STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS,		
Complainant,	:	Case XIX No. 23412 MP-885
vs.	:	Decision No. 16518-A
SCHOOL DISTRICT OF WINTER,		
Respondent.		

Appearances:
Mr. Alan D. Manson, and Mr. Robert E. West, Executive Directors, appearing on behalf of the Complainant.
DeWitt, McAndrews and Porter, Attorneys, by Mr. Robert M. Hesslink, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Northwest United Educators having, on August 16, 1978, filed a complaint with the Wisconsin Employment Relations Commission alleging that the School District of Winter had committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act; and the Commission having appointed Christopher Honeyman, a member of the Commission's staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Ladysmith, Wisconsin on October 3, 1978 before the Examiner; and briefs having been filed by both parties with the Examiner by January 15, 1979; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Northwest United Educators, hereinafter referred to as the Complainant or the Union, is a labor organization within the meaning of Section 111.70, Wisconsin Statutes; and that Robert E. West and Alan D. Manson are Executive Directors of the Complainant Union.

2. That the Complainant labor organization is recognized by the School District of Winter as the exclusive collective bargaining representative for all full-time employes of the Winter School District engaged in teaching, and including the classroom teachers, guidance counselors and librarians, but excluding the following: administrators and principals; non-instructional personnel; office, clerical, maintenance and operation employes; substitute teachers, student and/or intern teachers.

3. That School District of Winter and Board of Education of School District of Winter, hereinafter referred to as the Respondent District or District and Respondent Board or Board, are, respectively, a public school district organized under the laws of the State of Wisconsin and a public body charged under the laws of the State of Wisconsin with the management, supervision and control of said district and its affairs.

4. That Complainant Union and Respondent Board are parties to a collective bargaining agreement commencing in 1977 and terminating on June 30, 1979, which among its provisions contains a section headed "Personal Leave" which specifies as follows:

Personal Leave

A. Teachers shall be eligible for three (3) days personal leave per year. Such leave is non-accumulative and prior notice to the administration is required in all situations.

B. The first day of personal leave may be taken by a teacher without permission from the administrator. Permission in advance of taking personal leave is required for the two remaining days.

C. Personal leave shall be defined as leave granted for events or business that cannot be scheduled at any other time, and for which the employee's attendance is necessary. Example would be: Court appearance, IRS hearings, selective service exams, college exams, etc.

5. That at certain times material herein William Keigan has been the District Administrator for the Respondent District and has been an agent of said Respondent and Respondent Board, acting on their behalf.

6. That at certain times material herein Charles Ackerman was a labor consultant and in that capacity assisted the Respondent District in negotiations with the Complainant Union.

7. That on May 17, 1978 Esther Musser, a teacher employed by Respondent, requested her first day of personal leave in the 1977-78 school year, by letter and orally, to Keigan; that Keigan, orally and by letter, denied said request; and that Keigan's denial was for reasons impermissible under the provisions of Respondent's collective bargaining agreement with Complainant.

8. That Respondent, by its agent Keigan, violated the terms of the aforementioned collective bargaining agreement by its refusal to grant Musser her aforementioned request.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

That Respondent, by its refusal to grant Musser's May 17, 1978 request for personal leave, has committed and is committing a prohibited practice within the meaning of Section 111.70(3)(a)5, Wis. Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law the Examiner makes and renders the following

ORDER

IT IS ORDERED that School District of Winter, its officers and agents shall immediately:

1. Cease and desist from refusing paid personal leave time to Esther Musser, in accordance with her May 17, 1978 request.

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

   a. Make Esther Musser whole for any loss of pay and benefits she suffered by reason of Respondent's refusal to grant her paid personal leave time on or about May 18, 1978, if in fact she took unpaid leave on said date.

   b. Notify all employes by posting in conspicuous places in District premises where teachers work, copies of the notice attached hereto and marked Appendix A, which notices shall be signed by a responsible representative of the Respondent, shall be posted immediately upon receipt of a copy of this Order and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Respondent to insure that the said notices are not altered, defaced or covered by other material.

   c. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 2nd day of March, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

WE violated Esther Musser's rights under the collective bargaining agreement by our refusal to grant her request for paid personal leave time about May 18, 1978, and if she lost any pay or benefits by reason of that refusal we will make her whole for such losses.

By_____
School District of Winter

Dated this _____ day of _____, 197_.

THIS NOTICE MUST REMAIN POSTED FOR A PERIOD OF SIXTY (60) DAYS AND MUST NOT BE ALTERED, DEFACED OR COVERED BY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The complaint in this matter concerns the District's refusal to grant paid personal leave time for a teacher to attend her daughter's graduation from school; the Union contends that this action was a violation of the parties' collective bargaining agreement (hereinafter the Agreement) and thus violated Section 111.70(3)(a)5, Wis. Stats.

Few of the facts immediately involved in the refusal are in dispute. On May 17, 1978 Esther Musser, a teacher, gave District Administrator William Keigan a note requesting her first day of personal leave in that academic year, to be taken on May 18, 1978. Though the note gave no reason for the request, Musser testified without contradiction that Keigan asked the reason and that she told him it was to attend her daughter's graduation from school. Keigan denied the request, and Musser asked that he make his denial in written form. On the same day, Keigan gave Musser a letter formally denying the personal leave, in the terms quoted verbatim:

> "I must deny your request for personal leave.
>
> In the past I have interpreted personal leave to be for purposes that:
>
> 1. Require your attendance.
>
> 2. Cannot take place unless you are in attendance.
>
> The Language of the Master Contract outlines examples such as Court Appearances, I.R.S. Hearings, Selective Service Exams, College Exams, etc.
>
> Both of the reasons listed would apply in the examples.
>
> While I surely agree that your daughter's graduation from school requires your attendance, it would take place if you were not in attendance.
>
> Therefore, I will grant you permission to be absent that day from your duties; however, it will be without pay."

On May 30, 1978 Keigan denied another teacher's request for a first day of personal leave; the request was also to attend a child's graduation, but that instance is not part of the complaint herein.

The Agreement does not provide for arbitration of unresolved disputes over its interpretation. The parties agree that the only language in the Agreement that is germane to this dispute is that which follows:

Personal Leave

A. Teachers shall be eligible for three (3) days personal leave per year. Such leave is non-accumulative and prior notice to the administration is required in all situations.

B. The first day of personal leave may be taken by a teacher without permission from the administrator. Permission in advance of taking personal leave is required for the two remaining days.

C. Personal leave shall be defined as leave granted for events or business that cannot be scheduled at any other time, and for which the employee's attendance is necessary. Example would be: Court appearance, IRS hearings, selective service exams, college exams, etc.

The parties' dissension over the construction of the personal leave language is reducible to several competing contentions. The Union contends that the language is clear and unambiguous and that it means that a teacher may take the first day of personal leave without objection or approval from the administration, and that the standards for defining what qualifies as personal leave are to be applied by the administration in determining whether the second or third day's request qualifies. In the alternative, the Union argues that if the language itself be found unclear or ambiguous, the District violated the Agreement as a result of its substitution of the criteria listed in Keigan's letter for the criteria specifically expressed in part C of the personal leave language, and that Musser's request in fact meets the part C criteria.

The District, meanwhile, contends first that the Agreement's language is indeed clear and unambiguous but that it means that the part C criteria must be met by all requests for personal leave, including those for the first day. The District argues, in turn, that any personal leave request must be of the same nature as the four examples listed in part C, and that attendance at a graduation ceremony does not fall within the same description, that of "an express legal requirement that the teachers attend the event, or that some objective and readily ascertainable consequence will befall the teacher if he does not attend", to quote the District's brief.

Like the Union, the District advances an alternative argument in the event that the personal leave language be found something other than a model of clarity and certainty. The District in this argument contends that past practices, discussed below, were consistent, accepted by both parties, and were consonant with its position in this case.

Each party argues that (if the present language is unclear or ambiguous) the bargaining history supports its respective position.

In the Examiner's view, a bare reading of the personal leave language reveals a conflict between the sentence "The first day of personal leave may be taken by a teacher without permission from the administrator" and the sentence "Personal leave shall be defined as . . ." sufficient to render parol evidence, such as the bargaining history and past practice evidence herein, material. For in the Union's proposed interpretation, the phrase that the first day "may be taken . . . without permission" reflects an agreed intention that the District was precluded from denying the first day's request under any circumstances, while in the District's version, the phrase "defined as" reflects an agreed intention that even the first day of personal leave be available only if the basis for the request met the standard expressed. Though for this reason the parol evidence is to be considered, the undersigned finds neither the bargaining history nor the past practices herein to be of much assistance in interpreting the language, as will be seen below:

B. Personal leave may not exceed three (3) days per year and is non-accumulative.

C. Two days require advance permission from the administrator. One day would not require permission from the administrator. Prior notice is required in all situations.

D. Personal leave shall be defined as leave granted for events or business that cannot be scheduled at any other time, and for which the employee's attendance is necessary. Example would be: court appearances, IRS hearings, selective service exams, college exams, etc.

The record contains nothing in the way of evidence concerning the interpretation of that language, but in the 1973-74 contract the language agreed on was identical to that now at issue. Robert West, now Executive Director of the Union, testified that during the negotiations leading up to the 1973-74 agreement he acted as an advisor to the teachers' bargaining committee and in that capacity discussed the intent of this language with Charles Ackerman, then principal negotiator for the District. West stated that the "final agreement" between Ackerman and he "was that for one day the Employer couldn't substitute their values to whether attendance would be necessary. That was the unclear one we had to discuss, necessary to whom? Our agreement was for the first day, according to the employee. The second day the employee would probably be put to their proof in some additional litigation if the employee wished to pursue it if they were denied leave."

This statement is not directly contradicted by any witness, and would ordinarily be entitled to great weight. Several factors, however, cast doubt primarily as to whether this allegedly agreed interpretation of the 1973-74 language was, in fact, agreed to by a responsible representative of the District. West testified that on another occasion Ackerman had, in response to West's question, declared that he had authority to bind the District's Board and that the members of the Board then present had, by silence, assented. The District now, however, denies that Ackerman ever had such complete authority, and the parties agree that Ackerman, who has apparently moved elsewhere, was effectively unavailable to testify. There is no evidence that either West or Ackerman kept notes of the conversation at which this agreement as to the interpretation of the contract's personal leave language was reached. And West was at the time of these discussions not the Union's principal negotiator, nor even a member of its bargaining team; he testified that he served that team merely in an advisory capacity. Moreover, all of the discussions relevant to this issue between West and Ackerman took place out of the presence of any other member of the District's negotiating committee and of any member of the Union's. Furthermore, when the 1973-74 agreement was reached in its entirety Ackerman may have been present - the record is not clear - but West was not. But finally, and of most significance, the language itself preserves the ambiguity which, West testified, his and Ackerman's alleged agreement was intended to resolve. If such an agreement were actually intended by the parties whom West and Ackerman, in whatever capacity, served, it would have been simple enough to rewrite it so that the "definition of personal leave" would clearly apply only to the second or third day. The parties' failure to do so casts doubt, not necessarily on West's credibility, but rather on whether the District ever gave Ackerman authority to, or itself did, agree on such a provision or interpretation. The Examiner concludes that, with all these factors taken into account, the "clear and satisfactory preponderance of the evidence" required for the Union's contention (that the District agreed to the Union's interpretation of this language) to be upheld, is absent.

Even in a situation where the original intent of the parties is unclear, subsequent bargaining history may clarify the matter. Here each party contends that the bargaining history, and the interwoven practices of the parties since 1973-74, can only be interpreted as buttressing its position, but here again the Examiner finds a clouded history.

The record is silent as to whether in 1973-74 any requests for personal leave were granted, denied or even made. What evidence there is of past practices begins in December, 1975, when the District denied a request for personal leave for a teacher who wished to attend his grandfather's funeral. 1/ Subsequently, until October, 1977, various employes' requests for personal leave were denied in situations that included another grandfather's funeral, a longer Christmas break, car trouble and others. Each was, according to Administrator William Keigan's uncontradicted testimony, the first request by the teacher involved.

In the period from 1975-77 approximately 15 requests for personal leave were denied; others were apparently approved but the record contains no details of those. Of the 15 denials, the Union brought grievances concerning 9, all of which were dropped during negotiations over the Agreement now in effect. The District contends that by dropping these grievances the Union effectively assented to the District's interpretation of the disputed language; the Union contends that it dropped the grievances not in concession to the District's interpretation but in order not to hold up the new Agreement. The undersigned is persuaded by the Union's argument here principally because the current Agreement succeeded not a normal collective bargaining agreement, but a period during which the District had implemented and enforced an offer of its own which was never agreed to by the Union, when no impasse existed, and which not only modified the personal leave language from that existing in the 1973-74 and 1977-79 contracts, but which was found by the Commission to have been implemented illegally and was therefore struck down. 2/ The personal leave language in the implemented offer was different from that agreed to by the parties both before and since, but as the Examiner's Order in Case XI (adopted by the Commission) specifically identified the personal leave language as illegally implemented there is little point in discussing the difference and its implications. It is sufficient to say that the grievances arose during the existence of the implemented offer and the subsequent negotiations. Under these circumstances the inference that the Union's abandonment of the 9 grievances represented capitulation on the general interpretation of the language would be made only if the undersigned were utterly ignorant of the process of collective bargaining: it is probable that a union newly in a position to undo the effects of two years' illegal imposition of working conditions would find the obtaining of a comprehensive new agreement of greater priority than the ironing out of a disputed interpretation involving, at the most, three weeks' pay shared among a number of individuals. For these reasons, the Examiner finds that the bargaining history and practices since 1973-74 are of no significance in the determination of the language's true meaning.

1/ Grandparents were not at that time included among those for whom funeral leave as such was available, and the request was made as one for personal leave.

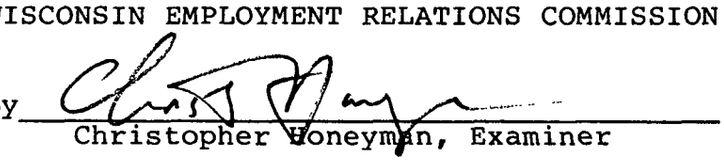
2/ In Case XI of the same title the Union charged the District with prohibited practices arising out of the District's implementation of the offer referred to above. The Union prevailed, and the Commission's Order in that case nullified the implemented offer.

As the overall bargaining history and past practices of the parties have proven to be unsatisfactory determinants, the undersigned is perforce thrown back upon the bare words of the Agreement, and must interpret the language on its own terms. And, taken by itself, the language is more probably interpreted the District's way than the Union's. For the fact remains that the definition of personal leave is not limited in its application to the second and third days, as it is written, but apparently applies to all; and such an interpretation does not render the first sentence of Section B meaningless, though it substantially weakens the right to the first day. Seen this way, the language would in effect say: "personal leave on all three days is leave usable only for purposes of the character described in Section C, but the only reason the District can deny the first day's request is for failure to meet those standards." The Examiner recognizes that this interpretation is to some extent inconsistent with the phrase "without permission from the administrator." But the inconsistency between ". . . without permission . . ." and ". . . shall be defined . . . ." permits no intelligent solution other than to uphold one over the other, and to give supremacy to ". . . without permission . . ." does greater violence, as it would have the effect of writing an exception into the definition which simply is not there. To find the reverse to be the true interpretation, on the other hand, does not make ". . . without permission . . ." entirely meaningless; it merely brands the language as relatively weak and rather peculiar. In the absence of any other reliable guidance, however, this remains the interpretation most consistent with the overall language of the article, and the Examiner must therefore adopt it.

The overall question of the language's interpretation is thus disposed of; what remains is the particular instance in which the District is charged. Musser, credibly enough, contended in her testimony that her daughter's graduation would not be "scheduled at any other time" merely in order that she be able to attend with rather than without pay: the graduation ceremony would therefore meet the first test expressed in the definition. As to the second, whether it is written in the Agreement's terms ("and for which the employee's attendance is necessary") or in Keigan's terms in his letter of denial (". . . purposes that: 1. Require your attendance"), the necessity of Musser's attendance is not in question here: Keigan's letter conceded that issue. ("While I surely agree that your daughter's graduation from school requires your attendance . . ."). Keigan, in fact, did not deny the request based on the "necessary" test or on the "scheduled at any other time" test, but based, it seems, on a third test of his own invention, that of "cannot take place unless you are in attendance." This is not simply a rewording of "cannot be scheduled at any other time" but is instead a new standard which represents a bolstering of the "necessary" standard. The District argues in its brief that Musser's daughter's graduation is not of the same nature as the four examples given in Section C and that her attendance was not "necessary," but the Examiner does not reach an independent evaluation of whether, in the context of a bargaining unit of teachers, attendance at a daughter's graduation is "necessary;" the District is estopped on this argument by Keigan's letter of denial. And the reason for which the request was denied at the time was one which appears nowhere in the Agreement, while it appears to substitute for one which for all practical purposes Musser's request would meet. The Examiner therefore concludes that the denial at issue violated the Agreement and, by derivation, Section 111.70(3)(a)5, Wisconsin Statutes.

Dated at Madison, Wisconsin this 2nd day of March, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner