BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MANITOWOC COUNTY HEALTH CARE CENTER EMPLOYEES LOCAL #1288, AFSCME, AFL-CIO

and

MANITOWOC COUNTY

Case 370
No. 60036
MA-11495

(Tina Nething Grievance)

Appearances:

Mr. Neil D. Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Attorney Steven J. Rollins, Manitowoc County Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

At all times pertinent hereto, Manitowoc County Health Care Center Employees Local #1288 (herein the Union) and Manitowoc County (herein the County) were parties to a collective bargaining agreement dated December 4, 2000, and covering the period January 1, 2000, to December 31, 2001, and providing for binding arbitration of certain disputes between the parties. On June 12, 2001, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration on the County's issuance of discipline to Tina Nething (herein the Grievant) for alleged excessive absenteeism and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on September 7, 2001. The proceedings were transcribed and the transcript was filed on September 26, 2001. The parties files briefs on November 14, 2001, and reply briefs on January 14, 2002, whereupon the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties were unable to stipulate to the framing of the issues. The Union would frame the issues as follows:

> Did the Employer violate the collective bargaining agreement when it disciplined the Grievant, Tina Nething, for the legitimate use of accumulated sick leave?
>
> If so, what is the appropriate remedy?

The County would frame the issue as follows:

> Is the grievance arbitrable?
>
> If so, did the Employer have just cause to issue a written warning to Tina Nething on January 26, 2000?
>
> If not, what is the appropriate remedy?

The Arbitrator frames the issues as follows:

> Is the grievance arbitrable?
>
> If so, did the County violate the collective bargaining agreement when it disciplined the Grievant for excessive absenteeism based upon her use of accumulated sick leave?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or

suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

Manitowoc County shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject to only the restriction imposed by this Agreement and the Wisconsin Statutes. In the event the Employer desires to subcontract any work which will result in the layoff of any County employees, said matter shall first be reviewed with the union.

The Employer retains the right to comply with the Americans With Disabilities Act. The Employer and the Union mutually agree that an employee who is a qualified individual as defined by the Americans With Disabilities Act is eligible for, upon request, reasonable accommodation as defined by the Act. In the event the Employer finds it necessary to accommodate the disability of an employee whose work is within the parameters of Article One, Recognition, it will inform the Union. The Union and the Employer will meet to discuss possible accommodations. Any disagreement over the accommodations shall be referred to the grievance arbitration procedure defined in Article Seven.

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of various employees as it, from time to time, deems necessary for the effective operation of the Institution. The Union agrees, at all times, as far as it has within its powers, to preserve and maintain the best care of all humanitarian considerations of the patients of said Institution and otherwise further the public interest of Manitowoc County. The Employer may adopt reasonable work rules except as otherwise provided in this Agreement.

The Employer agrees that all amenities and practices in effect for a minimum of twelve (12) months or more, but not specifically referred to in this Agreement, shall continue to for the duration of this Agreement. The parties recognize the County's right to implement an Employee Assistance Program. Practices and policies established pursuant to the Employee Assistance Program shall not be considered a past practice, regardless of how long the exist. The County reserves the right to modify or discontinue any portion of the program. The decision of the County to modify or discontinue any portion of the program shall not be subject to the grievance procedure.

The term "Employee Assistance Program" refers to a system of employee referral and counseling which helps employees deal with emotional, mental, chemical dependence and other personal problems. Referrals and counseling shall be confidential and shall not be disclosed or considered except as expressly authorized by the employee in writing.

ARTICLE 4 – DISCIPLINARY PROCEDURES

A. Employees may be disciplined for just cause. It is understood and agreed that just progressive discipline shall be forwarded. The Employer shall provide the employee and, at the same time, the Vice-President of Local 1288 with a letter setting forth the reason(s) for the disciplinary action.

   Employees will be disciplined for non-participation in mandatory in-service training sessions unless prior approval is obtained by the employee from their supervisor (vacation, sick leave, funeral leave and holiday time off shall automatically constitute prior approval). In-service training, fire drills, etc. shall be conducted during regular working hours. Management shall allot sufficient time for employees to attend in-service session(s) during the workday and shall provide adequate notice of in-service sessions.

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ARTICLE 7 – GRIEVANCE PROCEDURE

A. Definition of a Grievance: Should any differences arise between the Employer and the Union as to the meaning and application of this Agreement, or as to any question relating to wages, hours, and working conditions, they shall be settled under the provisions of this Article.
B. Time Limitations: The failure of a party to appeal a grievance in a timely fashion will be treated as a settlement to that particular grievance, without prejudice. However, if it is not possible to comply with the time limitation specified in the grievance procedure because of work schedules, illness, vacations, holidays, any approved leave or time off, these time limitations may be extended by mutual agreement.

   The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure.

C. Steps in Procedure:

   Step 1: The employee and one (1) Union steward shall present written notice within a reasonable period of time to the immediate

supervisor but in no event later than forty-five (45) calendar days after the Union knew or should have known of the occurrence of such grievance. In the event of a grievance, the employee shall perform his or her immediate assigned work task, if any, and grieve the dispute later, unless his/her health or safety is endangered. The immediate supervisor shall within seven (7) calendar days provide a written notice to the employee and the Union.

Step 2: If the grievance is not settled in Step 1, the Union shall reduce the grievance to writing and present it to the Administrator within fourteen (14) calendar days of communication of the immediate supervisor's written response. The Administrator shall offer to discuss the grievance with the employee and representatives of the Union (no more than one representative shall be on the schedule for that time), and following such meeting, if any, shall respond in writing within fourteen (14) calendar days of receipt of the grievance.

Step 3: If the grievance has not settled at Step 2, or if the parties mutually agree to waive Steps 1 and 2, the grievance shall be submitted in writing to the Personnel Director within fourteen (14) calendar days after receipt of the Department Director's written response. The Personnel Director shall offer to meet with the Union to discuss such grievance with the Union upon written request including identification of all grievances to be discussed within fourteen (14) calendar days after receipt of such request. Following such meeting, if any, the Personnel Director shall respond in writing to the Union within fourteen (14) calendar days following receipt of the grievance.

Step 4 – Arbitration:

a. Notice of Arbitration: If a satisfactory settlement is not reached in Step 3, the Union shall notify the Employer in writing within each thirty (30) calendar days after the receipt of the written decision of the Personnel Coordinator of its intent to process the grievance to arbitration.

b. Arbitrator: The grievance may be submitted to an Arbitrator mutually agreeable to the Employer and the Union. If the Employer and Union do not agree to an arbitrator within ten (10) calendar days, either party may request the Wisconsin Employment Relations Commission to appoint an arbitrator.

c. Arbitration Hearing: The Arbitrator shall with the consent of both parties, use his or her best efforts to mediate the grievance before the Arbitration Hearing. The parties shall attempt to agree in advance on stipulated facts and issues to be used as well as procedures to be followed at the hearing. The Arbitrator selected or appointed shall meet with the parties at the earliest mutually agreeable date to review the evidence and hear testimony. The Arbitrator shall make a decision on the grievance which shall be final and binding on both parties. The decision shall be submitted in writing as soon as possible after the completion of the hearing.

d. Expedited Arbitration: In order to increase efficiency and reduce cost to process grievances where facts are not in dispute, the Union and the Employer may agree to submit disputes to expedited arbitration in lieu of a formal arbitration hearing.

1. Availability: Both the Employer and the Union must agree to submit a dispute to expedited arbitration. The decision to submit a particular dispute to expedited arbitration does not constitute a past practice or precedent for future disputes.

2. No prejudice: Neither the Employer nor the Union waives any rights by submitting a grievance to expedited arbitration. No inference may be drawn from the fact that expedited arbitration has been selected. No change in the underlying burden of proof nor burden of presentation may be inferred from the submission of a dispute to expedited arbitration.

3. Stipulated Facts: All facts material to the dispute must be recited in a stipulation approved by the representative of the Employer and of the Union. Any exhibits or items of evidence shall be provided with the stipulation and listed.

4. No Testimony or Record: There shall be no testimony or oral record of such proceeding submitted for expedited arbitration. The record for the arbitrator shall be the stipulations and exhibits agreed to by the parties.

5. Briefs: The parties may agree to submit briefs arguing their case to the arbitrator. Briefs shall be filed within 45 days of the date the representatives sign the stipulations submitting the stipulated record to the arbitrator. Briefs shall be filed with the arbitrator, who shall exchange briefs on behalf of the parties. There shall be no reply briefs.

6. Effect of Decision: The decision of the arbitrator shall have the same effect as if the matter had been heard at a hearing.

e. Costs: Each party shall bear the costs of its attorneys' fees. The party against whom the decision is rendered shall bear the full cost, if any, of the selected arbitrator. Either party may request a transcript, however, no party shall be required to order or pay for a copy of the transcript. Any registration or filing fees shall be shared equally by the parties.

f. Decision of the Arbitrator: The Arbitrator shall not modify, add to or delete from the terms of the Agreement.

ARTICLE 13 – SICK LEAVE

A. Accumulation: Employees shall earn sick leave at a rate of one and one-quarter (1 1/4) days per month for a total of fifteen (15) days per year. Unused sick leave shall accumulate to a maximum of one hundred and twenty (120) days. However, no sick leave benefits may be used during the first year of employment although they may be accumulated on the employee's record.

B. Notice of Sick Leave: In order to be eligible for sick leave pay, it is understood that on any work day when an employee is unable to perform his or her duties, he or she shall so advise his or her immediate supervisor, the Administrator or the Administrator's designee prior to the start of his or her work shift, if possible. In the event the employee calls in due to sickness one (1) hour or more prior to the start of his or her shift, the employee will make a good faith effort to obtain replacement personnel.

In the event of critical illness or required attendance upon an employee's father, mother, spouse or child, an employee shall be allowed to use accumulated sick leave.

Manitowoc County recognizes and complies with both State and Federal Family and Medical Leave Acts, and when requested, will assist the employee in the utilization of those rights.

C. Regulation: Any employee off work due to illness for three (3) or more consecutive days shall be required by the Employer to submit an physician's statement.

After five (5) occurrences, (funeral supplement not included), the Employer may require an employee to furnish a physician's certificate for the sixth

(6th) sick leave occurrence and thereafter in a calendar year. It is understood that in counting occurrences for the requirement of bringing in a physician's certificate to return to work from sick days, no occurrence shall be counted if a physician's certificate is brought in for such occurrence. If there is any additional expense for such physician's certificate, the Employer shall pay the cost of the same.

As to sick leave absences caused by a dependent's sickness, the County may if it has a reasonable basis for questioning the taking of such leave, require that after five (5) total absences covering all sicknesses during a calendar year, that the employee supply a physician's certificate covering the sickness of the dependent, provided that the County pays for the cost of the physician's certificate. Furthermore, it is understood that in counting occurrences for dependent's sickness, no occurrence shall be counted if it is accompanied by a physician's certificate.

Under this Article, the Employer may at its expense, designate a physician to provide a second physician's written opinion regarding the employee's illness and/or need for sick leave.

Should there be a contradiction between the first and second physician's opinion, either the employee or the Employer may request a third physician's written opinion regarding the employee's illness and/or need for sick leave. Such third written opinion shall be from the physician selected by mutual agreement of the first and second physician's and at the Employer's expense. It is further understood that the practice of requiring a second or third physician's statement will not be required in every circumstance, but rather on a case by case basis.

Just progressive discipline may be implemented for a recognized pattern of absenteeism such as either the day before or the day after a scheduled time-off from work including non-scheduled working days, holidays, vacations, etc. These are examples only and do not limit the grounds for just progressive discipline for a recognized pattern of absenteeism.

In addition, an employee claiming or obtaining sick leave benefits by proven fraud, deceit, or falsified statement shall be subject to just progressive discipline.

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ARTICLE 27 – ENTIRE MEMORANDUM OF AGREEMENT

A. The Agreement constitutes the entire agreement between Manitowoc County and Manitowoc County Health Care Center Employees, Local 1288,

AFSCME, AFL-CIO. None of the terms and conditions of this Agreement shall be changed unilaterally. Changes may be made by mutual agreement of the parties in writing.

B. The parties agrees that during the term of this Contract and any extension of the contract by agreement, they shall not refuse to bargain in good faith.

OTHER RELEVANT LANGUAGE

ATTENDANCE POLICY

Policy Implemented 6/1/98
Policy Revised 6/1/99

Attendance Policy of Manitowoc County Health Care Center

The Manitowoc County Health Care Center provides residential nursing home care to its residents. It operates 24 hours a day, 7 days a week under strict state regulations. In order to assure that residents receive quality care and that the Manitowoc County Health Care Center complies with all legal requirements, it is essential that all employees work when scheduled to do so.

Adequate staffing is critical to meet state and federal regulations and to meet the mission statement of providing quality care to the residents of the Manitowoc County Health Care Center. Additionally, absenteeism causes unnecessary increases to payroll costs and is demoralizing to staff who do report to work as scheduled. For these reasons punctual and regular attendance is an essential element of every job at the Manitowoc County Health Care Center and the Manitowoc County Health Care Center expects its employees to report to work when scheduled.

The Manitowoc Health Care Center understands that sometimes it is not possible to report to work when scheduled. The Manitowoc Health Care Center provides sick leave, funeral leave, and other types of leave for unanticipated absences from work to help employees deal with these situations. The Manitowoc Health Care Center also provides vacation and holiday leave for anticipated absences from work.

The purpose of this policy is to improve the attendance and reduce absenteeism. This policy does not apply to probationary on on-call employees of the Manitowoc Health Care Center. This policy does not apply to absences covered by the Family and Medical Leave Acts, Worker's Compensation, or any other protected leave status covered by Federal or State law.

Sick Leave

Sick leave is one of the most valuable benefits the Manitowoc Health Care Center offers its employees because it can provide income protection during an extended illness or the recovery from an injury. Employees of the Manitowoc Health Care Center are allowed to accumulate a sick leave balance of up to 120 days to provide this insurance against disruption in income.

Sick leave may only be used in cases of actual illness or disability, other medical and health situations requiring the employee's absence from work, or in situations where an employee's personal attendance is required because of the serious illness or disability of a father, mother, spouse or child.

Definitions of terms contained within the Attendance Policy of the Manitowoc Health Care Center

No Call/No Show. A no call/no show is when an employee fails to report to work and does not notify the Manitowoc Health Care Center of their absence prior to the beginning of the scheduled work shift, unless medically incapable of doing so.

Occurrence of No Call/No Show. An occurrence of no call/no show happens each time an employees fails to report to work and does not notify the Manitowoc Health Care Center of their absence prior to the beginning of the scheduled work shift, unless medically incapable of doing so.

Unscheduled Absence. Unscheduled absence is a failure to complete a scheduled day of work, absence due to sickness of one (1) or more consecutive scheduled work days, absence due to any reason other than sickness, tardiness more than thirty minutes, or three instances of being tardy less than thirty minutes within the rolling calendar year. Funeral leave and leave for jury duty are not considered unscheduled absences.

Occurrence of Unscheduled Absence. An occurrence of unscheduled absence is a failure to complete a scheduled day of work, absence due to sickness of one (1) or more consecutive scheduled work days, absence due to any reason other than sickness, tardiness more than thirty minutes, or three instances of being tardy less than thirty minutes within the rolling calendar year.

Rolling Calendar Year. A rolling calendar year is used to access occurrences of unscheduled absence and is a look back of one calendar year from the current date. For example, if there is an occurrence of unscheduled absence on June 15, 1998 thorough [sic] June 15, 1999 (inclusive), will be examined to determine if progressive discipline is appropriate, and if so, at what level.

Call In Procedure to Report Unscheduled Absence

When unable to report for a scheduled day of work, an employee must call in as soon as the need to be absent is known and, in all cases, prior to the start of the employee's work shift. The employee must speak with his or her department director. If the employee's director is not available, the employee must call the director's designated representative or the nursing facility supervisor.

The employee must state the reason for the absence and the type of leave that the employee intends to use.

Calls from individuals other than the employee and messages left on answering machines are not acceptable and will not meet the requirements of this policy unless an emergency situation exists.

An employee who are unable to complete a scheduled a day of work notify his or her department director as soon as the need to be absent is known, and the type of leave the employee intends to use. If the employee's department director is not available, the employee must contact the director's designated representative or the nursing facility supervisors.

Physician Certificates

Any employee off of work for three (3) or more consecutive scheduled work days because of sickness or due to sickness of an immediate family member as provided for under the terms of the applicable collective bargaining agreement, policy, or law, is required to submit a physician's certificate upon his or her return to work. As provided for under the terms of the collective bargaining agreement or policy, every employee will be required to provide physician's certificate to his or her upon each return to work after the fifth (5^{th}) use of sick leave in a calendar year.

As authorized under the collective bargaining agreement, policy, or law, the Employer may, at its expense, designate a physician to provide a second physician's written opinion regarding the employee's illness or need for sick leave. The employee will be examined on a date and time specified by the Employer.

Progressive Discipline Schedule for Manitowoc Health Care Center Attendance Policy

Progressive Discipline For Occurrences of Unscheduled Absence

Beginning with the sixth occurrence of unscheduled absence in a rolling calendar year, progressive discipline will be administered as follows:

6th occurrence	verbal warning
7th occurrence	written warning
8th occurrence	suspension of three days
9th occurrence	termination of employment

Progressive Discipline For No Call/No Show

For each occurrence of no call/no show within the rolling calendar year, progressive discipline will be administered as follows:

1st occurrence	one day suspension
2nd occurrence	five day suspension
3rd occurrence	termination

Progressive Discipline For Sick Leave Fraud

Any employee claiming or obtaining sick leave benefits by proven fraud, deceit, or falsified statement shall be subject to accelerated progressive discipline, beginning at minimum at the suspension stage, up to and including termination.

Incentive

An employee who has not had an unscheduled absence for three consecutive months shall qualify for an incentive and will have an incident of unscheduled absence removed from his or her attendance record. If the employee would rather receive a cash payout and deduction of eight hours of sick leave, the employee must file a written request with the employer before the end of the month in which the incentive is earned and that request will be honored until it is withdrawn in writing.

The Health Care Center administration will review attendance records at the end of each month to determine which employees qualify for the incentive. Once the incentive is earned, the employee will be eligible for further incentives when he or she has three new, consecutive months without an unscheduled absence. No employee may qualify for more than four incentives in a calendar year.

BACKGROUND

The Union and the County are parties to a collective bargaining agreement, Article 13 of which provides for accrual of 15 days of paid sick leave each year for bargaining unit

members, up to a maximum of 120 days, and establishes criteria for sick leave usage. Under the sick leave language, in order to be eligible for sick pay an employee is to give prior notice of his/her unavailability for work, if possible. Further, sick leave usage is available to attend to a sick parent, spouse or child. After a total of 5 absences during a calendar year, the County may require an employee to provide a physician's certificate justifying each subsequent absence, subject to the County's defraying the cost of obtaining any such certificate, in order to receive sick pay. The sick leave provision also provides for discipline of employees in cases of fraud or pattern sick leave abuse.

Independent of the collective bargaining agreement, the County has also unilaterally adopted an attendance policy pursuant to the management rights reserved to it in Article 3 of the contract. The attendance policy ostensibly exists in order to curb excessive absenteeism among County employees. The most recent version of the attendance policy was adopted on June 1, 1999. Under the policy, an employee who accrues more than five occurrences of unscheduled absence during a rolling calendar year is subject to discipline. Absence from work due to illness, whether of the employee or a family member, is considered an unscheduled absence. In this regard, it is a no fault policy, since there is no inquiry into the reason for the absence or its justification - once the employee has passed the threshold of permissible unscheduled absences he or she is automatically subject to discipline. Prior to 1998, the policy did not apply to use of sick leave where the absence was supported by a physician's certificate, nor did it apply to absences resulting from an employee being sent home from work by a supervisor who deemed the employee to be too sick to work, but the 1998 and 1999 forms of the policy eliminated these provisions. In 1998, the County also adopted an incentive plan for employees who had no unscheduled absences in a rolling calendar quarter by allowing them to either have one previous unscheduled absence removed from their record or, in the alternative, having one sick day converted to cash and paid out. Subsequently, absenteeism among County employees has been significantly reduced.

Tina Nething, the Grievant herein, has been an employee at the Manitowoc County Health Care Center and a member of the bargaining unit since 1996. Over the course of her employment, she has made extensive use of the sick leave accrued during her employment, such that she had the equivalent of 4 days of sick leave available on January 23, 2001, despite having accrued 82 days of sick leave during her employment. On the date in question, she called in sick to work because her son was ill with strep throat and she was required to care for him, which was her 7th unscheduled absence in the rolling calendar year commencing January 23, 2000. She obtained a certificate from the doctor, confirming the illness, and provided it to her supervisor the next day, pursuant to the sick leave policy set forth in the collective bargaining agreement. On January 26, the Grievant was issued a written warning for violation of the County's absenteeism policy. Subsequently, the Grievant had an 8th unscheduled absence, which, although also supported by a physician's certificate, resulted in a 3-day suspension under the attendance policy. There is no allegation that any of the Grievant's absences were the result of fraud or pattern sick leave abuse, nor that she failed to comply with the County's notice and certification procedures for sick leave use in any material respect.

On or before February 26, 2001, the Grievant filed a written grievance over the January 26 written reprimand with the Director of Nursing, Julie Place, which was denied on February 27. The grievance was then submitted to the Health Care Center Administrator, Michael Thomas, who denied it on March 22, 2001. Finally, the grievance was submitted to the County Personnel Director, who denied it on April 30, 2001. The matter was then submitted for arbitration. Additional facts will be referenced, as needed, in the discussion section of the award.

POSITIONS OF THE PARTIES

The County

The issue is not arbitrable. In MANITOWOC COUNTY (HEALTH CARE CENTER), WERC CASE 249, NO. 46579, MA-7012 (KNUDSON, 10/30/92), the arbitrator upheld the County's attendance policy, which was a predecessor to the one at issue here. MANITOWOC COUNTY is, in effect, *res judicata,* therefore, on the question of whether its attendance policy is valid and reasonable. Further, the grievance is not timely. The grievance procedure in the contract provides that a grievance must be filed within 45 days after the Union knew or should have known of the circumstances giving rise to the grievance. The current policy went into effect on June 1, 1999, and the Grievant received a copy on July 29, 1999, therefore, the grievance would need to have been filed no later than September 12, 1999, in order to meet the time requirements of the contract.

On the merits, the County had just cause to discipline the Grievant for violation of the attendance policy. The County has a legitimate interest in reducing excessive absenteeism and its attendance policy is an appropriate means of achieving this goal. The Grievant has a long history of excessive use of sick leave, demonstrated by the fact that she had just 4 available sick leave days on January 23, 2001, despite over five years of employment during which she accrued 82 sick leave days. Just cause is determined by application of a seven part test which examines 1) adequacy of notice, 2) reasonableness of the rule in question, 3) adequacy of investigation, 4) fairness of investigation, 5) proof of violation, 6) equality of treatment, and 7) reasonableness of penalty. The Grievant has been aware of the policy since July, 1999, which is more than sufficient notice of the existence of the rule. The reasonableness of the policy is established by the award in MANITOWOC COUNTY, which upheld a substantially similar "no fault" attendance policy. A similar policy was also upheld in DETROIT RIVERVIEW HOSPITAL, 96 LA 639 (GLENDON, 1991). Being that the policy is "no fault," the only real issue to be investigated was whether the Grievant was absent on the day in question and the County conducted a fair and appropriate investigation, which determined that she was. This policy has been applied fairly and equitably since its adoption. In this case, the Grievant accrued a 7th unscheduled absence during a rolling calendar year, which calls for a written reprimand, the same penalty she received for a similar offense on December 15, 2000.

The Union

The grievance is arbitrable. MANITOWOC COUNTY is not dispositive of this case for a number of reasons. First, it dealt with a different attendance policy, which was dissimilar to the one in issue in several significant respects. It had more reasonable time and attendance requirements and provided for discretion in application of penalties, which the present policy does not. This last feature was key to Arbitrator Knudson's decision to sustain the policy. The current policy is a "no fault" attendance policy which mandates discipline for a specified number of absences, regardless of cause, and is unreasonable on its face. Discipline commences after the fifth absence in a rolling calendar year. The previous policy allowed for discretion in assessing penalties and did not call for a written warning until the tenth absence in a six month period. The policies are not substantially similar. Further, the Union did not waive its right to grieve the attendance policy. Each violation of the contract stands on its own and may be grieved, independently of what has gone on before.

The County's actions violated several provisions of the contract. It violated Article 4 – Just Cause, in that, contrary to the County's contention, the policy has not been applied even-handedly among the employees, but has been applied discriminatorily. Further, the County performed no adequate investigation. Once the Grievant's absence was determined there was no inquiry into its legitimacy, which might have mitigated the penalty. Finally, the penalty was unreasonable. The Grievant had sick leave available on the day in question, had a legitimate excuse for her absence and followed the sick leave provision to the letter in giving notice and obtaining a physician's certificate, yet she was disciplined. The County's actions also violate Article 13 – Sick Leave. The provision provides for discipline only for sick leave abuse in the form of fraud or a recognized pattern of absenteeism. Neither circumstance applies to the Grievant. Sick leave is a contracted for benefit and the County's policy hinders and restricts the employees' use of it. This is a violation of the contract. The County also violated Article 3 – Management Rights Reserved, which permits it to establish reasonable work rules. A rule which conflicts with the contract and impairs use of a contracted benefit is not reasonable. Finally, the County violated Article 27 – Entire Memorandum of Agreement, which prohibits unilateral amendment or alteration of the terms of the contract. Adoption of the attendance policy fundamentally altered the sick leave provision and thus constituted a violation.

The Arbitrator can, and should, require the County to conform its attendance policy to the terms of the contract and sustain the grievance.

The County in Reply

The challenge to the attendance policy is not timely. The contract specifies that a grievance must be filed within 45 days of the time the Union knew or should have known of the occurrence of the grievance. The Union was aware of the policy in June, 1999. Further,

it cannot assert a continuing violation as a basis for avoiding the contractual timelines. The only timely claim is the Grievant's objection to the County's application of the policy, not the Union's challenge to the policy, itself.

The 1999 policy is actually more lenient than the 1992 policy upheld by Arbitrator Knudson in MANITOWOC COUNTY. This is because the former policy counted total sick days used whereas the current policy is based on occurrences of absence. An occurrence could use multiple sick days an yet be considered only one occurrence, or none if the absence qualified for a Family and Medical Leave Act exclusion. The Grievant in this case did not request an FMLA exclusion for her absence on January 23, 2000. The Union argument that the policy has been applied inequitably does not bear scrutiny. The instances cited reflect situations when the policy was new and unfamiliar where discipline was retracted or not administered because a previous level of discipline was not applied. The Union concedes that this has improved. Further, the Grievant herself has benefited from the policy because she would have been terminated for her many absences under the previous policy.

The cases cited by the Union are not on point. Arbitrator Knudson's decision in CITY OF OSHKOSH, WERC CASE LV, NO. 33092, MA-3221 addressed a different policy and different contract language. None of his reasons for striking down that attendance policy apply here. Likewise, the Union's other case citations can be distinguished on their facts. Rather, MANITOWOC COUNTY makes it clear that in Arbitrator Knudson's view the employer here was within its rights to establish a policy that permitted discipline for misuse, fraudulent use or excessive use of sick leave.

The Union in Reply

The Union has not waived its rights to challenge the attendance policy. The application of the policy in violation of the contract represents a new grievable event each time it occurs and begins a new 45-day time period for filing. To hold otherwise would have the effect of allowing the County to adopt a policy and then avoid any substantive challenge by merely not implementing it until 46 days after adoption.

DETROIT RIVERVIEW HOSPITAL is distinguishable because the policy upheld there only applied to absences where no advance notice was given. This policy applies to all absences regardless of notice or cause. The policy in DETROIT RIVERVIEW HOSPITAL was also much less severe in its application. Further, it was held to not be in conflict with the provisions of the collective bargaining agreement. Where such a policy is in conflict with the contract, the policy must give way to the clear terms of the agreement. In this case, there is a clear contradiction between the terms of the attendance policy and the sick leave provision in the contract. Under the circumstances, therefore, the policy must be stricken and the grievance upheld.

DISCUSSION

Arbitrability

The County argues that this case is controlled by MANITOWOC COUNTY (HEALTH CARE CENTER), WERC CASE 249, NO. 46579, MA-7012 (KNUDSON, 10/30/92), which upheld a predecessor to the current attendance policy. I disagree. The policy upheld in MANITOWOC COUNTY was, as here, a "no fault" plan, as noted by Arbitrator Knudson. However, it was a different plan with different timelines, different criteria for discipline and different rules for application. Further, Arbitrator Knudson tailored his award to the specific language of the policy and contract in place at the time and made no sweeping generalizations regarding the reasonableness of no fault policies, per se. Over time, both the contract language and the policy have been modified and must be compared and evaluated on their own merits. MANITOWOC COUNTY is not, therefore, binding in this case.

In its reply brief, the County concedes that the grievance was timely filed, but only as to the application of the attendance policy in this particular instance. 1/ It is the County's apparent position, based upon the decision in DETROIT RIVERVIEW HOSPITAL, 96 LA 639 (GLENDON, 1991), that any substantive challenge to the policy itself was waived when the Union failed to file a grievance within 45 days of its adoption in 1999. This argument misperceives the issue. The grievance is based upon discipline issued allegedly without just cause, as the County concedes in its proposed framing of the issue. The Grievant exercised a contractual right and was subsequently disciplined. She grieved the discipline in a timely manner and is entitled to a determination of whether this action was a violation of the just cause principle set forth in Article 4, Section A. In making this determination it may be necessary to determine not only whether application of the policy upon which the discipline is based is reasonable, but whether the policy itself is inherently incompatible with the contract. The Arbitrator's authority to make such a determination is not restricted by the fact that the grievance flows from the enforcement of the policy rather than its adoption.

1/ The County does not challenge the Grievant's failure to file a grievance after receiving an oral reprimand for her 6th absence, nor claim that such failure constitutes a waiver of her right to grieve the County's actions herein.

The Merits

The Grievant's attendance records, set forth in Exhibits 15-17, reflect that all of the unscheduled absences resulting in her discipline on January 26, 2001, were the result of her use of sick leave, and in fact all of her unscheduled absences since 1997 have been the result of the use of sick leave, Family Medical Leave or an injury qualifying for Worker's

Compensation. The record does not indicate any evidence that the Grievant's absences were not legitimate uses of sick leave, or that she did not comply with the terms of the sick leave provision in giving notice or providing subsequent certification. On the other hand, the Union does not dispute that the attendance policy was applied to the Grievant in accordance with its terms. Rather, it contends that the policy violates the contract, is unreasonable on its face, and also has not been applied consistently throughout the bargaining unit. 2/ Thus, it becomes necessary to evaluate the interplay between the policy and the contract in order to make a determination as to the merits of the Grievant's case.

2/ That is to say, there is no contention that the Grievant's absences were incorrect in number or designation, nor that the level of discipline imposed was inordinate according to the policy's terms, only that the policy, itself, is flawed.

The parties have cited numerous authorities in support of their respective positions. The County relies heavily on MANITOWOC COUNTY and DETROIT RIVERVIEW HOSPITAL for the proposition that "no fault" attendance policies are not inherently unreasonable, even when they are in conflict with other contract language, that employers have a legitimate interest in trying to reduce absenteeism, and that imposing discipline for excessive unscheduled absences is an appropriate means of doing so. The Union has cited contrary authorities, most notably SPOONER COMMUNITY MEMORIAL HOSPITAL AND NURSING HOME, WERC CASE 15, NO. 53872, MA-5460 (BIELARCZYK, 1/6/97), BROWN COUNTY (MENTAL HEALTH CENTER), WERC CASE 294, NO. 38184, MA-4446 (BIELARCZYK, 8/6/87) and ST. JOSEPH MERCY HOSPITAL, 87 LA 529 (DANIEL, 1986). These cases stand for the proposition that work rules, and specifically attendance policies, that unreasonably conflict with contractually guaranteed benefits are unenforceable. In each instance certain controlling principles are recognized by virtually all arbitrators in analyzing the cases. It is fair to say that all the propositions put forth by the employer concerning "no fault" attendance policies, generally, have received widespread arbitral support. Nevertheless, it is also equally true that arbitrators have generally not held "no fault" attendance policies to be reasonable *per se* and that, therefore, each policy must stand the test of reasonableness on its own in order to be upheld. This is particularly true when policies that are developed and imposed unilaterally by the employer undercut contract provisions that have been mutually bargained by the parties.

In this case, there is no question that the County's attendance policy does conflict with the sick leave provision contained in Article 13 of the collective bargaining agreement. Under the sick leave provision, employees accrue 15 sick days per year, with unused days accumulating to a maximum of 120. Further, according to Article 13, Section C., employees may only be disciplined for sick leave use when there is a recognized pattern of absenteeism or a proven case of fraud, deceit or a falsified statement. 3/ Nevertheless, under the attendance policy, upon the 6th taking of one or more sick days within a rolling calendar year, which are

defined as occurrences of unscheduled absence, the employee is subject to mandatory discipline, commencing with a verbal warning. Each successive occurrence results in additional, more severe, discipline until the 9th occurrence, which results in termination. Further, the attendance policy requires no inquiry into whether the absence was legitimate, but is strictly triggered by the number of absences. Thus, under the attendance policy, an employee could be legitimately absent due to personal illness and/or illness of a dependent on 6 occasions within a 12-month period and be disciplined after using only 40% of his or her earned annual sick leave and terminated after using only 60% of his or her earned annual sick leave. I find this policy to be unreasonable.

3/ The contract cites use of sick leave the day before or after a scheduled holiday as one illustrative example of pattern sick leave abuse. While the contract states explicitly that this example is not all inclusive, it does reveal the underlying rationale, which is that sick leave routinely taken at such times or in such fashion that it gives rise to a suspicion of use for ulterior reasons creates a rebuttable presumption of misuse. Extensive use of sick leave, in and of itself, does not constitute pattern sick leave abuse and the County does not so contend.

The County's cited authorities are distinguishable. DETROIT RIVERVIEW HOSPITAL involved an attendance policy that provided significantly more exceptions than that in issue here, including military obligation, inpatient injuries, weather emergencies and absence due to low census. Most notably, use of sick leave was not counted in cases where there was at least 24 hours advance notice of the absence. No such exceptions exist here. Further, employees only accrued 10 sick days per year, but were not suspended until the 9th absence or terminated until the 13th. The numerous exceptions and significant number of occurrences necessary to invoke discipline were explicitly noted by the arbitrator in his determination that the policy was reasonable. I am more persuaded by the reasoning in ST. JOSEPH MERCY HOSPITAL, 87 LA 529, (DANIEL, 1986). In that case, the arbitrator struck down a "no fault" attendance policy for the same problem that appears here, the inexorable procession toward, and imposition of, mandatory discipline for a specified number of absences, regardless of legitimacy. Specifically, Arbitrator Daniel stated:

> . . . the bothersome aspect of such no fault systems is the unrelenting progression through disciplinary steps without regard whatsoever for the reason why the employee is absent from work – all excuses are disregarded. This system has a fatal flaw, noted above, found in other systems causing their rejection by other arbitrators. When employees are by contract accorded a certain number of personal or sick days, any attempt in a no fault system to assign or attribute blame or disciplinary jeopardy for the use of such days must be regarded as a violation of the contract. In other words, employees are not being given that which has been bargained for their benefit . . .

> It is the opinion of this arbitrator that if days absent are excused – that is the employee meets all eligibility requirements or call-in requirements for the day and is compensated for the time missed – then that day may not be counted in a "no fault" system." 87 LA at 533.

Under the policy in place here, once five unscheduled absences have occurred any additional unscheduled absences will result in discipline, no matter the cause, except in cases where the employee's right to be absent is protected by law (e.g., Worker's Compensation, Family Medical Leave Act, etc.). Under this policy, employees are even assessed with unscheduled absences when sent home by the supervisor because they are too sick to work, which was not the case under the original policy approved in MANITOWOC COUNTY. Sick leave, however, is a bargained for right, which employees are entitled to use for illnesses or injuries without reference to whether those absences would otherwise be permissible by law. Further, the County has bargained into the contract language that permits it to require a physician's certification after a specified number of absences and to discipline misuse of sick leave to protect it against malingering employees.

Implicit in Arbitrator Knudson's award in MANITOWOC COUNTY was his belief that the policy installed in 1991 contained a degree of flexibility whereby the County could forego or remit discipline where unscheduled absences were justified. I find no such flexibility here. Under this system, an ill employee with five unscheduled absences in the previous year must choose between going to work sick or mandatory discipline, even if he or she has available sick leave. In my opinion, this is unreasonable, particularly in a setting where the employees work with patients in a health care center, who could be exposed to infectious disease by an employee trying to avoid discipline. The County presented substantial evidence documenting its absenteeism problem, as well as the apparent success of the attendance policy in curtailing it. Nonetheless, however laudable its goal, the County cannot address its problem by, in effect, unilaterally amending the contract to permit the discipline of employees for proper use of a contract benefit. If there is no means for legitimate absences due to illness to be excepted, such a policy overreaches management's rule making power, infringes on the sick leave provision, and thereby violates the contract. The grievance is sustained.

Based upon the foregoing and the record as a whole, the Arbitrator hereby enters the following

AWARD

The grievance was timely filed and the Grievant has the right to challenge to language of the County's attendance policy, therefore, the grievance is arbitrable. Because application of the policy violated the Grievant's rights under Article 13 of the collective bargaining agreement, the County did not have just cause to discipline the Grievant. Therefore, the County shall expunge the written reprimand issued on January 26, 2001, from the Grievant's

personnel file, shall remit any subsequent and progressive discipline issued to the Grievant under the attendance policy by one degree, and shall make the Grievant whole for any loss in wages or benefits incurred due to any such subsequent discipline.

The Arbitrator shall retain jurisdiction for thirty (30) days subsequent to the issuance of this award to address any questions that may arise from its implementation.

Dated in Fond du Lac, Wisconsin, this 17th day of May, 2002.

John R. Emery /s/
John R. Emery, Arbitrator

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