although Bretzel asserted the sick leave provision has always been given broad meaning, he offered no concrete evidence to support his self-serving testimony. To the contrary, he admitted that the issue of elective surgery has never been addressed in discussions at the District, and acknowledged that the language has never been modified to cover absences due to elective surgery. Although he testified that the issue of sick leave has been a subject of discussions in negotiations, he offered no evidence that the parties had any intent, other than what is expressly stated, regarding the limited use of sick leave when it was negotiated and agreed to.

The Association's allegation that past practice supports their broad interpretation regarding the use of sick leave for reasons other than those expressly stated in the Agreement, is unsupported by any credible evidence. While Bretzel identified several types of surgeries that unit members had undergone and for which sick leave had been used, he offered no evidence as to any specific individual who had undergone such surgery, nor that the surgery was elective and not the result of an illness or an emotional upset, nor that the person had used sick leave to cover the absence, as opposed to a paid personal day. Bretzel admitted he had no knowledge as to whether any of those may have been necessary due to an illness or an emotional upset. The Association offered no evidence establishing that the District had knowingly approved the use of sick leave to cover an absence resulting from an elective surgery. Further, Bretzel admitted that certain state and federal laws require the District to allow employees to use paid sick leave to cover time off that was not due to the employee's own personal illness or emotional upset.

The most convincing evidence that there is no unequivocal practice of allowing paid sick leave to cover absences caused by elective, non-medically necessary surgery is the "If they don't ask, don't tell" approach advised by the Association in this case. Based on that advice, the Grievant failed to disclose the elective nature of her surgery to the administration. Had the Association believed that the administration did not distinguish between the use of sick leave for personal illness, as opposed to the use of sick leave to cover elective surgery, their policy of omission would not have been necessary. Similarly, there is no evidence that the District ever clearly enunciated that it considered sick leave could be used for absences due to elective surgery. To the contrary, Campion stated that whenever he reviews a request for sick leave that suggests surgery is not due to personal illness or emotional upset, he follows up with the individual regarding the use of sick leave. Where the surgery is not necessary, he has denied the use of sick leave and has asked the employee to have the procedure done on his/her own time or to use a personal day to cover the absence. Finally, the evidence demonstrates that there has been no practice of knowingly allowing the use of sick leave for elective surgery. Campion is responsible for approving all requests for leave, including the use of paid sick leave, and he stated that he has never approved a request to use sick leave for surgery that does

not address an existing physical illness or some kind of personal illness or psychological problem. Given that the Association advised the Grievant not to voluntarily disclose the fact that the surgery was elective, it is clear that the Association had no belief that there was a past practice of permitting sick leave for elective surgery and chose to avoid the issue by advising the Grievant to be less than forthcoming in her disclosure to the District.

In its reply brief, the District asserts that the Association has taken incomplete testimony of Campion out of context in order to support its contention that the contract language is ambiguous. When that testimony cited by the Association is reviewed in context and in its entirety, it does not support the Association's position, as the testimony does not even pertain to the contract language. In response to questions regarding whether the treatment for a particular condition is or is not elective, he frequently responded that he did not know whether it was elective or not, since he is not a doctor. While Campion testified he did not know whether types of surgery he was asked about were elective or not, absent additional information, he also testified that where he had information the surgery was not necessary at the time, but was cosmetic, he would tell them no, and ask that they use their own time to have that done. As to the contention that Campion thought the language of the Agreement was subject to interpretation, he acknowledged no such thing. Further, the Association misstates the testimony of Campion and Stover regarding the use of sick leave to cover absences for a doctor's appointment. Both testified they would not question the use of sick leave for a doctor's appointment because it is a generally-held belief that people schedule an appointment with a doctor because they have a physical or mental condition that necessitates seeing a doctor. Contrary to the Association's claim, neither Campion nor Stover testified that going to a doctor's appointment that was not necessitated by an underlying personal illness or emotional upset was an appropriate use of sick leave, because neither believed that a person would go to a doctor absent such a condition.

Again, even if the language were found to be ambiguous, the Association has offered only unsupported allegations that the District applied the language in accord with the Association's interpretation. If, as the Association contends, a practice had been in existence for more than 27 years, the Association could have offered evidence supporting Bretzel's allegations. Even if such unsubstantiated allegations were given any weight, the amount of weight to be given to the testimony should be carefully evaluated in light of Bretzel's interest in obtaining a result favorable to the Association members. The only evidence of a specific factual situation regarding the use of sick leave for elective surgery is the instant case. It is undisputed that upon learning that the absence was not due to surgery for an existing physical or psychological condition, the administration withdrew its approval for the leave. Thus, the only evidence as to the implementation of the sick leave provision unequivocally demonstrates the administration has not approved the use of sick leave for surgery that is not medically necessary.

The Association asserts that even if the administration had no knowledge of the use of sick leave for elective surgery, a practice was established. That argument ignores the requirement that a past practice must be clearly enunciated between the parties. The record is void of any evidence establishing that the use of sick leave for elective surgery was an unequivocal practice accepted by both parties. Instead, the evidence demonstrates that the District's unequivocal practice has been to disallow the use of sick leave to cover absences for surgeries that were not the result of a physical or a psychological illness, as required by the clear and unambiguous language of the agreement. Because the Association has not and cannot establish a mutually-agreed upon past practice of expanding the use of sick leave beyond that expressly provided for in the Agreement, the contention that the District has somehow reinterpreted or changed the implementation of the Agreement is meritless.

Finally, the nature of the Grievant's surgery, other than the undisputed fact that it was not necessary due to a medical or psychological condition that prevented her from performing her job, was not a criterion used by the District in denying her request for paid sick leave. Rather, after learning the nature of the surgery, Campion requested information on several occasions to establish that the surgery was due to a physical or psychological condition. It was finally at a meeting in June of 2000 that the Grievant admitted that it was not for any such illness. If Campion had considered the nature of the surgery itself as a criterion for denying the use of paid sick leave because of some supposed value judgment on his part, he would have denied the request immediately upon learning the nature of the surgery, rather than as he had done in the past with other employees, sought information from the employee and the Association confirming that the absence for surgery or treatment met the express limitations set out in the parties' Agreement. Because the use of sick leave for surgery that was not necessary due to a physical or psychological condition that rendered the Grievant unable to perform her duties is not allowed under the Agreement, the grievance must be denied.

DISCUSSION

It is important to note that the Arbitrator's role is in this case is to interpret the provisions of the parties' Agreement in order to determine whether the Grievant was entitled to use paid sick leave for the ten days of work she was absent as a result of having "elective surgery". It is not the Arbitrator's role to decide whether or not it would be a good thing to cover absences due to elective surgery, or whether the parties' Agreement ought to or ought not cover such absences.

Article IV, Section A, provides for sick leave with pay and, in relevant part states:

> Sickness is defined as personal illness or emotional upset by accident or illness in the immediate family, or similar circumstances which render the unit employee incapable of carrying on his/her regular assignment.

Contrary to the District's assertion, that language is not clear and unambiguous. While there is no real dispute that the Grievant's condition did not fall within the categories of "personal illness" or "emotional upset by accident or illness in the immediate family", it is the latter part of the wording that creates the ambiguity and the dispute in this case. The District's assertion ignores the wording "or similar circumstances. . .", and would give it no effect. Such an interpretation is to be avoided. The Association asserts that past practice resolves that ambiguity.

Contrary to the Association's assertion, the evidence does not establish that there has been a mutually-understood and accepted practice of granting the use of paid sick leave for "elective surgery". The testimony of Bretzel in that regard was that he was aware that over the years there were a number of employees who had surgeries that might have been "elective" in nature (he conceded he was not privy to the medical circumstances surrounding those situations) and used paid sick leave for their absences. Bretzel conceded he did not know what the administration had been told or been made aware of in each instance. Perhaps more telling is the Association's own actions in advising the Grievant to essentially avoid telling the administration the surgery was "elective" and only state that she was "having surgery", unless she was directly asked if it was elective surgery. Such actions belie there being the mutually-understood and accepted practice the Association asserts has existed. While Campion testified that he has not knowingly granted requests to use sick leave for elective surgery, the District does not assert there is an established practice in that regard and concedes that the only evidence of a specific situation involving a request to use sick leave for "elective surgery" is the instant case.

As to bargaining history, the evidence indicates the relevant wording of Article IV, Section A, of the Agreement has been unchanged for many years. Bretzel testified that the District has raised issues in negotiations over the years with regard to sick leave, but that he could not recall the words "elective surgery" ever being raised.

We are then left to resolve the ambiguity with the words themselves. Again, it is conceded that the Grievant's surgery was not due to "personal illness or emotional upset by accident or illness in the immediate family." The question is whether the surgery, and resulting absence, fall within the ambit of the terms "similar circumstances". That term can only refer to circumstances that are similar to those in a "personal illness" or an "emotional upset by accident or illness." The common factors in each of the latter two circumstances are the inability to control their occurring and the timing of when they occur. Those factors are not present in the Grievant's case. The surgery was at the choice of the Grievant, and there is no evidence that it was in any way due to medical necessity. The Grievant also chose when it

would occur, based upon her personal convenience. 2/ The Grievant's surgery and resulting absence from work 3/ therefore do not fall within the scope of "similar circumstances", and thus do not qualify the Grievant to use paid sick leave to cover her absence.

2/ That is not to say that the reasons the Grievant chose to have the surgery when she did were not valid. Those reasons were not, however, related to addressing any medical problems.

3/ With regard to the nine days required for her recovery from the surgery, while she was incapable of carrying out her regular assignments during that period, it must be "personal illness" or "emotional upset by accident or illness in the immediate family" or "similar circumstances" that renders the employee incapable of carrying out her regular assignment in order to qualify for sick leave (i.e. the mere fact of being incapable of performing one's duties does not, by itself, qualify.) As it has been concluded that the Grievant's surgery does not fall within any of those circumstances, her absence for recovery from that surgery does not qualify her to use sick leave to cover that absence.

It is noted that while the parties have used the term "elective surgery" to describe the Grievant's circumstances, their Agreement does not use that term. The undersigned does not find the term particularly helpful in defining a set of circumstances, and makes no attempt to define that term in this instance. All that is decided in this case is that the circumstances that led to the Grievant's having the surgery do not fall within the scope of any of the conditions that would entitle an employee to paid sick leave under Article IV, Section A of the parties' Agreement. Therefore, the District did not violate that provision, or any other provision of the Agreement that has been cited, when it denied the Grievant ten days of paid sick leave for her absence due to her surgery.

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

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 25th day of May, 2001.

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

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