

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RHINELANDER EDUCATION ASSOCIATION, Complainant,

vs.

SCHOOL DISTRICT OF RHINELANDER, Respondent.

Case 48
No. 57661
MP-3530

Decision No. 29716-B

Appearances:

Mr. Gene Degner, Executive Director, Northern Tier Uniserv, P.O. Box 1400, Rhinelander, Wisconsin 54501, appearing on behalf of the Complainant.

Quarles & Brady, LLP, by **Attorney Michael Aldana**, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Rhinelander Education Association (the Complainant) filed a complaint with the Wisconsin Employment Relations Commission (the Commission) on June 24, 1999, alleging that the School District of Rhinelander (the Respondent) had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act (MERA), by denying the requests of John and Deana Bigley for paid leave in order to attend the 1999 NCAA Wrestling Tournament. On September 9, 1999, the Commission issued an order appointing the undersigned as Examiner. On October 4, 1999, the Respondent filed a motion to dismiss and, on October 5, filed an answer, as well. The Complainant filed an amended complaint on October 6, withdrawing the allegation of a violation of Sec. 111.70(3)(a)4 and adding an allegation of a violation of Sec. 111.70(3)(a)5 and, as a result, the motion to dismiss was denied. A hearing was conducted on October 21, 1999 and November 18, 1999. The parties filed briefs and the record was closed on January 14, 2000.

No. 29716-B

The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. The Complainant, Rhinelander Education Association, 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501-1400, is a labor organization as defined in Sec. 111.70(1)(h), Stats.

2. The Respondent, School District of Rhinelander, 315 South Oneida Avenue, Rhinelander, Wisconsin 54501, is a municipal employer as defined in Sec. 111.70(1)(j), Stats.

3. The Respondent recognizes the Complainant as the exclusive and sole bargaining representative for certain certified professional employes of the District, including non-supervisory certified teaching personnel, guidance counselors and department heads.

4. John Bigley is an eighth grade science teacher at James Williams Junior High School in Rhinelander, has been a teacher in the Rhinelander School District since 1974, and is a member of the bargaining unit. During his employment he has also coached various sports on the Varsity, Junior Varsity and Junior High levels and has served for twelve years as Athletic Director at the Junior High School. Bigley does not live within the Rhinelander School District and his children have never attended Rhinelander schools.

5. Deanna Bigley is married to John Bigley, is a physical education teacher at James Williams Junior High School in Rhinelander, and is a member of the bargaining unit. She has been a teacher in the Rhinelander School District since 1974, with the exception of a period in the late 1980s when she was a teacher at Nicolet College during a layoff. In her job she teaches students the fundamentals of a variety of sports, including football, basketball, wrestling, gymnastics, tumbling, track and field, and softball.

6. The Complainant and Respondent were, at all material times, parties to a collective bargaining agreement dated July 1, 1997 and covering the period from July 1, 1997 to June 30, 1999. Article II of the agreement states, in pertinent part, as follows:

II. MANAGEMENT RIGHTS

A. The Board retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the term of the collective bargaining agreement except to the precise extent that functions and rights are explicitly, clearly and unequivocally restricted by the express terms of this Agreement. These rights include, but are not limited by enumeration to, the following rights:

1. To direct all operations of the school system;
2. To establish and require observance of reasonable work rules and schedules of work;
3. To hire, promote, transfer, schedule and assign employees in positions with the school system;
4. To suspend discharge and take other disciplinary action against employees;
5. To relieve employees from their duties;
6. To maintain efficiency of school system operations;
7. To take whatever action is necessary to comply with State or Federal law; or to comply with State or Federal agency decisions or orders;
8. To introduce new or improved methods or facilities;
9. To select employees, establish quality standards and evaluate employee performance;
10. To contract out for goods or services;
11. To determine the methods, means and personnel by which school system operations are to be conducted;
12. To take whatever action is necessary to carry out the functions of the school system in situations of emergency;
13. To determine the educational policies of the school district;
14. To determine all school activities;
15. To determine the means and methods of instruction, the selection of text-books and other teaching materials and the use of teaching aids, class schedules, hours of instruction, length of school year and terms and conditions of employment.

B. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement and Wisconsin Statutes, Section 111.70, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States.

Article VI of the agreement states, in pertinent part, as follows:

B. Personal Leave: One (1) day per year shall be granted teachers for personal leave. Such leave shall be deducted from sick leave.

1. Teachers will notify their immediate supervisor of their intent to take personal leave at least twenty-four (24) hours prior to the leave in writing whenever possible.
2. While it is expected that teachers will use their leave for important reasons, the decision of what is important lies with the teacher. Personal leave should not be used for recreation or to extend any holiday or vacation periods, as shown on the present school calendar.
3. In the event of special circumstances, for example, failure of a plane to fly during bad weather conditions, the teacher shall notify the principal immediately and the principal will notify the Superintendent.
4. Administration will deny personal leave only when the teacher cannot be replaced or schools cannot be appropriately staffed without said teacher.
5. If a teacher does not fulfill the obligation of his/her teaching contract with the Board, by not attending work on a day he/she is required to attend, this violation constitutes a breach of contract.
6. Personal leave may be accumulated at the rate of one (1) day per year to a maximum of three (3) days. Upon accumulation of three (3) personal leave days, teachers shall not be allowed to accumulate any further.
7. The grievance procedure contained in the collective bargaining agreement does not provide for final and binding arbitration.
8. The collective bargaining agreement makes no provision for the extension to bargaining unit members of additional paid leave or vacation beyond the amounts and increments set forth therein. Historically, however, the District Superintendent, without objection by the Union, has exercised discretionary authority to grant additional leave to faculty members upon request, either as an excused absence, for which pay is not deducted, or as unpaid leave. Since at least 1991, the District has used a leave report form which lists excused absence and unpaid leave as two of the options in addition to the various types of leave set forth in the contract. Although there is no written policy regarding when excused absences

are granted, in recent years the administration has granted excused absences to teachers to attend athletic tournaments in which their children are participants. Unpaid leave has been granted to teachers for a variety of reasons, including family reunions, children's graduations, and college visitation trips.

9. From 1996 through February, 1999, excused absences with pay were given to: Bill Makris, on February 25 and 26, 1999, to watch his son compete in the WIAA State Wrestling Tournament, on March 20, 1997, to watch his son compete in the WIAA State Basketball Tournament, and on March 21, 1997, to lead a school sponsored field trip with students; John and Deana Bigley, on March 19 and 20, 1998, to watch their son compete in the NCAA National Wrestling Tournament; Cheryl Hanson, on March 22, 1997, to watch her son compete in the WIAA State Basketball Tournament; Steve Jensen, on February 21, 1997, to attend the State Swim Meet; and Rich Fortier, on May 13, 1996 and June 6, 1996, for unspecified reasons. Additionally, Fortier, the Rhinelander High School basketball coach, was given an excused absence on March 16 and 17, 1999, prior to the commencement of the WIAA Tournament, in which Rhinelander was competing.

10. From 1994 through February, 1999, unpaid leave was granted to: Mike Piehl, on May 5-7, 1999, to accompany his wife on a trip (while the trip took place in May, the request for leave was processed on February 13, 1999); Bill Makris, on January 29, 1999, April 16, 1998, February 2, 1998 and February 19, 1997, to accompany his children on college visitation trips; Pete Biolo, on November 20, 1998, to attend football playoffs, and on November 21, 1997, for unspecified reasons; Sue Kuckhahn, on May 7-9, 1997, to attend her daughter's graduation; Deana Bigley, on June 3, 1994, to watch her son compete in the WIAA State Track Meet, and on March 16 and 17, 1994, to accompany her son on a college visitation trip; and Liz Wahlstrom, on March 3-7, 1994, to attend a family reunion.

11. Prior to March, 1999, the only apparent instance where a request for paid leave was denied was on February 20, 1997, when Bill Makris requested emergency leave to accompany his son on a university visit. The request was denied and Makris was required to use unpaid leave, instead.

12. In November, 1998, John Bigley informed the new Superintendent, Robb Jensen, who had taken his position with the District on July 1, that he and Mrs. Bigley wished to use their personal day to attend their daughter's college graduation in May. He also told Jensen that the previous year he and his wife had been given an excused absence for two days to attend their son's wrestling tournament, and that, should he qualify this year, they would probably request an excused absence again. Jensen told him the personal day would be approved, but also indicated that he didn't know whether he could honor a request for an additional excused absence because the collective bargaining agreement did not provide for it.

13. On February 2, 1999, the Bigleys sent Jensen the following letter:

Date: 2-11-99

To: Robb Jensen, Superintendent

From: John & Deana Bigley

Re: Request to Attend 1999 NCAA National Wrestling Tournament

As we mentioned to you in November, the spring semester of 1999 is going to be a very demanding one for the Bigley family.

Our son, Ken, and our daughter, Amber, are seniors graduating with honors. Having achieved such accomplishments Deana and I plan to attend their graduations. Ken graduates Saturday, May 8, from the University of Northern Iowa and Amber graduates from the College of the Ozarks on Sunday, May 9. We plan to use our only personal day on May 10 because we will not be able to make the 13 hour trip back to Rhinelander by Monday morning.

On Saturday, March 6, Ken ranked among the top twenty wrestlers in his weight class in the nation, will compete at the regional wrestling tournament held at Howard University in Washington, D.C. to qualify for the National Division 1 Championships. Should he qualify, Deana and I are requesting to be excused, as we were last year, with pay to attend this national tournament to be held at State College, Penn. March 18 to the 20. We would be absent on March 18 and 19. We have arranged for substitute teachers, trusting our request will be granted.

Attached is a copy of our request last year which was approved.

A check of our use of personal days will show that we have used such days very sparingly in our twenty plus years of service to the district. One can not (sic) predict the future, but to be this busy with our children's accomplishments in the future is hard to imagine.

Thank you for your consideration of this request.

14. On March 3, 1999, Laura Millot, the District's Human Resources Director, sent the Bigleys the following response:

Dear Mr. And Mrs. Bigley:

The School District of Rhinelander is in receipt of your request for personal leave for the date May 10, 1999 and paid leave for March 18-19, 1999. Review of the collective bargaining agreement indicates that personal leave is not to be utilized for recreational purposes. In as much as the purpose of your leave is not in conflict with the agreement, it is **APPROVED**.

With regard to your request for paid leave, as was discussed previously with Mr. Jensen, this is not a benefit afforded to teachers of the District per the collective bargaining agreement. Although it may have been approved last year, this does not constitute a practice. Given the District's support of parental involvement by its staff members, your request for time away from work has been **APPROVED** under the auspices of **UNPAID LEAVE**. This leave is not addressed in the agreement nor is it a specifically bargained for benefit, but the past practice of the District indicates that employees have been approved for unpaid leave for a variety of reasons.

Please be advised that the administration is concerned with your absence from the classroom. Because we believe so strongly that your presence in the classroom is integral to the academic achievement of the children, we consider it our obligation to discourage your absence.

In the event that you have any questions, please do not hesitate to telephone me at 365-9734.

Very truly yours,

Lauri Millot /s/

Lauri Millot
Human Resources Director

15. On March 16, 1999, and pursuant to the grievance procedure set forth in the collective bargaining agreement, the Bigleys and Jackie Cody, the Union President, filed a grievance with Chuck Radtke, principal of James Williams Junior High School, setting forth the basis for their grievance as follows:

Bill Makris was granted paid leave to attend his son's wrestling tournament during February, 1999.

The Bigleys' request for paid leave to attend their son's wrestling tournament was denied by the School District of Rhinelander.

And seeking the following relief:

The Bigleys receive fair and equal treatment.

The Bigleys be granted the requested paid leave to attend their son's wrestling tournament.

Radtke responded to the grievance on March 18, 1999, as follows:

Dear John and Deana,

The decision for leave in this case in (sic) not within my authority to approve or disapprove.

The collective bargaining agreement does not address paid leave.

You may want to proceed to step 2.

16. On March 22, 1999, pursuant to Step 2 of the grievance procedure, the Bigleys and Cody submitted the grievance to Superintendent Jensen. Jensen responded in a letter dated April 6, 1999, as follows:

Dear Ms. Cody:

On Tuesday, March 30, 1999 the Step 2 grievance conference was conducted in relation to the above-referenced grievance. At that conference, you, Deana Bigley and John Bigley had the opportunity to explain your rationale for the grievance. Subsequently, I have reviewed the collective bargaining agreement in light of the information that was shared during the conference. Based on this analysis, I concur with the decision of Mr. Radtke and am denying this grievance.

The collective bargaining agreement with the Rhinelander Education Association does not identify a "paid leave" benefit. The District retains the management right to direct the operation of the organization. This right has included approval of excused leave in pay status for staff members under circumstances

but their attendance does not provide a “flow through” benefit to the District nor is their request sufficiently similar to that of Mr. Makris to justify paid attendance.

Sincerely,

Robb Jensen /s/

Robb Jensen
Superintendent of Schools

17. On March 18 and 19, 1999, while the grievance process was underway, the Bigleys took unpaid leave to attend their son’s wrestling tournament. As a result, John Bigley received a reduction in pay totaling \$487.20 and Deana Bigley received a reduction in pay totaling \$398.42.

18. In denying excused absences to John and Deana Bigley on March 18 and 19, 1999, the District violated its implicit obligation to exercise its management rights in a non-arbitrary, non-capricious and non-discriminatory fashion.

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

CONCLUSIONS OF LAW

1. The District’s actions in denying paid excused absences to John and Deana Bigley on March 18 and 19, 1999, were not a direct or derivative violation of Sec. 111.70(3)(a)1, Stats.; therefore, said claim is dismissed.

2. The District, as a result of the arbitrary, capricious and discriminatory exercise of its management rights, as set forth in Finding #18 above, did violate the terms of the agreement and Sec. 111.70(3)(a)5, Stats.

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

ORDER

IT IS HEREBY ORDERED that the District shall reimburse John and Deana Bigley and make them whole for any and all wages withheld, along with any corresponding reductions in other benefits, with interest accrued from the dates of the violations at the rate of 12% per annum, 1/ for March 18 and 19, 1999.

1/ The applicable interest rate is that set forth in Sec. 814.04(4), Stats., and in effect when the original complaint was filed on October 10, 1996, which was 12 percent.

Dated at Eau Claire, Wisconsin, this 8th day of March, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

SCHOOL DISTRICT OF RHINELANDER

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITION OF THE COMPLAINANT

The Union contends that, under the previous superintendent, the District had a policy of granting excused absences, with pay, outside the leave provisions contained in the collective bargaining agreement, to District employees in order to attend functions or competitions of their children resulting from excellence in athletics or achievement. Under this policy, John and Deana Bigley, along with several other teachers, were given paid leave to attend state and national athletic tournaments in which their children were participants. In 1999, the Bigleys again sought paid leave to watch their son compete in the NCAA Division I wrestling tournament and their request was denied. The articulated reason for the denial is that paid leave is only available where the child is a student in the Rhinelander School District. This arbitrary change in policy has the effect of denying a benefit to the Bigleys, which they previously enjoyed, while preserving it for others, without a legitimate basis.

The District's previous policy constitutes a recognized past practice under Article VI, Section B of the contract of permitting extra paid leave to bargaining unit members to attend events of honor or competition for their children. Furthermore, the High School Basketball Coach was given four days of paid leave in March, 1999, when Rhinelander was in the State Tournament, even though the tournament itself only encompassed two school days. In 1998, the Bigleys, themselves, had been given two paid days to watch their son compete in the NCAA Wrestling Tournament. Although the record does show occasions when the Bigleys asked for and received unpaid leave to attend events for their children, these occurred in years past, before they became aware that teachers were granted paid leave for such things. The record does not reflect, however, any occasion when the Bigleys were refused paid leave prior to March, 1999.

The new policy is unfair and inequitable for several reasons. First, it is a departure from past practice without notice or justification. Second, it has a disproportionate impact on the Bigleys because, since both are teachers in the District, each unpaid day exacts a double penalty. Third, not only does the rationale for the current policy lack merit, but it gives the impression of disparate treatment because one of the few teachers who has benefited from the change is also the spouse of a School Board member. The District argues that paid leave is only granted in circumstances where there is a benefit to the District, nevertheless the record is clear that there was no benefit to the District when the Board member's husband was permitted to attend the State High School Wrestling Tournament in March, 1999, to watch his son. There is, however, an arguable benefit to the District in allowing Deana Bigley to attend the

NCAA Tournament because she teaches wrestling as part of her physical education curriculum and being able to observe such a high level of competition gives her an opportunity to learn techniques which she can incorporate into her teaching.

It is no justification that the District has denied paid leave in the past for trips with spouses, family reunions, and the like. These cases are distinguishable on their facts and evidence regarding the circumstances surrounding the requests was not entered into the record. What is clear is that the current superintendent has interpreted and applied the District leave policy in an arbitrary fashion, to the cost of the Bigleys. As a result, the District has violated the contract, as well as Secs. 111.70(3)(a)1 and 5, Stats., and the Bigleys are entitled to the two days' pay which was withheld from each of them, plus interest.

POSITION OF THE RESPONDENT

The District maintains that the complaint is without merit and should be dismissed because the record is clear that the Bigleys received all the paid leave to which they were entitled under the collective bargaining agreement. The language of the agreement is clear and unambiguous and there was no established past practice of automatically giving teachers paid leave to attend their children's events. To the contrary, the Bigleys were treated the same as other teachers in similar circumstances and consistent with District policy.

The Union filed a prohibited practice complaint because the collective bargaining agreement does not provide for grievance arbitration. Accordingly, the Union must establish a violation of Sec. 111.70(3)(a)5, Stats., in order to sustain its claim, which it cannot do. There was no violation of the agreement because the Bigleys received all the paid leave to which they were entitled. They each had only one day of contractually provided personal leave available, which they elected to use to attend their daughter's graduation. Nothing in the contract can be construed to provide any entitlement to additional personal leave and they, in fact, agreed that no such benefit is expressly provided by the contract.

Likewise, there is no consistent and mutually agreed past practice of allowing teachers paid leave to attend their children's events. To the contrary, the record establishes that the only time paid leave has been granted in the past is when the District has benefited thereby, and that teachers who sought leave for other reasons have had to take it without pay. Mrs. Bigley took unpaid leave in 1994 to watch her son, not a Rhinelander District student, compete in the State Track Meet. The paid leave given the Bigleys in 1998 was an exceptional case in which they agreed to make up the time at a later date and cannot be used as precedent.

The Union's argument of discrimination, or disparate treatment, also fails. The record reveals that no similarly situated teacher received a benefit which was denied to the Bigleys. In each case where a teacher was given additional paid leave there was a corresponding benefit to the District. Such was the case with Bill Makris. He received paid leave to attend the State

High School Basketball and Wrestling Tournaments, in which his son was competing as a Rhinelander student. As a Rhinelander teacher, Makris' presence at the tournament was good for the school's image. Further, had problems arisen, Makris was on the scene to render assistance and to provide leadership, which the District could rightfully expect him to do under such circumstances. On those occasions he was a representative of the Rhinelander School District, as well as a parent, and it was for that reason that he was granted paid leave. The Bigleys' son was not a Rhinelander student and no benefit was conferred on the District as a result of their attendance of his tournaments. Other than the Bigleys in 1998, there is no evidence of any teacher being given paid leave to attend a child's sporting event where that child was not a Rhinelander student. There is no basis to the argument that the Bigleys were treated differently than others; therefore, the complaint should be dismissed.

DISCUSSION

Contract Language

On the subject of personal leave, the collective bargaining agreement is both specific and clear. Teachers are allotted one paid personal leave day per year and may accumulate up to three personal leave days at any given time. Neither party disputes the clear meaning of this language, nor does the Union contend that the Bigleys had more than one personal leave day apiece available to them under the contract when they made their request to the District. They chose to use this day to attend their daughter's graduation, which the District approved. Having used their contractually provided personal leave days, any entitlement or expectation they had to additional paid leave would, of necessity, have to lie outside the language of the personal leave clause.

Past Practice

The Union argues that there is a consistent past practice of the District extending additional paid leave days to teachers, under the rubric of "excused absence," to attend recognitions or athletic competitions involving their children. The District denies that this is so, and maintains that its consistent policy has been to only grant excused absences in cases where the teacher's absence is tied to some "flow through" benefit to the District. The record reflects that over the past several years a number of teachers have requested time off, with or without pay, for a variety of reasons. In two cases, one being that in issue here, a request for paid leave was denied and unpaid leave was offered instead. In all other instances where unpaid leave was granted, the record is unclear whether there was a prior denial of paid leave.

It has been said that, "Past practice may be used (a) to clarify ambiguous contract language; (b) to implement general contract language; or (c) to create a separate, enforceable condition of employment. Some arbitrators use past practice to modify or amend clear and

unambiguous contract language.” The Common Law of the Workplace, § 2.19 (T. St. Antoine 1st ed. 1998). In any event, however, "In the absence of a written agreement, past practice, to be binding on both parties, must be 1) unequivocal; 2) clearly enunciated and acted upon; 3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by the parties." CITY OF CUMBERLAND, CASE 18 NO. 55310 MA-9976 (MEIER, 4/23/98), quoting CELANESE CORP. OF AMERICA, 24 LA 168, 174 (JUSTIN, 1954). In this case the record does not establish that the practice in question was, in fact, unequivocal or clearly enunciated. On at least three prior occasions teachers received unpaid leave to attend athletic events. On May 31, 1994, Deana Bigley requested and received unpaid leave to watch her son compete in the WIAA State Track Meet. She testified that at the time she was unaware that teachers were eligible for paid leave for such activities and, thus, did not request it. On June 2, 1995, Kathy Vick-Martini was granted unpaid leave to attend the WIAA State Tennis Tournament and on November 19 and 20, 1998, Pete Biolo was granted unpaid leave to attend football playoffs. The record is silent as to whether these teachers were attending events involving their children, or whether either requested paid leave. On this record, therefore, I am unable to conclude that the criteria for establishing a binding past practice exist.

Managerial Discretion

The District argues that it has discretion to grant additional leave, with or without pay, under the terms of the management rights clause, which reserves to the District the right to direct all operations of the school system. Superintendent Jensen testified that additional paid leave is only given where the purpose of the absence generates some derivative benefit to the District, and that in all other cases leave must be taken without pay. Thus, in those cases where teachers have been given paid leave to attend their children's athletic competitions, the children have been Rhinelander students, playing on Rhinelander teams, and the teachers have attended not only as parents, but also as representatives of the Rhinelander School District. Because the District perceives a benefit to having its teachers attend such events, they are compensated while absent. In the case of the Bigleys, Jensen testified that no such benefit to the District attached to their absence, hence their request was denied. There are several problems with this position, however.

First, the District has never drafted nor issued a formal statement of policy on this issue. Nor does the evidence indicate that anyone, other than the Superintendent and the Human Resources Director, was even aware of any specific criteria for determining when extraordinary leave was to be with pay and when not. More to the point, Superintendent Jensen never articulated to the Bigleys, before the fact, that benefit to the District was the basis for distinguishing between a grant of additional paid leave and a grant of unpaid leave. So far as the record shows, this distinction was first made in the District's response to the grievance at Step 2 (Jt. Ex. 2-5).

An additional complication is the fact that the Bigleys received paid leave the previous year to attend the NCAA Wrestling Tournament under essentially identical circumstances. The District argues that this occasion is distinguishable based on Superintendent Jensen's impression that his predecessor granted the request on a "one time only" basis and that the Bigleys agreed to make up the days at a later time. The record does not support this assertion. Mr. Bigley made no reference in his testimony to a quid pro quo for the excused absence in 1998. Also, the Bigleys' 1998 leave request, dated March 12, 1998, and approved by Superintendent Hanson the same day, merely requests two days' excused absence with pay and makes no reference to any agreement to make up the excused days at a later time. Had the Bigleys offered to make up the days, or had Mr. Hanson predicated the paid leave on such a condition, one would expect it to be contained in the written exchange. Further, no evidence suggests that Superintendent Hanson regarded their request as extraordinary, or as a departure from existing policy. I am persuaded, therefore, that there is no meaningful distinction between the Bigleys' 1998 request, which was granted, and their 1999 request, which was denied.

If there was such a policy in place, one could assume that the previous Superintendent felt that there was a District benefit intrinsic in the Bigleys attending the tournament. Alternatively, it may be that the District had no clearly defined policy regarding additional paid leave prior to Superintendent Jensen. The record supports this in that there is no indication that Mr. Jensen ever discussed this issue with Mr. Hanson, or was even aware, prior to the conversation with Mr. Bigley in November, that teachers did ask for and receive additional paid leave in certain cases.

In either event, the current administration clearly takes a different view. It does see benefit to the District as a requirement for paid leave and does not believe the Bigleys' attendance at the NCAA Tournament conveys such a benefit. Unfortunately, whatever Superintendent Jensen may have understood or believed to be the appropriate policy, this was never adequately or timely articulated. His comments to Mr. Bigley in November were to the effect that he didn't believe he could grant additional paid leave, but he did not give a reason for his opinion (Tr. p.43). Ms. Millot's March 3 letter, denying the Bigleys' request for additional paid leave, stated that the District's position was based on the fact that such leave was not a bargained for contractual benefit, nor was it an established practice, and that it was the desire of the District to discourage them from taking extra leave due to its view that ". . . your presence in the classroom is integral to the academic achievement of the children . . ." (Jt. Ex. 2-2). This quoted language and stated rationale also appear in a February 13, 1999 letter from Ms. Millot to teacher Mike Piehl, similarly denying a request for a paid excused absence, suggesting that the District's position on extra paid leave was driven by bargaining issues and a concern for teachers being out of the classroom inordinately.

Standing alone, this correspondence gives the impression that such leave is not available, except under extraordinary circumstances, but is silent as to what those circumstances might be, except insofar as the Bigleys were granted such leave to attend the

NCAA Tournament in 1998. Contemporaneous to the denial of the Bigleys' request, however, teacher Bill Makris submitted Leave Reports on March 1 and March 19, 1999, seeking, after the fact, to receive a paid excused absence for his attendance at the State High School Wrestling Tournament to watch his son compete (U. Ex. 2-2, 3). These requests were granted, apparently summarily, and the record does not indicate the existence of any correspondence containing the District's rationale for granting the request. The rationale set forth in the letters to the Bigley's and Mr. Piehl, however, would seem to apply equally to the request of Mr. Makris.

The District argues that the significant distinction is that Mr. Makris' son was a Rhinelander student and that the Rhinelander High School team was participating in the tournament. The Union argues that the significant distinction is the fact that Mr. Makris' wife is on the Rhinelander School Board. Mr. Jensen testified that the District receives several benefits from having a teacher attend a State athletic tournament. Specifically, the teacher is an unofficial representative of the District and is seen as such by the other parents. Also, should problems arise, the teacher is available to help handle the situation (Tr. p. 50). He conceded, however, that Makris was not expressly asked to represent the District or assigned any specific duties while watching his son compete (Tr. p. 53). The teacher is under no obligation to attend any functions, organize any events, coordinate hotel reservations, generate fan support, enforce or honor a code of conduct, or do anything else. Whether any benefit accrues to the District, therefore, would seem to depend on both the teacher and the situation and not on any formal role or function the teacher is asked to perform beyond that of a supportive parent.

Management does, by contract, however, retain the right to direct the operations of the District and in this case the parties have apparently construed that right to include the authority to grant extra-contractual leave requests. This is consistent with general arbitral thought, nevertheless, the exercise of such authority may not be unreasonable or discriminatory. Elkouri and Elkouri, How Arbitration Works, 1025 (M. Volz & P. Goggin 5th ed. 1997); cf. DAVENPORT OSTEOPATHIC HOSPITAL, 79 LA 973, 977 (SLADE, 1982). This, the District failed to do. The most telling evidence in this regard is the fact that the District granted the identical request from the Bigleys the previous year. Further, when their request in 1999 was denied, no explanation was given to justify the different outcome and none appears in the record other than a change in administration. As a result, the impression given is that the District addresses such requests on an ad hoc basis and without reference to a rational and consistent policy.

The current administration no doubt believes that the policy it has articulated regarding paid leave is rational, defensible and is in the best interest of the District. It is arguable, however, that the benefit upon which the District relies is minimal, at best, inasmuch as Superintendent Jensen conceded that Rhinelander faculty have no express obligation to represent the school or act in any manner other than as a spectator when attending their children's athletic contests. Regardless, when such a policy is an apparent departure from previous practice, it is incumbent on the District to give notice to the bargaining unit and the Union of the change or modification, particularly when any such change will have a different

impact on the employees than it has done in the past. The Bigleys' request in March, 1999, was, in any meaningful sense, identical to the one which had been approved in 1998. By denying it, therefore, without first announcing the establishment or change of policy regarding excused absence requests, the District abused its discretion in the exercise of its management rights and, thus, violated the collective bargaining agreement.

Dated at Eau Claire, Wisconsin, this 8th day of March, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner