

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 SOUTHERN DOOR EDUCATION ASSOCIATION :  
 : Case 17  
 and : No. 42213  
 : MA-5610  
 SOUTHERN DOOR COUNTY :  
 SCHOOL DISTRICT :  
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Appearances:

Mr. Dennis W. Muehl, Executive Director, Bayland Teachers United,  
 appearing on behalf of the Association.  
Mr. Joseph Innis, Superintendent, appearing on behalf of the District.

ARBITRATION AWARD

Southern Door Education Association, hereinafter referred to as the Association, and Southern Door County School District, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the denial of a personal leave request. The undersigned was so designated. Hearing was held in Brussels, Wisconsin on June 21, 1989. The hearing was not transcribed and the parties filed post-hearing brief which were exchanged on July 14, 1989.

BACKGROUND

The basic facts underlying this grievance are not in dispute. The grievant, Mrs. Terry Jane Bobbe, made a request for a personal leave day for Friday, April 21, 1989 in order to travel to the University of Missouri in Columbia, Missouri so she could sing with a reunion of University Singers for the University's Sesquicentennial celebration on Saturday, April 22, 1989. Rehearsals started at 10:00 a.m. on Saturday and in order to be there at that time, the grievant requested the personal leave day for travel. The request for a personal leave day was denied by the District Administrator but the grievant was allowed to take Friday, April 21, 1989 off as leave without pay. A grievance was filed on the denial of the personal leave day and is the subject of the instant arbitration.

ISSUE

The parties' stipulated to the following statement of the issue:

Did the District violate the collective bargaining agreement, specifically Article VIII, Section E, when it denied the personal leave request of teacher Terry Bobbe?

If so, what remedy is appropriate?

PERTINENT CONTRACTUAL PROVISIONS

. . . .

ARTICLE VIII ABSENCES

E. Personal Leave. Teachers may be excused from school during the work day, with prior approval from the district administrator, for necessary personal business which requires a teacher's presence during the school day and which cannot be rescheduled outside the normal school day.

#### ASSOCIATION'S POSITION

The Association contends that the grievant should have been granted a personal leave day with pay on April 21, 1989. It submits that travel time was essential for the grievant to be in attendance at the Sesquicentennial celebration on a timely basis. It claims that this was a once in a lifetime opportunity for the grievant and was personal business that required her attendance during the school day. The Association insists that the District has in the past granted requests similar to that of the grievant, such as attendance at the Lions Convention, Wedding Attendant, See the Pope, Sons College Honor, UW Madison, etc. It maintains that while the present District Administrator has been employed by the District for only one year, he is bound by the practice of his predecessors until such time as notice is given through negotiations to end the past practice and the evidence failed to demonstrate any notice to this effect. The Association argues that the District is bound by the past practice and also by the policy with respect to personal leaves as determined by the bargaining history of the parties. It notes that the language on personal leave first appeared in the 1981-83 contract and gave the Administrator discretion in terms of granting leave. After there was dissatisfaction with the implementation of this language, the Association pointed out that it proposed different language for 1983-84. The Association contends that the result was that the language did not change but it was agreed that future leaves would be determined by past leaves and where leave was acceptable in one case, it would be acceptable in all. The Association relies on two arbitration cases involving the Saydel Consolidated School District which held that a past practice on leaves must be continued absent a negotiated change. The Association requests that the grievance be sustained and the grievant be paid for April 21, 1989.

#### DISTRICT'S POSITION

The District contends that the clear and unambiguous language of the parties' agreement gives the District Administrator the authority to grant or deny personal leave requests. It refers to Article VIII, Section E, as providing that personal leave is discretionary as evidenced by the use of the word "may". It maintains that these conditions must be fulfilled for personal leave; 1) prior approval of the Administrator, 2) necessary personal business requiring the teacher's presence, 3) cannot be scheduled outside the normal school day. It argues that each leave request must be evaluated on its specific facts and circumstances. The District notes that there were ten (10) incidences similar to the grievant's request which were denied as personal leave or taken as unpaid leave. It claims that the Administrator's decision was not arbitrary, capricious or discriminatory and should not be disturbed by the arbitrator. It takes the position that the grievant's request for travel was not "business" but "recreation" and the travel could have occurred outside the normal school day, so none of the conditions set out above were met and the request was properly denied. The District asserts that past history supports its position. It limits its history to the present Administrator's tenure since July 1, 1988 and notes that he denied requests for personal leave for travel which were not grieved. It submits that the grievant's request was subject to the same standards applied to these other requests. The District believes that the Association failed to prove a binding past practice, and furthermore, the contractual language is clear and unambiguous so resort to past practice to deny the plain language of the agreement is inappropriate. The District argues that the past history of personal leave requests relied on by the Union involved different administrators and none matches the grievant's situation. It insists that a past practice must be unequivocal, clearly enunciated and readily ascertainable over a long period of time, and in this case the Association has not shown that any practice meets these requirements.

It submits that no past practice exists on the use of personal leave for travel time. The District takes the position that the granting or denial of personal leave is the result of its exercise of management discretion and the exercise of discretion does not create a past practice especially in light of clear contract language. It claims that "past practice" cannot be used to "water down" express language that was bargained between the parties and the clear and unambiguous language best reflects the parties' intent. For the reasons set forth above, the District requests that the grievance be denied.

## DISCUSSION

Article VIII, Section E provides that personal leave requires the prior approval of the district administrator. While the plain language gives the district administrator discretion to grant or deny personal leave, the administrator must exercise such discretion in an equitable and consistent manner. 1/ Each request must be viewed on its own facts but equitable treatment requires granting or denial of a request in accordance with past practice. Past practice here is not reviewed to vary the clear and unambiguous language of the contract but is applicable to the consistency of the exercise of discretion by the administrator in granting or denying leaves. Additionally, the practice here does not relate solely to a management right where the administrator has the sole discretion to change but rather this involves a benefit to employees where the exercise of discretion must be consistent and the practice is reviewed to see if the exercise of discretion is in fact consistent. Although the District has argued that the present administrator has exercised his discretion consistently and is not bound by his predecessors, the undersigned does not find the latter argument persuasive. The Association's and employees' expectations and understandings as to the granting of leaves is not subject to the personal interpretation by each administrator but rather depends on the interpretation of the contract and its consistent application no matter how many changes occur in the administration.

Otherwise, the Association would have to continually bargain on personal leave with each change in administrator. Thus, the entire past practice must be considered and not just the past practice of the present administrator. The bargaining history supports this conclusion. 2/ It appears that in the past, personal leave was granted for a wide variety of reasons including son's graduation, sister's wedding, vacation, antique show, family reunion, Lions convention, wallpaper and no reason. 3/ Even accepting the District's argument that past practice should involve the present administrator only, the evidence indicates a wide range of reasons for approval of personal leaves. The District points out that some teachers did not request personal leave in circumstances similar to the grievant's. 4/ These requests were to accompany a spouse on a trip or to see a relative or to excuse reporting to work due to weather. 5/ These are not exactly similar to the grievant's case and the fact that the other teachers chose not to seek pay does not establish that the grievant is not entitled to a personal leave under her circumstances. 6/ A review of some of the personal leaves granted in 1988-89 indicates that Richard Barker was granted leave for the Lions Convention, Katherine Charles to meet her son arriving at airport, Dan Frater to take his car in, Robert Kinziger for his brother-in-law's wedding, Gary Langenberg's father's retirement ceremony, Theresa Mueller for moving, Carol Nimlos for a family business meeting, Sharon Rogness for son's Christmas program, Jim Zellmer for sister's wedding, Rich Fahey for son graduating-Navy, Mary Greisen for son's Christmas concert, Darlene Harmann for daughter graduating, Julie Peterson for attendant for wedding, and Dale Winkler for Financial matters. 7/ Given the above instances, the undersigned finds that the necessary personal business requirement of Article VIII is broadly interpreted so that separating recreation from business is difficult if not impossible. Attendance at a son's graduation or Christmas concert or the Lion's convention is difficult to distinguish from attendance to sing at the University's Sesquicentennial Celebration. The undersigned concludes that the grievant's request, while not exactly similar to other requests, was not so dissimilar from the others granted that the District's consistent practice should result in a denial of her leave request. Although this is a close case, the evidence demonstrated that there was not a valid distinction between the grievant's request for personal leave and the District's past practice as evidence by those leaves that were granted. In short, the Administrator did not exercise his discretion in a consistent manner in denying the grievant's request. Thus, the undersigned concludes that the District violated the agreement by denying the grievant's request for personal leave.

Based on the above and foregoing, the record as a whole, and the arguments of the parties, the undersigned issues the following

- 1/ Hennepin Technical Centers, 86 LA 1292 (Kapsch, 1986); Saydel Consolidated School District, 75 LA 953 (Belcher, 1980).
- 2/ Ex. - 8.
- 3/ Exs. - 10 & 11.
- 4/ Ex. - 12.
- 5/ Id.
- 6/ Saydel Consolidated School District, 76 LA 673 (Nathan, 1981) at 675.
- 7/ Ex. - 11.

AWARD

The District violated Article VIII, Section E of the collective bargaining agreement when it denied the grievant's personal leave request for April 21, 1989, and the District is directed to make the grievant whole and pay her for April 21, 1989.

Dated at Madison, Wisconsin this 1st day of August, 1989.

By \_\_\_\_\_  
Lionel L. Crowley, Arbitrator