STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FENNIMORE EDUCATION ASSOCIATION - SOUTHWEST TEACHERS UNITED,		
Complainant,		Case 14 No. 42058 MP-2219
vs.		Decision No. 26036-A
FENNIMORE COMMUNITY SCHOOL DISTRICT,		
Respondent.		

Appearances:

Mr. Kenneth Pfile, Executive Director, South West Education Association, 145 West Barber Street, Livingston, Wisconsin 53554, appearing on behalf of Fennimore Education Association - Southwest Teachers United.

Ms. Eileen A. Brownlee, Kramer and McNamee, Attorneys at Law, 1038 Lincoln Avenue, P.O. Box 87, Fennimore, Wisconsin 53809, appearing on behalf of Fennimore Community School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Fennimore Education Association - Southwest Teachers United filed a complaint with the Wisconsin Employment Relations Commission on April 17, 1989, alleging that Fennimore Community School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5, Stats. On May 31, 1989, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a), and Sec 111.07, Stats. Hearing on the matter was conducted in Fennimore, Wisconsin on June 20, 1989. A transcript of that hearing was provided to the Commission on June 29, 1989. The parties filed briefs and waived the filing of reply briefs by August 1, 1989.

FINDINGS OF FACT

1. Fennimore Education Association - Southwest Teachers United, referred to below as the Association, is a labor organization which maintains its offices in care of 145 Barber Street, Route 1, Livingston, Wisconsin 53554.

2. Fennimore Community School District, referred to below as the District or as the School Board, is a municipal employer which maintains its offices at 1397 Ninth Street, Fennimore, Wisconsin 53809.

3. The Association and the District have been parties to a series of collective bargaining agreements, including one in effect, by its terms, "for the period July 1, 1988 through June 30, 1991". That agreement contains, among its provisions, the following:

PERSONAL BENEFIT PROVISIONS

. . .

6. Accumulative Leave

. . .

D. Accumulative Leave - Personal

Accumulated leave - personal applies to certificated employees who have been employed for more than 52 consecutive weeks and for at least 1,000 hours during the preceeding (sic) 52 week period.

A certificated employee may at their discretion use up to two of their accumulated leave provided:

1. No more than two teachers per building, ie., High School (8-12) and Elementary (K-7) are absent on the same day for personal leave. Unusual circumstances may be reviewed for consideration.

2. The leave request was presented in writing on a form, provided by the District Office, two (2) working days prior to the date of the requested leave. Unusual circumstances may be reviewed for consideration.

3. The day requested is not the day preceeding (sic) or following any calendar vacation day, a holiday, or any other non student attendance days. Unusual circumstances may be reviewed for consideration.

4. The day requested is not a parent-teacher conference day, workshop day or inservice day. Unusual circumstances may be reviewed for consideration.

Employees without accumulated leaves days would be ineligible for personal days.

. . .

Appendix E of that agreement sets forth the school calendar for the 1988- 89 school year. The School Board prepared a color-coded calendar for the 1988-89 school year which contains a "Summary" section which explains the color-coding of the calendar. That summary is divided into two sections: "Student Attendance Days" and "Non Student Attendance Days". The Student Attendance days section contains one subsection headed "181 School Days". The Non Student Attendance Days section contains the following five subsections: "Inservice Days & Workshop Days; Parent-Teacher Conference Days; Holidays; Calendar Vacation Days; and Any Other Non Student Attendance Days". Next to each of the six subsections noted above is the color corresponding to the color-coded calendar days of the 1988-89 school year calendar. The color next to the "Any Other Non Student Attendance Days" subsection is black. Weekends are handwritten on that calendar in black ink. The final page of the calendar section of the 1988-91 collective bargaining agreement reads as follows:

191 Days

179-School Days 6.5 hours of Student Instruction 8 a.m. - 4 p.m. Work Day

2-One half (1/2) School Days 3.25 hours of Student Attendance 8 a.m. - 4 p.m. Work Day

3-Days of Teacher Workshop No Student Attendance 8 a.m. - 3:30 p.m. Work Day

2-Days of Professional Development No Student Attendance 8 a.m. - 3:30 p.m. Work Day

3-Holidays

1st Student Attendance Day 8-22-88 8 a.m. - 4 p.m. Work Day

Last Student Attendance Day 6-2-88 8 a.m. - 4 p.m. Work Day

Student Attendance Day on 1st and Last Day of School Will Be in the A.M. Only

Make-Up Day

Chronological Order of Make-Up Days: #1- March 20, #2- March 21, #3- March 22, #4- March 23

2-Parent Conference Days 12:30 p.m.-4:30 p.m. and 6:00 p.m. - 9:00 p.m. All Final Report Cards Mailed to Parent/or Guardian(s)

February 8 - SWIC Convention. Personal Day Shall Not Be Used on the 8th. The Calendar Does Not Recognize SWIC's. 1/

The 1988-91 agreement also contains a grievance procedure which culminates with a written decision by the School Board. The agreement contains no provision for the arbitration of grievances.

4. The collective bargaining agreement which preceded that mentioned in Finding of Fact 3 was in effect, by its terms, "for the period July 1, 1986 through June 30, 1989". That agreement provided for Accumulative Leave as follows:

PERSONAL BENEFIT PROVISIONS

. . .

3. Accumulative Leave

A. Accumulation

Accumulative leave for all certificated employees shall be ten (10) days per year for personal illness or personal injury accumulative to one hundred (100) days. The day(s) shall accumulate at a rate of 4 days for the first month of the contract period and 1 day per month for the next 6 months for a total not to exceed ten (10) days per year. The days accumulate on the first day of each month.

B. Accumulation Incentive Pay

Teachers may at their discretion use up to 4 of the current 10 days accumulative leave. The first 4 days of absence from work shall be attributed to any reason, including illness at the discretion of the teacher. The 6 days remaining in the current accumulative leave shall be used for personal illness or personal injury only. Those staff who have accumulated 50 days may use 2 of the 6 days remaining at their discretion.

All certificated employees will be paid at the additional rate of $45.00 per day for 4 days or $180.00 as an intregal part of their individual contract pay. This amount will be itemized on their individual contract as incentive pay and will be paid at the first pay period.

Each and any absence from work will result in the teacher having to return $45.00 to the District. This applies to the first 4 days only, with a maximum being returned to the District of $180.00. The return

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1/ This section of the contract states the explanation for various handwritten symbols used on the calendars placed in the contract. Those handwritten symbols appear to the left of the major entries reproduced above, but can not be reproduced in this decision, and have been omitted.

shall be made by payroll deduction. Half day(s) absent shall be charged at the rate of $22.50.

The incentive pay does not include emergency leave as specifically defined in Article 3-Death in Immediate Family. Other emergency (leave) situations shall be considered as absence from work as cited above for the purpose of this article.

Teachers who are required by the School Board and/or Administration to attend a workshop, meeting, etc. or otherwise to be absent from work, except absence resulting from disciplinary proceeding, will not return the $45.00 per day. Teacher suspended shall have the $45.00 per day deducted for up to 4 days.

. . .

Appendices C, D and G of that agreement provided that the "Dollar Amounts" for the Salary Schedule and the Extra-Curricular Schedule remained "to be Determined", as well as the calendar for the 1988-89 school year.

5. The collective bargaining agreement which preceded that mentioned in Finding of Fact 4 was in effect, by its terms, "for the period July 1, 1984 through June 30, 1986". That agreement provided for Accumulation Leave as follows:

PERSONAL BENEFIT PROVISIONS

. . .

3. Sick Leave - Accumulation Leave

Accumulation leave for all certificated employees shall be ten (10) days per year for personal illness or personal injury accumulative to one hundred (100) days. The day(s) shall accumulate at a rate of 4 days for the first month of the contract period and 1 day per month for the next 6 months for a total not to exceed ten (10) days per year. The days accumulate on the first day of each month. Teachers may at their discretion use up to 2 of the current 10 day accumulative leave.

6. The parties met on March 14 and on April 7 of 1988 to bargain the salary and extra curricular schedules as well as the calendar for the 1988-89 school year. The parties scheduled an additional meeting for May 11, 1988. In the week prior to May 11, 1988, Valerie Honschel, the Association's Head Negotiator, approached Edgar Ryun, the District's Superintendent of Schools, who serves as the District's Head Negotiator. Honschel asked Ryun if the School Board would consider entering a multi-year collective bargaining agreement before the anticipated enactment of a bill which would have put certain spending limitations on the Board. Honschel felt, at the time of her request, that the parties had until mid-May to reach such an agreement. Ryun agreed to discuss the matter with the School Board and to create a proposal for such a multi-year agreement. On May 11, 1988, Ryun presented a proposal, on behalf of the School Board, for a three year agreement commencing on July 1, 1988. The Accumulated Leave provision of that proposal read as follows:

D.Accumulated Leave - Personal

Accumulated leave - personal applies to certificated employees who have been employed for more than 52 consecutive weeks and for at least 1,000 hours during the preceeding (sic) 52 week period.

A certificated employee may at their discretion use up to two of their accumulated leave provided:

1.No more than one teacher per building, ie., High School (8-12) and Elementary (K-7) is absent on the same day for personal leave. Unusual circumstances may be reviewed for consideration.

2.The leave request was presented in writing on a form, provided by the District Office, five (5) working days prior to the date of the requested leave.

3.The day requested is not the day preceeding (sic) or following any calendar vacation day, a holiday, or any other non student attendance days. Unusual circumstances may be reviewed for consideration.

4.A substitute teacher is available.

5.The day requested is not a parent-teacher conference day, workshop day or inservice day. Unusual circumstances may be reviewed for consideration.

Employees without accumulated leave days would be ineligible for personal days.

Any teacher who falsely takes a medical leave, family leave, accumulated leave - medical or personal day will be subject to progressive disciplinary action.

During the course of the negotiations on May 11, 1988, Association successfully proposed to modify Section 6.D.1. and 2. to read as they appear in Finding of Fact 3 above. The Association also successfully proposed that Section 6.D.4. of the District's proposal be deleted and that Section 6.D.5. of that proposal be renumbered as Section 6.D.4. None of the balance of the District's proposal was modified on May 11, 1988. The parties' meeting on May 11, 1988, lasted approximately three to three and one-half hours. By the end of that meeting, the parties had reached tentative agreement on a three year contract to commence on July 1, 1988.

7. The tentative agreement reached on May 11, 1988, was placed before the members of the bargaining unit in a meeting held on May 12, 1988. The members voted to reject the tentative agreement. Certain members of the Association's negotiating team contacted Ryun to determine if certain changes could be made to the tentative agreement reached on May 11, 1988. A meeting was held at Ryun's house on May 12, 1988. During the course of that meeting the parties agreed to certain modifications of the tentative agreement reached on May 11, 1988. Included in these modifications was the deletion of the final paragraph of the District's proposal on Section 6.D. Tentative agreement was again reached, and both the School Board and the Association ratified the tentative agreement thus reached. The parties executed the 1988-91 collective bargaining agreement on May 13, 1988.

8. Ryun met with the School Board prior to his presentation of the District's initial proposal for a three year agreement. Apart from economic issues, the School Board and Ryun hoped to clarify certain problems with the school calendar and to change the contractual leave provisions. Ryun hoped to amend the contractual leave provisions to harmonize them with the State's Family Leave Act; to end the accounting and personnel problems created by the Accumulation Incentive Pay provisions of the 1986-89 agreement; and to place limitations on the use of personal leave. Ryun presented the District's proposal to the Association line by line on May 11, 1988. Ryun and the two School Board members who were present at that meeting heard Ryun note to the Association's negotiating team that the District's proposal was intended to prevent teachers from using paid personal leave to extend weekends. The Association's negotiating team understood Ryun's presentation to indicate that the Board was concerned with the possibility of the abuse of paid personal leave. The Association's negotiating team assumed, however, that the District's proposal on Section 6.D.3. did not specifically preclude the use of personal leave to extend a weekend, although one member of that team believed the proposed language of Section 6.D.3. could be interpreted to have that effect. No Association representative asked Ryun to define "non student attendance days". Honschel did ask Ryun if Section 6.D.3. of the District's proposal was intended to preclude a teacher from taking the day before or the day after holidays, teacher convention days, personal development days or inservice days. Ryun did respond that the proposal was intended to have that effect. The Association made no counter proposal to the District's proposal on Section 6.D.3.

9. Commencing with the 1988-89 school year, the District refused to grant teacher requests to take paid Accumulative Leave - Personal on a Monday or a Friday unless the School Board determined unusual circumstances were present. Of eleven teacher requests for such paid leave, the School Board has determined that seven presented unusual circumstances warranting the granting of paid leave.

10. On October 13, 1988, the Association filed a grievance which reads as follows:

I.Grievant: Fennimore Education Association

II.Agreement Provision(s) Violated:

PERSONAL BENEFIT PROVISIONS
6. Accumulative Leave
D. Accumulated Leave - Personal

III. Statement of Grievance:

The District has applied the Agreement provision referenced above such that "non-student attendance days" is construed to include weekends. No such interpretation was agreed to between the parties during negotiations.

IV. Remedy Requested:

The District shall desist in the above construction of the Agreement, shall approve otherwise - proper requests for paid personal leave on Mondays and Fridays, and in a timely manner, and shall make whole any employees who have been improperly denied pay and/or benefits according to such erroneous construction and application of the Agreement provision cited above.

This grievance was processed through the steps of the grievance procedure noted in Finding of Fact 3. The School Board formally denied the grievance at a meeting conducted on November 10, 1988, and supplied the Association with a written decision confirming that denial on November 18, 1988. With this decision the parties completed all of the steps of the contractual grievance procedure.

CONCLUSIONS OF LAW

1. The Association is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

2. The District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. Monday and Friday constitute days "preceeding (sic) or following . . . any other non student attendance days" within the meaning of Section 6.D.3. of the "PERSONAL BENEFIT PROVISIONS" of the collective bargaining agreement mentioned in Finding of Fact 3. The District's refusal to grant teacher requests to use "Accumulated Leave - Personal" as provided by Section 6.D. unless the School Board determines "unusual circumstances" as provided by Section 6.D.3. are present does not violate the collective bargaining agreement mentioned in Finding of Fact 3, and thus does not violate Sec. 111.70(3)(a)5, Stats.

ORDER 2/

The complaint is dismissed.

Dated at Madison, Wisconsin this 28th day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Richard B. McLaughlin, Examiner

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

FENNIMORE COMMUNITY
SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint alleges a District violation of Sec. 111.70(3)(a)5, Stats.

THE PARTIES' POSITIONS

The Association initially argues that "(t)he District violated the agreement by improperly applying the term 'non student attendance days' to include weekends". Specifically, the Association argues that the term is not ambiguous in a school setting, and that "the syntactical structure of the term . . . requires that it be read as a description of some kind of attendance days". According to the Association, the term, as phrased in the agreement, must be read to mean "attendance days for non students". To read the term as the District asserts would require, in the Association's view, that the disputed phrase read: "student non attendance days". Beyond this, the Association argues that "(t)he term 'non student attendance days' is not ambiguous within the context of the collective bargaining agreement" since Section 6.D.4. of Accumulated Leave - Personal and the 1990-1991 Calendar define and list non student attendance days. Beyond this, the Association contends that "(t)he District's construction of the phrase 'non student attendance days' is not supported by the agreement as a whole". Specifically, the Association asserts that the purpose of the portion of the agreement in dispute here is to extend personal benefits to teachers and that the District's interpretation of the agreement subverts that purpose by eliminating 87 out of 191 contract days available for personal leave. This interpretation, according to the Association, produces an absurd result which renders certain portions of Section 6.D.3. superfluous and violates the rule of "ejusdem generis". In addition to this, the Association contends that "(b)argaining history does not support the District's position", and more specifically that "(t)he District's interpretation moves unreasonably away from prior agreement provisions for paid personal leave". A review of the record establishes, according to the Association, that its negotiators "would not have agreed to such a broad restriction and that FEA members would not have ratified it had they understood it that way". The Association concludes that:

> As the originator of the proposal and of the disputed phrase, the District clearly had the burden of making its meaning clear, particularly since its structure is not syntactically consistent with the meaning ascribed to it by the proposer, and since the FEA negotiators did ask clarifying questions about the effect of the paragraph. The District has not met the burden of proof required.

The District argues initially that "(t)he term 'non student attendance days' as used in paragraph 6.D.3. of the parties' collective bargaining agreement is clear and unambiguous", and means "a day when students are not in school attendance". Relevant judicial precedent establishes, according to the District, that unambiguous terms are not open to construction. With this as background, the District argues that the disputed terms are not terms of art within a school setting, and that they should be given their "clear and unambiguous meaning". The District's next major line of argument is that "(t)here was a meeting of the minds of the parties with respect to the interpretation of Paragraph 6.D.3. of the collective bargaining agreement". A review of the record establishes, according to the District, that "the term 'non student attendance days' was created by the District and explained to the Association's bargaining committee". Beyond this, and citing Sec. 111.07(3), Stats., the District contends that the "burden of proof here is on the complainant to show that there was no meeting of the minds as alleged in the complaint". The District's next major line of argument is that "(e)ven if there was no meeting of the minds with respect to the interpretation of Paragraph 6.D.3. of the parties' collective bargaining agreement, Paragraph 6.D.3. should be construed against the Association in light of all the facts and circumstances surrounding the parties' negotiations". More specifically, the District contends that a review of "the leave language of the parties' prior collective bargaining agreements, the negotiations resulting in the present collective bargaining agreement, the language of the present collective bargaining agreement, and the District's implementation of the present collective bargaining agreement" establishes that the Association's interpretation of the disputed language is unreasonable. Viewing the record as a whole, the District concludes that "the agreement should be construed against the Association (and the) complaint should be dismissed".

DISCUSSION

It is undisputed that the parties' labor agreement does not provide for grievance arbitration, and that the Association has exhausted the procedural requirements of the contractual grievance procedure. It is, then, appropriate to exercise the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., to determine if the District has violated the parties' collective bargaining agreement. 3/

The Association's concluding arguments question whether the District has "met the burden of proof required". The statutes and the Commission's case law address the required burden of proof. Sec. 111.70(4)(a), Stats., makes the procedures of Sec. 111.07, Stats., applicable to complaints of prohibited practice under the Municipal Employment Relations Act. Sec. 111.07(3), Stats., states the required burden of proof thus:

> . . . the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

The Commission allocates the burden of proof in cases of discipline under a just cause provision differently than in cases of contract interpretation. 4/ In cases posing issues of contract interpretation, the complainant has the burden. 5/

In this case, then, the Association bears the burden of proof. That burden requires that the Association, by a clear and satisfactory preponderance of the evidence, establish a contractual provision intended by the parties to govern the grievance, and an interpretation of that provision which is more persuasive than that of the District's.

It is undisputed that the parties intended Section 6.D. of their agreement to govern requests for taking paid personal leave. The interpretive issue posed here is whether Section 6.D.3. should be read to limit the circumstances under which paid personal leave may be taken on a Monday or a Friday. On this interpretive point, the Association has not met its burden of proof, since the District's interpretation of Section 6.D.3. is more persuasive.

Both parties assert that the language of Section 6.D.3. clearly and unambiguously supports their own interpretation of the provision. Neither assertion is persuasive. The Association's grammatical analysis of the terms "non student attendance days" persuasively demonstrates that the terms can be read to mean days on which non students (i.e. teachers) must attend, such as inservice days. Their analysis does not, however, establish that their own construction is clear and unambiguous. The terms "non student attendance days" can be read, as the District asserts, to mean days in which students do not attend school. This reading does not violate the grammatical analysis asserted by the Association, but links "student" with "attendance" as adjectives modifying "days". The "non" means the days referred to are those in which students are not in attendance. The difference between the two asserted interpretations can be clarified by hyphenating the disputed terms. The Association urges that the disputed terms should be read "non-student attendance days", while the District urges that the disputed terms should be read "non student-attendance days". The ambiguity posed here is that the contractual reference is not hyphenated.

If the terms "non student attendance days" stood alone, the Association's grammatical analysis could be considered a more persuasive interpretation of those terms than the District's. Those terms do not, however, stand alone, and the Association's grammatical analysis ignores that the disputed terms are preceded by the word "other". This word decisively favors the interpretation advanced by the District. The word "other" links the terms "non student attendance days" to "any calendar vacation day, a holiday . . .". Vacation days and holidays can not be considered "non student attendance days" as the Association interprets those terms, since neither teachers nor students are in attendance on those days. The Association's interpretation, then, reads the word "other" out of Section 6.D.3. This is a less persuasive reading of Section 6.D.3. than the District's. The District's view does, as the Association correctly notes, make the specific reference to a vacation day or to a holiday unnecessary. This flaw must be noted. However, the District's interpretation does, through reiteration, underscore the significance the District attaches to attendance on the day preceding or following a vacation or a holiday, and does not read a contractual term out of existence as the Association's view does.

Both parties have pointed to the school calendar to support their

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3/ See Winter Joint School District No. 1, Dec. No. 17867-C (WERC, 5/81).

4/ See Tomahawk School District, Dec. No. 18670-D (WERC, 8/86).

5/ See Memorial Hospital Association, Dec. Nos. 10010-B, 10011-B (WERC, 11/71), and Evco Plastics, Dec. No. 16548-E (WERC, 6/84).

interpretations, but the calendars placed in evidence do not afford determinative guidance here. The color-coded calendar does identify weekends as "Any Other Non Student Attendance Days", but it is not clear if this color-coding was mutually agreed to. The Association's assertion that the terms "No Student Attendance" in the final page of the calendar appendix define what "non student attendance days" in Section 6.D.3. means is unpersuasive. Even assuming the terms "No Student Attendance" define "non student attendance days", the fact that the terms do not appear next to the "3-Holidays" reference can support either party's interpretation of "non student attendance days", since Section 6.D.3. separately refers to holidays and to non student attendance days.

Thus, the District's interpretation has greater support in the language of the contractual provision acknowledged by the parties to govern the present dispute than does the Association's.

Since the language of Section 6.D.3. can not be considered clear and unambiguous, recourse to interpretive guides beyond that language is appropriate. None of the interpretive guides cited by the Association can, however, make the District's interpretation less persuasive than the Association's.

Bargaining history can be a useful guide for the interpretation of ambiguous contract language, but the evidence of bargaining history in this matter is of limited use, and, if anything, supports the District's interpretation. The Association cites evidence of bargaining history not to demonstrate that the parties reached a mutual understanding regarding Section 6.D.3., but to demonstrate that the District was offered an opportunity to explain its intent and failed to do so. Thus, the Association uses bargaining history as a preface to its argument that Section 6.D.3. must be interpreted against its drafter -- the District.

The Association persuasively asserts that ambiguous language should be interpreted against the drafter where the language proposed or the drafter's conduct in proposing the language is so misleading that the other party is reasonably misled regarding the drafter's intent. The present record will not, however, support applying this principle to the present record.

The language proposed by the District, while ambiguous, can not be characterized as misleading in any significant respect. As noted above, the District's proposal on Section 6.D.3. on its face can be read to include weekends. This fact did not escape the notice of Dennis Williams, a member of the Association's negotiating team, who acknowledged in testimony that he was aware the language could be given that effect. Because he did not voice his opinion to his fellow team members or to the District, his testimony does not indicate that the Association somehow agreed to or acquiesced in the District's interpretation. It does, however, make concrete what is apparent on the face of the District's proposal -- that Section 6.D.3. can be read to cover weekends. That language can be considered ambiguous, but can not be considered misleading.

Nor can the District's conduct in proposing that language be considered as misleading. Honschel's testimony is the strongest evidence advanced by the Association on this point. She credibly testified that she specifically questioned Ryun on whether Section 6.D.3. would apply to the days before and after "Thanksgiving . . . the WEAC convention . . . personal development days . . . (or) inservices . . .". 6/ Ryun responded that it would. There is no persuasive evidence that Honschel asked or Ryun stated that Section 6.D.3. would be limited to such situations. The record indicates the Association assumed such a limitation, but the record will not support a conclusion that Ryun misled the Association to this assumption.

The record, in fact, points to a contrary conclusion. Ryun and two School Board members credibly testified that Ryun explained that Section 6.D.3. was intended to prevent teachers from extending weekends. Paula Bauman, a member of the Association's negotiating team, acknowledged that "there was some discussion that employees were using personal days to extend weekends . . .". 7/ She, as at least three other members of the negotiating team, did not feel Ryun made it clear that Section 6.D.3. was specifically intended to preclude this. Each of the members of the Association's negotiating team who testified, however, acknowledged that there was discussion on the abuse of paid personal leave or on the significance of a teacher's attendance. Against this background, it is impossible to conclude Ryun or the School Board somehow misled the Association into assuming that Section 6.D.3. did not include weekends.

This is not to say that the present record involves a credibility determination and the testimony of the Association witnesses is not credible. To the contrary, there is no reason to believe any of the testifying

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6/ Transcript (Tr.) at 25.

7/ Tr. at 17.

Association or District witnesses offered anything less than their sincere view of the events of May 11, 1988. Rather, the record indicates the parties papered over a significant area of potential dispute in their determination to wrap up a three year contract on that evening. Going into the evening of May 11, the parties had, in two negotiations sessions, failed to agree on a salary schedule, an extra-curricular schedule and a calendar to govern the 1988-89 school year. In three to three and one-half hours on May 11, 1988, the same parties agreed to a total economic and language package to cover the 1988-89, the 1989-90 and the 1990-91 school years. It can not be considered surprising that in the haste to tie up a three year agreement, not every area of potential dispute was fully realized.

That the parties papered over a potential dispute regarding Section 6.D.3. does not mean that that provision can not be given effect. It is apparent that the parties intended the provision to govern certain requests for paid personal leave. The record will not support a conclusion that the School Board misled the Association into assuming that Section 6.D.3. would not apply to weekends. That assumption has no reasonable basis in the language of Section 6.D.3., which, on its face, must be read to apply to weekends. It follows that Section 6.D.3. should not be construed against the District based on the Association's erroneous assumption on its scope.

The remaining Association arguments question whether the District's interpretation produces a ludicrous or inequitable result. Testimony of both Association and District witnesses indicates the potential abuse of paid leave provisions concerned both parties. Student/teacher contact is a significant point. That the District would seek to encourage such contact by seeking to limit teacher discretion to extend weekends is not surprising. That the Association would be willing to cede such discretion can not persuasively be characterized as inconceivable or ludicrous. Beyond this, it is impossible on the present record to conclude that the Association gave up more than could reasonably be expected. The Association secured a three year agreement during negotiations under a limited reopener covering one school year. The trade-offs involved are, at a minimum, difficult to weigh, and the scope of the concession questioned here should not be exaggerated. The record establishes that a teacher can still secure paid leave with Board consent, and that unpaid leave is also available. The record will not support the Association's assertion that the District's interpretation produces a ludicrous or inequitable result.

In sum, the Association bears the burden of establishing, by a clear and satisfactory preponderance of the evidence, the existence of a contractual provision intended by the parties to govern the grievance, and an interpretation of that provision which is more persuasive than that of the District's. In this case, the parties acknowledge that Section 6.D.3. of the 1988-91 labor agreement governs the present grievance. The District's view of Section 6.D.3. is more persuasive than that of the Association. Although that provision can be considered ambiguous, the District's interpretation resolves the ambiguity without reading any of the contractual terms out of existence. Evidence of bargaining history will not support a conclusion that the District's conduct in drafting and in advocating its proposal on Section 6.D.3. was so misleading that the Association reasonably assumed that the proposal could not apply to weekends. Nor will the record support the Association's assertion that the District's interpretation of Section 6.D.3. produces a nonsensical result. The Association has not, then, met its burden of proving a District violation of the parties' collective bargaining agreement. Accordingly, no violation of Section 111.70(3)(a)5, Stats., has been found, and the complaint has been dismissed.

Dated at Madison, Wisconsin this 28th day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Richard B. McLaughlin, Examiner