IN THE MATTER OF THE ARBITRATION BETWEEN	ARBITRATOR'S OPINION AND AWARD
LANE COMMUNITY COLLEGE EMPLOYEES FEDERATION, LOCAL 2417	
"THE ASSOCIATION" OR "THE UNION"	
AND	
LANE COMMUNITY COLLEGE	
"THE DISTRICT" OR "THE EMPLOYER"	RITA LOOP GRIEVANCE

HEARING:
January 31, 2012
Eugene, Oregon

HEARING CLOSED:
February 29, 2012

ARBITRATOR:
Timothy D.W. Williams
830 NE Cesar Chavez Blvd.
Portland, OR 97232

REPRESENTING THE EMPLOYER:
Meg Kieran, General Counsel for Lane CC
Darcy Dillon, HR Manager
Dennis Carr, Chief Human Resources Officer

REPRESENTING THE UNION:
Richard Schwarz, Executive Director AFT-Oregon

APPEARING AS WITNESSES FOR THE EMPLOYER:
Darcy Dillon, HR Manager
Sue Norton, Mgmt Coordinator for Child and Family Education Department.
Nancy Hart, Assoc. Dean of Student Affairs for Disability Resources.
Sharon Daniel, HR Analyst.
Kate Barry, Former Dean of Student Affairs.
Nadine Williams, Former Library Director
Dennis Carr, Chief Human Resources Officer

APPEARING AS WITNESSES FOR THE UNION:

Rita Loop, Grievant

Bob Baldwin, President Local 2417, LCCEF, AFT, AFL-CIO

Denise Brinkman, Chief Steward Local 2417, LCCEF, AFT, AFL-CIO

EXHIBITS

Joint

1. Collective Bargaining Agreement 2008-2015
2. Grievance Documents
3. Article 14 and 15, 2004-2008 Collective Bargaining Agreement.
4. Articles 14 and 15, 2000-2004 Collective Bargaining Agreement.
5. Articles 14 and 15, 1997-2000 Collective Bargaining Agreement.
6. Articles 14 and 15, 1997-2000 Collective Bargaining Agreement.
7. Loop Request for Leave.
8. Loop Health Care Provider Certification, August 10,2011.
9. Rita Lopp August 2011 Timesheets.

Union

1. Carr Reply November 2008 to Barrager re Article 14.1 leave
2. Brinkman Emergency Leave

Employer

1. Management Working Conditions Agreement 2004-2007 "Emergency Leave"
2. Legislative Version of Article 6 Contract Changes (Articles 14.1 and 14.2).
3. 2008 Bargaining Notes.
4. Human Resources Memorandum to Managers regarding 2008 contract changes, 9/16/08.
5. Dennis Carr e-mail to Union and Managers regarding emergency leave,10/23/08
6. Dennis Carr e-mail to Bob Baldwin regarding emergency leave, 11/4/10.
7. Family Connections Procedure for leave requests, 9/10 and 3/11.
8. Emergency Leave Use by Classified Employees only, 2008-2011.

9. Changes in Paid Leave, 2008.
10. E-mail to and from Darcy Dillon and Bob Baldwin, 10/17/11.
11. OAR 839-009-0280, Use of Paid Leave.

BACKGROUND

Lane Community College (hereafter "the College" or "the Employer") and the Lane Community College Employees Federation, Local 2417 (hereafter "the Association" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy Williams in Eugene, Oregon on January 31, 2012. At the hearing the Parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made an audio recording of the hearing in a digital format as a part of his notes. A copy of the recording was sent to each Party as an attachment to an e-mail message.

At the close of the hearing, the Parties were offered an opportunity to give closing oral arguments or to provide arguments in the form of post-hearing briefs. Both parties chose to submit written briefs and the briefs were timely received by the Arbitrator. Thus the award, in this case, is based on the evidence and arguments presented during the hearing and on the arguments found in the written briefs.

SUMMARY OF THE FACTS

The grievance in this case is between Lane Community College and Lane Community College Employees Federation, Local 2417. The Parties are bound by a Collective Bargaining Agreement, effective 2008 through 2015, under which the present grievance arose. The following is a brief summary of the events that led up to the filing of the grievance. It is based on both documentary and testimonial evidence presented during the hearing.

The Grievant began her employment with Lane Community College approximately six years ago. On July 28, 2011, Ms. Loop submitted a request to her supervisor, Sue Norton, for two days of sick leave, to be taken on Wednesday, August 10th and Thursday, August 11th because her husband had scheduled shoulder surgery for Wednesday, August 10th. (J 7; T Rita Loop) On August 3, 2011, Ms. Norton granted the request (J 7). The College is closed on Fridays during the summer, so Ms. Loop's leave hours for Friday, August 12, 2011 were taken as vacation time (J 9, p 1). On or about August 11, 2011, Ms. Loop faxed to the Human Resources Department a "Family and Medical Leave Health Care Provider Certification" that had been completed by her husband's physician.

The form was received by Sharon Daniel, Human Resources Analyst. Ms. Daniel is responsible for receiving and processing

staff requests for emergency leave and for Family Medical Leave. Ms. Loop also left a voice message for Sharon Daniel, requesting that her time off while she was assisting her husband be treated as emergency leave, and explaining that her husband had scheduled out-patient shoulder surgery for his rotator cuff and needed her assistance for two days during the post-surgery recovery period. He could not care for himself without Loop's assistance.

Ms. Daniel informed Ms. Loop that she did not believe that pre-scheduled shoulder surgery qualified for emergency leave, but she would consult with her supervisor and get back to her. After consultation with Darcy Dillon, Human Resources Manager and Sharon Daniel’s supervisor, Ms. Daniel informed Ms. Loop that her request for emergency leave was denied because her husband's shoulder surgery did not qualify as a "critical illness" within the meaning of Article 14.1 of the collective bargaining agreement. Ms. Daniel informed Ms. Loop that the leave did qualify as statutory family leave (OFLA). On August 15, 2011, the Union filed a grievance.

Darcy Dillon processed the grievance at Step 1. On August 17, 2012, Ms. Dillon met with Union representatives Bob Baldwin and Denise Brinkman and Ms. Loop's supervisor, Sue Norton. They discussed the facts of the pre-scheduled shoulder surgery and the meaning of Article 14.1. On August 22, 2011, Ms.

Dillon spoke with Rita Loop, who explained that her husband's surgery was out-patient shoulder surgery and that her husband needed assistance for two days afterwards to allow the anesthesia to wear off and because of the possibility post-operation bleeding might occur. Ms. Dillon also concluded that routine, scheduled, out-patient, rotator cuff shoulder surgery did not quality as a critical family illness. She denied the grievance at Step 1.

On August 24, 2011, the Union filed the grievance at Step 2. The grievance alleged that "The affected employee is Rita Loop. Rita was denied Emergency Leave in violation of Article 14.1 of the CBA" (J 2). The resolution sought stated: "The College… shall reinstate the leave used and credit Rita with two days EL instead" (J 2). Nancy Hart, Associate Dean for Student Affairs for Disability Resources, Child and Family Education and Veteran's Programs, and Sue Norton's supervisor, was appointed to resolve the grievance at Step 2. On September 2, 2011, Ms. Hart conferred with Union President Bob Baldwin by telephone. In her Step 2 grievance decision, Ms. Hart summarized the meeting as follows: "They clarified a range of issues where there is disagreement and Bob described that the Union does not think the College should focus on 'critical illness' but should focus on whether the family member is 'unable to care for him or herself.' Bob and Nancy discussed

the possibility that it may be helpful to develop a definition of 'critical illness,' but this requires a broader labor relations discussion not linked to a specific illness or injury."

Ms. Hart denied the grievance at Step 2, concluding that "In reviewing various examples of how the term 'critical illness' has been applied in previous determinations, the decision to deny Emergency Leave for the present factual circumstances concerning Rita Loop is consistent with the previous administration of article 14.1 dating back to 2008" (J 2, p 5).

The Union then moved the grievance to Step 3. On October 4, 2011, Helen Garrett, Executive Dean of student Affairs, the President's designee at Step 3, met with Union representatives Bob Baldwin and Denise Brinkman. Ms. Garrett summarized the Union's position in her decision at Step 3: "The Union asked that we consider using the criteria of "emergency leave" as meeting the OFLA/FMLA standards and/or that a physician has provided written documentation that the person was incapacitated to determine what qualifies for the critical illness requiring the use of Emergency Leave" (J 2, p 9). Ms. Garrett denied the grievance at Step 3.

HR Manager Darcy Dillon's duties include responsibility for labor relations and oversight of all classified union

grievances. During the above grievance process, Ms. Dillon, in addition to talking to members of the college 2008 bargaining team, and to HR employees who process and track employee use of sick leave, family medical leave, and emergency or bereavement leave, performed research into commonly used definitions of the term "critical illness" (E 10). Her research revealed a spectrum of definitions, but she concluded that a common theme regarding the term "critical" in the medical context was that "critical" requires that the circumstances involved should reasonably be considered a crisis, such that it gives rise to imminent danger to health and that could cause a decisive change in an individual's life.

By way of background, Human Resources Director Dennis Carr advised managers by Memorandum of September 16, 2008 that the contract settlement combined "the former 'compassionate leave' and 'family (or critical) illness leave' into a new article for emergency leave." He noted then that the language "is modeled after the language and guidelines for 'emergency leave' that currently apply to Lane managers in the Management Working Conditions Agreement. Five (5) work days are granted more or less 'automatically' **with appropriate prior notice from the employee to their supervisor**" (E 4, p 3).

Carr did also say that "The bargaining teams did not resolve a standard definition of 'emergency leave.' " (E. 4, p 4) Carr

later advised various supervisors and managers, copying Union officers in the same communication, Article 14.1 leaves application to circumstances "involving critical illness or accidents/incidents impacting an employee's immediate family member..." (E 5, p 1)

Since the inception of the provision in 2008, the Union points out "Emergency Leave" has applied to a variety circumstances including: "back surgery; with post-op care; (domestic partner)," "gallbladder disease; surgery; (spouse)," "surgery; care after surgery; (domestic partner)," ''ulcerative colitis (son);" (E 4, p. 4) *(emphasis added)* chronic acute asthma (son)," "hospitalized; and skilled nursing placement (mother)," "hospitalized (daughter)," "pneumonia/severe anemia (mother)," "back and hip hospitalization (mother-in-law)," "open heart surgery (mother)," "hospitalized-unclear what is condition (unclear)," "cervical fusion-surgery and post-op care (unclear)," "c-section (daughter)," "medication management (father-in-law)."

Within the Employer's inventory of emergency leave from 2008 through 2011, 106 of some 500 had an identified "condition" or reason for the leave. Ninety-eight indicated there was documentation of the reason for the leave. Of those with documentation, at least 30 were for a wide variety of hospitalization, various surgeries and post-op care (E 8).

On October 10, 2011 the Union notified the College that it was not satisfied with the Employer's Step 3 response to the grievance and therefore it was advancing the matter to Step 4 (J 2). Step 4 of the grievance procedure calls for arbitration of the issue in dispute. Arbitrator Timothy Williams was selected according to the requirements found in the CBA and the matter was set for hearing.

STATEMENT OF THE ISSUE

The Parties were able to agree on a statement of the issue.

1. Did the Employer violate the collective bargaining agreement when it denied emergency leave to Rita Loop in August of 2011?
2. If so, what remedy will make the Grievant whole?

The Parties stipulated that the grievance was timely and properly before the Arbitrator, and that the Arbitrator may retain jurisdiction for sixty (60) days following issuance of his Award to resolve any issues over remedy, if one is provided.

APPLICABLE CONTRACT LANGUAGE

COLLECTIVE BARGAINING AGREEMENT, 2008 – 2015

10.7.3 The Arbitrator shall render a decision within a reasonable time. The powers of the arbitrator shall be limited to interpreting this Agreement and/or determining if it has been violated. The decision of the Arbitrator shall be binding on both Parties.

10.7.4 The costs of the Arbitrator shall be shared by the Parties. Each Party shall be responsible for all costs of presenting its own case in arbitration.

14.1 Emergency Leave (for employees hired into budgeted positions of .500 FTE or greater)

14.1.1 In the event of a death, critical illness or accident in the employee's immediate family, the employee may be granted up to five (5) working days leave with pay per occurrence by his/her immediate supervisor to attend to the needs or affairs of the immediate family member. The employee using "emergency leave" is required to have prior authorization from their responsible supervisor and the "emergency leave" shall be entered into the employee's Express Lane time sheet. No deductions in accrued leave shall result for the first five (5) work days per occurrence. These days shall be taken in whole day increments and shall be counted against the emp0looyee's OFLA/FMLA allowances (see Article 15.4). Up to five (5) additional work days may be granted by the President or their designee upon written request from the employee. If granted, these five (5) additional work days shall also count toward the employee's OFLA/FMLA allowances. If the five (5) additional work days shall be paid at one-half salary for any time not worked and the employee may apply sick leave, personal leave or vacation leave accruals to be used in lieu of salary loss for the difference. The employee shall provide the earliest possible notice of his or her absence to his or her supervisor. He or she may be required to submit written validation of the reason for the leave. Emergency leave shall be subject to OFLAQ/FMLA maximum allowances. For the purpose of this article, immediate family members to include:

Parents (including step)
Children (including foster and step)
Brothers
Sisters
Spouse
Grandparents
Grandchildren
Mother-in-law
Father in-law
Son in-law
Daughter in-law
Sister in-law
Brother in-law

Domestic partner
Other persons who reside in the same household and who are dependent on the employee for care

POSITION OF THE UNION

The Union's basic position is that under Article 14.1 classified employees are eligible for emergency leave for a critical illness whenever a family member is incapacitated due to a medical condition leaving him or her in need of assistance with daily physical activities. The Union contends that a qualifying "critical illness" does not have to be potentially life-threatening, involve imminent peril to the family member, or necessarily be sudden or unanticipated.

In August 2011, Rita Loop, the grievant, requested use of the leave under the article to attend to the needs of her husband, an immediate family member. Her husband required shoulder surgery in order to be able to perform his duties as a military service member. The surgery also necessitated that she provide post-operative care immediately afterwards when her husband was heavily bandaged and could not use his affected arm and shoulder. Put plainly, he could not care for himself without Loop's assistance.

Loop was a part-time employee covered by the collective bargaining agreement. She was employed as a multi-cultural specialist in the Employer's Family Connections program. She initially requested and was granted Sick Leave under the provisions of Article 14.3 for absences on August 10 and 11, 2011.

Following conversation with co-workers about the application of the rule in her circumstances, Loop contacted her employer to request the sick leave be changed to Article 14.1 leave. That section of the agreement is titled "Emergency Leave" and applies to employees employed at .50 full time equivalent or greater. Loop falls into that category. The section title (*Emergency Leave*), however, does not determine eligibility for the benefit. Rather, the specific language found in Article 14.1 is controlling and it provides leave for one or more of three events: death; critical illness; or accident.

The provision was agreed in the course of negotiations leading up to the current, 2008-2015 agreement. At the time of the negotiations, the Employer was already providing "emergency leave" of "up to five days" to its non-represented managerial employees for "death, serious illness or accident in the employee's immediate family." The collective bargaining agreement included separate provisions for "Compassionate Leave" and "Family Illness Leave."

Negotiations resulted in combining and restating compassionate leave and family illness leave into a new Article 14.1, the section in dispute. This combined article was applicable "in the event of death, critical illness or accident" in the "immediate family," including a lengthy list of relations to be included under its terms.

Following the settlement, Human Resources Director Dennis Carr advised managers in a memorandum on September 16, 2008 that the settlement combined “'the former compassionate leave' and 'family (or critical) illness leave' into a new article for 'emergency leave.'”

Carr specifically said that "The bargaining teams *did not resolve a standard definition* of 'emergency leave.'" Carr later advised various supervisors and managers, copying Union officers in the same communication, that Article 14.1 leaves application to circumstances "involving critical illness or *accident/incidents* impacting an employee's immediate family member..."

The Union points to the fact that since the inception of the provision in 2008, *Emergency Leave* has applied to a variety of circumstances including: back surgery; with post-operative care; (domestic partner), gallbladder disease; surgery; (spouse), surgery; care after surgery; (domestic partner), ulcerative colitis (son); chronic acute asthma (son), hospitalized; and skilled nursing placement (mother), hospitalized (daughter), pneumonia/severe anemia (mother), medication management (father-in-law).

Within the Employer's inventory of emergency leave from 2008 through 2011, only 106 of some 500 had an identified "condition" or reason for the leave. Only 98 indicated there was any

documentation of the reason for the leave. Of those with documentation, at least 30 were for a wide variety of hospitalizations, various surgeries and post-operative care.

Loop's request for leave under Article 14.1 was consistent with the documented reasons listed in the Employer's inventory of emergency leave used since the inception of the current rule, so we therefore request the arbitrator find in her favor and grant the two days of Emergency Leave.

POSITION OF THE Employer

The College's position is that statutory family leave is the appropriate leave for employees whose family members suffer from a chronic condition or other medical illness or medical circumstance that is not critical and that requires the family member to have assistance. The Emergency leave provided for in Article 14.1 is reserved for those situations in which the employee's family member suffers a "critical illness," which presents imminent or potential significant danger to the family member's life or physical wellbeing, and which causes the family member to require the direct support and/or immediate assistance of the employee.

In this case regarding leave, Rita Loop is employed by the College as a Multi-Cultural Specialist in a .75 FTE position in the Family Connections Department. She works 30 hours per week.

She has been a college employee for approximately six years and is a member of the bargaining unit. On July 28, 2011, Ms. Loop submitted a request to her supervisor, Sue Norton, for two days of sick leave, to be taken on Aug. 10th and 11th because her husband had pre-scheduled shoulder surgery for Aug. 10th. On Aug. 3, Ms. Norton granted the request.

On or about Aug. 11, Ms. Loop faxed to the Human Resources Department a "Family and Medical Leave Health Care Provider Certification" that had been completed by her husband's physician. The form was received by Sharon Daniel. Ms. Daniel is responsible for receiving and processing staff requests for emergency leave and for Family Medical Leave. Ms. Loop also left a voice message for Sharon Daniel, requesting that her time off while she was assisting her husband be treated as emergency leave, and explaining that her husband had scheduled out-patient shoulder surgery for his rotator cuff and he needed her assistance for two days during the post-surgery recovery period. Ms. Daniel informed Ms. Loop that she did not believe that pre-scheduled shoulder surgery qualified for emergency leave, but she would consult with her supervisor.

After consulting with Darcy Dillon, Human Resources Manager and Sharon Daniel's supervisor, Ms. Daniel informed Ms. Loop that her request for emergency leave was denied because her husband's shoulder surgery did not quality as a "critical

illness under the collective bargaining agreement. Ms. Daniel informed Ms. Loop that the leave did qualify as statutory family leave (OFLA). In processing similar requests from other employees, Ms. Daniel considers "critical illness" to mean life threatening, such as heart surgery or cancer, an accident or an emergency.

Darcy Dillon processed the grievance at Step 1. On Aug. 17, Ms. Dillon met with Union representatives Bob Baldwin and Denise Brinkman and Ms. Loop's supervisor, Sue Norton. They discussed the facts of the pre-scheduled shoulder surgery and the meaning of Article 14.1. On Aug. 22, Ms. Dillon spoke with Ms. Loop, who explained that her husband's surgery was out-patient shoulder surgery and that her husband needed assistance for two days afterwards to allow the anesthesia to wear off and because of the possibility that post-operation bleeding might occur. Ms. Dillon concluded the surgery did not qualify as a critical family illness.

On Aug. 24, the Union filed the grievance at Step 2. Nancy Hart, Associate Dean for Student Affairs for Disability Resources, Child and Family Education and Veteran's Programs was appointed to resolve the grievance. Ms. Hart again denied the grievance, concluding that "In reviewing various examples of how the term 'critical illness' has been applied in previous determinations, the decision to deny Emergency Leave for the

present factual circumstances concerning Rita Loop was consistent with the previous administration of article 14.1.”

The Grievance was then filed at Step 3. On Oct. 4, 2011, Helen Garrett, Executive Dean of Student Affairs, the President's designee at Step 3, met with Union representatives Bob Baldwin and Denise Brinkman. Ms. Garrett denied the grievance at Step 3, again saying it was consistent with previous administration of the article.

The parties' disagreement over the meaning of the term "critical illness" does create some ambiguity in that term. Language which is ambiguous must be construed consistent with the parties' intent. In order to determine the parties' intent, the arbitrator must consider extrinsic evidence, including the bargaining history and the parties' past practices. In construing the intent of the parties, the Arbitrator may look at the circumstances under which it was made; "If the principal purpose of the parties is ascertainable, it is given great weight." (Restatement 2nd Contracts§ 202). The intent of the parties at the time they agreed to the current language of Article 14.1 demonstrates that the changes made in 2008 were intended to give the classified staff the same emergency leave benefit that the management staff had at the time of the contract negotiations.

The Union’s grievance should therefore be denied, because it has failed to present any probative evidence that the challenged decision was inconsistent with the contract language or with any of the College's past decisions.

ANALYSIS

The Arbitrator’s authority to resolve a grievance is derived from the issue that is presented to him and the Parties’ collective bargaining agreement (CBA). The issue before the Arbitrator is whether the Employer violated Article 14.1 of the CBA by denying Rita Loop the right to use *Emergency Leave* when her husband had surgery on his shoulder. The pertinent language covering emergency leaves from the CBA states:

> In the event of a death, critical illness or accident in the employee’s immediate family, the employee may be granted up to five (5) working days leave with pay per occurrence by his/her immediate supervisor to attend to the needs or affairs of the immediate family member.

The Arbitrator begins his analysis by noting that in a grievance arbitration proceeding, the employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters, the union is assigned the burden of proof. The instant grievance does not involve an issue of discharge, but rather concerns the interpretation of contract language regarding *Emergency Leave*. The burden of proof, therefore, lies with the Union.

As this is a contract interpretation dispute, the level of proof required of the Union is a preponderance of the evidence. In order to prevail, therefore, the Union must show by a preponderance of the evidence that the proper interpretation of the above-cited article required the Employer to grant *Emergency Leave* to the Grievant as she requested.

The Arbitrator carefully re-listened to the testimony of both Employer and Union witnesses, studied the documentary evidence and gave careful consideration to the briefs provided by the Parties. Based on this review, the Arbitrator has concluded that the Union's evidence is sufficient to meet its burden of proof. The Arbitrator's reasoning is set forth in the following multipoint analysis.

First, this case does not involve disagreement over the basic facts. There is no disagreement that the Grievant applied and was approved for leave to be taken from her sick leave bank because of the need to attend to her husband following his shoulder surgery. There is also no dispute that the Grievant later, as a result of conversations with her fellow employees, petition the Employer to have the status of her leave changed to *Emergency Leave.*

Second, *Emergency Leave* is granted for "death, critical illness or accident in the employee's immediate family." The

only issue before the Arbitrator is the meaning and application of the words "critical illness."

Third, while the instant grievance involves facts pertinent to a single employee (Rita Loop), the Union has made it clear that the significance is much greater than the two leave days at question. Using EML, in most cases, keeps an employee from having to use days from their sick leave bank. The Union has concerns beyond the Loop grievance with regard to the Employer's narrow definition of the term "critical illness" and the fact that the definition was never created by mutual agreement.

Both Parties recognize that the critical point is the dividing line between those illnesses considered critical and those not critical as that distinction applies to the granting of *Emergency Leave* to employees in this bargaining unit. Or, from a different perspective, the evidence indicates that the Parties never achieved a common understanding of the meaning of the phrase "critical illness" and this arbitration decision is needed to help bridge the gap between how the Employer is defining the term and how the Union perceives it.

Fourth, reviewing the testimony of Employer witnesses and the grievance responses found in joint exhibit #2, the Arbitrator finds that the Employer uses three primary concepts to draw the distinction between a critical versus not critical illness. Those three include 1) whether an individual was hospitalized, 2)

sudden or unexpected onset and 3) potentially life changing or threatening medical condition.

The Arbitrator's review of the evidence indicates that, from the Employer's perspective, the last of these three is the most significant towards defining the phrase "critical illness." The Union is specifically concerned because the Employer's definition because it leaves out the concept of incapacitation. In other words, from the Union's perspective, if a medical condition results in a family member's incapacitation requiring the employee's assistance, the fact of incapacitation should help define the term "critical." The Arbitrator will further address the Parties disagreement over this element of the definition of critical illness later in this analysis.

Fifth, when denying the Grievant's *Emergency Leave* request, the Employer relied heavily on past decisions. Both the Step 2 response by Nancy Hart and the Step 3 response by Helen Garrett conclude with the following statement:

> In reviewing various examples of how the term "critical illness" has been applied in previous determinations, the decision to deny emergency leave for the present factual circumstances concerning Rita Loop is consistent with the previous administration of Article 14.1, dating back to 2008. (J 2)

Similarly, a memo from Dennis Carr dated November 4, 2010 sets forth the results of informal labor relations discussions as follows:

> We agree with the Union that EML is intended and appropriate for situations such as emergency and urgent surgeries, injury/accidents and incidents when a family member was suddenly hospitalized or required emergency medical care with little or no notice, and of course for reasons related to bereavement concerning an immediate family member. (E 5)

The problem from the Arbitrator’s perspective is that the Employer’s efforts to define the qualifications for taking EML are not consistent with the actual practice. This conclusion is contrary to the assertion by the Employer, reproduced above, that there has been consistent denial for circumstances similar to those found in the instant case. The Arbitrator finds himself in agreement with the Union’s position found at pages six of its brief:

> Within the Employer’s inventory of emergency leave from 2008 through 2011, only 106 of some 500 had an identified condition or reason for the leave. Only 98 indicated there was any documentation of the reason for the leave. Of those with documentation, at least 30 were for a wide variety of hospitalization, various surgeries and post-op care. (E. Ex. 8)

From the Arbitrator’s perspective, it is hard to find consistency with the above set of facts. Most of the Employer's practice is simply unknown and the rest seems widely divergent.

Sixth, ultimately the Arbitrator arrives at the conclusion that Mr. Carr, Ms. Dillon and others from HR are making an extended and good faith effort to promote a consistent definition and application of the phrase “critical illness.” However, in practice EML is often given without the knowledge of HR and the

evidence indicates that there is not great consistency in determining what constitutes a critical illness for the purpose of granting EML. The Arbitrator further notes that while there is a Lane Community College Form used for Federal and Oregon Family Medical Leave (J 8), there is no similar form with accompanying instructions that a supervisor can use when an employee requests EML.

Seventh, the College argues and the Arbitrator agrees that the lack of a mutual understanding with regard to the definition of "critical illness" requires that some consideration be given to the Parties' intention when the language was negotiated. The College and the Union agree that the language was intended to mirror a benefit that other employees received. Thus, how the College defined "critical illness" for the other employees should be controlling in the instant dispute. The Arbitrator would agree except that the College's practice is so unclear with regard to the concept of what constitutes a "critical illness."

Finally and most important with regard to the Rita Loop grievance, the College does appear to have achieved relative consistency with regard to sudden or unexpected medical events, but it has not achieved the same consistency with regard to a serious, scheduled medical procedure. For example, EML is granted for open heart surgery scheduled six months out (T of Bob Baldwin) and yet a scheduled medical procedure is generally

viewed as not qualifying for EML. As the Arbitrator understands the Employer's position, scheduled and life-threatening is supposed to qualify for EML while scheduled but not life-threatening is not supposed to qualify.

The Arbitrator finds a basic problem with the application of this construct. That problem is the fact that it requires nonmedical personnel to render a medical judgment as to the seriousness of the medical procedure. For example, gallbladder surgery was granted EML (E 8) -- the facts of this event are not provided so it is being used here only for illustrative purposes. Is gallbladder surgery more serious than rotator cuff surgery? The Arbitrator surmises that they can both be done on an outpatient basis, general anesthesia is used for both and there is a period of incapacitation for both. The Arbitrator doubts that either operation is in and of itself life-threatening, but the Arbitrator has no medical expertise upon which to draw this conclusion. The point being, of course, that the College is having nonmedical personnel with a similar lack of medical expertise determine the seriousness of a medical procedure and based on that determination grant or not grant EML.

The Arbitrator emphasizes again that the problem of inconsistency appears to be around the distinction between a scheduled event so serious as to warrant EML versus one not so serious and thus not qualifying. This problem area is magnified

because nonmedical personnel are judging the seriousness of medical procedures. The Arbitrator notes that there are criteria that could be used that would take medical judgment out of the equation. Some of them are already being used such as was hospitalization required and was it an unexpected event. Other factual criteria could include such items as was a surgical procedure performed under a general anesthetic, was the medical procedure scheduled for more than a week out and did the Physician document a period of incapacitation following the medical procedure. Importantly, these are all questions of fact that do not require a supervisor or someone in HR to make a judgment about the seriousness of a medical event. Ultimately, to avoid further disagreements, the Employer and the Union need to reach a clear understanding of how to make the distinction between qualifying EML events and those not qualifying and communicate that understanding to those who approve requests for EML.

As to the Loop grievance, the Arbitrator's understanding of the evidence is that her husband had a surgical event, under a general anesthetic, resulting in a period of post-op incapacitation and for which her assistance was specifically needed. These four factors are clearly sufficient to meet a reasonable test of the meaning for the phrase "critical illness." Moreover, with only about 20% of EML leaves documented and that

documentation showing a wide variety of approval, the Arbitrator concludes that the Employer cannot rely on the history related to the granting of EML as a basis to deny the Loop request. Thus, the Employer violated Article 14.1.1 when it denied EML to Rita Loop for the dates of August 10 and 11, 2011. The appropriate remedy for this violation is to change the status of leave granted for those two days so that it is shown as EML. This would result in the Grievant having two days added back to her sick leave bank.

CONCLUSION

The issue before the Arbitrator is whether the Grievant qualified for and was entitled to receive *Emergency Leave* as provided in Article 14.1.1. The Arbitrator determined, based on the evidence, that the Employer does not have an objective, defined bases by which it distinguishes between a critical illness and a less severe illness that would not qualify for *Emergency Leave.* Decisions to grant *Emergency Leave* are made on a subjective basis, usually by the immediate supervisor. The results have been a lack of consistency with regard to the granting of *Emergency Leave*.

The surgery on the Grievant's husband required the use of a general anesthesia and resulted in his incapacitation for a period of time following the surgery. During this period of

time he required the assistance of his wife. These facts were properly noted in a Health Care provider certificate. As such, the Arbitrator concludes that the Grievant's situation is similar to a significant number of other critical illness situations where the Employer did grant *Emergency Leave.* Therefore, the decision by the Employer to deny the Grievant *Emergency Leave* violated the requirements of Article 14.1.1. The appropriate remedy is to put back into her sick leave bank the two days that were withdrawn for her leave dated August 10 and 11, 2011.

An award is entered consistent with these findings and the ultimate conclusion.

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
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	)	
LANE COMMUNITY COLLEGE EMPLOYEES FEDERATION, LOCAL 2417	)	
	)	
"THE ASSOCIATION" OR "THE UNION"	)	
	)	
AND	)	
	)	
LANE COMMUNITY COLLEGE	)	
	)	RITA LOOP
"THE DISTRICT" OR "THE EMPLOYER"	)	GRIEVANCE

After careful consideration of all arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The Employer did violate the collective bargaining agreement when it denied emergency leave to Rita Loop in August of 2011.
2. To remedy this violation, the Arbitrator directs the Employer to credit the Grievant's sick leave bank with two days.
3. The Arbitrator retains jurisdiction for a period of 60 days to resolve any issues that might arise over the implementation of the above remedy.

   The CBA provides that the costs of the Arbitrator shall be shared by the Parties. Thus the Arbitrator assigns his fees 50% to the Employer and 50% to the Union.

Respectfully submitted on this, the 27th day of April, 2012 by

Timothy D.W. Williams
Arbitrator