Daniel #1

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER

and

UNION

ARBITRATOR: WILLIAM P. DANIEL

FACTS

This case concerns the claimed right of police officers to use accumulated sick leave days after the birth of a child to remain home and care for the mother and children. Such fell under the General Reference in Article XIV, Section A of "for sickness or other good cause".

According to union witnesses, there had been a long time practice in the police department. The chief granted such requests without limitation on use and without requiring medical certifications of the necessity for such. Business Agent Person 1, who served this unit since 1981, testified that this practice had continued during his tenure and through a number of negotiated contracts. He recalled a settlement agreement in 1984 which established the right to so use sick days to cover not only the day of birth but also "when a member of the employee's immediate family is sick and in need of his/her care or presence". He testified that from that time on, officers were permitted to use sick days to be with their wife and family after the birth for an indefinite period of time.

Such use was not a subject of contract negotiations or policy clarification until the

negotiation of the 1999-2005 contract. In a memorandum of understanding made part of the contract, the parties continued the prior language of "other good cause" but sought to define the contract terms. This noted that such use would be extended (as had been the practice since 1984) to include "a bona fide personal illness or injury of one's immediate family . . . requiring the employee's presence, including the birth of an employee's child".

It was the opinion of union witnesses that this reference to the "birth of a child" meant also the period thereafter necessary for care of the mother and family. Union negotiators Markey and Person 1 testified there was no discussion regarding limiting the use of the days. It was the contrary opinion of employer witnesses Assistant Employer Manager Person 2 and Human Resources Director Person 3 that such pertained only to the actual date of birth. They recalled discussions in which it was pointed out that such referred only to that single day.

After the contract and memorandum of understanding became effective, requests for such leaves of absence were still processed by the Police Department and not the Human Resources Department. Prior to the 1999-2005 contract, a number of officers had obtained approval of such sick day use for various periods of time – in one case as much as 200 hours after a birth. After the contract and memorandum, the practice continued. For example, Person 4 was granted six weeks in 2001 and Person 5 took three weeks in 2000. Person 6 had been allowed three weeks after, the birth of his first child in 2000. None of the leaves granted over the years or since the new contract and memorandum in 1999 had required documentation or distinguished between natural and caesarian births. All leave requests continued to be processed by each Employer department.

In February 2003, the employer began reviewing all leave requests and reserving authority to issue final approval of leaves longer than five days. Coextensive with this, Assistant

Employer Manager Person 2 and Human Resources Director Person 3 drafted a February 2003 policy which permitted only one week of such leave for the birth of a child. This was intended to bring the actual procedure in conformity with a prior policy of 2001 regarding FMLA. This new policy stated in its introduction that it did not "supercede any policies, procedures or contract provisions that may impact a leave of absence". This new policy specified that females would be allowed up to six weeks use of sick leave after natural birth and eight weeks for a caesarian. For fathers, it provided one week "to care for his wife" after a natural delivery and two weeks after a caesarian or high risk pregnancy. Additional leave would require a physician's statement and then only "in extreme circumstances wherein the mother is disabled with complications, not normal post-partum". The distribution of this new policy was limited only to department heads and not promulgated to city employees or the unions.

This dispute arose when the policy was applied to leave requests of officers Person 6, Person 7, Person 8, and Person 5. Person 6 submitted a leave request in late August 2003 in anticipation of the caesarian delivery of twins. It specifically requested four weeks leave to care for the newborns, his other child and wife, and set an anticipated date of October 7, 2003. A FMLA request was also submitted completed by his wife's doctor. The physician's statement indicated that the wife "would be recovering for eight weeks after a caesarian delivery". The physician recommended that Person 6 remain home "to provide psychological comfort to his wife". Person 3 reviewed the requests and decided that the medical note was insufficient to justify the use of sick leave beyond the standard two weeks for caesarian birth as set forth in the policy – there was no indication that the wife would have other than a normal recovery period.

Person 6's twins were delivered early and he began his leave September 23, 2003 and was on the leave for approximately two weeks by the time Person 3 reviewed his original request.

She contacted him by phone October 7 and told him that the extended leave was not approved absent further medical documentation and followed this up with a letter. Person 6 then provided a short hand-written prescription pad note from the doctor indicating the circumstances, that the wife was "on restriction" and invited the employer to call if there were any questions. This note was also rejected by Person 3. She contacted the doctor but determined no additional reasons that would justify special application of the policy. Officer Person 6 was then allowed to use only two weeks of sick leave; additional time he took off, came out of his vacation entitlement.

Officer Person 7 originally submitted a leave request on September 19, 2003 for five days of sick leave to commence October 29, 2003. He modified this request on October 17 and requested retroactive use to October 11, the day after his child was born – October 10, 2003. The total amount of time requested was eight work days and that was the period of his absence. Person 7 submitted two doctors' notes – one on a prescription pad of October 10, 2003 and one an official form. According to Person 3, neither of these showed any medical complications or anything other than usual postpartum recovery. She thereupon approved one week of sick leave and notified Person 7 that more than that would require additional documentation of other than simply recovery. Person 7 used other leave entitlement days to cover the difference.

Officer Person 5 took 14 days of sick leave in September 2003 after the birth of his child by caesarian delivery. Officer Person 4 took seven days of leave in July and August 2003 after the natural birth of his child. Person 3 explained that these leaves of absence and use of sick days did not come to her attention until there was an audit of such records at the end of 2003. She then discovered that the policy had not been properly applied in those two cases. Her review showed that Person 5 had provided the normal WH-380 form indicating a normal recovery after caesarian section which noted that he was not needed to provide assistance 'for basic medical or

personal needs or safety, or for transportation". The form submitted simply indicated that he would be a psychological comfort to his wife after the birth. Person 3 then determined that Person 5 should have been allowed to use only two weeks of sick leave days and Person 4, five days.

In January 2004, each officer was notified of this correction of records and the fact that they would have to cover the short fall by other means and they elected under protest to use compensatory time. Person 5 was able to show that an additional two days of his sick leave was due to medical complications experienced by the child after birth and so he was permitted, upon documentation, to maintain his credit for use of sick days resulting in only two days of compensatory time being charged to him.

The grievance filed contended violation of the contract and the memorandum of understanding and seeks an order that the Employer cease and desist from implementing the policy and to make whole any officers who, since September 2003, have been denied the use of sick time leave and to accordingly replenish vacation or comp time banks with sick leave bank days. The employer denied any contract violation, asserted that it had proceeded in accordance with the terms of the contract, and that the policy established carried out the intent of the contract and constituted the exercise of its management rights.

PERTINENT CONTRACT PROVISIONS AND POLICIES

ARTICLE XIV — SICK LEAVE

Sec. A: Sick Leave. Employees shall be entitled to absence without loss of pay for sickness or other good cause upon application by the employee. An employee may be granted up to fifteen (15) days under this provision in any one year.

MEMORANDUM OF UNDERSTANDING

It is understood and agreed to by the Employer and the Union that the sick leave provisions of this Agreement are intended to provide employees with income insurance in the

event an employee is unable to work due to personal injury or illness or due to the serious injury or illness of an employee's immediate family member (spouse or child) requiring the care of the employee. The parties acknowledge the operational problems which may be caused by absenteeism, including staff shortages, overtime, lost productivity, reduced moral, increased costs, and inequitable distribution of workload. Recognizing the difficulties imposed on the Employer when employees are absent from work, the parties agree to the following guidelines, controls and incentives governing the use of sick leave outlined herein:

1. Sick Leave Absenteeism Control

A. Definitions

1. An absence for sickness or other good cause will be defined as an absence due to inability to work resulting from one of the following:

* * *

b. a bona fide personal illness or injury of one's immediate family member residing in the same household and requiring the employee's presence, including the birth of an employee's child.

B. Regulations

* * *

6. Those provisions of this Memorandum are considered to be in addition to those already negotiated by the parties in their collective bargaining agreement. The parties do not waive any other rights except as specifically stated herein.

March 16, 1984 — Michaluk Grievance Settlement — Per Employer Manager Costick Excerpted.

[I]t is the intent of the Employer in the administration of its personnel practices and polices to include in the definition of sick time the ability of an employee to take sick time when necessary when a member of the employee's immediate family is sick and in need of his or her care or presence.

POSITIONS OF THE PARTIES

Union: The employer has violated the contract and the well-established past practice by denying officers the right to use sick time in conjunction with the Family Medical Leave Act to care for a newborn child and/or the child's mother after the birth of that child. Officers are

entitled to FMLA leave and, during FMLA leave, are entitled to use paid days. The practice has been clear and consistent and the memorandum of understanding must be interpreted as intending a continuation of that practice.

The grievances should be granted, the new policy of 2003 set aside and it be directed that any officer who, since September of 2003 has been denied such use, be credited with such and the records accordingly be corrected.

Employer: The language of the memorandum of understanding clearly shows that there was no violation of the collective bargaining agreement. The definition as contained therein covers only the birth of the employee's child and not time thereafter. The claim of a past practice must be rejected because the contract language is clear and unambiguous and must be enforced by the arbitrator. Even if there was a binding past practice, there was no violation of such. The grievants were allowed to use the appropriate amount of time out of their sick leave banks. The Employer had the right to implement a city-wide policy regulating the use of such sick leave under these circumstances and did so in a fair and reasonable manner. Where there are special circumstances, the individual employee may make application based upon credible medical documentation and the Employer has demonstrated a willingness to apply the policy accordingly. For the reasons noted, the grievance should be denied.

ISSUE

Did the employer violate the contract, memorandum of understanding or any past practice in issuing and applying the leaves of absence policy in denying the requests of the grievants involved?

OPINION

The arbitrator is a creature of the contract between the parties and has only that authority

and jurisdiction granted him. Where the contract is clear and unambiguous, then it is his obligation to enforce it in accordance with its terms.

Often parties may, in addition to written contractual language, develop certain ways of doing things over a period of time that demonstrate an agreement or understanding that such should be considered as a part of, or an extension of, the actual contract. Where such has occurred, it is the obligation of the arbitrator to also apply and enforce those terms.

The Employer had, for many years, recognized a contractual commitment which allowed the use of sick days to cover absences "for other good cause". The lack of specific contractual definition of "other good cause" fed to the grievance of 1984 and the statement by the then Assistant Employer Manager of the commitment of the Employer to apply the contract language so as to allow the use of sick time when necessary when a member of the immediate family was in need of his or her care or presence. This was the guideline for many years as used by Employer departments including the police department.

Part of the problem in regard to this subject matter is that there was no central control or review of leaves of absence and, as a result, each department was permitted to develop its own definition and procedures. Apparently, in the police department over the years, the chiefs were disposed to be very liberal and accommodated almost any request for such leaves after the birth of a child. Indeed, the one case of 200 hours without any real documentation of need tends to demonstrate the lack of any consistent standards.

It is obvious that in the negotiation of the 1999-2005 contract, the parties had finally come to a point of realizing that some definitions were necessary. It, undoubtedly, was the Employer's concern because the union and its members must have been quite satisfied with the liberally applied policy up to that point. The employer contends that it was discussed in some

detail as to the actual date of birth being the only covered event and that it was not intended to extend the benefit to post-partum care for the mother, child, or family. Union witnesses do not agree that such took place but that it was simply a matter of a definition that was not intended to change the past practice of extending such use for the officer to be at home for the benefit of the family. In this regard, the arbitrator finds that the employer has not proven its recollection. In fact, it would be highly unlikely that the union would have agreed to such interpretation and application after some 15 years of allowing use of sick days not just for the birth of the child but afterward. The employer's argument in this regard is also put in doubt by the fact that it subsequently found it necessary to issue the policy in 2003.

Of course, this policy was necessary because during the interim after the execution of the contract and memorandum of understanding, the individual departments continued to administer the sick leave procedures and the police department continued to do so in a liberal and open-ended manner. There is enough evidence to demonstrate that and the experience of other officers confirm a continuation of the same approach after the new contract as had existed previously.

Although the union would characterize what happened since 1984 to the present as the establishment of a past practice, the arbitrator finds that difficult to accept. The police department procedures had no guidelines and was totally open-ended. That situation, in no respect, met the commonly accepted definition of a past practice where a certain way of doing something has gone on for such a period of time that it is presumed to be with the mutual agreement of the parties and understood to be applied in the future. That simply was not the case here. This was simply a police department way of doing things which was caused by the Employer's inattention. This is not to say that the officers and the union did not have some reason to believe that this was how such leaves would be handled in the future.

The memorandum of understanding was the result of an attempt, particularly by the employer, to define terms so as to limit the use of sick days under certain circumstances. It defined and recognized that "other good cause" would be a personal illness or injury of an immediate family member that required the employee's presence at home. Without saying more, this language alone would be sufficient to allow such leaves of absence after the birth of a child for caregiving to the wife, child, or family.

The addition of "including the birth of an employee's child" did not change that but simply was specific as to a certain event. The employer's interpretation and reliance upon that phrase as somehow excluding all other use of sick days after the birth of the child is rejected. There continued, even after this memorandum of understanding, the right of employee officers to use sick days for that purpose. What the memorandum of understanding did not do was to establish any set guidelines for how long an officer could be off. In failing to do so, it was left to the Employer and the police department in each individual case to decide what was reasonable. In actuality, the police department developed no separate standards or guidelines and each case was still handled in a liberal fashion; generally, whatever sick leave time off was requested was granted. In the arbitrator's opinion, this was not a consistent or reasonable application.

It is astounding that it took so long for the Employer administration to figure out what was going on, but when it did in February 2003, it saw the inconsistencies and lack of guidelines for the use of sick time, particularly in the police department. At this point, it was reasonable for the Employer to develop a policy based on generally accepted medical opinion. The policy fairly anticipated that additional leave might be necessary depending upon individual circumstances and allowed for such application. It is found that this policy is fair and reasonable and within management's right to establish provided, however, that the extended use of such leave past the

designated periods, when substantiated by medical certification, should not be denied. The employer certainly has the right in those cases to require a physician to be very specific as to the need for the officer to be away from work and at home. For example, comments such as "psychological comfort" may appropriately be rejected while indication of postpartum depression would generally be a sufficient basis for such leave. This is simply to say in applying such policy, the employer must accept medical documentation that addresses the need for the officer to be at home as a caregiver.

While the arbitrator finds the policy to be within the authority of the employer to have implemented and reasonable generally, the employer failed to properly promulgate and initiate the policy. Simply giving direction to department heads was not enough. Every Employer employee should have been specifically notified of this new policy and the unions given notice also and given the opportunity to discuss and consult in regard to it. Notification was accomplished most informally by the very application of the new policy to the grievants in this case and the filing of the grievance. It is found that the application of the policy to these grievants was ineffective for that reason.

At the time of the request by each of these grievants for their leave, they were unaware of, and uninformed of, such restriction. Even though as to Person 6 and Person 7, the application of the new policy of five days natural birth, ten days caesarian birth might have otherwise been reasonable, such was not published by the Employer in a timely fashion beforehand. It is for that reason that their grievances are granted; the grievants' records are to be corrected by the appropriate entries of credits to compensatory time or vacation time and deductions from sick time. In the cases of Person 5 and Person 4, this failure to have officially promulgated the policy with notification to the unions and employees likewise requires that their grievances be granted

with appropriate assessment of sick leave and credits to other banks.

A further factor in the cases of Person 4 and Person 5 is that the leaves had already been approved and processed for sick leave usage and the attempt months later by the employer to reverse that process was unreasonable under such circumstances. The granting of the grievances in these cases does not constitute a finding that if the policy had been in effect and properly applied, they would have been entitled to such use as claimed.

In summary, the arbitrator finds that there was no past practice established, that the proper application of the memorandum of understanding must allow for use of sick leave days after the birth of a child for a reasonable period of time in consideration of the particular circumstances of each case. Moreover, it is found that the employer properly established a policy regulating the length of such leaves with reasonable consideration to be given upon medical documentation of valid medical reasons, for the need of extension of such leave.

The Employer's position as to these four grievants might have been upheld had the policy been properly put in effect after due notice prior to their applications for leave and applied in a fair and reasonable manner. The reason that the grievances in this cases are granted is because of the failure of the employer to have properly promulgated the policy. The arbitrator will not grant the relief requested to nullify the policy or to recognize a binding past practice otherwise or to extend relief to unnamed grievants.

AWARD

The grievances are granted in part. The individual grievances are granted due to the failure of the employer to give adequate notice of the policy prior to the requests. Appropriate credits and deductions from respective sick leave banks, compensatory time banks, and vacation day banks are to be made.

There is no established binding past practice and the policy established by the employer is found to be generally reasonable subject to proper implementation and application in individual cases. The arbitrator retains jurisdiction for a period of 90 days to assist the parties in the event of disagreement over reconstituting the leave banks.

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WILLIAM P. DANIEL

Arbitrator

Dated: March 30, 2005