

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BRIAN ZORDEL, MARY ZORDEL, and the
WHITEWATER EDUCATION ASSOCIATION,

Complainants,

vs.

WHITEWATER UNIFIED SCHOOL DISTRICT
NO. 1, JOHN J. NEWHOUSE, and THANE
UGLOW,

Respondents.

Case X
No. 17661 MP-331
Decision No. 12503-A

Appearances:

Mr. Jermitt J. Krage, Organization Specialist, Wisconsin Education Association Council, appearing on behalf of the Complainants.
Rogers & Mealy, Attorneys at Law, by Mr. Alan Rogers, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Brian Zordel, Mary Zordel and the Whitewater Education Association, having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that Whitewater Unified School District No. 1, through its agents, John J. Newhouse and Thane Uglow, has committed certain prohibited practices within the meaning of the Municipal Employment Relations Act; and the Commission having appointed George R. Fleischli, a member of its staff to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Whitewater, Wisconsin, on April 3, 1974, before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Whitewater Education Association, hereinafter referred to as the Complainant Association or Association, is a labor organization which has been at all times material herein the certified bargaining representative of certain members of the professional staff employed by Whitewater Unified School District No. 1, including Complainants Brian and Mary Zordel, hereinafter referred to individually as Brian Zordel and Mary Zordel and jointly as the Zordels.

2. That Whitewater Unified School District No. 1, hereinafter referred to as the Respondent District, is a Municipal Employer and a school district organized under the laws of the State of Wisconsin for the purpose of operating a school system in the City of Whitewater, Wisconsin; that Respondent John J. Newhouse and Respondent Thane Uglow, hereinafter referred to as Respondent Newhouse or Newhouse and Respondent Uglow or Uglow, are, respectively, High School Principal and District Administrator for the Respondent District and, as such, are agents of the Respondent District.

3. That at all times relevant herein, the Complainant Association and Respondent District were parties to a collective bargaining agreement which contained the following provisions relevant herein:

"VII. Fringe Benefits

. . .

B. Reimbursable absence.

. . .

3. Personal Days. Teachers may use two (2) days of the twelve (12) sick leave days for personal days. These days may be used for personal business which cannot be conducted on other than a school day, according to the following provisions:
 - a. Personal leave, in all cases except unforeseen emergency, requires at least two days' advance notice to the Principal or immediate supervisor.
 - b. Personal leave is to be used for sound, pressing and unavoidable reasons only, its proper use may be subject to verification at the request of the school administration if warranted by the teacher's previous attendance record, or if there is legitimate cause to suspect that the leave has been used improperly.
 - c. Personal leave days are not to be used for any purpose that one could construe to be a failure to accept one's professional responsibility and/or failure to conduct oneself in a professional or ethical manner.

. . .

VIII. Management Rights.

The Board hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and constitution of the State of Wisconsin and the United States, including, but without limiting, the generality of the foregoing, the right, except as modified by terms of this agreement:

- A. To the executive management and administrative control of the school system and its properties and facilities, and the assigned school activities of its employees:
- B. To hire all employees and, subject to the provisions of law, to determine their qualifications and the conditions for their continued employment, their dismissal or demotion, for just cause, and to promote and transfer all such employees:
- C. To approve grading systems and courses of instruction, including special programs, and to provide for athletic, recreational and social events for students, all as deemed necessary or advisable by the Board.

D. To approve the means and methods of instruction, the selection of textbooks and other teaching materials, and the use of teaching aids of every kind and nature."

4. That either on August 13 or 14, 1973 both Brian and Mary Zordel met with Respondent Newhouse and gave notice of their desire to take two days of personal leave on August 23 and 24, 1973, which were the first two days of classes under the established school calendar; that Respondent Newhouse advised the Zordels that their proposed use of personal leave was unusual because it was for the first two days of classes and that there might be difficulty in obtaining substitute teachers for those two days; that Newhouse advised the Zordels that he would check on the availability of substitutes and get back in contact with them; that, although Newhouse may not have advised the Zordels of his intention, Newhouse also intended to read the provisions of the collective bargaining agreement with regard to personal leave.

5. That after reading the relevant provisions of the collective bargaining agreement, Newhouse met with the Zordels again on August 16 or 17, 1973; that at that meeting Newhouse asked the Zordels to state the purpose of their proposed absence and the Zordels informed Newhouse that they raised Arabian horses and a relative had made a substantial sum of money available to them for the purpose of purchasing a certified Arabian horse and that a horse of the type desired could be purchased at the International Arabian Horse Association, National Consignment Sale which was scheduled to be held on August 23, 1973, in Oklahoma City, Oklahoma; that the Zordels further advised Newhouse that said sale was held only once a year and that it was necessary to attend the sale in order to purchase a horse; that after hearing the Zordels' reason for requesting personal leave, Newhouse advised the Zordels that he did not believe that personal leave was available for such a purpose under the provisions of the collective bargaining agreement; that Newhouse then asked the Zordels if they would take two days off if the days were treated as leave without pay or "docked days" and the Zordels informed Newhouse that they intended to take the two days off without pay if necessary since it was very important to them that they attend said sale; that during this conversation Newhouse made it clear that, in his opinion, personal leave was not available for the stated reason and stated, in effect, that if they were absent on the two days in question he would "disapprove" of the payment of their salary for the two days in question; ^{1/} that at the end of the meeting, Newhouse indicated that he would again get back in contact with the Zordels.

6. That on the morning of Tuesday, August 21, 1973, Mary Zordel advised Ken Smejkal, Principal of Lakeview Elementary School where she taught physical education half-time, that she had requested two days of personal leave and that Newhouse was aware of her request; that Smejkal advised Mary Zordel that, consistent with the Respondent District's practice in such matters, she should await Newhouse's decision and that if Newhouse indicated that she could have personal leave on the two days in question, her absence at Lakeview Elementary School would be covered by the existing staff; that thereafter, that afternoon, Mary Zordel again contacted Newhouse with regard to her request and Brian Zordel's

^{1/} At the time of this conversation, Newhouse had the impression that he had the final authority to approve or disapprove such payments and consequently gave the impression he would "disapprove" of the payment rather than recommend the disapproval of the payment.

request for two days of personal leave; that Newhouse again advised Mary Zordel of the difficulty in attempting to find substitute teachers and again advised Mary Zordel that the two days would not be treated as personal leave; that Mary Zordel informed Respondent Newhouse that if the days were not treated as personal leave they would take them as "docked days"; that Respondent Newhouse did not say at this time or at any other time that Mary Zordel or Brian Zordel could not take the two days as docked days; that after said conversation, Respondent Newhouse called Smejkal's office and advised his secretary that the Zordels' request for personal leave had been denied but that he was uncertain if they would be present or absent on the two days in question; that after receiving said message from his secretary, Smejkal prepared a memorandum for distribution to the faculty at Lakeview Elementary School which included an item of information indicating that Mary Zordel would be gone the first two days of classes; that it was Smejkal's intention at that time to utilize the existing staff to cover the absence of Mary Zordel on the two days in question if she was, in fact, absent, and no lesson plans were necessary for that purpose.

7. That on August 23 and 24, 1973, the Zordels were absent from their respective teaching positions for the purpose of attending the International Arabian Horse Association National Consignment Sale, in Oklahoma City, Oklahoma; that Complainant Mary Zordel did not file any formal lesson plans with Smejkal or Newhouse but that she did leave instructions on her desk at the High School for use by any substitute teacher; that Brian Zordel did not file any formal lesson plans for the two days in question but instead left a handwritten note concerning his lesson plans for the two days in question on his desk at the High School and contacted the Head Football Coach to advise him that he would not be available to perform his duties as Junior Varsity Football Coach on August 23, 24 and 25, 1973.

8. That, on the morning of August 23, 1973, Respondent Newhouse learned that Brian Zordel had not reported for work and he thereupon contacted Respondent Uglow for the purpose of advising him that both Brian and Mary Zordel had apparently gone to Oklahoma City in spite of his advice to them that they could not take the two days in question as personal leave; that Uglow directed Newhouse and Smejkal to obtain substitute teachers to cover the Zordels' absences and he, thereafter, contacted the Head Football Coach to determine what arrangements Brian Zordel had made for his absence from his extra duty as Junior Varsity Football Coach; that Uglow advised the Head Football Coach to obtain the services of a substitute to cover Brian Zordel's absence from his duties as Junior Varsity Football Coach; that on Friday, August 24, 1973, Uglow advised Newhouse and Smejkal that they should arrange for substitutes to take the Zordels' classes on Monday, August 27, 1973, so that Newhouse, Smejkal and the Zordels could be in his office at 9:30 a.m. on that date; that on August 24, 1973, Newhouse drafted a memorandum to Brian Zordel which read in relevant part as follows:

"It is my feeling that you did not follow through following my determination that the two (2) days you requested could not be considered 'personal days', by informing me specifically that you were actually going to be absent knowing that your absence would cause a deduction from your salary. In addition, we did have to know in order to secure a substitute and to know some information for planning the class for two (2) days, and these were not clear at all.

As a result I have been instructed to employ a substitute for you for Monday and Mr. Uglow has requested that you be in his office for a conference at 9:30 A.M.

(Mrs. Zordel will be covered by the same instructions.)"

9. That at 9:30 a.m. on August 27, 1973, Mary Zordel and Brian Zordel met with Uglow in his office along with Newhouse and Smejkal; that during the course of this meeting, Uglow asked a number of questions with regard to what notification had been given by the Zordels to Newhouse and Smejkal indicating that they would be absent on the two days in question and what planning the Zordels had made for their absences; that after pursuing those two questions, Uglow advised Newhouse and Smejkal that they could leave and he continued to discuss the situation with the Zordels and their absence; that after discussing the matter further with the Zordels, Uglow advised the Zordels to return to his office at 11:00 a.m. and they did so; that upon their return at 11:00 a.m., Uglow advised the Zordels that they were suspended without pay for the remaining two and one half days of classes scheduled during that week and gave them a letter to that effect which read in relevant part as follows:

"Due to your absence on the opening two days of school and your failure to file lesson plans as required by district policy, you are suspended from your teaching positions, without pay, temporarily.

You are suspended as of 12:00 P.M., Monday, August 27, 1973 and will be reinstated to the payroll on Monday, September 3, 1973. You will report to your teaching assignments and other duties on Tuesday, September 4, 1973."

10. That thereafter on August 28, 1973, Newhouse compiled a list of teachers who had failed to file their weekly lesson plans as of that date and issued a memorandum to that effect which read in relevant part as follows:

"In both the Superintendents Bulletin and the Faculty Handbook, the completion of weekly lesson plans are required to be turned in prior to departing on Friday.

The following staff members did not submit lesson plans covering the first days of school as was requested. Please arrange to do this each week from now on.

Mr. Bleck	Mrs. Wutti
Mr. Daniel	Mr. Nelson
Mrs. Flanagan	Mr. Zordel
Mr. Haring	Mrs. Zordel
Mr. Mead"	

that although there were seven teachers listed in the memo in addition to the Zordels, no disciplinary action was taken against anyone for failure to file their lesson plans except the Zordels.

11. That prior to August 27, 1973, teachers who desired to take personal leave were expected to verbally advise their supervisory principal of their intention to do so at least two days in advance and were not normally required to state the reason for the request; that if the teacher giving notification of intent to take personal leave desired to state the reason they could do so and often did; that on some occasions in the past, teachers would advise Newhouse of their intent to take personal leave for reasons which were not considered to be acceptable under the language contained in the collective bargaining agreement; that on those occasions, the teacher would either indicate that he or she intended to take the leave without pay as a "docked day" and do so or decide not to take any leave; that on the occasion in question, Newhouse was opposed to the Zordels' request for the

use of personal leave for the first two days of school for the reasons stated and clearly indicated his opposition; that Newhouse was also opposed to the Zordels taking the first two days of classes off for the reason given as "docked days", but he failed to clearly indicate that this was so or that they could not do so.

12. That the Zordels filed a grievance alleging that the decisions to deny them two days of personal leave and the disciplinary suspension imposed for their absence on the two days in question were both in violation of the terms of the collective bargaining agreement and after that grievance had been processed in accordance with the grievance procedure in existence at that time the complaint herein was filed.

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSIONS OF LAW

1. That, by the actions of its agents, Respondent Newhouse and Respondent Uglow, in denying the Complainants, Mary and Brian Zordel, pay for the two days they were absent from their teaching duties on August 23 and 24, 1973, the Respondent District has not violated the provisions of Article VII, Section B, paragraph 3 of the collective bargaining agreement set out above and, therefore, has not committed and is not committing a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

2. That, by the actions of its agent, Respondent Uglow, of suspending Brian and Mary Zordel without pay for two and one half days, the Respondent District has violated the provisions of Article VII Section B, paragraph 3 and Article VIII, Section B of the collective bargaining agreement set out above and has thereby committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and enters the following

ORDER

That Respondent, Whitewater Unified School District No. 1, its officers and agents, take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

1. Pay Brian Zordel and Mary Zordel a sum of money equal to that which they would have earned if they had not been suspended without pay for two and one half days beginning on August 27, 1973 and ending on August 29, 1973.
2. Remove Respondent Uglow's letter of August 27, 1973 set out above and all related correspondence from Brian Zordel and Mary Zordel's personnel files.
3. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 12th day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Complainants contend that the Respondent District has violated Article VII, Section B, paragraph 3 of the collective bargaining agreement by the actions of Newhouse and Uglow in refusing to grant Brian and Mary Zordels' request for two days of personal leave. The Complainants further contend that the subsequent suspension of the Zordels for two and one half days without pay by Uglow was unreasonable since they followed the established procedure for taking personal leave. The Complainants ask that the Respondent District be ordered to expunge any and all references to the suspension of the Complainants, Brian and Mary Zordel, from the files held by the Respondent and that they be made whole for salary lost due to the denial of the two days of personal leave and the two and one half days suspension.

The Respondent District contends that the leave time requested by the Zordels was not for "sound, pressing and unavoidable reasons". The Respondent District denies that the Zordels gave advance notice to Newhouse that they would be absent on the two days in question. Rather, the Respondent District contends that the Zordels requested Newhouse's approval for two days of personal leave which was denied and that they did not at any time thereafter indicate that they would be absent on the two days in question.

This case presents the Examiner with two issues. First, was the reason upon which the Zordels request for personal leave was founded such that the Zordels were entitled to personal leave as qualified under the terms of the agreement. Secondly, was the disciplinary action taken against them by Respondent Uglow proper under the circumstances.

Personal Leave

The Zordels raise Arabian Horses in their spare time. A relative of the Zordels made a substantial sum of money available to them for the purpose of purchasing a certified Arabian horse. A horse of the type desired could be purchased at the International Arabian Horse Show, National Consignment Sale which was to be held on the first two class days of the 1973-1974 school year and the Zordels requested personal leave for the purpose of attending that sale. This request related to an activity which was in the furtherance of a spare time business venture. The Examiner is satisfied that a voluntary activity of this nature, which is motivated by a secondary business interest, is not an activity which comes within the contemplation of the personal leave provision set forth in the collective bargaining agreement.

Article VII, Section B, paragraph three does not establish two days of vacation which may be taken at the discretion of the teacher involved. Rather, it grants to the teacher the right to use two days of sick leave, as personal leave, for the purpose of attending to "personal business which cannot be conducted on other than a school day." Standing alone this language might support the Zordels' claim; however, the use of sick leave days as personal leave is qualified by subparagraph b which states that: "Personal leave is to be used for sound, pressing and unavoidable reasons only." Thus, the Zordels' reason for taking the two days of personal leave must fall within the meaning of that language.

The furtherance of a spare time business interest cannot be deemed to fall within the scope of that language. There is nothing in the record to indicate that the Zordels' outside business interest was

improper and was permitted by existing school board policy. However, the wording of the personal leave provision, as well as the practice under that provision, indicates that it was intended to allow teachers time off, with pay, for the purpose of attending to personal business and not for the purpose of pursuing an outside business interest.

The Complainants introduced evidence of a number of examples involving the use of sick leave as personal leave. The Complainants apparently rely on these examples to establish that, in the absence of evidence of abuse, the administration has no right to inquire into the reason behind the request for personal leave and that, therefore, the inquiry in this case was improper. However, in all but one of the prior cases brought into evidence by the Complainants, the individual requesting personal leave volunteered the reason for the requested leave at the time the request was made. In the one instance where the specific reason was not given, the individual informed his supervisor that the personal leave was needed for a pressing family problem. The collective bargaining agreement is silent on the point. It neither permits nor prohibits an inquiry into the reason behind the request for personal leave.

While it is true that the wording suggests that the "notice" need not include the reason which is subject to subsequent verification, a common sense view of the situation herein, supports the propriety of Newhouse's inquiry into the Zordels' reason for wanting personal leave. The Zordels requested personal leave for the first two days of the school term. In light of the problems posed by such a request and the fact that there is no express prohibition in the contract which precludes the administrator from inquiring into the reasons (as opposed to demanding verification) for the requested leave, Newhouse's inquiry was a proper exercise of his administrative responsibility under the circumstances.

The Complainants also point to these past incidents as analogous situations, in that some of the reasons underlying the requests are no more serious in nature than the Zordels' reason. They contend that these examples form a past practice of granting personal days upon request and without regard to whether the reason upon which the request is based actually falls within the scope of the restrictive language set forth in the collective bargaining agreement. Six of these eight examples seem to clearly fall within the scope of the language contained in the collective bargaining agreement qualifying the use of personal leave. Two of these requests were for attending or preparing for attendance at weddings in the immediate family. One request was for attending a funeral, and three requests were to make court appearances or to attend to immediate family problems ultimately requiring court appearances. As such, these examples appear to fit the purpose of personal leave as set forth in the agreement and are distinguishable from the Zordels' request which was based on an outside business interest.

Judy Ziegler was the only witness with examples of occasions where personal leave had been granted for purposes that were arguably not within the scope of the language contained in the collective bargaining agreement. In one instance she was granted a personal day to supervise the installation of carpeting in her new home. In that case, the original installation date which was to occur during the summer time was cancelled due to shipping delays. The carpet arrived later that fall, at which time the carpet was installed on short notice to Ziegler. The second instance involved a request by Ziegler for a personal day to enable her to help a close friend prepare for a wedding which was to be held out of town. The reasons presented by Ziegler are clearly distinguishable from the Zordels' reason on the simple ground that Ziegler used the personal days to attend to personal matters whereas the Zordels requested personal days for pursuing a spare time business interest.

Even if the personal days granted to Ziegler are viewed as having been improvidently granted, the mere fact that this has happened on two isolated occasions in the past does not now require that personal leave be granted for reasons lying outside the scope of the qualifying language contained in the collective bargaining agreement. The Complainants have not made out a clear and unambiguous past practice of interpreting the language to include situations of the type in question and the fact that personal leave may have been improvidently granted on one or two occasions in the past does not require that personal days be similarly granted in a case arising in an entirely different context.

Disciplinary Action

Although the Zordels were not entitled to take the two days as personal leave with full pay under the provisions of the collective bargaining agreement, the disciplinary action taken against them by the Respondent District was clearly improper under the circumstances. The Respondents contend that the Zordels failed to notify their supervisor, Newhouse, that they would be absent on the first two days of classes. According to the Respondents, the Zordels' alleged failure to notify their supervisor constituted a breach of their professional responsibilities. The Respondents also contend that this breach was further aggravated by the Zordels' failure to file lesson plans. As a result of this alleged abuse of their professional responsibilities, Respondents contend that it was proper to discipline the Zordels and the action taken was "minimal" under the circumstances. However, the facts do not support the Respondent District's position that the Zordels failed to notify their supervisor of their impending absences.

The record indicates that at their second meeting on August 16, or 17, 1973, Newhouse asked the Zordels if they intended to take the two days off if they were treated as "docked days" and the Zordels informed Newhouse that they intended to take the two days off without pay if necessary since it was very important to them that they attend the sale. The Zordels' statement to Newhouse that they intended to take the two days off as leave without pay constituted adequate notice under the circumstances. If Newhouse did not want them to be absent under any conditions, he should have said so.

Although Newhouse did not recall the conversation regarding "docked days", there is no evidence in the record sufficient to overcome the Zordels' unequivocal testimony in that regard. On the contrary, there are several things in the record that support the Zordels' version of the conversation. First of all Newhouse ultimately advised Smejkal's secretary that, although he had "denied" the Zordels' request for personal leave, he was not sure if they would be there to teach on the two days in question. Secondly, in his letter to them on August 24, 1973, Newhouse stated that: "It is my feeling that you did not follow through following my determination that the two (2) days you requested could not be considered 'personal days', by informing me specifically that you were actually going to be absent, knowing that your absence would cause a deduction from your salary." This statement indicates that Newhouse was of the opinion that the Zordels knew that their absence would cause a deduction from pay either because of their prior conversations or because of the established practice of docking people who take personal leave when they have been advised that they are not entitled to do so with pay. Finally, in the Respondent's answer, which was signed by Newhouse, the Respondent admitted, without qualification, that "although (Newhouse) had discussed Complainants' proposed personal days with them, Respondent Newhouse had given no indication to Complainants that they would be penalized beyond a possible loss of pay for absence on the two days in question". Again, the implication

of this admission is that Newhouse was of the opinion that they knew or should have known that they would be docked for the two days in question, and that they had no reason for believing that discipline would be imposed.

The Zordels' failure to file formal lesson plans, does not, standing alone, justify the suspension. Although other teachers who failed to file lesson plans for the first two days were merely chastized for failing to do so, the Zordels were, as the Employer contends, in a different situation. Because they intended to be absent on the first two days of classes it was incumbent upon them to leave adequate instructions for any substitutes that would take their place.


Smejkal advised Mary Zordel that her absence would be covered by the existing staff at the elementary school and consequently she knew that no instructions were necessary. The un rebutted testimony indicates that both Brian and Mary Zordel left instructions, albeit not in the form of lesson plans, at the High School and Brian Zordel advised the Head Football Coach of his impending absence. Although there were substitutes in both Brian and Mary Zordels' rooms on the two days in question, neither party saw fit to call them as witnesses. Under the circumstances, it must be assumed that their testimony would have supported the Zordels' testimony or at least not contradicted their testimony.

The Zordels followed the existing procedure for requesting personal leave. When they were advised that their request was not one which qualified for personal leave, they indicated that they would follow the practice in similar cases, and take the two days as "docked days". Under these circumstances, it was clearly inappropriate to dock them for more than two days under the provisions of Article VII, Section B, paragraph 3 as that provision has been applied in the past and as it was applied in this case. This is not to say that the Respondents could not have disciplined the Zordels if they had been insubordinate. It clearly has that right as spelled out in Article VII, Section B. In fact, if they had been told that they could not be absent on the two days in question and went in defiance of an express directive from Newhouse, the Respondents might be correct in their contention that the action taken would have been "minimal" under the circumstances.

Dated at Madison, Wisconsin this 12th day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


George R. Fleischli, Examiner