BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PORTAGE COUNTY

and

PORTAGE COUNTY COURTHOUSE, HEALTH CARE CENTER, DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND LIBRARY SYSTEM EMPLOYEES LOCAL 348, AFSCME, AFL-CIO

Case 150
No. 59347
MA-11259

(Grievance SL00CO--Medical Appointment Time and Sick Leave)

Appearances:

Mr. J. Blair Ward, Assistant Corporation Counsel, 1516 Church Street, Stevens Point, WI 54481, appearing on behalf of the County.

Mr. Gerald Ugland, Staff Representative, AFSCME Council 40, PO Box 35, Plover, WI 54467-0035, appearing on behalf of the Union.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz as arbitrator to hear and decide a dispute concerning the above-noted grievance under the parties' calendar 1998-99 collective bargaining agreement (Agreement).

Pursuant to notice, the grievance dispute was heard in the Courthouse Annex in Stevens Point on March 19, 2001. The proceedings were transcribed. The parties' post-hearing briefs were exchanged on June 22, 2001, and neither party gave notice of intent to submit a reply brief by the July 2, 2001, deadline, marking the close of the hearing.

ISSUES

At the hearing the parties authorized the Arbitrator to decide the following issues:

1. Did the Employer violate the Agreement by disallowing use of sick leave for physical therapy, chiropractic, counseling and other physical and mental care appointments than those specified in Art. 13(F), by employees otherwise able to perform their job?

2. If so, what is the remedy?

PORTIONS OF THE AGREEMENT

ARTICLE 13 - SICK LEAVE

A) Monthly Accrual: All employees will accrue one day of sick leave per month with no limit on the total accumulative total.

B) Sick Pay: Sick leave shall be paid on the basis of the regular hourly or monthly rate. (Regular hourly or monthly rate meaning that received at the time of sickness or injury.)

. . .

D) Worker's Compensation: In the event an employee receives an injury arising from his/her employment, he/she shall be eligible to use accumulated sick leave amounting to the difference between that received under Worker's Compensation and his/her regular rate of pay. (Regular rate of pay meaning that received at the time of injury.)

E) Notice to County: Any employee absent because of sickness or injury shall notify the department head at least one-half (1/2) hour before the start of work whenever possible, except . . . who shall notify the department head or designee at least one (1) hour before the start of work whenever possible. For an absence of more than one (1) day, the employee need not call in each day, but shall give an estimate of the number of days he/she shall be absent from work. The employee shall notify the department head prior to returning to work. When an employee is off on sick leave for three (3) or more consecutive workdays, the employee shall provide the employer with a doctor's certificate if required by the immediate supervisor. In the event of documented abuse, the preceding sentence is not applicable.

F) Medical Appointments: Employees shall be allowed necessary time off up to a maximum of two (2) hours during working hours for physician, ophthalmologist or dental appointments. Time in excess of two (2) hours per appointment or sixteen (16) hours per calendar year shall be deducted from sick

leave. Such appointments shall be made during non-working hours whenever possible. When requested by the County, the employee shall submit a statement from the doctor certifying his/her appearance at the doctor's office.

When necessary, employees shall be allowed time off, to be deducted from sick leave, to accompany a spouse or dependent child to a medical appointment. The employee must state in writing the need for their presence at the medical appointment.

. . .

ARTICLE 31 - ENTIRE MEMORANDUM OF AGREEMENT

This Agreement constitutes the entire agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The County recognizes that the Union may request negotiations during the term of this Agreement on any changes in working conditions not covered by this Agreement.

BACKGROUND

The County maintains and operates the Portage County Courthouse and Annexes, Health Care Center, Department of Health and Human Services, Library, Highway Department, Department of Aging, Portage House, Highway Department, Housing Authority, Law Enforcement Center and Solid Waste Department. With certain exceptions, the Union is the exclusive collective bargaining representative of employees in a bargaining unit consisting of all of the County's non-professional employees in those facilities and departments.

As of the March 10, 2001 hearing in this matter, the parties' most recent labor contract was the Agreement, which covered calendar years 1998-99 with a nominal expiration date of December 31, 1999. The parties' bargaining had not yet reached the point of certification of final offers at the time of the hearing in the case.

On April 10, 2000, County Personnel Therese Freiberg sent the following memorandum:

To: Portage County Department Heads

CC: Gerald Ugland, AFSCME Staff Representative, Collene Ottum, President, AFSCME Local 348, Portage County Personnel Committee

From: Therese Freiberg, Personnel Director

Date: Monday, April 10, 2000

Re: AFSCME Local 348 Medical Appointment Time.

On Monday April 10, 2000, this office became aware that despite the clear language in the AFSCME Local 348 agreement department heads are granting medical appointment time when the time is not warranted. This must cease immediately. I am attaching the last version of the form that is to be used by all departments for medical appointment time requests. Article 13 of the AFSCME labor agreement provides that medical appointment benefit is only available for Physician, Ophthalmologist and Dental appointments. Medical appointment time is **not** appropriately granted for chiropractor, physical therapy, optometrist, or other appointment with a provider not specifically listed. If an employee requests time off for any other type of appointment they must use either vacation, comp time, or unpaid time to be considered on approved time away from the work place. Sick time is not to be used unless the employee is ill, not able to perform their job.

This very clear language needs to be adhered to in order to properly administer benefits to all AFSCME employees in a consistent manner.

Please contact the Personnel Department should you have any questions regarding the matter.

The form attached to the memorandum calls for the employee to check "yes" or "no" in response to the question whether the appointment is with one of the following professionals:

Physician
Ophthalmologist
Dentist

As noted above, a copy of that memorandum and attached form was sent to the Union Staff Representative and to the Local 342 President.

The grievance giving rise to this arbitration was filed on behalf of "Local 348 et al" by Ottum on April 18, 2000. The grievance asserts that the County violated "Article 13 of the Labor Agreement per letter from T. Freiberg dated 4/10/2000" and requests that the County "adhere to the contract and past practice [and provide] any other remedy as may be required or allowed."

The dispute was ultimately submitted for grievance arbitration as noted above. At the hearing, the Union presented testimony from Ottum, Union bargaining unit employee Toni Kaminski, Union Chief Steward Betti Trzebiatowski, and retired bargaining unit employee Carol Richardson. The County offered testimony from County Nursing Home Administrator Dale Hagen and Freiberg.

It is undisputed that after issuance of Freiberg's April 10, 2000 memorandum, the County has disallowed use of sick leave for physical therapy, chiropractic counseling and other physical and mental care appointments than those specified in Art. 13(F), by employees otherwise able to perform their job.

It is also undisputed that the April 10, 2000 memorandum was issued after the nominal December 31, 1999 termination date of the Agreement covering calendar 1998-99; that proposals for modification of Art. 13 were advanced during the parties' bargaining about a successor to the Agreement; but that by mutual agreement those proposals were withdrawn in favor of allowing the results of this arbitration to determine the meaning and application of Art. 13 of the successor agreement as regards the issue submitted in this case. (tr. 105-107).

Additional factual background is set forth in the positions of the parties and in the discussion, below.

POSITIONS OF THE PARTIES

The Union

By issuing and implementing Freiberg's April 10, 2000 memorandum, the County violated the Agreement by violating a longstanding practice of the parties that is not inconsistent with the language of the Agreement.

The Union has presented testimony from various witnesses to the effect that the language of Art. 13 has remained materially unchanged since at least 1987; and that for many years bargaining unit employees have been allowed to take sick leave for appointments such as physical therapy, counseling and chiropractic services, regardless of whether the employee was or was not otherwise able to perform his or her work, in circumstances where the Department Head involved knew the nature of the appointments involved. Ottum's testimony was based not only on her own use of sick leave for such appointments, but also on her having performed payroll functions at the Health Care Center and later for the entire County and on her having been the Local president since the early 1990's. Trzebiatowski's testimony was based not only on her own use of sick leave for such appointments but also on her many years as a steward and Union officer to whom grievances would have been referred had sick leave denials occurred. Richardson's testimony was based on her experiences over 15 years of employment in the purchasing department. Health Care Center Administrator Hagen admitted that prior to

April 10, 2000, sick leave was allowed for appointments other than with a physician, ophthalmologist and dentist and that he does not recall refusing to allow an employee to take sick leave for such appointments on a day when the employee was able to work.

Regardless of what Freiberg may have learned of the practice since her relatively recent hire in March of 1998, the Union has clearly shown that the County was aware of the practice relied on in this case by the Union. Specifically, as reflected in Exhibit 6, former County Personnel Director Gerry Lang was faced with a dispute regarding the use of a form for requesting time off for appointments. Lang responded by issuing a memorandum to all Department Heads stating that AFSCME bargaining unit employees could avoid providing information they considered confidential by scheduling "confidential medical appointments during non-work time, vacation time, or sick time if the employee does not want their department head to know about their confidential medical circumstance." That memorandum shows that the County's former Personnel Director understood that sick leave could be used for any type of medical appointment, not just for those with a physician, ophthalmologist or dentist. Moreover, even Freiberg admitted that she learned in April of 2000 that some departments were allowing use of sick leave for people who were not sick but who had health-related appointments other than with a physician, ophthalmologist or dentist.

Significantly, the Employer offered no testimony or other evidence to contradict the Union's proof of a longstanding, uniform, and mutually understood pattern of allowing sick leave to be used by employees who were otherwise able to work but who were absent from work for appointments of various types in addition to those listed in Art. 13(F).

It is common knowledge that many employers allow use of sick leave for appointments under language similar to that in Art. 13. The language of Article 13(F) provides for paid time not charged to sick leave for certain listed types of medical appointments under certain conditions, but it does not express or imply that sick leave use is precluded for appointments of types not on that list. Other appointments are paid through sick leave and the employee, upon retirement, does not receive a payout from sick leave previously used for such appointments. This is the difference between Art. 13(A), (B) and (D) on the one hand and Art. 13(F) on the other.

For those reasons, the Arbitrator should sustain the grievance; conclude that the April 10, 2000 memorandum violated an established and binding past practice under the Agreement; and order the County to reinstate the practice of allowing employees to use sick leave for appointments of types not listed in Art. 13(F). The Arbitrator should also order the County to make whole all employees adversely affected by the implementation of the April 10, 2000 memorandum.

The County

The language of Art. 13(F) strictly limits appointments for which employees will be allowed time off to those with a physician, ophthalmologist or dentist. The provision does not authorize the employee to use sick leave for physical therapy, chiropractic counseling and other physical and mental care appointments. Rather, as Freiberg testified (at Tr.87),

> [A]n employee under the AFSCME labor agreement is able to use sick leave if they are unable to perform their job due to illness or injury. They're able to use sick leave if they have an eligible medical appointment that goes beyond two hours in duration, or they're able to use sick leave if they have an eligible medical appointment, by that I mean the three categories that are listed in there, and they have already used 16 hours per year of medical appointment time for those eligible appointments. . . . And they are eligible to convert it at retirement . . . .

Freiberg testified that she learned during an April 10, 2000 meeting with members of the County negotiating committee that some department heads were allowing their employees to use sick leave for health-related appointments in addition to those with a physician, ophthalmologist or dentist. Freiberg further testified that from the beginning of her employment with the County in March of 1998 until that meeting, it had always been her understanding that the County was uniformly limiting sick leave for appointments to appointments with a physician, ophthalmologist or dentist.

Accordingly, Freiberg immediately issued the April 10, 2000 memo to all department heads informing them of the correct way to apply Art. 13 of the Agreement.

As noted, the language of Art. 13 clearly and unambiguously limits sick leave for appointments to appointments with a physician, ophthalmologist or dentist. The Union's contention that past practice supersedes the clear language of the agreement must be rejected for several reasons.

The Union's proofs are not sufficient to show a practice that is unequivocal, clearly enunciated, acted upon and readily ascertained over a reasonable period of time as a fixed and established practice. The Agreement covers 300 employees in some 20 County departments. The record evidence is limited as to the number of departments to which it relates. Moreover, many of the appointments about which witnesses testified would have been proper uses of sick leave under either party's position in this case, such that they do not lend persuasive support the Union's position in this case; for example, instances in which the witness was absent from work for an appointment but was too sick to work as well. In addition, Freiberg testified that her office and the payroll office would have no way of knowing that sick leave was being improperly used by employees or improperly implemented by department heads.

Even if there were proof of a practice meeting the recognized arbitral standards above, the practice would be contrary to Art. 31 which expressly provides that any amendment or supplement of the Agreement shall not be binding upon either party unless executed in writing by the parties. Moreover, because the Agreement contains neither a maintenance of standards clause nor any other contractual basis to support enforcement of the practice relied upon by the Union, the practice was subject to unilateral discontinuation by the County. Citing, CITY OF LA CROSSE, WERC MA-5865 (JONES, 8-20-90). Freiberg's April 10, 2000 memorandum properly discontinued any on-going practice that was inconsistent with the language of Art. 13(F) limiting sick leave for appointments to those with a physician, ophthalmologist or dentist.

For those reasons, the grievance should be denied in all respects. If the Arbitrator finds any merit in the grievance, the remedy should be limited to expanding the Art. 13(F) list of appointment types only to the extent supported by the record evidence.

DISCUSSION

As the County argues, the language of Art. 13, read as a whole, does not, on its face, provide for the use of sick leave for any appointments other than those specifically listed in 13(F). The references to sick leave in Art. 13(B), (D) and (E) make sick leave generally available regarding employees who are "absent because of sickness or injury." The Agreement expressly authorizes the use of sick leave for other purposes only in 13(G) relating to conversion of sick leave to pay for insurance premiums of eligible retirees (which has no bearing on this case), and in 13(F) regarding "Medical Appointments" (which does have a bearing on this case).

In the first paragraph of 13(F), the parties have effectively defined "Medical Appointments" as "physician, ophthalmologist or dental appointments." The parties have further specifically and expressly provided in that paragraph that time spent on employee medical appointments so defined "shall be . . . during non-working hours whenever possible" and ". . . shall be deducted from sick leave" except for the first two hours per appointment up to sixteen hours per calendar year, for which there is no deduction from the employee's sick leave and no loss of pay.

In the second paragraph of 13(F) the parties have specifically and expressly provided time off deducted from sick leave "[w]hen necessary [for an employee] to accompany a spouse or dependent child to a medical appointment."

Thus, the parties have specifically and expressly provided that medical appointments as defined in 13(F) shall be deducted from sick leave when they involve accompanying a spouse or dependent child to a medical appointment or when they exceed the stated hours standards relating to an employee's own appointments. By contrast, the parties have not specifically or

expressly provided anywhere in the Agreement that any of the other kinds of health-related appointments at issue in this case shall be deducted from sick leave under any circumstances.

Applying the well-recognized standard of contract interpretation known by the maxim "*expressio unius est exclusio alterius*" — to express one is to exclude all others — it is appropriate and conventional to interpret the language used by the parties in Art. 13 as clearly and unambiguously meaning that the only appointments for which sick leave is available under the Agreement are those listed in Art. 13(F). See, Volz and Goggin, eds., How Arbitration Works, 5th Edition, p. 497 (BNA, 1997) and cases cited therein.

The Arbitrator finds unpersuasive the Union's argument that the sole purpose of Art. 13(F) is to define three special categories of appointments for which the employee, in specified circumstances, is allowed time off that is not deducted from sick leave. The second paragraph of 13(F) provides time off deducted from sick leave "[w]hen necessary [for an employee] to accompany a spouse or dependent child to a medical appointment" without any reference to time off that is not deducted from sick leave. Moreover, the first paragraph not only provides for time off not deducted from sick leave in certain circumstances, but it also expressly provides for time off deducted from sick leave in other circumstances.

Those specific and expressed provisions in 13(F) for time off deducted from sick leave for physician, ophthalmologist and dentist appointments are unusual. When they are read together with the balance of the Art. 13, the plain meaning of the Article is that the only appointments for which sick leave is available are those listed in Art. 13(F).

The Union has presented persuasive and virtually uncontroverted evidence of a longstanding practice whereby employees have been allowed to use sick leave for health-related appointments other than those listed in Art. 13(F) where the employee involved was otherwise able to perform his or her job duties. The Union has also presented Exhibit 6 which persuasively indicates that the practice was known and acquiesced in not merely by a few isolated department heads, but also by the County's former Personnel Director, as well.

However, assuming (without deciding) that Art. 31 would permit evidence of past practice to supercede the plain meaning of the language of Art. 13, a past practice like the one relied upon by the Union in this case — which the Arbitrator has determined does not involve interpretation of ambiguous language — is subject to unilateral repudiation by either party at the time a new agreement is being negotiated. See, NICOLET HIGH SCHOOL DISTRICT, WERC MA-10243 (GRATZ, 5-24-99) citing, St. Antoine, Theodore, ed., The Common Law of the Workplace, 81 (BNA, 1998) at 82-83 ("Altering a Past Practice. An established practice that is an enforceable condition of employment, wholly apart from any basis in the agreement, cannot be unilaterally modified or terminated during the term of the contract. Either party may repudiate such a past practice, however, at the time a new agreement is negotiated, since its continuing existence depends on the parties' inferred intent to retain existing conditions, in the absence of any objection. On the other hand, a practice that serves to clarify an ambiguous provision in the agreement becomes the definitive interpretation of that term until there is a mutual agreement on rewriting the contract. The practice cannot be repudiated unilaterally.

Finally a change of conditions that initially produced the practice may permit a party to discontinue it. For a full analysis, see Mittenthal, Richard, Past Practice and the Administration of Collective Bargaining Agreements, in 14 NAA 30, (1961)").

The County's April 10, 2000 memo, coming as it did when the 1998-99 Agreement had nominally expired and when a new successor agreement was open for negotiations, constituted a notice sufficient to effectively repudiate the practice unless the Union obtained a change in the language of Art. 13 conforming that language to the practice in that round of bargaining. That memorandum clearly put the Union on notice that the County was not willing to grant sick leave for appointments other than those specified in 13(F) and hence was not willing to conform its interpretations of Art. 13 to any past practice that was inconsistent with the plain meaning of the language of that Article.

Once the County gave the Union that memorandum, the Union, by ultimately agreeing to maintain the language of Art. 13 materially unchanged, failed to take the step necessary to prevent the County from terminating the past practice and from strictly construing Art. 13 according to the plain meaning of its language as regards all times after the April 10, 2000 memo was issued to the Union.

Accordingly, the Arbitrator concludes that the Agreement did not require the County to maintain the practice after the County's issuance of the April 10, 2000, memo. The grievance has therefore been denied in all respects.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the issue submitted that:

1. The County did not violate the Agreement by disallowing use of sick leave for physical therapy, chiropractic, counseling and other physical and mental care appointments than those specified in Art. 13(F), by employees otherwise able to perform their job.

2. The subject grievance is denied, and no consideration of a remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin, this 17th day of December, 2001.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator

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