STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Mr. Kenneth Pfile, Executive Director, South West Education Association, 145 West Barber Street, Livingston, Wisconsin 53554, and Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708, 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.

ORDER AFFIRMING EXAMINER'S 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.

On August 28, 1989, Examiner McLaughlin issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum wherein he concluded that the District had not violated Sec. 111.70(3)(a)5, Stats. and therefore dismissed the Union's complaint. The Union filed a petition with the Commission September 14, 1989 seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties filed written argument, the last of which was received November 10, 1989. The Commission has considered the record, the Examiner's decision, and the parties' arguments on review and concluded that the Examiner should be affirmed.

NOW, THEREFORE it is

ORDERED 1/

That the Findings of Fact, Conclusions of Law and Order issued by Examiner McLaughlin on August 28, 1989 are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of December, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6)

(Footnote one continued on page three)

1/ continued

> and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.
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> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.
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> . . .
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> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Pleadings

The complaint alleges that the District violated Sec. 111.70(3)(a)5, Stats. by the manner in which it administers the personal leave provisions of the parties' 1988-1991 contract. The Union asserts that the District's interpretation of the phrase "non student attendance days" in Section 6.D.3 of the contract improperly denies employes the right to use personal days on a Monday or Friday.

The District's answer admits that it is interpreting Section 6.D.3. in the manner asserted by the Union but denies that its administration of the personal leave language is contrary to the parties' agreement.

The Examiner's Decision

The Examiner concluded that the District was properly administering the personal leave provisions of the 1988-1991 contract and thus dismissed the complaint.

The disputed contractual language provides:

> 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.
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> 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.

. . .

The Examiner commenced his analysis of the disputed contract language by concluding that while Section 6.D.3. was not clear and unambiguous, the District's interpretation of the language "has greater support in the language of the contractual provision . . . than does the Association's". He reasoned:

> 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.
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> 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.

As he found Section 6.D.3. could not be considered clear and unambiguous, the Examiner found it appropriate to examine evidence of bargaining history presented by the parties. He held:

> 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 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.

6/ Transcript (TR.) at 25.

7/ Tr. at 17.

Lastly, the Examiner considered and rejected the Union assertion that the District's interpretation of the language produces a ludicrous or inequitable result. He stated:

> 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.

POSITIONS OF THE PARTIES ON REVIEW

The Union

While acknowledging that the Examiner "is to be commended for his considerable insight as to how this dispute developed as well as his exacting legal and syntactical analysis", the Union contends that the Examiner should be reversed. The Union asserts that "both common sense as well as basic laws of contract construction" dictate that the District's position can prevail only if the District had used the term "weekend" in Section 6.D.3. or else made it clear to the Union that "non student attendance days" included weekends. As the District did neither of the above, the Union believes the District's position must fail.

The Union notes that the term "weekend", like the terms "vacation" and "holiday" found in Section 6.D.3., is a commonly accepted concept that "no one defines it in terms of student attendance". Given the use of the terms "vacation" and "holiday" in Section 6.D.3., employes could reasonably expect that when the District then used the phrase "non student attendance days", said phrase was not being used to include common concepts like "weekends" but was instead being used as a technical term encompassing inservice and convention days. The Union also points out that the interpretation of "non student attendance days" advanced by the District and adopted by the Examiner renders the words "vacation" and "holiday" surplusage.

The Union urges the Commission to view with some skepticism the testimony of District witnesses to the effect that the Union bargaining team was advised of the District's intent that personal days not be used to extend weekends. It argues that on cross examination the focus of the testimony of the District's chief spokesperson became extension of vacations and holidays and that the term "weekend" becomes "conspicuously absent".

In conclusion, the Union argues:

> . . . correct resolution lies in the application of basic concepts of human discourse. Unless the Commission wishes to employ the language of the Pentagon or other infamous abusers of the English language, a weekend simply is not two non-student (sic) attendance days.

The District

The District urges the Commission to affirm the Examiner. The District argues that the Examiner properly and exhaustively considered the disputed language, bargaining history, prior contract language, the parties' intentions, and the consequences of adopting the District's interpretation before concluding that the District had not violated the contract.

DISCUSSION

Like the parties, we commend the Examiner on the quality of his analysis of the contractual dispute before him. Unlike the Union, we also find that his analysis produces the correct result as to the interpretation of Section 6.D.3.

Given the exhaustive and persuasive nature of the Examiner's analysis quoted earlier herein, we will only comment briefly on several points. Like the Examiner, we conclude use of the word "other" in Section 6.D.3. prior to the phrase "non student attendance days" provides critical support for District's position. 2/ We so conclude not through an "epistemological dissection" of the contract language but simply on the basis of what we view as a reasonable interpretation of the language in issue. On balance, we also find the Examiner was correct when he determined the testimony of the parties as to bargaining table discussions was, if anything, supportive of the District's position. Contrary to the Union's arguments on review, we find no inconsistency between the testimony of the District chief spokesperson on direct examination and on cross examination. Contrary to the Union's assertion, the term "weekend" is not "conspicuously absent" on cross examination. While the Union correctly cites the absence of the phrase "weekend" at Tr. 82, the phrase is used or encompassed within the spokesperson's testimony on cross examination on three other occasions at Tr. 80, 81 and 83. Thus, it was clearly appropriate for the Examiner to conclude, based on testimony of District chief spokesperson Ryun and two School Board members, that Ryun advised the Union bargaining team that Section 6.D.3. was intended to prevent teachers from extending weekends.

Given the foregoing, we have affirmed the Examiner.

Dated at Madison, Wisconsin this 29th day of December, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner

2/ We note that in its briefs on review, the Union repeatedly cites the key contract language as being "non-student attendance days" instead of non student attendance days". The Examiner correctly noted that had a hyphen appeared between "non" and "student" in the contract, the Union's position would be enhanced.