1-3-2002

Re Health Care Corp of St. John's and NAPE

Innis Christie

G Butler

D Hurley

Re Health Care Corporation of St. John's and Newfoundland Association of Public Employees

[Indexed as: Health Care Corp. of St. John's and N.A.P.E. (Re)]

Newfoundland and Labrador
I. Christie, G. Butler, Q.C., and D. Hurley

Heard: July 3 and 4, 2001
Decision rendered: January 3, 2002

POLICY GRIEVANCE concerning operation and utilization of Functional Assessment Form.

R.A. Pink, Q.C. and others, for the union.
A.F. Bruce and others, for the employer.

AWARD

Union policy grievance dated August 13, 1999, alleging breach of Articles 2, 3.08 and 22 of the Collective Agreement between the Employer and the Union signed June 2, 1998, with expiry date March 31, 2000, in that in a Memorandum to "All Employees" dated August 11, 1999 the Employer announced the introduction of a new Functional Assessment Form to be used by all employees seeking permission to be absent on sick leave in accordance with Article 22. Since February 1, 2000 the Functional Assessment Form, referred to by the parties as the "FAF", has in fact been required in a somewhat revised version, to which, by agreement of the parties, the Grievance still applies.

The Union requested a declaration that the FAF and the Employer's policy for its administration constitute a violation of the Collective Agreement or, in the alternative, a declaration that the Employer is estopped from implementing the FAF and its attendant policy until the expiry in 2004 of the Collective Agreement current at the date of the hearing.

At the outset of the hearing the parties agreed that this Board of Arbitration is properly constituted and properly seized of this matter and should remain seized to deal with any issues arising directly from it. The parties also agreed to waive any pre- or post-hearing time limits.

By a Memorandum dated August 11, 1999 addressed to "All Employees" from the "Employee Wellness Division" the Employer announced the introduction, effective August 22, of a new Functional Assessment Form (referred to the parties as the "FAF")

to be used by all employees seeking permission to be absent on sick leave in accordance with Article 22. The Grievance before us here was filed two days later, on August 13. Perhaps because of that, the implementation of the requirement that the FAF be used was delayed until February 1, 2000. Since then the FAF has in fact been required in a somewhat revised version, to which, it is undisputed, the Grievance still applies.

The Union claims the FAF and its administration are contrary to and inconsistent with the Collective Agreement in the following ways:

1(a) The Employer's mandatory requirement for an FAF in all cases of sick leave of five days or more is contrary to the exercise of discretion required of the Employer in Article 22.04(a);

1(b) The requirement that the FAF be submitted within a particular time frame is a unilateral addition to the Collective Agreement that is again inconsistent with the Agreement;

1(c) The FAF is not a "medical certificate" within the meaning of the Collective Agreement, and therefore the introduction of the FAF to replace the traditional doctor's note is contrary to the Collective Agreement; and

1(d) The information required by the FAF is directed at information to assist the Employer in arranging for an early return to work, but the mandatory nature of this requirement is inconsistent with Article 22.04(c), which leaves participation in an early return to work optional for employees.

2. With respect to the issue of whether or not the FAF constitutes a "medical certificate" within the meaning of Article 22.04(a), the Union argues in the alternative that the term "medical certificate" is latently ambiguous, as disclosed and resolved by the clear and unambiguous past practice of the parties. The evidence of past practice in this case demonstrates clearly that a "medical certificate", as referred to in Article 22.04(a), is a traditional doctor's note.

3. If the Board accepts the Employer's position that the FAF can constitute a "medical certificate" within the meaning of the Collective Agreement the Union argues in the further alternative that the Employer is estopped from introducing the FAF as

a replacement to the traditional doctor's note based on the Employer's long-standing past practice.

At the hearing Union counsel stated that the Union is not relying on any allegation of personal harassment, as appears in the Grievance.

At the conclusion of the hearing the parties also agreed on the following "Stipulations":

(i) There is no evidence before the Board of any inappropriate use of confidential information gathered for the FAF;

(ii) Information required in the FAF is essential to the operation of an appropriate early intervention program;

(iii) The issue for the Board is use and operation of the FAF. Counseling of employees for excess or "pattern" use of sick leave is not at issue in this case, nor is disciplinary/non-disciplinary treatment of employees for excessive or "pattern" use at issue in this case.

RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT

Article 2 — *Management Rights*

2.01 The Union recognizes and agrees that all the rights, powers and authority both to operate and manage the hospitals under its control and to direct the working forces is vested exclusively with the Employer except as specifically abridged or modified by the express provisions of this Agreement.

Should a question arise as to the exercise of management's rights in conflict with the specific provisions of the Agreement, failing agreement by the parties, the matter shall be determined by the grievance and arbitration procedure.

. . . . .

3.08 *Agreement Overrides Hospital Policy*

The provisions of the Collective Agreement shall take precedence over any and all policies, rules and regulations made by the Employer concerning wages, benefits, or working conditions affecting members of the Union covered by this Collective Agreement.

. . . . .

Article 22 — *Sick Leave*

22.01 *Sick Leave Defined*

Sick leave means a period of time that an employee has been permitted to be absent from work without loss of pay by virtue of being sick, disabled,

quarantined or because of accident for which compensation is not payable under the *Workers' Compensation Act.*

. . . . .

22.04 *Proof of Illness*

(a) Before receiving sick leave with full pay, an employee may be required to produce a medical certificate for an illness in excess of two (2) consecutive working days. In cases of suspected abuse shown by an established pattern of sickness, the Employer reserves the right to request a medical certificate for any period of illness.

(b) An employee shall have the option of being attended by a doctor of his/her choice and under no circumstances will the employee be penalized in any way by the Employer for exercising his/her option of being attended by his/her personal physician.

(c) The parties acknowledge when an employee cannot perform his/her regular duties because of sickness, the Employer may endeavour to provide suitable alternative employment for which the employee is qualified. Notwithstanding the above such action will not be taken without the employee's consent.

As we say below, it is clear from both the second paragraph of Article 2.01 and Article 3.08 that the Employer is bound by Article 22.04(a), as it is by every provision of the Collective Agreement. While that clause could be read literally as merely entitling the Employer to require an employee to produce a medical certificate for an illness in excess of two consecutive working days and in cases of suspected abuse shown by an established pattern of sickness, in the context in which it appears we read it as expressing the shared intent of the parties to limit the Employer's right to require an employee to produce a medical certificate to those cases. In *Newfoundland (Treasury Board) v. N.A.P.E.*, [1986] N.J. No. 269 (QL) (S.C.T.D.), Goodridge J. considered on judicial review the award of a board of arbitration applying precisely the same language that now appears in Article 22.01, 22.02 and 22.04 (a) and (b). His Lordship stated:

> A term may be implied where it is necessary to give efficacy to the contract.
>
> It is clear that article 22 is something expressed in derogation of management rights. To that extent, it creates a right in the employees. Sick leave benefits are rights, not privileges. If it is necessary to imply language to give effect to this, then so be it.

The same conclusion, that where the cases in which the employer can demand a medical certificate are set out in the collective agreement, the employer cannot demand it in others, was reached, unanimously, in the Award of the Board of Arbitration in *Newfoundland Hospital Association and Newfoundland and Labrador Nurses' Union* (D.M. Browne, Chair, December 21, 1988, unreported, at pp. 16-18 and 26 and "Dissent", pp. 2-3), which both parties relied upon to some extent.

In the *Nurses' Union* Award the Board of Arbitration answered thirty questions arising out of the "Newfoundland Hospital and Nursing Home Association Sick Leave Control Policy" put to it by the parties. While that Award is not binding on us, it is an important part of the context in which the Collective Agreement here, and its predecessors, were negotiated. Unfortunately, while that Award states on p. "B" that the relevant articles of the collective agreement under which it was decided are appended, neither the copy provided by the Union nor the one in the Employer's Brief includes that appendix. The text of the Award deals separately with each of the thirty questions but the Board never quotes the collective agreement provision under consideration in the text of the Award, except on p. 22, where the majority says:

> Article 19.02 states
>
> "1. Sick leave with full pay in excess of three consecutive days shall not be awarded to an employee unless he has submitted in respect thereof a medical certificate; and
>
> "2. In cases of an established pattern of sickness, the employer preserves the right to request a medical certificate for any period of illness."

That is sufficiently similar to Article 22.04 to provide guidance on this threshold point, that where the cases in which the employer can demand a medical certificate are set out in the collective agreement, the employer cannot demand it in others. The serious issues before us, however, are those raised by the Union's "claims" set out above.

FACTS

We will consider each of the Union's submissions or claims as they are stated above, except that we will consider #1(d) before #1(c), dealing with the evidence applicable to each submission or claim as we address it. There are, however, some facts relevant to all of them.

The Employer here is a relatively new legal entity. It was brought into being on April 1, 1995 by an Act of the Provincial Legislature which combined six pre-existing employer entities: the Ball Island Hospital, the Health Science Complex, Waterford Hospital, the Janeway Child Health Centre, St. Claire's Mercy Hospital and the General Hospital. Little time was spent in evidence or argument on the pre-existing relationships among these entities or on their continuing identities, if any. What is significant is that where there were six separate employers there is now one.

This single Employer has negotiated three successive Collective Agreements with the Union: the June 2, 1998-March 31, 2001 Collective Agreement before us here, its predecessor Collective Agreement and the Collective Agreement under negotiation in the late Winter and Spring of 2001, which will expire in 2004. The relevant provisions of the Collective Agreement have remained the same throughout.

This 1995 merger involved a significant restructuring at the management level, and as part of that, in 1997, the Employer created an "Employee Wellness Division". Although each of the pre-existing employers had had a staff physician and an Employee Assistance Program the Employer adopted a new focus, driven in part by what it perceived to be an inordinately high rate of absenteeism. In 1998 the Employer hired a doctor with expertise in occupational medicine. Under his direction and after some study the Employer put in place a program to attempt to reduce time lost through illness and injury of employees by stressing and encouraging early return to work, partly through the intervention of five Occupational Health Nurses. Stephen Dodge, the Employer's Vice-President of Human Resources from the start of its existence put in evidence a Memorandum with respect to the "Launch of Attendance Support Program" which he sent to "All Employees" dated January 25, 1999. It states in part:

> The Health Care Corporation of St. John's is in the process of launching a new Attendance Support Program. This new program will focus on finding ways of helping employees who are off on paid or unpaid sick leave to return to work. It will also focus on helping employees remain at work and improve their attendance . . . To date, the organization has set up five main initiatives to help employees:

Occupational Health Nurses

The Health Care Corporation has five Occupational Health Nurses who will play a key role in this process. On February 1, 1999, the Occupational Health Nurses will start contacting employees who are on sick leave to assess ways of helping them. They may determine that there are resources within the Employee Wellness Division, such as physiotherapy and occupational therapy services, which could benefit the employee. The nurses are also Employee and Family Assistance (EFAP) referral agents; therefore they can also help employees access these services.

The nurses will protect the confidentiality of all information shared by the employee. Employee medical information will only be available to the nurses and the Occupational Health Physician. It will not be shared with the employee's manager or human resources officers without the informed consent of the employee.

We note the "stipulation" between the parties quoted above, to the effect that there is no evidence before the Board of any inappropriate use of confidential information gathered for the FAF. Mr. Dodge's memo continued:

Occupational Health Physician

Approximately one year ago, Dr. Oscar Howell joined the Corporation to help develop the Attendance Support Program and to provide Occupational Health Services. Dr. Howell has been a family physician for many years and has recently completed his Masters in Occupational Health. He has done work in this area for a number of other local organizations. Dr. Howell's role is to liaise with employees, local physicians and therapists to ensure that employees receive the treatment they need, when they need it. He will also liaise with members of the Employee Wellness Division of Human Resources to help employees return to work in their own or alternate positions.

Human Resources Officers

The Human Resources Officers in Employee Wellness will facilitate an employee's return to work after a period of illness or injury. They will work with the employee, union representatives, managers and caregivers to develop a plan to accommodate the employee's individual circumstances. Accommodation can be made through alternate work assignments, modification of duties, hours, work environment or transitional work.

Case Conferencing Group

This group includes representatives of the Employee Wellness Division such as human resources officers, managers, occupational therapists and physiotherapists, occupational health nurses and injury prevention staff. The group meets monthly to discuss ways of helping injured or ill employees. Employees and managers are invited to attend the monthly sessions to discuss their concerns with the group. The process involves the employee, union, manager and

caregivers in a problem solving approach. The goal is to develop an action plan to help employees remain at work or return to work after an injury or illness. No medical information is discussed, only the employee's ability or inability to work.

Attendance Advisory Committee

The Corporation has also set up an Attendance Advisory Committee. Representatives from all employees groups (NAPE HS&LX, NLNU, AAHP, Management and Management Support) were invited to participate in this process. The committee will be responsible for monitoring the effectiveness of the Attendance Support Program and the group will be asked to review creative programs to keep employees healthy and to help them back to work. The committee will also keep employees and managers updated on new developments with the Attendance Support Program.

The Union has not, in fact participated in this Committee, and takes serious issue here with the FAF. It also stresses the undoubted right of employees under Article 22.04(c) of this Collective Agreement not to return to alternate employment unless they wish to, but it did not take issue with the general benefits to employees, as well as to the Employer, that are involved in safe early return to work.

The Employer introduced the Functional Assessment Form as part of this overall program of attendance enhancement. The Functional Assessment Form was first brought to the attention of the Union in the summer of 1999 by a memorandum from Maureen Meaney of the Employee Wellness Division "for" Mr. Dodge to "All Employees" dated August 11, 1999. The Union immediately expressed its disagreement with the FAF and filed this Grievance on August 13. The Union had a number of meetings with the Employer as early as August 16, 1999, which did not result in agreement regarding the operation of the FAF. There were attempts made to meet again between August 23, 1999 and October 4, 1999, and correspondence in October and November, but no resolution of the parties' differing views was achieved, although there were apparent changes made to the FAF and its administration. On January 20, 2000, by a memorandum from Maureen Meaney, Manager of Employee Wellness, the Employer advised employees of its intention to impose the FAF system, effective the first day of February 2000, with the Union's Grievance still to be dealt with.

There were statements in the Memorandum of August 11, 1999 which do not appear in Ms. Meaney's Memorandum of

January 20, 2000 or in the FAF set out below. To the extent that those statements are still part of the FAF and its administration, this Board of Arbitration cannot be taken to have considered them beyond what we say here.

In the Memorandum of August 11, 1999 it is stated "Back-dated notes will not be accepted." There is nothing specific about this in the FAF. There is a place on the form for the physician to sign and beside that a place for the date. There are also places for the "Date of visit on which this report was based" and "Surgery date". It must go without saying that the FAF is not to be filled in fraudulently. However, we note that if this is part of the Employer's policy in using the FAF, and is to be interpreted to always preclude entitlement in a case like that which was the subject of the award of Arbitrator Easton in *Re Newfoundland (Treasury Board) and N.A.P.E. (Williams)* (March 22, 1985, unreported), it would be a breach of the Collective Agreement. There, on the same wording that appears in the Collective Agreement before us, the employee was held entitled to return to the doctor to get a new or amended certificate where it was realized, in good faith, that the certificate did not cover one of the days upon which the Grievor had been ill, according to his own credible testimony.

The Memorandum of August 11, 1999, after explaining that employees will be required to have a FAF completed for any period of sick leave of five or more consecutive days, also states:

> You may also be asked to have it completed if you have legitimate chronic short-term illness, if you have an identified pattern of absence or if you request an extension of sick leave benefits.

In the case of an extension of benefits which involved an illness "in excess of two (2) consecutive working days" the Employer's right to require the FAF in accordance with Article 22.04(a) would be no more or less than it is in the case of sick leave of five or more consecutive days, which is considered below. "Legitimate chronic short-term illness" may also involve an illness where each recurrence is "in excess of two (2) consecutive working days". Again, where it does, the Employer's right to require the FAF would again be no more or less than it is in the case of sick leave of five or more consecutive days.

"An identified pattern of illness" is a basis for requiring a medical certificate with respect to an illness not "in excess of two (2) working days" only where there is "suspected abuse". We say no more about that because the parties have stipulated, as quoted above, that "Counseling of employees for excess or 'pattern' use of sick leave is not at issue in this case".

The FAF in dispute is set out, first the front page and then the back.

HealthCare
Corporation of St. John's

CONFIDENTIAL Functional Assessment Form
Please forward to Occupational Health (See back of form)

To help our employees recover from illness/injury, we offer easeback and modified work programs as well as transitional work. Any medical information provided is held confidential and supports our rehabilitation initiatives and health promotion activities.

SECTION A TO BE COMPLETED BY THE EMPLOYEE

Identifying Information

PLEASE CHECK ONE: INITIAL FORM ☐ SUPPLEMENTARY FORM ☐

EMPLOYEE'S FULL NAME:	BIRTH DATE (yy/mm/dd):	HOME PHONE NUMBER:
PROGRAM/DEPARTMENT:	SITE:	
IMMEDIATE MANAGER'S NAME:	MANAGER'S TELEPHONE NUMBER:	

Absence Details

FIRST FULL DAY OF ABSENCE (yy/mm/dd):	DATE SYMPTOMS BEGAN OR INCIDENT HAPPENED (yy/mm/dd):	MEDICAL CONDITION PREVENTED ME FROM WORKING SINCE (yy/mm/dd):

THIS DISABILITY IS THE RESULT OF:
AN ILLNESS ☐ A NON-WORK INJURY ☐ A WORK INJURY ☐

PHYSICIAN'S FULL NAME AND CLINIC NAME:	PHYSICIAN IS A: FAMILY DOCTOR ☐ SPECIALIST (INDICATE) ☐	PHYSICIAN'S PHONE NUMBER:

I AUTHORIZE THE PHYSICIAN TO RELEASE THE INFORMATION REQUESTED IN SECTION B TO THE OCCUPATIONAL HEALTH SERVICE.

EMPLOYEE'S SIGNATURE: DATE:

SECTION B TO BE COMPLETED BY THE ATTENDING PHYSICIAN

DATE OF FIRST VISIT FOR THIS PROBLEM (yy/mm/dd):		DATE OF VISIT ON WHICH THIS REPORT WAS BASED (yy/mm/dd):

Optional Information

DIAGNOSIS:	1. PRIMARY DIAGNOSIS	2. SECONDARY DIAGNOSIS
SURGERY: YES ☐ NO ☐	TYPE	SURGERY DATE (yy/mm/dd):

Functional Information

FUNCTIONAL ABILITIES/DEGREE OF IMPAIRMENT AT THE TIME OF ABSENCE:

	NONE	SLIGHT	MODERATE	SEVERE		NONE	SLIGHT	MODERATE	SEVERE
COGNITION	☐	☐	☐	☐	REACHING	☐	☐	☐	☐
SPEAKING	☐	☐	☐	☐	WALKING	☐	☐	☐	☐
HEARING	☐	☐	☐	☐	STANDING	☐	☐	☐	☐
VISION	☐	☐	☐	☐	PUSH/PULL	☐	☐	☐	☐
SENSATION	☐	☐	☐	☐	SITTING	☐	☐	☐	☐
DEXTERITY	☐	☐	☐	☐	BENDING	☐	☐	☐	☐
PSYCHOLOGICAL	☐	☐	☐	☐	LIFTING	☐	☐	☐	☐
CROUCHING	☐	☐	☐	☐	OTHER____	☐	☐	☐	☐

Do you wish our occupational health nurse or physician to contact you to help in the rehabilitation of your patient? YES ☐ NO ☐

Remarks

PHYSICIAN'S SIGNATURE: DATE:

The Health Care Corporation of St John's will pay the physician up to a maximum of $20 00 for completion of this form (See reverse for billing instructions)

QUESTIONS AND ANSWERS ON THE FUNCTIONAL ASSESSMENT FORM (FAF)

WHEN DO I HAVE TO SUBMIT A FUNCTIONAL ASSESSMENT FORM?
Because the FAF is tool to help employees get back to work after a long-term illness or injury, it will only be required if you are off sick for five (5) or more working days. The FAF must be returned to the Occupational Health Nurse within 14 calendar days of your first day off sick

WHY DO WE HAVE A FUNCTIONAL ASSESSMENT FORM?
The Functional Assessment Form provides the Employee Wellness Division with information about what you can or cannot do as a result of your illness or injury With this information, they will help you get back to work. If you are able to get back to work sooner, you can avoid using up all your sick leave that you might need in the future if you develop a serious illness.

HOW IS MY CONFIDENTIALITY PROTECTED?
The FAF is not seen by anyone except the Occupational Health Nurse or Physician.

DO I HAVE TO LET OCCUPATIONAL HEALTH KNOW IF I HAVE HAD SURGERV OR WHAT MY DIAGNOSIS IS?
No The Occupational Health Nurse and Physician are only interested in what you can or cannot do in relation to your work so they can help you get back to work You and your family physician do not have to provide diagnostic information or complete medical history

WHAT INFORMATION IS SHARED WITH MY MANAGER?
The Occupational Health Nurse will advise your manager when the FAF is received. If a return to work program is set up for you, your manager will also be told if your hours or duties need to be changed in order for you to return to work.

INSTRUCTIONS FOR EMPLOYEES

- Section A is to be completed in full by the employee. Do not complete Section B.
- Please ensure that you **sign the form** before you have your physician complete it.
- The Functional Assessment Form must be completed by your physician **during the period of illness.**
- The Functional Assessment Form must be returned to the Occupational Health Service at St Clare's within fourteen (14) calendar days of the first day of absence. See mailing address and fax number below.
- All medical information supplied will be held in the **strictest confidence.**

INFORMATION FOR PHYSICIANS

- Section B is to be completed only by the physician.
- Diagnosis and Surgery are optional fields however the information does assist us with facilitating return to work programs and health counselling and promotion. Any such information provided will be held in strict confidence in the Occupational Health Service. Only Functional Information will be shared with the employee's manager.
- The Health Care Corporation of John's will pay the physician up to a maximum of $20.00 for completion of this form.
- Invoices should be forwarded to the Occupational Health Service at St. Clare's Mercy Hospital. Please ensure you indicate the employee's name and date of visit on the invoice. See mailing addresses listed below.

OCCUPATIONAL HEALTH SERVICE CONTACTS

Occupational Health Services			**Marion Scanlon, Manager of Occupational Health and EFAP**
General Hospital	Phone (709) 777-7198	Fax (709) 777-6595	Phone (709) 737-6442
St Clare's	Phone (709) 777-5507	Fax. (709) 777-5527	
Waterford	Phone (709) 777-3657	Fax (709) 777-3428	**Dr. Oscar Howell, Occupational Health Physician**
Janeway	Phone. (709) 778-4543	Fax (709) 778-4333	Phone (709) 737-7198
Miller	Phone (709) 777-6387		

MAILING ADDRESS

Please return all Functional Assessment Forms and invoices to:
Occupational Health Service
St. Clare's Mercy Hospital
4th Floor Morrissey Wing
LeMarchant Road
St John's, NF A1C 5B8
Phone. (709) 777-5507
Fax (709) 777-5527

DECISION

The FAF is more than a form. Together with the requirement that it be filled out for an employee to get paid sick leave, the statements on the back of it and whatever other rules the Employer applies with respect to its administration, some of which we have commented on above, it constitutes a unilaterally imposed policy in the context of the administration of the Collective Agreement. Neither party took issue with the general principles that govern the enforceability of such policies, that is the "*KVP* rules". The Board of Arbitration in

Newfoundland Hospital Assn. and Newfoundland and Labrador Nurses' Union (D.M. Browne, Chair, December 21, 1988, unreported) referred to above commenced its consideration of the sick leave policies before it by stating at p. "G":

> In evaluating the policies in terms of this Collective Agreement, the parties referred the Board to *Re Lumber and Saw Mill Workers Union, Local 7 and KVP Co. Limited* (1965) 16 L.A.C. 73 (Robinson) wherein the Board stated at p. 85 as follows:
>
> "A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> "1. It must not be inconsistent with the collective agreement.
>
> "2. It must not be unreasonable.
>
> "3. It must be clear and unequivocal.
>
> "4. It must be brought to the attention of the employee affected before the company can act on it.
>
> "5. The Employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge."

It is clear from both the second paragraph of Article 2.01, which is the Management Rights clause, and Article 3.08, which provides explicitly that the provisions of the Collective Agreement "Overrules Hospital Policy", that the Employer is bound by Article 22 as it is by every provision of the Collective Agreement. The FAF must, therefore, conform with the requirements of Article 22.04(a) and (c), set out above. The Employer cannot escape any requirements that the Collective Agreement must be applied reasonably by promulgating its rules on the FAF form or otherwise, and to the extent that those rules then provide a basis for Employer action that affects employee rights they must be "clear and unequivocal" and both the rule and its possible effects must have been brought to the attention of the employees.

The Union relied on the answers to several of the specific questions posed to the Board in the *Newfoundland Nurses' Union* Award, which, in effect, asked whether the Employer could deny sick leave with pay to a legitimately ill employee who failed to complete the form required by the Employer. The Board's answer appears, in effect, to have been "no", but that does not assist us here where the Employer is explicitly empowered by Article 22.04(a) to require a medical certificate of any employee "for an illness in excess of two

(2) working days", whether he or she turns out to be legitimately ill or not.

1(a) The Employer's mandatory requirement for an FAF in all cases of sick leave of five days or more is contrary to the exercise of discretion required of the Employer in Article 22.04(a)

The Union's submission is that in requiring the FAF in all cases of sick leave for five or more working days the Employer has fettered the discretion Article 22.04(a) requires it to exercise in each case. That is, according to the Union, in agreeing that in every case of absence for "illness in excess of two (2) consecutive working days", "an employee *may* be required to produce a medical certificate" (emphasis added), the parties are to be taken to have intended that in every such individual case the Employer's responsible manager would turn his or her mind to whether a medical certificate is to be required. Thus, the Union says, to make the requirement of a medical certificate in whatever form automatic in all cases of sick leave for five or more working days is a breach of Article 22.04(a).

In making this argument the Union relied principally on the award of Arbitrator Brault in *Re Nav Canada and C.A.T.C.A.* (2000), 86 L.A.C. (4th) 370. The collective agreement there provided for sick leave with pay as follows [at p. 373]:

> "9.02 An employee is eligible for sick leave with pay when the employee is unable to perform his or her duties because of illness or injury provided that:
>
> . . . . .
>
> "(b) the employee satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer.
>
> "9.03 Unless otherwise informed by the Employer before or during the period of illness or injury that a certificate from a qualified medical practitioner . . . will be required, a statement signed by the employee stating that because of this illness or injury the employee was unable to perform his or her duties shall, when delivered to the Employer, be considered as meeting the requirements of clause 9.02(b)"
>
> . . . . .

In response to a high level of absenteeism on the weekend of May 17, 1998, what may in fact have been a "sick-in" although the arbitrator never calls it that, the Employer issued the following policy regarding sick leave, which became the subject of Arbitrator Brault's award [at p. 375]:

> "1- all absences due to illness must be supported by a certificate from a physician who has actually seen the ill employee. Failure to provide such a certificate on return to work will mean that the sick leave will not be authorized. Even with a certificate, sick leave may not be authorized, depending on the circumstances. Additionally, depending on the circumstances, further medical information may be requested including, where appropriate, a referral to MEDCAN, which is now providing NAV CANADA and its employees with occupational health and integrated disability management service."

The learned arbitrator stated at pp. 383-4:

> . . . such right of the Employer to require medical certification is essentially a "discretion that must be exercised reasonably" given the purpose as well as the wording of clauses 9.02 and 9.03. That such a discretion would exercise itself through the application of a policy requiring in advance the blanket medical certification of each and every short-term sick leave claim, would be in our view excessive.
>
> . . . What it does in fact is eliminate any notion of discretion, *i.e.* one where proper consideration would be given to the actual circumstances giving rise to an individual employee's claim for sick leave.
>
> . . . This discretion . . . clearly represents an exception to the principle set out in section 9.03 where a declaration under the employee's signature as opposed to medical certification is deemed to meet the eligibility requirements.

As Arbitrator Brault states in this passage, the words of Article 9.02 and 9.03 of the collective agreement before him quite clearly contemplated "a declaration under the employee's signature as opposed to medical certification" as the normal way of meeting the eligibility requirement for sick leave with pay, with the possibility of the exceptional requirement of a medical certificate left to the employer's discretion. That is not the case here. The Collective Agreement before us appears to contemplate the requirement of a medical certificate as the norm, when an employee is ill for more than two days.

In fact, the plain meaning of the words "an employee may be required to produce a medical certificate" in this context is simply that the Employer has the right to require a medical certificate where illness exceeds two working days. The next sentence of Article 22.04(a) makes that meaning even more clear, in providing that in cases of suspected abuse the Employer "reserves the right" to require a medical certificate "for any period of illness", that is for shorter periods. Subject to the Union's submission on past practice and estoppel, in our view, in requiring the FAF where employees are off work for five days or more, the Employer is exercising the right

clearly given to it by the first sentence of Article 22.04(a), in an easily identified subset of the circumstances to which that sentence applies.

The strongest support for the Union's submission that in requiring the FAF in all cases of sick leave for five or more working days the Employer has fettered the discretion Article 22.04(a) requires it to exercise in each case, comes from passages in an award of Arbitrator Swan quoted by Arbitrator Brault. He says at pp. 384-5:

> For the purpose of disposing of this grievance, we rely on the following views expressed in *Re Meadow Park Nursing Home* (page 4) [*Re Meadow Park Nursing Home and S.E.I.U., Loc. 220* (1983), 9 L.A.C. (3d) 137 at p. 142 (Swan)]:
>
> . . . . .
>
> "In these circumstances, where the parties have agreed to give the employer a discretion to suspend the payment of earned benefits on certain circumstances, we think that it must have been intended in using that formulation to incorporate a number of elements of the administrative law concept of discretion. In particular, we think that the exercise of the employer's discretion must be in good faith, must be a genuine exercise of discretion and not merely the application of a rigid policy, and must include a consideration of the merits of each individual case."

We take no issue with the suggestion that the Employer's decisions must be made in good faith and not on the basis of a policy that wrings all reasonableness out of them, but that does not justify reading a simplistic version of the complex administrative law doctrine of "fettering discretion" into Article 22.04(a). To say that the use of the word "may" means that individual cases cannot be dealt with on the basis of general rules made in the interests of fair and efficient administration is itself unreasonable. We do not accept that in agreeing on the wording of Article 22.04(a) the parties intended to hamper the Employer's capacity to deal fairly and efficiently with the many employee absences it would, predictably, have to deal with.

In providing that broad categories of absences are to be brought forward for decision with the same information available, and thus processed uniformly, the Employer is helping to ensure that all employees affected get the same level of consideration. That is good, fair, administration, not "fettering", in any context. As Arbitrator Thompson commented in *Re Pacific Press Ltd. and Vancouver Typographical Union, Loc. 226* (1977), 15 L.A.C. (2d) 113 [at 116], "Forms . . . are commonly used in large organizations to ensure that

employees receive the pay to which they are entitled, while protecting the employer against abuses of the right to sick leave". In fact in *Re Meadow Park Nursing Home and S.E.I.U., Loc. 220* (1983), 9 L.A.C. (3d) 137 (Swan), which is relied on so heavily by Arbitrator Brault, Arbitrator Swan went on to say at p. 144:

> . . . giving notice of the employer's intention to invoke art. 14:05 before the first illness in respect of which it is intended not to pay sick-leave will give the employee an opportunity to shape his or her behaviour in accordance with the employer's view of his or her attendance record.

That is what good policies do. Provided they are not inconsistent with the Collective Agreement, are not unreasonable in themselves, are clear and known by the employees, they give employees notice of what will be expected of them.

1(b) The requirement that the FAF be submitted within a particular time frame is a unilateral addition to the Collective Agreement that is again inconsistent with the Agreement

The "Instructions for Employees" on the back of the FAF include: "The Functional Assessment Form must be returned to the Occupational Health Service . . . within fourteen (14) calendar days of the first day of absence" and "The Functional Assessment Form must be completed by your physician *during the period of illness*". The Union's submission is that there is no requirement in Article 22.04(a) as to when the medical certificate has to be produced, so these requirements are "additional" to the requirements of the Collective Agreement.

Article 22.01 defines "sick leave" as "a period of time that an employee *has been* permitted to be absent" (emphasis added), and Article 22.04(a) provides that "Before receiving sick leave with full pay, an employee may be required to produce a medical certificate". On the face of the Collective Agreement, therefore, it would appear that the Employer could deny sick pay until it has received any medical certificate it can properly require, and the leave itself is a matter of permission, the obvious implication being that the Employer may grant or deny permission. It is clear, of course, from many arbitration awards that the Employer could not deny sick leave unreasonably, an understanding that the parties must be assumed to have had when they negotiated this Collective Agreement. We elaborate on those awards below, in connection with the Union's

submission 1(c) that the FAF is not a "medical certificate" within the meaning of this Collective Agreement.

Where the employee has in fact been prevented from working by illness, in the reasonable application of the sick leave provisions, permission will often, naturally, have to be given after the fact.

Insofar as the Employer's requirement that the FAF be submitted within 14 days of the first day of illness amounts to saying that it will not pay for time not worked *until* it has received the FAF, it is in fact exercising its rights under the Collective Agreement to grant or deny sick leave reasonably and fairly. This must be subject, of course, to exceptional cases where employees' illness or other insurmountable obstacles can be shown to have precluded them from preparing the FAF, or having it prepared, with the result that they are missing pay periods for reasons beyond their control.

Insofar as the 14-day requirement might operate to deny sick pay to an employee for a period during which he or she was in fact absent from work, in the words of Article 22.01, "by virtue of being sick, disabled, quarantined or because of (non-compensable) accident", the question would be whether the Employer had acted unreasonably in denying permission to be absent without loss of pay, and this rule of FAF administration would only be binding to the extent that the Employer had not acted unreasonably. We do not accept that it will always be reasonable for the Employer to deny sick pay where the application is not made within 14 days from the first day of illness.

The same is true for the rule that the FAF "must be completed . . . during the period of illness". We note that the FAF calls for the physician to provide functional impairment information "at the time of absence". Presumably, a credible physician would want to see the employee in that period.

While it would appear not to be part of the administration of the FAF as evidenced by what appears on the back of the form or in Ms. Meaney's Memorandum of January 20, 2000, the statement in Mr. Dodge's Memorandum of August 11, 1999 that "The Functional Assessment Form will be required within 14 days . . . If you do not submit the form within this time, your sick leave benefits will not be paid", clearly does not allow for reasonable administration and thus limits the right to sick pay under the Collective Agreement.

Of course, it has always been held by arbitrators that the Employer cannot add to the requirements under the Collective Agreement and thus limit employees' rights to sick leave. There is a full and careful discussion of the awards up to that point and a balanced application of the general principle by Arbitrator Emrich in *Re St. Lawrence Lodge and O.N.A.* (1985), 21 L.A.C. (3d) 65, where she concluded that the employer's proof of illness policy was "inconsistent with the provisions of the collective agreement to the extent that it purport[ed] to require completion of the form before an employee [wa]s allowed to return to work" [p. 84].

Further by way of example, in *Re Women's Christian Assn. of London (Parkwood Hospital Veterans Care Centre) and London and District Service Workers' Union, Loc. 220* (1983), 10 L.A.C. (3d) 336, the board of arbitration chaired by H.D. Brown considered a letter from the employer advising employees that they had thereafter to produce a doctor's certificate to support any further illness of whatever duration. The Collective Agreement provided [at p. 338]:

> "19:05 To qualify for sick leave pay or allowance, an employee must give notice to the Employer at least one (1) hour prior to the commencement of his shift that he will not be reporting for duty by reason of illness, or shall give to the Executive Director or Designate, in writing, on request, a reason or explanation satisfactory to and accepted by the Executive Director or Designate of the Hospital/Home as satisfactory for the failure to give such minimum one (1) hour notice."

Not surprisingly the arbitration board concluded [at p. 347]:

> In our opinion the requirement for the production of a medical certificate is inconsistent and contrary to the terms of art. 19.05 which require only a reason or explanation satisfactory to the employer which does not require the production of a medical certificate to cover any length of illness.

Other examples are the awards of Arbitrator Michel Picher in *Re Toronto (City) and C.U.P.E., Loc. 79* (1984), 16 L.A.C. (3d) 384, and of Arbitrator Langille in *Re London (City) and C.U.P.E., Loc. 101* (1983), 9 L.A.C. (3d) 262, where the arbitrator concluded [at p. 270]:

> The essence of this decision is that having agreed with the union upon a set of rules concerning validation of absence due to illness, the employer cannot alter those rules in mid-contract.

This last award is discussed more fully below, in connection with the next issue.

In sum on this point, under the Collective Agreement the Employer cannot take the position that it will in every case deny sick leave with

pay because the FAF "was not returned to the Occupational Health Service . . . within fourteen (14) calendar days of the first day of absence" or because it was not "completed . . . during the period of illness", because there is no such limit in the Collective Agreement on entitlement to sick leave with pay. On the other hand, subject to the exceptional cases discussed above, the Employer is within its rights in not providing sick pay until it has the FAF, after which it must not be unreasonable in making the decision not to permit the employee to be absent from work without loss of pay.

1(d) The information required by the FAF is directed at information to assist the Employer in arranging for an early return to work, but the mandatory nature of this requirement is inconsistent with Article 22.04(c), which leaves participation in an early return to work optional for employees

We do not accept this claim by the Union. There is nothing on the face of the FAF or in the evidence with respect to its administration to suggest that employees are being, or will be, required to accept any alternate employment without their consent, however suitable and however well the employee is qualified to do it. For the Employer to so require would be a breach of the Collective Agreement.

The "Questions and Answers" on the back of the FAF do inform employees that, with the information on the form about what employees can or cannot do in relation to their work, the Employee Wellness Division will "help you get back to work . . . sooner [so] you can avoid using up all your sick leave that you might need in the future if you develop a serious illness". As well as making it clear that all that needs to be provided for that purpose is information about "what you can or cannot do in relation to your work" and not diagnostic information, the "Q and A" section also makes clear that all the employee's manager will legitimately know is what the changed duties and hours are. For any manager to require employees to do any other alternate work without their consent would also be a breach of the Collective Agreement.

The system implemented by the Employer with respect to the Wellness Program is such that when employees are off work for five days or more, the Employer's Payroll Department provides a printout to the Occupational Health Department advising of the absence. An Occupational Health Nurse will then call the employees at home

to advise them of the services offered by the Occupational Health and give the employee the option of partaking in these services. The testimony of Ms. Meaney, confirmed by that of Marion Scanlon, Manager of the Employee and Family Assistance Program, was that employees do have the option to participate, or not, in the Occupational Health program. If the employee does not wish to participate in any program of early return to work the Occupational Health Nurse does not make any further calls to the employee, but reminds the employee that she or he remains available to assist in any way.

In asserting that the FAF and its administration went beyond the Employer's right in the Collective Agreement to require medical certificates and is inconsistent with the provision in Article 22.04(c), which leaves participation in an early return to work optional for employees. The Union relied on the award of Arbitrator Langille in *Re London (City) and C.U.P.E.* cited above. The grievance in that case was against a "home visitation programme" instituted by the employer as part of its response to a report entitled "Absenteeism in the City of London Workforce 1980" which, as described by the employer, involved [at p. 263]:

> ". . . a visit of the employee by the Occupational Health Nurse or another representative of the Health and Safety Section. Such visits will, whenever possible, occur on the first day of absence from work.
>
> "The nurse will have four responsibilities in visiting the employee; to assist the employee by referral if medical care or assistance is required, early identification of potential health hazards in the work place, to help expedite the employee's return to work and to refer potential abuse of the provisions of the paid sick leave plan to the Manager of Health, Safety and Labour Relations."

The arbitrator explained the employer's response to the grievance [at p. 266]:

> First, the employer states that the programme's purpose is not to "police" the use of sick leave by employees. The employer argues that the programme serves other legitimate ends . . . The nature of the non-policing purposes of the programme perceived by the employer, are set out in the notice of employees, *supra.*

He then went on at pp. 266-9:

> Upon reviewing the evidence and the arguments of the parties, I find this part of the employer's case must fail for the following reasons. First, from the notice which was posted it is clear that one of the announced purposes of the programme was to "police" the use of sick leave.

> Second, the testimony at the hearing reveals that the policing function was the predominant if not exclusive purpose of the programme in practice.
>
> . . . . .
>
> In the collective agreement provisions relating to sick leave . . . it is obvious that the union and the employer have turned their minds to the problem at hand.
>
> . . . . .
>
> . . . What the employer has sought to do in this case is to restrike the balance achieved in the collective agreement between the ends set out above. It has sought to introduce another step in the process by implementing the system of home visitation as a further method of preventing abuse of the sick-leave provisions.

The evidence before us here is that "policing" was no part of the announced purpose of the introduction of the FAF, and there is no evidence that such was its purpose in practice. It must be borne in mind that the parties have stipulated here that: (i) There is no evidence before the Board of any inappropriate use of confidential information gathered for the FAF and (ii) Information required in the FAF is essential to the operation of an appropriate early intervention program.

More relevant to the Union's claim here that the FAF and it administration is inconsistent with the provision in Article 22.04(c), which leaves participation in an early return to work optional for employees, is the following from the award of Arbitrator Langille in *Re London (City) and C.U.P.E., Loc. 101, supra,* at p. 269:

> The employer's second response was that the programme is a voluntary one in the sense that no one has been or will be disciplined for refusing to see the nurse.
>
> That to me, however, misses the point of the union's objection. It is clear that the employer's decision to send the nurse around to visit everyone who is off sick is intended to be, and is in practice, a method of validating the legitimate use of sick-leave provisions and of preventing their "blatant abuse".

There is no evidence here that the intervention of the Occupational Health Nurses here is intended to be, or is in practice, a method of preventing abuse of sick leave. There is evidence that early return to work, on one basis or another, is being widely accepted by employees, but it cannot be assumed that that is so for the wrong reasons. Employer accommodation of employees who are not ready to return to their regular duties is desirable, indeed it is required by provincial legislation in many instances. The mandatory

provision of information that equips the Occupational Health Nurses and the Wellness Division to suggest an appropriate early return to work does not mean that the consent of the employees to whom suggestions are made is not real, nor is it inconsistent with the requirement of Article 22.04(c) that participation in early return to work be optional for employees.

1(c) The FAF is not a "medical certificate" within the meaning of the Collective Agreement, and therefore the introduction of the FAF to replace the traditional doctor's note is contrary to the Collective Agreement

There is no basis upon which to suggest that the FAF is not *a* "medical certificate". Clearly, that is what it is. If it is not a medical certificate "within the meaning of the Collective Agreement" that must be because the Collective Agreement says so, expressly or by implication. This Collective Agreement nowhere limits, defines or provides other useful contextual guidance to the intended interpretation of this phrase, beyond the generally accepted implied requirements that sick leave provisions are not to be unreasonably administered and that rules unilaterally imposed by the Employer under a collective agreement must be reasonable. We will consider the arbitral jurisprudence on those generally accepted implied requirements before considering the Union's alternative claims based on past practice and estoppel.

As arbitrator between entirely different parties I stated in a 1996 Award, cited by the Union here, *Re Faculty Assn. of the University of St. Thomas and St. Thomas University (Goltz)*, [1996] N.B.L.A.A. No. 37 (QL), at para. 73 [summarized 44 C.L.A.S. 501]:

> There is ample arbitral authority for the proposition that, in balancing the grievor s right to privacy against the employer's right to prevent abuse of the sick leave system, the employer may only seek information reasonably required to confirm the validity of the claim (*Re York County Hospital Corp. and S.E.I.U., Local 204* (1992), 25 L.A.C. (4th) 195 (Fisher, chair), at p. 194) and will not be allowed to go beyond the language of the collective agreement where the collective agreement specifies the content of a medical certificate. (*Re St. Lawrence Lodge and Ontario Nurses Association* (1985), 21 L.A.C. (3d) 65 (Emrich), at p. 80 and the awards cited there, and *Re Regional Municipality of Halton and O.N.A.* (1993) 32 L.A.C. (4th) 137 (Swan, chair)). The employer is not entitled to a full diagnosis, but only to information that will meet the requirements of the collective agreement.

In the same vein, Arbitrator Langille in *Re London (City)*, *supra*, concluded, at p. 270:

> I would only add that the employer must keep in mind that there are two goals which any system of validation of sick leave must achieve. First, the system must ensure that only valid claims are made. But second, the system must protect the privacy, and avoid unnecessary allegations against the integrity, of the employees involved.

Apart, for the moment, from extrinsic evidence of what these parties intended by the use of the phrase "medical certificate", these considerations must guide us, as they have other arbitrators, in our assumptions about what the mutual intentions of the parties were, agreeing in Article 22.04(a) that in specified circumstances "a medical certificate" could be required.

In *Newfoundland Hospital Assn. and Newfoundland and Labrador Nurses' Union* (D.M. Browne, Chair, December 21, 1988, unreported) discussed above, "Question 12" put to the Arbitration Board was "Are the prescribed contents of the medical certificate reasonable". There, as here, the collective agreement simply entitled the employer to demand a medical certificate in specified circumstances, with no further definition of that document. That Board quoted from *Re Nova Scotia Assn. of Health Organizations and C.B.R.T. & G.W., Loc. 606* (unreported) (Outhouse, 1980), where Arbitrator Outhouse cited with approval *Re Pacific Press Ltd. and Vancouver Typographical Union, Loc. 226 and Vancouver-New Westminster Newspaper Guild, Loc. 115* (1977), 15 L.A.C. (2d) 113, where it was stated at p. 116:

> There is no doubt that the Collective Agreement permits the employer to require a certificate from a physician as a condition of paying sick leave. Furthermore it is inherent in the orderly administration of a normal sick leave plan that the employer may require claimants to supply pertinent and germane information relating to sick leave requests. Forms similar to ex. 3 are commonly used in large organizations to ensure that employees receive the pay to which they are entitled, while protecting the employer against abuses of the right to sick leave.

Arbitrator Outhouse then stated at p. 4 of his award:

> All that remains to be decided is whether the questions to which the Union objects are designed to elicit pertinent and germane information. This is obviously something that depends on the facts of each case and is largely a matter of judgment. Arbitrators ought, therefore, to be reluctant to substitute their judgement [*sic*] for management's and should as a rule interfere only in cases of harassment or abuse. There is no evidence of harassment or abuse in the present case and the Board sees no valid objection to any of the questions on the Employee Absence Report Form.

On these authorities, the Board in the *Nurses' Union* case held:

> We do not find these certificates used in the hospital's policies offensive in any matter [*sic*]. Item 4 wherein the employer requests information pertaining to the medical condition rendering the patient unable to perform his regular duties is appropriate, reasonable and integral to the medical certificate. After all, article 19.02 requires "Proof of Illness". It would seem that general information would satisfy this requirement on this certificate as there is no demand that a diagnosis should be given which would be inappropriate and in fact an invasion of an employee's right to privacy.

The phrase "Proof of Illness" is not used in Article 22, but, obviously, the intended purpose of the medical certificate is to establish that the employee is entitled under Article 22.01 to sick leave with pay "by virtue of being sick, disabled, quarantined or because of accident for which compensation is not payable under the *Workers' Compensation Act*".

On the face of the Collective Agreement here the Employer must be taken to be entitled, in the specified circumstances, to require a medical certificate that identifies what aspects of his or her regular duties the employee is unable to perform. The "Functional Information" to be provided on the FAF by the employee's doctor goes no further than that. The spaces for diagnostic information are clearly labelled "Optional Information". There is "no demand that a diagnosis should be given which would be inappropriate and in fact an invasion of an employee's right to privacy", to quote the language of the Board in the *Nurses' Union* case.

Insofar as the wording of the collective agreement there and the Collective Agreement here is the same, or similar, the *Nurses' Union* Award is clearly one that the parties must be taken to have had in mind when they agreed to adopt the pre-existing language of the NAPE collective agreements in this Collective Agreement. A major difficulty with this is the answer the Board gave in the *Nurses' Union* Award to Question 13, at p. 33, as follows:

> 13. Can an Employer refuse sick leave payment to an employee whose doctor verifies the employee's illness in a medical certificate not prepared in the format prescribed by the Employer?
>
> Already we have stated that no Article in this Collective Agreement endorses the use of a particular medical certificate. However the contents of any medical certificate must satisfy the required proof of illness under Article 19.02. By insisting upon a specific format for a medical certificate prior to the awarding of Sick Leave Payment the Employer is introducing a requirement into Article 19 that has not been negotiated. Thereby, the Employer is unilaterally attempting to amend Article 19. Therefore our response to this question is in the negative.

This response seems inconsistent with the Board's response to the previous question, Question 12, which is quoted above. What is the point of their conclusion that, although the Employer is constrained by the *KVP* rules, "We do not find these certificates used in the hospital's policies offensive in any matter [*sic*]. Item 4 wherein the employer requests information pertaining to the medical condition rendering the patient unable to perform his regular duties is appropriate, reasonable and integral to the medical certificate . . . " if that does not lead to the conclusion that the hospital can require such a medical certificate? If the Board means that where a doctor provides all the information requested but does not use the actual form prescribed it would be unreasonable to deny sick leave with pay, its conclusion is, perhaps, consistent with their answer to the previous question and the authorities they quote. Otherwise, we must respectfully disagree with them.

There are, however, many other arbitration awards that make the same point with respect to the kind of information an employer would be reasonably expected to need to administer a sick leave policy, in contrast with the kind of private information that an employee could only be asked to provide if the Collective Agreement explicitly empowered the employer to ask for it. See *Re Scarborough (Borough) and O.N.A. (sick-leave policy)*, March 5, 1985, unreported (Shime); *Re York County Hospital Corp. and S.E.I.U., Loc. 204* (1992), 25 L.A.C. (4th) 189 (Fisher); *Re Rosewood Manor and H.E.U., Loc. 180* (1990), 15 L.A.C. (4th) 395 (Greyell), quoting *Re Victoria Times Colonist and Victoria Newspaper Guild, Loc. 223* (Hope) (unreported, February 12, 1986) and *Re Ford Motor Co. of Canada Ltd. and U.A.W., Loc. 1520* (1975), 8 L.A.C. (2d) 149 (Palmer); *Re Salvation Army Grace Hospital and U.N.A., Loc. 47* (1995), 47 L.A.C. 114 (Tettensor); and *Re Leduc General Hospital and H.S.A.A.* (Moreau) (1993, unreported) [summarized 31 C.L.A.S. 251], referred to at p. 121 of *Re Salvation Army Grace Hospital and U.N.A., Loc. 47.*

On the basis of the arbitration awards of which the parties must have been aware when this Collective Agreement was negotiated there are no implied requirements that lead us to conclude that the FAF is not a medical certificate "within the meaning of the Collective Agreement".

2. *With respect to the issue of whether or not the FAF constitutes a "medical certificate" within the meaning of the Collective Agreement, the Union argues in the alternative that the term "medical certificate" is latently ambiguous, as disclosed and resolved by the clear and unambiguous past practice of the parties. The evidence of past practice in this case demonstrates clearly that a "medical certificate", as referred to in Article 22.04(a) is a traditional doctor's note*

Although we have concluded that there is neither any basis in the language of the Collective Agreement nor any implied requirement that has led us to conclude that the FAF is not a medical certificate "within the meaning of the Collective Agreement", in this claim Union alleges that, read in the context of past practice, the requirements of Article 22.04(a) are latently ambiguous. It relies on the doctrine that latent ambiguity may be both disclosed and resolved by extrinsic evidence, including past practice. I have no reason to depart here from the statement of that doctrine that I made as arbitrator in *Re Izaak Walton Killam Hospital for Children and N.S.G.E.U., Loc. 22A* (1992), 29 L.A.C. (4th) 332 at pp. 341-2:

> This brings me to the use of extrinsic evidence to indicate, as well as to resolve, ambiguity. While I find the concept unsatisfying it is undeniably backed by authority. Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., looseleaf, state in para. 3:4400:
>
> > ". . . the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing.
> >
> > . . . . .
> >
> > "Although many arbitrators have accepted the common law principles and limited the introduction of extrinsic evidence accordingly, others have taken the view that the legislative provisions [giving the arbitrator control over his or her procedure, including power to admit evidence inadmissible in court] permit the admission of parol evidence at the discretion of the arbitrator . . . Where an ambiguity is patent, that is, where it appears on the face of the agreement, an arbitrator may resort to extrinsic evidence as an aid to its interpretation. Where an ambiguity is latent, that is, where it is not apparent on its face, an arbitrator may rely upon extrinsic evidence not only as an aid to resolve the ambiguity once established but also to disclose the ambiguity."
>
> The learned authors footnote the non-labour law case of *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. (Inc.)* (1969), 3 D.L.R. (3d) 161, [1969] 1 O.R. 469 (Ont. C.A.), as support for the proposition quoted. They also cite half a

dozen arbitration awards . . . Moreover, the Ontario Court of Appeal in *Noranda Metal Industries Ltd. v. I.B.E.W., Loc. 2345* (1983), 44 O.R. (2d) 529, 84 C.L.L.C. 14,024, 23 A.C.W.S. (2d) 136, a case in which the issue was whether the arbitrator had erred in relying on evidence that during negotiations the parties had agreed on a special meaning for words in the collective agreement, Dubin J.A. said [at p. 536]:

> ". . . assuming that [the arbitrator] failed to make that finding [that the words in question were ambiguous] . . . before admitting the extrinsic evidence, it was unnecessary for him to do so since he was entitled to entertain the extrinsic evidence with a view to determining whether that evidence disclosed the ambiguity in the words expressed."

. . . . .

Counsel for the union submitted that past practice cannot be relied upon to demonstrate any such intent unless it meets the standard articulated some years ago by arbitrator P.C. Weiler in *Re Int'l Assn. of Machinists, Loc. 1740 and John Bertram & Sons Co.* (1967), 18 L.A.C. 362 at p. 368:

> ". . . there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the collective agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice."

I accept this as a useful formulation of the questions to be answered on the evidence here.

The Union's submission on the evidence before us here is that in the past, for normal absences of five days, where there was no suspicion of abuse or other irregularity, employees regularly produced a medical certificate which was a traditional medical note signed by a doctor, which indicated only that the employee was off sick due to illness and gave his or her expected date of return to work. Ralph Morris who has held a wide range of Union positions, both in his workplace and Provincially, and has worked in nearly all units that now make up the Employer's establishment, testified that before the introduction of the FAF "99%" of doctor's certificates were of this type.

Mr. Morris also testified that in at least two collective bargaining sessions the Employer had brought to the table a sick leave regime like that of which the FAF is part and had dropped its proposal in the

final stages of bargaining. This testimony, which was not disputed, is particularly relevant to the Union's claim of estoppel, dealt with below. He also testified that he had filed a group grievance in 1993, and subsequently 3700 other grievances against the attempts by the Employer or its predecessor's attempts to insist on more medical certificates with more information in them.

The Employer's submission on the same evidence is that the overwhelming weight of the evidence heard was that the policy of the Employer and its predecessors was not to accept a traditional medical note signed by a doctor, which merely indicated that the employee was off sick due to illness and gave his or her expected date of return to work. In particular, the Employer submitted, the evidence of Ralph Morris that the group grievance filed against the General Hospital Corporation resulted in the withdrawal of the Policy put in place by that Employer, was soundly contradicted, not only by the oral testimony of Wayne Scott, but by virtue of Exhibit No. 31, which indicated that that Grievance was dropped after approximately five years. That document is to the effect that the Grievance was dropped.

Mr. Scott was Manager of Employee Relations for the Employer from its formation in 1995 until 1998 when he left the Employer. Prior to 1995 he was in a similar position for the General Hospital Corporation, one of the predecessor employers. In both capacities he was involved in the administration and enforcement of sick leave policies. He testified that to his knowledge the policy of the General Hospital Corporation was as set out in the statement of "Sick Leave Policy" revised 1993 08 09, and it was enforced. That statement of policy states in para. 4.1 that employees are required to submit a medical certificate when sick leave is in excess of two consecutive days in the case of "N.A.P.E. (HS)" and three consecutive days in the case of "N.A.P.E. (LX)". It calls for the medical certificate to include, in addition to all relevant dates, "relevant and sufficient information of a general nature to substantiate the claim for sick leave".

Mr. Scott testified that the Employer's policy did not change in spite of the huge number of individual grievances and the group grievance filed by Mr. Morris in 1993.

Heather Hanrahan, Director of Human Resource Policy, who was Associate Executive Director of Human Resources at the Waterford

Hospital 1992-1995, introduced that employer's written policy on paid sick leave into evidence. She testified with respect to her work with the Occupational Health Nurses there, in attempting to maintain an approach to sick leave much like the one which has involved the adoption of the FAF by the Employer.

Marilyn Nichols was Employee Relations Officer at St. Clair's Mercy Hospital prior to the merger. She introduced and spoke to similar effect about that employer's "Sick Leave Control Policy" dated January 17, 1991.

The evidence is clear that the predecessor employers had sick leave policies in place, which were made known to the Union, and which, formally at least, were enforced by those predecessor employers. Those policies all required "functional" type information to be provided in medical certificates under the Collective Agreement. Undoubtedly, many front line managers did not enforce these policies, but the policies remained in place.

If the Employer were relying on evidence of past practice in this respect it might fail to meet the *John Bertram* standards set out above, but it is not the Employer that is relying on past practice here. It is the Union that must meet that standard to show that the words "medical certificate" in Article 22.04 of the Collective Agreement have a special meaning that precluded the Employer from requiring the FAF.

The Union has certainly not shown conduct by the Employer "which unambiguously is based on one meaning attributed to the relevant provision", *i.e.* that "medical certificate" means *no more than* a simple doctor's note stating only that the employee is ill and when he or she is expected to return to work. The Union may have shown that *its* stance has been unambiguously to that effect but it has fallen far short of proving "acquiescence" by the Employer "in the conduct" of submitting only such notes "which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection". Mr. Morris' own evidence, as well as that of the Employer's witnesses, demonstrates the Employer's long-standing objection to "the simple doctor's note". Finally, there is no "evidence that members of the . . . management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice of accepting such notes". The Union's evidence falls far short of the *John Bertram* standards of showing an accepted past practice.

We reject the Union's alternative argument that the clear and unambiguous past practice of the parties discloses that the term "medical certificate" is latently ambiguous, or demonstrates clearly that a "medical certificate", as referred to in Article 22.04(a), is a simple doctor's note stating only that the employee is ill and when he or she is expected to return to work.

3. *If the Board accepts the Employer's position that the FAF can constitute a "medical certificate" within the meaning of the Collective Agreement the Union argues in the further alternative that the Employer is estopped from introducing the FAF as a replacement to the traditional doctor's note based on the Employer's long-standing past practice*

The thrust of this claim by the Union is that, even if there is no ambiguity in the term "medical certificate", patent or latent, the Employer is precluded by the doctrine of "estoppel" from insisting on more than the traditional doctor's note which indicated only that the employee was off sick due to illness and gave his or her expected date of return to work. The doctrine of estoppel has been recently articulated by an eminent Canadian arbitrator as follows (*Re Beatrice Foods Inc. and R.W.D.S.U., Loc. 440* (1994), 44 L.A.C. (4th) 59 (MacDowell) at p. 68):

> . . . the principle of estoppel is available to avoid the inequitable application or administration of a collective agreement, and may be applied where:
>
> (1) there is a representation by words or conduct that a particular legal regime will be maintained, and
>
> (2) where the other party relies upon that representation and, expecting the *status quo* to continue, foregoes the opportunity to negotiate appropriate contract language.
>
> The principle is reciprocal. It is available whether an employer, relying on union behaviour, seeks to confirm a state of affairs less generous than the negotiated terms, or whether a union, relying upon employer behaviour, seeks to maintain a state of affairs more generous than the agreement provides.

Brown and Beatty, *Canadian Labour Arbitration*, 3rd ed., loose-leaf, state in para. 2:2210 that the essentials of the doctrine of equitable estoppel are:

> [1] a finding that there was a representation by words or conduct, which may include silence,
>
> [2] intended to be relied on by the party to which it was directed;
>
> [3] some reliance in the form of action or inaction; and
>
> [4] detriment resulting therefrom.

Where these requirements are met the party against whom the estoppel is set up will not be allowed to enforce the rights it has represented itself as undertaking to forgo, at least not until the party setting up the estoppel has had a fair opportunity to escape the effects of its detrimental reliance.

The doctrine of equitable estoppel has been accepted by the courts as well as by arbitrators in Newfoundland and Labrador, See *U.F.C.W., Local 1252 v. Lewisporte Wholesalers Ltd.* (1989), 79 Nfld. & P.E.I.R. 237 (Nfld. S.C.T.D.), and *N.A.P.E. v. Memorial University of Newfoundland* (1992), 99 Nfld. & P.E.I.R. 251 (Nfld. S.C.T.D.).

The Union here does not rely on "conduct" or accepted practice as estopping the Employer from requiring the FAF. To the extent that it did so it would fail on the facts, for the same reason that the preceding claim, based on latent ambiguity, failed. There was no such clear practice acquiesced in by the Employee. Rather it relies on Ralph Morris' testimony that in at least two collective bargaining sessions the Employer brought to the table a sick leave regime like that of which the FAF is part and dropped its proposal in the final stages of bargaining. This testimony was not disputed and there is a document entitled "Employer #6, NAPE (HS) Negotiations, December 14, 2000" in evidence to substantiate it. The issue here is one of "law". Does the doctrine of estoppel operate in these circumstances to preclude the Employer from using the FAF because it attempted to negotiate for language that would have put its right to do so beyond question but dropped its proposal?

It is well established that equitable estoppel may arise from representations made in the course of collective bargaining (Brown and Beatty, *supra*, at footnote 15). In *Re Beatrice Foods*, at pp. 65-6, the learned arbitrator discusses the leading case on this, *Re CN/CP and Canadian Telecommunications Union* (1981), 4 L.A.C. (3d) 205 (Beatty); application for judicial review dismissed as *Canadian National Railway Co. v. Beatty* (1981), 128 D.L.R. (3d) 236, 34 O.R. (2d) 385 (Div. Ct.). In that case the Ontario Divisional Court held, at pp. 243-4 D.L.R.:

> What the arbitrator did here, however, was not to interpret the agreement but to make a finding as to its proper application and to give consequential relief.
>
> That finding surely fits within the principles [of equitable estoppel] . . . By its conduct in persistently paying many classifications of employees from the first day of illness in the face of a clause providing for a waiting period, the

company gave the union an assurance which was intended to affect the legal relations between them. The union took the company at its word and refrained from requesting a formal change in the agreement. The company should not now be allowed to revert to the previous relations as if no such assurance had been given.

In its post-hearing written argument the Union states:

145. It is the submission of NAPE that the Employer, when confronted with the opportunity to modify its position, recognizing the view the Union took with respect to Article 22.04, was in a situation where they could have demanded a modification to the Collective Agreement to meet the requirements of the Employer and the FAF. The Employer, by making the proposal, recognized the difficulty it had with its position regarding the FAF and they tried to modify the Collective Agreement to ensure that they had the right to the detailed information and the forms that they had proposed. The problem, from the Employer's perspective, is that they, having acknowledged their concern with the language of the Collective Agreement, then set out about to change the language to meet their objectives and then withdrew those proposed changes. The Employer knew or ought to have known that it was going back to the same position it had in the expired Collective Agreement.

It is important to note that we do not understand the Union to be relying on any express or implied representation by the Employer that in dropping its proposed new language for Article 22.04 it was agreeing to accept the Union's interpretation of the existing language. If that were the Union's claim it would fail on the facts. There is no evidence whatever to suggest that was why the Employer dropped its proposal. In "going back to the same position it had in the expired Collective Agreement" the Employer was maintaining the interpretation of Article 22.04 as we have stated it thus far in this award, a position with which the Union disagreed and against which it had filed this Grievance.

The Union's brief continues:

146. The failure of the Employer to change the Collective Agreement language during negotiations puts the Employer back in the same position it was in at the time the grievance was filed.

147. It is the submission of NAPE that its position with respect to the interpretation of the collective agreement was supportable on at least a *prima facie* basis. On that basis, the Union was entitled to pursue its rights under the grievance and arbitration procedures of the Collective Agreement without risking the termination of the estoppel. Having taken the position that the existing sick leave provisions of the collective agreement supported its position, the Union was not obligated to negotiate changes to the collective agreement language to gain what it reasonably believed it already had. In turn, the estoppel continued through negotiations and into the current Collective Agreement.

148. This was the result reached in the case of *Re Corporation of City of London and Canadian Union of Public Employees* (1990), 11 L.A.C. (4th) 319, which involved facts very similar to those in the present case. In that case, the union filed a grievance claiming that the existing collective agreement language required the employer to pay a shift premium to particular employees. In the alternative, the union argued that the employer was estopped from discontinuing what was a longstanding practice of paying the premium. The employer on the other hand, agreed that it was estopped, but only until the expiry of the collective agreement under which the grievance was filed. It was the employer's position that the estoppel terminated at that point in time. As in the present case, just prior to negotiations, the employer had indicated that it was changing its practice. During negotiations, the union did not make any proposals to change the existing collective agreement language.

The aspect of the doctrine of estoppel that the Union thus raises for our adjudication is when the estoppel terminates, specifically in the context of negotiations. It will be recalled that following the quote above from Brown and Beatty, *Canadian Labour Arbitration*, we concluded:

> . . . the party against whom the estoppel is set up will not be allowed to enforce the rights it has represented itself as undertaking to forgo, *at least not until the party setting up the estoppel has had a fair opportunity to escape the effects of its detrimental reliance.* [Emphasis added.]

Estoppel is often alleged in the context of collective bargaining on the basis that one party has led the other to believe that there was no need to renegotiate a term of the collective agreement. This will have been by words or deeds that amounted to a representation that the first party shared the opinion of the second as to what the term meant or, at least was prepared to apply it that way. The detrimental reliance will have consisted in the loss of the opportunity to renegotiate the term in question. In those circumstances there is said to be no "fair opportunity to escape the effects of the detrimental reliance" until the next round of collective bargaining. Only then does the first party's obligation terminate. See *Re Beatrice Foods*, quoted above, at p. 69. Does that doctrine apply here because in the last round of negotiations the Employer dropped its proposal to reword Article 22.04?

On this point the Employer responded in its written argument by citing awards in which it has been held that an estoppel cannot survive a round of collective bargaining in which the meaning of the term to which the estoppel is said to apply has been in issue. In *Re Victoria Times Colonist and Victoria Newspaper Guild* (1984), 17 L.A.C. (3d) 284 (Hope), the learned arbitrator stated in part, at pp. 297-8:

Even assuming that the doctrine of estoppel did apply to the circumstances, I would have difficulty concluding that the notice given verbally . . . was not sufficient to terminate the practice. When that notice was given the collective agreement was due to expire on November 30, 1983. Collective bargaining for a renewal of the collective agreement took place after the notice was given and there was ample opportunity in the union to seek to have the benefit it asserted included in the collective agreement.

The position of the guild was that it had elected to pursue a grievance under the existing agreement and had filed that grievance in its letter of November 30, 1983. The employer, said the guild, responded to that grievance in its reply letter of December 7, 1983. The guild submitted that there was no obligation on it in those circumstances to pursue the matter in collective bargaining. Assuming that the ingredients necessary for the application of estoppel were present, it was the guild's view that the employer would not be at liberty to terminate the practice until after the issue raised by the grievance had been resolved. The guild pointed out that the term of the expired collective agreement was extended and remained in force . . .

. . . . .

The submission of the guild was that the collective agreement continued in force under that provision, including any of its terms which may arise by implication. I agree with that submission. But the same reasoning does not assist the guild, in my view, where reliance is placed upon an application of the doctrine of estoppel as a foundation for the claim. The basis for a finding of detrimental reliance in an application of the doctrine of estoppel in a collective bargaining relationship appears to be the fact that the party adversely affected by a change in practice is prevented from pursuing a collective bargaining remedy during the currency of the collective agreement.

It is difficult to apply that reasoning to circumstances where notice is given prior to the commencement of collective bargaining and the union, in effect, decides not to raise the issue in collective bargaining . . .

The significance of a failure to address an issue in collective bargaining when a plea of estoppel is raised was addressed by the arbitrator in *Re Longyear Canada Inc. and Int'l Assoc. of Machinists, Local Lodge 2412* (1981), 2 L.A.C. (3d) 72 (Picher). On p. 80 the arbitrator said as follows:

> "I would note, though, that a party going into negotiations, having benefited from the other party's non-enforcement of its strict legal rights under the collective agreement, takes a substantial risk if it does not raise the issue in negotiations either to ground the practice in the written words of the collective agreement or to obtain a renewed undertaking, perhaps equivalent to a concession, that the previous course of conduct will be continued."

The Employer's brief states:

95. . . . The Union knew very well what the position of the Employer was with respect to the issue of sick leave, and in particular the sick leave form that had

been implemented, the FAF. The Union chose not to take any steps other than to file a grievance seeking an interpretation of the language of the Collective Agreement. It is in the same position as the Employer, in that it is subject to the interpretation of the relevant provisions of the Collective Agreement at issue in this arbitration.

. . . . .

97. . . . There can be no such detriment [loss of opportunity to renegotiate the collective agreement] in this case, given the clear notice given by the Employer. If there were any detrimental reliance, it would only have been until the negotiating of the new collective agreement in 2000, prior to the expiry of the Collective Agreement in March, 2001.

98. The decision in *Re Corporation of City of London and Canadian Union of Public Employees, Local 101* (1990), 11 L.A.C. (4th) 319 (Chairperson Roberts) cited at paragraph 148 of the Union's Argument, is contrary to the weight of arbitral and Court authority cited above. It found that, even given clear notice of termination of a long-standing practice with respect to payment of shift premium, the estoppel created continued not only to the end of the then current collective agreement, but also to the end of the collective agreement in force at the time of the rendering of the decision in the grievance in question. The award does not provide any analysis as to the detrimental reliance necessary in such cases, and is therefore of very little if any persuasive value. It appears on its face to be wrong in law. The Board appears to have placed some value on the fact that the Union had a *prima facie* case for its interpretation of the language in issue. With respect, that confuses the issues of interpretation/construction of the language of the collective agreement and estoppel/detrimental reliance. Estoppel does not depend on a favourable interpretation of the language, in fact it is usually at issue when there is an unfavourable interpretation. It is unclear from the decision how any party can be misled or "lulled into a false sense of security" in circumstances where the other party has made it abundantly clear that it is adopting a position on the language of a collective agreement, contrary to the first party's position. The comments articulated in *Re Longyear Canada*, cited in paragraph 95 above, are appropriate here.

We agree with the Employer. The doctrine of estoppel as we understand it means that the resolution of a grievance outstanding at the start of the negotiation of a new collective agreement cannot normally be based on an estoppel that arose before bargaining commenced. An estoppel could arise during bargaining only on the basis of an express or implied representation by one of the parties in the course of bargaining that it will accept the meaning or application of a provision sought by the other. Brown and Beatty state this basis of estoppel at para. 2:2210:

> Where, however, the representation is made so as to operate for a future period of time as in the case of a representation made during negotiations as to the

> application of a particular clause in the agreement, or by conduct for a period that spanned a renewal of the agreement, then the doctrine would apply for the duration of the agreement or as otherwise represented which may extend beyond the expiry of the agreement, *e.g.*, until the expiry of the statutory freeze period or until the end of the period a statute extended the collective agreement.

The learned authors go on to state:

> Further, one arbitration board has held that union failure to raise an issue during negotiations for a new collective agreement because the disputed language had already been referred to arbitration, did not act to terminate an estoppel [citing *Re London (City) and C.U.P.E., Loc. 101* (1990), 11 L.A.C. (4th) 319 (Roberts)].

We are less circumspect than was arbitrator Hope in his Award in *Re Victoria Times Colonist* quoted above or Arbitrator P.C. Picher in *Re Longyear Canada Inc. and I.A.M., Lodge 2412* (1981), 2 L.A.C. (3d) 72, to which he refers. In our view where there has been, as there was in *Re Victoria Times Colonist* and here, "ample opportunity in the union to seek to have the benefit it asserted included in the collective agreement", we do not accept the union view "that the employer would not be at liberty to terminate the practice [allegedly giving rise to the estoppel] until after the issue raised by the grievance had been resolved". We agree with the Employer's brief and with Arbitrator Hope that where a collective agreement continues in force it includes both express terms and any terms that arise by implication:

> *But* [emphasis added] the same reasoning does not [apply] . . . where reliance is placed upon an application of the doctrine of estoppel as a foundation for the claim. The basis for a finding of detrimental reliance in an application of the doctrine of estoppel in a collective bargaining relationship appears to be the fact that the party adversely affected by a change in practice is prevented from pursuing a collective bargaining remedy during the currency of the collective agreement.

However, that does not lead us to conclude, as Arbitrator Hope did, that "It is difficult to apply that reasoning [*i.e.* the doctrine of estoppel] to circumstances where notice [of a change in practice] is given prior to the commencement of collective bargaining and the union, in effect, decides not to raise the issue in collective bargaining".

Instead, our understanding of the doctrine of estoppel as applied in the interpretation and application of collective agreements is that, where the collective agreement has been renegotiated and the

language in question is unchanged by the negotiations, *whether or not the issue was raised in collective bargaining*, that language may thereafter be given full effect. The party purporting to rely on estoppel having had an opportunity to recover its original position (to "scramble back", in the words of the English courts), the party seeking to give effect to the language in question is no longer estopped by any prior representation that did not purport to be effective beyond the negotiations in issue.

What then of the award of the Board of Arbitration in *Re London (City) and C.U.P.E.* (1990), 11 L.A.C. (4th) 319 (Roberts)? In that case, the union filed a policy grievance and a group grievance both claiming that the existing collective agreement language required the employer to pay a shift premium to particular employees. The Board held that, past practice notwithstanding, that was not what the collective agreement, as interpreted, provided. In the alternative, the union argued that the employer was estopped from discontinuing what was a long-standing practice of paying the premium. The employer agreed that it was estopped, but only until the expiry of the collective agreement under which the grievance was filed. Just prior to negotiations the employer had indicated that it was changing its practice and the union had filed the grievance under consideration. During negotiations, the union did not make any proposals to change the existing collective agreement language.

The Board states in its award [at p. 324]:

> But because we have found that the union had at least a *prima facie* case that the existing language of the collective agreement, interpreted in light of negotiating history and long-standing past practice, already provided for payment of shift premium to parking meter enforcement officers, we find that the union was entitled to pursue its rights under the grievance and arbitration procedures of the collective agreement without risking termination of the estoppel. Having taken the good faith position that the existing language of the collective agreement already required payment of the shift premium, the union could not be obligated to negotiate new language in the collective agreement to gain the same objective.
>
> The law providing for termination of estoppel cannot be taken this far. It never was intended to be used as a lever to force one side to accept the other's interpretation of disputed contractual language and negotiate new language on that basis.
>
> So long as they can make out a *prima facie* case for their conflicting interpretations of contractual language, both sides are entitled to test them at

> arbitration before suffering the consequences of having one interpretation or the other rejected. The termination of an estoppel, whose function, as here, is merely to preserve the *status quo ante*, does not even arise for consideration until then. Similar observations were made in *Re Com'r of Northwest Territories and Northwest Territories Public Service Assn.* (1986), 24 L.A.C. (3d) 132 (Hope).

With respect, we do not agree with the breadth of this language. It may have been that some of the grievors in the group grievance had rights to overtime pay that vested before the new collective agreement was effective. In other words, as long as the pre-existing collective agreement continued in effect the employer would have continued to be estopped by its long-standing practice from asserting its rights under the language of the collective agreement as interpreted. But as to the continuing effect of the new collective agreement, which was the subject of the policy grievance there, it is the law providing for estoppel, not the law providing for its termination, that cannot be taken this far.

The Board in *London (City)* decided that the union's "interpretation of the contractual language" had failed the test at arbitration. The question before it was whether the employer was "equitably" estopped from giving effect to its rights under that language because the union had been led to rely, to its detriment, on the employer's representation by conduct. Once the union had a new chance to renegotiate the collective agreement that "detriment" no longer existed.

We must add that in our opinion the arbitrator in *Re Com'r of Northwest Territories and Northwest Territories Public Service Assn.* (1986), 24 L.A.C. (3d) 132 (Hope), did not apply the doctrine of estoppel in the same way the Board in *London (City)* did. The arbitrator there found in favour of the Union on that basis of past practice in aid of the interpretation of an ambiguous provision. In the alternative he stated at p. 143:

> The employer failed to give clear notice of an intention to discontinue paying commuting allowance . . . in a context which would release it from a continuing estoppel against terminating the practice until the union is offered an opportunity to pursue the matter in collective bargaining.

In summary we reject the Union's claim that the Employer is estopped from insisting on more than the traditional doctor's note which indicated only that the employee was off sick due to illness and gave his or her expected date of return to work. There was no

such clear practice acquiesced in by the Employee which amounted to a representation by words or conduct that only such notes would be required. In dropping its proposed new language for Article 22.04 in the last round of collective bargaining the Employer made no express or implied representation that it was agreeing to accept the Union's interpretation of the existing language.

In "going back to the same position it had in the expired Collective Agreement" the Employer was maintaining its interpretation of Article 22.04, a position with which the Union disagreed and against which it had filed this Grievance. That clause having been the subject of collective bargaining, the Union had a "fair opportunity to escape" the effects of any detrimental reliance that could be said to have arisen (and we do not see, on the facts before us, what representation by words or conduct would have given rise to any such reliance) and the Employer was not estopped until the next round of collective bargaining from giving Article 22.04 the meaning we have held it to have. To the extent that the facts before us here are similar to those in *Re London (City) and C.U.P.E.* (1990), 11 L.A.C. (4th) 319 (Roberts), we decline to follow it.

CONCLUSION AND ORDER

We reject most of the Union claims that the FAF and its administration are contrary to and inconsistent with the Collective Agreement. Our disposition of this Grievance is contained in the foregoing in its entirety. However, as a summary, we make the following declarations with respect to each of the Union's specific claims.

We repeat at the outset of this summary that there were statements in the memorandum from Maureen Meaney of the Employee Wellness Division "for" Mr. Dodge to "All Employees" dated August 11, 1999 which do not appear in Ms. Meaney's Memorandum of January 20, 2000 or in the FAF set out above. To the extent that those statements are still part of the FAF and its administration, this Board of Arbitration cannot be taken to have considered them beyond what we have said in this Award. Specifically, we have addressed the statement in the Memorandum of August 11, 1999 that "Back-dated notes will not be accepted" as being too rigid and noted that the Employer's right to require the FAF of employees with "an identified pattern of absence" or who

"request an extension of sick leave benefits" is limited to the Employer's right to require a medical certificate for illness "in excess of two (2) consecutive working days" or "in cases of suspected abuse".

1(a) The Employer's mandatory requirement for a FAF in all cases of sick leave of five days or more is contrary to the exercise of discretion required of the Employer in Article 22.04(a)

The Employer's decisions must be made in good faith and not on the basis of a policy that wrings all reasonableness out of them, but that does not justify reading a simplistic version of the complex administrative law doctrine of "fettering discretion" into Article 22.04(a). The word "may" does not mean that individual cases cannot be dealt with on the basis of general rules made in the interests of fair and efficient administration. In providing that broad categories of absences are to be brought forward for decision with the same information available, and thus processed uniformly, the Employer is helping to ensure that all employees affected get the same level of consideration.

1(b) The requirement that the FAF be submitted within a particular time frame is a unilateral addition to the Collective Agreement that is again inconsistent with the Agreement

Under the Collective Agreement the Employer cannot take the position that it will in every case deny sick leave with pay because the FAF "was not returned to the Occupational Health Service . . . within fourteen (14) calendar days of the first day of absence" or because it was not "completed . . . during the period of illness", because there is no such limit in the Collective Agreement on entitlement to sick leave with pay. On the other hand, subject to the exceptional cases discussed above, the Employer is within its rights in not providing sick pay until it has the FAF, after which it must not be unreasonable in making the decision not to permit the employee to be absent from work without loss of pay.

1(c) The FAF is not a "medical certificate" within the meaning of the Collective Agreement, and therefore the introduction of the FAF to replace the traditional doctor's note is contrary to the Collective Agreement

The FAF is *a* "medical certificate". This Collective Agreement nowhere limits, defines or provides other useful contextual guidance

to the intended interpretation of this phrase, beyond the generally accepted implied requirements that sick leave provisions are not to be unreasonably administered and that rules unilaterally imposed by the Employer under a collective agreement must be reasonable. On the basis of the arbitration awards of which the parties must have been aware when this Collective Agreement was negotiated there are no implied requirements that have led us to conclude that the FAF is not a medical certificate "within the meaning of the Collective Agreement".

1(d) The information required by the FAF is directed at information to assist the Employer in arranging for an early return to work, but the mandatory nature of this requirement is inconsistent with Article 22.04(c), which leaves participation in an early return to work optional for employees

We do not accept this claim by the Union. There is nothing on the face of the FAF or in the evidence with respect to its administration to suggest that employees are being, or will be, required to accept any alternate employment without their consent, however suitable and however well the employee is qualified to do it. For the Employer to so require would be a breach of the Collective Agreement.

The evidence before us here is that "policing" was no part of the announced purpose of the introduction of the FAF, and there is no evidence that such was its purpose in practice. It must be borne in mind that the parties have stipulated here that: (i) There is no evidence before the Board of any inappropriate use of confidential information gathered for the FAF and (ii) Information required in the FAF is essential to the operation of an appropriate early intervention program. The mandatory provision of information that equips the Occupational Health Nurses and the Wellness Division to suggest an appropriate early return to work does not mean that the consent of the employees to whom suggestions are made is not real, nor is it inconsistent with the requirement of Article 22.04(c) that participation in early return to work be optional for employees.

2. *With respect to the issue of whether or not the FAF constitutes a "medical certificate" within the meaning of Article 22.04(a), the Union argues in the alternative that the term "medical certificate" is latently ambiguous, as disclosed and resolved by the clear and unambiguous past practice of the parties. The evidence*

of past practice in this case demonstrates clearly that a "medical certificate", as referred to in Article 22.04(a) is a traditional doctor's note

The Union's evidence falls far short of the standards of showing an accepted past practice. We reject the Union's alternative argument that the clear and unambiguous past practice of the parties discloses that the term "medical certificate" is latently ambiguous, or clearly demonstrates that a "medical certificate", as referred to in Article 22.04(a), is a simple doctor's note stating only that the employee is ill and when he or she is expected to return to work.

3. *If the Board accepts the Employer's position that the FAF can constitute a "medical certificate" within the meaning of the Collective Agreement the Union argues in the further alternative that the Employer is estopped from introducing the FAF as a replacement to the traditional doctor's note based on the Employer's long-standing past practice*

For the reasons given in the immediately preceding pages of this Award, we reject the Union's claim that the Employer is estopped from insisting on more than the traditional doctor's note which indicated only that the employee was off sick due to illness and gave his or her expected date of return to work.

[D.F. Hurley concurred.]

DISSENT (Butler)

I have reviewed the majority reasons reflected in the Decision of Chairman Christie and with the greatest of respect I am unable to agree with the conclusions he has reached on the issues raised. I therefore offer the following reasons for my dissenting opinion.

The majority's decision turns on the overall conclusion that the Functional Assessment Form (hereafter referred to as "FAF") and its administration are neither contrary to nor inconsistent with the Collective Agreement and therefore that this grievance must be resolved in the Employer's favour. In reaching this conclusion, the majority found that the FAF was a medical certificate as the term is used in Article 22.04(a) of the Collective Agreement. I disagree.

THE FAF

1. Purpose

I conclude that the FAF's sole purpose is to *assist* sick or injured *employees return to work after a long-term absence.*

An employee utilizing sick leave benefits for routine matters (such as the common cold) would have a *short term absence*; neither the employee or the employer would benefit from an assessment of the employee's functional abilities and there would be no assistance needed in returning him/her to the workplace.

2. Definition

The FAF is not addressed in the Collective Agreement between the parties but a definition of sorts is found in the August 11, 1999 memorandum from Stephen Dodge to all employees and entered as Exhibit 5. It states:

> Functional Assessment is an assessment completed by your family physician advising the Occupational Health Service about limitations to function imposed by an injury or illness. Examples of limitations may be ability to lift, walk, push/pull or may include hearing or visual problems. Depending upon the limitations identified, a detailed objective assessment may be arranged by the occupational Health Nurse, i.e. functional Capacity Evaluation (FCE).

3. Submission

The FAF is intended to be submitted to the Occupational Health Service of the Hospital and is specifically stated to be "not seen by anyone except the occupational health nurse or physician". In direct contrast to the standard sick leave note, *it is not intended to be shared with the employee's supervisor.*

4. Nature/Mandatory

By virtue of the January 24, 2000 memorandum to all employees on leave, the FAF is stated to be *mandatory* to sick leave in excess of five days (see Exhibit 23) and, if an employee failed or refused to provide the FAF within fourteen calendar days of the first absence, he/she would not get paid.

THE MEDICAL CERTIFICATE

1. Purpose

In comparison, the sole purpose of the medical certificate/sick leave note is to allow the *employer* to *assess* the legitimacy of an employee's claim for sick leave benefits on the basis that an illness/injury renders him/her *unable to work.*

2. Definition

The Collective Agreement does not contain a definition of the term "medical certificate," but the request for a medical certificate/sick leave note is governed specifically by Article 22.04 of the Collective Agreement.

3. Submission

The medical certificate is a note that is shared with an employee's supervisor *if it is requested* for an absence in excess of two days.

4. Nature/Discretionary

However, whether or not a sick leave note is requested was (according to the evidence heard before us) subject to the *discretion* of the manager on the floor; in this regard, the Employer acknowledged that varying standards were being applied throughout the Hospital. The Collective Agreement made no provision for the requirement that the sick leave note be submitted within a stated period in order for sick leave benefits to be paid.

IS THE FAF A MEDICAL CERTIFICATE?

Despite the differences apparent (above), there is clear and uncontroverted evidence that the Employer considered the FAF to be a *replacement* for the traditional medical certificate. For example, Exhibit 5 states in part "We are very pleased to be introducing this form as a replacement for the traditional Sick Leave note . . ." and in Exhibit 23 it states "for periods of sick leave of less than 5 days, a regular sick leave note can be submitted". In comparison, Article 22.04 of the Collective Agreement states that "an employee *may* be required to produce a medical certificate for an illness in excess of two (2) working days".

I agree with those portions of the majority decision from pp. 229-233 to (but not including) the discussion of "Facts". The conclusion, to this part of the majority decision is clearly that "where the cases in which the employer can demand a medical certificate are set out in the collective agreement, the employer cannot demand it in others".

In reaching this conclusion the majority relies upon *Newfoundland (Treasury Board) v. N.A.P.E.*, [1986] N.J. No. 269 (QL), and *Newfoundland Hospital Assn. and Newfoundland and Labrador Nurses' Union* (unreported decision of D.M. Browne, Chair, December 21, 1988).

Relevant to this conclusion, the overall issue raised by both the Union and the Employer is worth repeating: "*has the Employer (by introducing the FAF) violated the provisions of the Collective Agreement and in particular Article 3.08 and Article 22.04*?"

In my opinion, with the greatest of respect to the majority Decision of Chairman Christie, this question must be answered in the affirmative. The circumstances under which the Employer can demand a medical certificate are set out in Article 22.04 of the Collective Agreement which (as previously seen) is a discretionary section applicable to sick leave only exceeding two days. (I note that we are not addressing cases of suspected abuse for which the Employer has the right to request a medical certificate for any period of illness).

By introducing the Functional Assessment Form, considering it a replacement for the traditional sick leave note, making its application mandatory, adding the additional requirement that benefits will not be paid unless the note is provided and altering the time periods applicable to the supply of the note, the Employer has clearly violated the terms of Article 22.04.

I agree with the facts as recited by Chairman Christie on pp. 233-238 of the majority decision, however the conclusion I have reached on these facts differs. I note that there is a contradiction between the Employer's Argument and the evidence before the Arbitration Board insofar as the August 11, 1999 memo entered as Exhibit 5 states:

> We are very pleased to be introducing this form as a *replacement for the traditional Sick Leave note* and will become an integral part of the Corporation's Attendance Support Program. Your manager will no longer ask you for a traditional sick leave note if you are off for two or three days in order to be paid for sick leave. *You may also be asked to have it completed if* you have legitimate chronic short-term illness, if *you have an identified pattern of absence* or if you request an extension of sick leave benefits.

These provisions are inconsistent with:

a) the Exhibits which reflect the intention of the Functional Assessment as assisting employees return to work, and
b) the Employer's Argument that the FAF is not intended to be used in cases of suspected abuse of sick leave.

The majority decision concludes that the FAF "constitutes a unilaterally imposed policy in the context of the administration of the Collective Agreement", but despite this finding the majority concludes that the policy does not offend the "*KVP* Rules" referred to in the decision of *Re KVP Co. and Lumber and Saw Mill Workers Union, Loc. 7* (1965), 16 L.A.C. 73 (Robinson).

Once again, with respect I disagree. For convenience, I repeat the first three *KVP* Rules [at p. 85]:

> A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement.
> 2. It must not be unreasonable.
> 3. It must be clear and unequivocal.

I conclude that the FAF by being "a replacement for the traditional sick leave note", mandatory in nature to absences in excess of 5 days, with punitive results following the non-provision of the note, is not only inconsistent with the discretionary nature of the traditional sick leave note contemplated by Article 22.04, but also unreasonable. There are many cases in which an ill employee would, for valid reasons, be unable to supply an FAF within the time period required by the Policy. It therefore offends Rules one and two.

Finally, the Employer's own Argument contains proof of the violation of *KVP* Rule 3 insofar as counsel for the Employer argues that the FAF is "the medical certificate contemplated by Article 22.04(a)". (See Employer's Argument, para. 43). Exhibit 5 also clearly states the Employer's intention to use the FAF *in place of* the traditional medical certificate. However, the Union's Reply Argument lists 7 examples from the Exhibits which set out a different purpose for the functional analysis, namely assisting employees return to work. The policy is therefore not clear and unequivocal.

While it may be considered as unnecessary (as a result of my conclusion on the Policy's violation of the *KVP* Rules), I will address each of the specific issues discussed at length in the majority decision.

1(a) The Employer's mandatory requirement for an FAF in all cases of sick leave of five days or more is contrary to the exercise of discretion required of the Employer in Article 22.04(a)

Here, the majority distinguishes a case relied upon by counsel for the Union, being *Re Nav Canada and C.A.T.C.A.*, (2000) 86 L.A.C. (4th) 370 (Brault).

At p. 242 of the majority decision, Chairman Christie cites from pp. 383-4 of the Decision of Arbitrator Brault where he determined that the Collective Agreement in question contemplated a document unlike that required by the Employer. The majority decision

concludes that our facts are different insofar as "The Collective Agreement before us appears to contemplate the requirement of a medical certificate as the norm, when an employee is ill for more than two days". Once again, I disagree. The discretion apparent in Article 22.04 suggests that there is no norm and the evidence of the witnesses called before our Arbitration Board confirmed this fact. They indicated that this Article of the Collective Agreement had been and was being enforced to varying degrees by managers as an exercise of their own discretion. Thus, it cannot be said that the evidence before us appears to contemplate *the requirement of a medical certificate as the norm, when an employee is ill for more than 2 days.* Further, at the risk of repeating myself, the traditional sick leave note contemplated by Article 22.04 contemplates something quite different from the FAF entered into evidence before us as Exhibit 23.

Finally, and perhaps most importantly on this point, the majority decision concludes at p. 242 that "In fact, the plain meaning of the words 'an employee may be required to produce a medical certificate' in this context is simply that the Employer has the right to require a medical certificate where illness exceeds two working days" and further "in requiring the FAF where employees are off work for five days or more, the Employer is exercising the right clearly given to it by the first sentence of Article 22.04(a)". I strongly disagree. This conclusion, in my opinion, ignores the discretionary language in Article 22.04 and the mandatory language in the introductory section of the FAF with the clear result that the Employer's policy and the FAF contravene Article 22.04 of the Collective Agreement.

1(b) The requirement that the FAF be submitted within a particular time frame is a unilateral addition to the Collective Agreement that is again inconsistent with the Agreement

In relation to this issue, the majority concluded at p. 245 as follows:

> We do not accept that it will always be reasonable for the Employer to deny sick pay where the application is not made within 14 days from the first day of illness.
>
> The same is true for the rule that the FAF "must be completed . . . during the period of illness". We note that the FAF calls for the physician to provide functional impairment information "at the time of absence". Presumably, a credible physician would want to see the employee in that period.

> While it would appear not to be part of the administration of the FAF as evidenced by what appears on the back of the form or Ms. Meaney's Memorandum of January 20, 2000, the statement in Mr. Dodge's Memorandum of August 11, 1999 that "The Functional Assessment Form will be required within 14 days . . . If you do not submit the form within this time, your sick leave benefits will not be paid" clearly does not allow for reasonable administration and thus limits the right to sick pay under the Collective Agreement.

I agree.

However, despite these findings, the majority decision concludes at pp. 246-247:

> In sum on this point, under the Collective Agreement the Employer cannot take the position that it will in every case deny sick leave with pay because the FAF "was not returned to the Occupational Health Service . . . within fourteen (14) calendar days of the first day of absence" or because it was not "completed during the period of illness", because there is no such limit in the Collective Agreement on entitlement to sick leave with pay. On the other hand, subject to the exceptional cases discussed above, the Employer is within its rights in not providing sick pay until it has the FAF, after which it must not be unreasonable in making the decision not to permit the employee to be absent from work without loss of pay.

I disagree. In my opinion, the Employer cannot add to the requirements of Article 22.04 and I consider a decision similar to that reached by Chairman H.D. Brown in *Re Women's Christian Assn. of London (Parkwood Hospital Veterans Care Centre) and London and District Service Workers' Union, Loc. 220* (1983), 10 L.A.C. (3d) 336, to be the only fair conclusion to our facts, namely [at p. 347]:

> In our opinion the requirement for the production of a medical certificate is inconsistent and contrary to the terms of art. 19.05 which require only a reason or explanation satisfactory to the employer which does not require the production of a medical certificate to cover any length of illness.

In other words, the Employer is not within its rights in refusing sick pay until it has the FAF where such provision is not specifically provided for in the Collective Agreement.

1(c) The FAF is not a "medical certificate" within the meaning of the Collective Agreement, and therefore the introduction of the FAF to replace the traditional doctor's note is contrary to the Collective Agreement

The majority decision's conclusion on this issue at p. 252 is that:

> On the face of the Collective Agreement here the Employer must be taken to be entitled, in the specified circumstances, to require a medical certificate

that identifies what aspects of his or her regular duties the employee is unable to perform. The "Functional Information" to be provided on the FAF by the employee's doctor goes no further than that.

Once again, I disagree. In my opinion, as I have expressed on pp. 270-272, the purpose of the sick leave note is distinguishable from the purpose of the FAF; the Functional Information to be provided by the FAF goes further than the traditional sick leave note because the purpose intended is different. There was no evidence before the Arbitration Board that suggested a form similar to the FAF was contemplated by either of the parties when the Collective Agreement was negotiated.

1(d) The information required by the FAF is directed at information to assist the Employer in arranging for an early return to work, but the mandatory nature of this requirement is inconsistent with Article 22.04(c), which leaves participation in an early return to work optional for employees

On this point, the majority concludes at pp. 249-250 that "The mandatory provision of information . . . [is not] inconsistent with the requirement of Article 22.04(c) that participation in early return to work be optional for employees". *Again, I disagree* and on this point would merely add that for the reasons already stated in this dissenting opinion, the mandatory nature of this requirement is inconsistent with Article 22.04(c) of the Collective Agreement.

2. With respect to the issue of whether or not the FAF constitutes a "medical certificate" within the meaning of Article 22.04(a), the Union argues in the alternative that the term "medical certificate" is latently ambiguous, as disclosed and resolved by the clear and unambiguous past practice of the parties. The evidence of past practice in this case demonstrates clearly that a "medical certificate", as referred to in Article 22.04(a) is a traditional doctor's note

Given my determination that the FAF is not a medical certificate as contemplated by Article 22.04 of the Collective Agreement, I need not address this issue.

3. If the Board accepts the Employer's position that the FAF can constitute a "medical certificate" within the meaning of the Collective Agreement the Union argues in the further alternative that the Employer is estopped from introducing the FAF as a

replacement to the traditional doctor's note based on the Employer's long-standing past practice

Given my determination on issue 1(c), I need not address this issue. However, I make the following comments relative to the Union's reliance upon the decision of the Board of Arbitration in *Re London (City) and C.U.P.E., Loc. 101* (1990), 11 L.A.C. (4th) 319 (Roberts) (see paras. 146-8 of its Argument).

In particular, I note that relevant to the *London (City)* case, the Union argues at para. 148:

> . . . the union filed a grievance claiming that the existing collective agreement language required the employer to pay a shift premium to particular employees. In the alternative, the union argued that the employer was estopped from discontinuing what was a longstanding practice of paying the premium. The employer on the other hand, agreed that it was estopped, but only until the expiry of the collective agreement under which the grievance was filed.

The Employer here does not agree that the doctrine of estoppel applies and therefore the City of London case may not be of full assistance to the decision which we are required to make. Further, I agree that the Employer made no representation to the Union when it introduced its proposal to modify Article 22. However, even if the doctrine of equitable estoppel is inapplicable to our facts, what the majority decision ignores is the consistency between the Employer's attempts to amend Article 22.04 of the Collective Agreement and the FAF Policy (Exhibit 23). In other words, I see the Employer's actions in implementing a policy to introduce an FAF as a "back door" attempt to impose more stringent sick leave terms on its unionized employees under the Collective Agreement when the employer's attempts to amend Article 22.04 through the Collective Bargaining process failed.

CONCLUSION

In conclusion, I would answer each of the questions addressed by the majority decision as follows:

1(a) The Employer's mandatory requirement for an FAF in all cases of sick leave of five days or more is contrary to the exercise of discretion required of the Employer in Article 22.04(a). *I agree.*

1(b) The requirement that the FAF be submitted within a particular time frame is a unilateral addition to the Collective Agreement that is again inconsistent with the Agreement. *I agree.*

1(c) The FAF is not a "medical certificate" within the meaning of the Collective Agreement, and therefore the introduction of the

FAF to replace the traditional doctor's note is contrary to the Collective Agreement. *I agree.*

1(d) The information required by the FAF is directed at information to assist the Employer in arranging for an early return to work, but the mandatory nature of this requirement is inconsistent with Article 22.04(c) which leaves participation in an early return to work optional for employees. *I agree.*

2. With respect to the issue of whether or not the FAF constitutes a "medical certificate" within the meaning of Article 22.04(a), the Union argues in the alternative that the term "medical certificate" is latently ambiguous, as disclosed and resolved by the clear and unambiguous past practice of the parties. The evidence of past practice in this case demonstrates clearly that a "medical certificate", as referred to in Article 22.04(a) is a traditional doctor's note. *My answer to 1(c) renders a decision on this issue unnecessary.*

3. If the Board accepts the Employer's position that the FAF can constitute a "medical certificate" within the meaning of the Collective Agreement the Union argues in the further alternative that the Employer is estopped from introducing the FAF as a replacement to the traditional doctor's note based on the Employer's long-standing past practice. *My answer to 1(c) renders a decision on this issue unnecessary.*

As to the relief sought by the union, I would have allowed the grievance and issued a declaration that the FAF and the Employer's policy for its administration constitute a violation of the Collective Agreement.