BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WAUKESHA SCHOOL DISTRICT EMPLOYEE'S UNION LOCAL 2485, of the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	Case 59 No. 42622 MA-5751
and	
WAUKESHA SCHOOL DISTRICT	

Appearances:

Mr. Robert Chybowski, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W345 S4011 Virgin Forest Drive, Dousman, Wisconsin 53118, appearing on behalf of Waukesha School District Employee's Union Local 2485, of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Gary M. Ruesch, Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-3101, appearing on behalf of the School District of Waukesha, referred to below as the Employer or as the District.

ARBITRATION AWARD

The Union and the District are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Eleanor Jahnke, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as the Arbitrator. Hearing on the matter was conducted in Waukesha, Wisconsin, on September 15, 1989. The hearing was transcribed. The parties submitted briefs by November 13, 1989.

ISSUES

The parties stipulated the following issues for decision:

> Did the District discharge the Grievant for proper cause?
>
> If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE XVII

LEAVE OF ABSENCE

> 17.01 Application: Any employee who wishes to absent himself from his employment for any reason not specifically provided for in this Agreement must make application for a non-paid leave of absence from the Employer. All requests for leave of absence shall be made in writing at least ten (10) work days prior to the start thereof. In the event of emergency conditions, shorter notice will normally be accepted.

17.02 Employer Determination: The Employer shall determine whether or not justifiable reason exists for granting a leave of absence.

. . .

ARTICLE XXIII

RULES, REGULATIONS, AND DISCIPLINE

23.01 Rules and Regulations: The Union recognizes that the Board may adopt reasonable work rules and regulations governing the conduct, performance, and safety of employees covered by this Agreement.

23.02 Discipline: The Board may reprimand, suspend, discharge, or otherwise discipline employees for proper cause. Copies of any written notice of reprimand, suspension, discharge, or other form of disciplinary action shall be furnished to the Union, subject to the approval of the employee. Should any disciplinary action taken by the Board be found to be unjustified, the employee or employees involved shall be reimbursed any wages and benefits lost as a result of such discipli-nary action.

ARTICLE XXIV

GRIEVANCE PROCEDURE

24.01 Definition and Procedure:

. . .

Step 3: . . . The arbitrator shall be limited in power to the determination of the terms of this Agreement and shall have no authority to add to, subtract from, disregard, alter or modify any of the terms of this agreement.

BACKGROUND

The Grievant was employed by the District for about fifteen years as a Reading Aide at Heyer Elementary School. She was discharged by the District in April of 1989. At the time of her discharge, she worked two hours per day in a second grade class taught by Mary Petrie.

The grievance which prompted the present matter was filed on April 5, 1989, by Carole Kober, a Steward for the Union. The grievance form states the factual basis of the grievance thus:

> Mrs. Jahnke took an unpaid leave from 3-20 to 3-23. This was okayed by the classroom teacher and building principal. She has taken the four day prior to Good Friday for 15 yrs. She stated her intent to do this on a yearly basis when she was hired. She returned on 4-3 after spring break and was dismissed.

Jack Bothwell, the Principal of the District's Heyer Elementary School, answered the grievance for the Employer thus:

. . .

> I have carefully considered all of the information presented by you and Mrs. Kober in that meeting. I continue to maintain that I had no other alternative but to recommend termination of your employment at Heyer School after you chose to take four days of vacation when your request for those four vacation days had been denied.
>
> I am certain that before you left for the four day vacation, you were aware that termination of your employment would be the consequence to your choice of action. It is for this reason that I believe the consequence was in order. Your action was a direct contradiction with an action directive, and, you were aware of the ensueing consequence.

The Grievant testified that due to the nature of her husband's business, her family takes a vacation each year around Easter. Her family has followed this schedule for about twenty years. At the time she applied for work as an Aide with the District, she informed the then incumbent Personnel Director, Paul Dyvad, and the then incumbent principal of Heyer Elementary School, Bill Megna, of this vacation schedule. She testified that Megna, her brother in law, informed her that her vacation would not pose a problem if she could accommodate the needs of the classroom teacher she assisted, Kay Ramstack. The Grievant testified that she had no problem accommodating Ramstack's concerns. From the time of her hire until her discharge, the Grievant took the four work days preceding Good Friday as a leave of absence.

The Union was not certified as the exclusive bargaining representative of the unit of which the Grievant was an individual member until June 15, 1976.

The District did not unconditionally grant every leave request made by the Grievant. The Grievant applied for a leave of absence in a letter dated March 18, 1986, which reads as follows:

> I am a second grade aide at Heyer School, and the opportunity has come up for my husband and myself to take a family vacation to visit our son who is enrolled in school in California. I would like the following day off, March 21, 24, 25, 26, 27.

Pascal V. DeLuca, the then incumbent Executive Director of Operations for the District, responded in a letter to the Grievant dated March 25, 1986, which reads as follows:

> I am in receipt of your March 18, 1986 correspondence requesting March 21, 24, 25, 26 and 27, 1986 as excused days from your reading/large class size aide position at Heyer Elementary School.
>
> These days will be unpaid leave days. This type of unpaid work day will be excused in rare circumstances and I will not grant you another leave for this purpose in the future.
>
> If you have any questions regarding this decision, please call me.

The Grievant testified that she could not recall receiving this letter, a copy of which appears in the Grievant's personnel file and in the files maintained at Heyer Elementary School.

The next difficulty experienced by the Grievant in securing an Easter leave occurred in 1988. She requested the leave in a letter to Paul V. Roberts, the District's Executive Director of Operations, dated January 21, 1988, which reads as follows:

> We are planning a family vacation to Florida over Easter break. Section 17.01 of the Aide Master Agreement states that a leave of absence may be applied for. March 28-31 are the dates I would be absent. A qualified replacement will be found to take my hours on these days. Since we are driving, these days are needed for travel.

Roberts had been working for the District for only about a year at the time of this request, and he researched the District's practices regarding leave requests before responding to the Grievant in a letter dated January 25, 1988, which reads as follows:

> I have received your request for absence for the purpose of traveling on March 28-31, 1988.
>
> The rule of thumb is that these types of leaves are only approved on a non-regular basis. Because we have approved similar leaves over the last several years, I will not be able to approve your request.
>
> If you have any questions, feel free to contact me.

The Grievant discussed the matter with Roberts, indicating that she had already made plans which could not be unmade without great difficulty and expense. Roberts testified that he reviewed the matter, discovered that the District had been lax in enforcing its policy, and reconsidered his decision. He confirmed this in a letter to the Grievant dated January 29, 1989, which reads as follows:

> I have reconsidered your request to be absent from your aide responsibilities on March 28 through 31, 1988. I am granting you these days on a deduct basis.
>
> As we discussed, I will not be able to entertain a request of this nature from you in the future. Please plan accordingly.

The Grievant and Roberts did not discuss the issue of Easter leave from the time of this letter until February of 1989.

Bothwell testified that sometime in late January or early February of 1989, the Grievant approached him to request a leave of absence for the four work days preceding Good Friday. Bothwell stated that they discussed the matter in some detail, and that he informed the Grievant that Roberts had discussed the matter of leaves at a principals' meeting and had informed those in attendance that such requests should be granted in unique circumstances and should not be routinely granted. Bothwell informed the Grievant that he had concerns about whether the request could be granted, and that if she wished, she should write a letter to Roberts stating the reasons for the leave.

In a letter to Roberts dated February 9, 1989, the Grievant made the following request for a leave of absence:

> On March 17th, we are taking a family vacation to Florida. Due to the nature of my husband's business, this is the only time of year he is able to vacation for a two week period of time. As in the past 15 years, I am asking for 4 extra days of vacation time (8 hours of work time) from March 20th thru the 23rd. Mary Petrie, the teacher I work with, and I have discussed this matter and have worked out an agreement acceptable to her. Also, I talked with Mr. Bothwell about this situation, but do not want to place him in an adverse position. A replacement teacher has been found to work these eight hours, as has been done in past years. Mrs. Petrie has never been without an aide when I am gone. I enjoy my work and ask for your favorable consideration in the matter.

Roberts and Bothwell discussed the Grievant's request, and Roberts responded to the request in a letter to the Grievant dated February 27, 1989, which reads as follows:

> I have received your request to be absent from your teacher aide position for vacation purposes beginning March 17, 1989.
>
> As I indicated to you last year in my letter of January 29, 1989, I am sorry to inform you that I am unable to grant your request.
>
> If you have any questions, please feel free to contact

me.

Bothwell testified that shortly after the issuance of this letter, he met with the Grievant. He stated that he informed her at that meeting that if she took the vacation, she would leave him no alternative but to fire her. He testified that he referred her to her Union representative if she needed assistance. The Grievant testified thus regarding the nature and the timing of her awareness of the consequences of taking the requested, but unapproved, leave:

> Q Do you agree with the statements made that you knew for sure that you were going to be fired if you indeed went on vacation with your family at Easter time?
>
> A Not until the last day or two. It could have been no longer than two days before, because I had considered resigning first because I didn't want to create all this havoc. But I did feel it was unfair, because there were different alter-natives. So I waited until the last minute to make my final decision.
>
> I wanted to file a grievance no matter which way I went, if I resigned or if I was terminated. I didn't know until the last two days that if I resigned I could not file a grievance, and that's why I waited so long. At about that point then, I think it was when I talked to Jack, that I realized I would have to be fired in order to file the grievance. I realized that some disciplinary action would take place. 1/

In a letter to Roberts dated March 2, 1989, the Grievant's husband expressed the following concerns regarding the requested leave:

> Recently my wife . . . requested to be absent from her teacher's aide position for vacation purposes. This letter is written to confirm that due to a very busy business schedule from April through November, it is not possible for me to take an extended vacation during these months. My brother, President of our firm, and I try to schedule our vacations at different times of the year, he takes his in the Fall and I take mine in the Spring.
>
> It is essential for me to get one vacation of at least two (2) weeks duration at some time in the year. Easter has proven to be an acceptable solution. Since I want my wife . . . to accompany me, she has been doing this for the last 20 years.

1/ Transcript (Tr.) at 72-73.

> In the past she discussed this with the various principals she has worked under and administrative staff and was assured these four days were not a problem. Part of the reasoning was based on the fact that (she) always finds a capable replacement acceptable to the teacher she works with and has done the same this year.
>
> Being in my own business I know that general policies are necessary, but have also realized through experience that some flexibility is essential in making these decisions. In (her) case I would hope that you would discuss this situation with the teacher she works with (Mary Petrie) and the principal. (She) is a graduate teacher who has proven valuable to the school system in her aide position.
>
> (She) is caught in my vacation situation, but I would hope that this does not jeopardize her position. She enjoys her work and does a very good job. Hopefully, you would reconsider and be more flexible in this case based on her conscientious record through the years.

The Grievant testified on the background to this letter thus:

> Q Was that letter written by your husband?
>
> A Yes, it was.
>
> Q And was that done at your request?
>
> A He volunteered, because he felt that I was being put in the middle of something that I really didn't have that much control over. 2/
>
> . . .
>
> Q Would it have been possible to change your plans within the last several days of actually leaving?
>
> A No. Because there were other people involved. After talking to Mr. Roberts the previous year we did try to work things out so this wouldn't happen again. However, it didn't work out, and my husband really felt that he wanted the full two weeks. At that point I was really torn, because I wanted to keep my job, and yet I could see his point. And that's when he decided to write the letter, because I just felt, you know, torn in both directions. 3/

Roberts responded to the Grievant's husband in a letter dated March 14, 1989, which reads as follows:

> I appreciated receiving your letter of March 6th and I realize your concern with regard to your wife's request for time off for a vacation. I have nine hundred teachers and approximately seven hundred classified staff members, all of whom would no doubt like to take a vacation during the school year. This would be an impossible task to administer.

2/ Tr. at 72.

3/ Tr. at 74.

> We allowed your wife to take a vacation last year but at that time indicated to her that we would not grant any such request again in the foreseeable future, and I am therefore rejecting her request.

In a note to Bothwell dated March 17, 1989, the Grievant formally stated her intention to take the days she had requested off, whether she had the District's approval or not. That note reads thus:

> This is to inform you that because my husband can only take a two week vacation at this time of year, I will be taking 4 extra vacation days (March 20-23) even though my request for these days has been denied. I will return to work on April 3rd.

Bothwell testified that the Grievant's intention to take the days off was well known prior to March 17, 1989. He stated the Grievant had informed him of this verbally, and that the matter had become well enough known at Heyer that the staff was discussing whether a coffee could be held to recognize the Grievant's years of service.

The Grievant did not report for work on March 20 through March 23, 1989. Bothwell responded in a letter to the Grievant dated April 4, 1989, which reads as follows:

> You chose to take four days of vacation (March 20-23) even though your request for those days has been denied. Because this action was in direct contradiction with an action directive by the administration of Waukesha School District, and willfully disregards the welfare of the employer, I have no alternative but to recommend termination of your employment at Heyer School, effective Monday, April 3, 1989.

Roberts' approved Bothwell's recommendation, and confirmed this in a letter to the Grievant dated April 7, 1989, which reads as follows:

> Your failure to report to work on March 20-23, 1989, as directed, shows your willful disregard for the welfare of your employer. As a result, I have no alternative but to terminate your employment with the School District of Waukesha,
>
> Your termination will take effect April 3, 1989.

The parties stipulated that:

> Mary Petrie, the teacher for whom (the Grievant) worked for several years fully supported the approval of (the Grievant's) leave of absence request for the four days before Good Friday in 1989, as she had supported the approval of same in past years. She wrote a letter to that effect to Paul Roberts. 4/

The Grievant found a substitute to fill in for her on March 20 through 23, 1989. Bothwell characterized the Grievant's work record as "very excellent" 5/, and testified that he informed her in the late February, 1989, conversation noted above, that she was "a very valued employe and a person I wanted to keep at Heyer School". 6/

4/ Tr. at 4-5.

5/ Tr. at 56.

6/ Tr. at 87.

Bothwell testified that he considered lesser discipline than discharge:

> I considered a lesser form of discipline certainly. I would have preferred to be able to do something of that nature. Being a new principal at Heyer School is a very difficult thing for me. (The Grievant) has many friends among the staff at that school. 7/

Bothwell articulated his reasoning for recommending the Grievant's discharge thus:

> Well, I recommended that she be discharged because I didn't see any alternative type of response that would assure that I would have (the Grievant) in the classroom as an aide in future years. My concern was that if I should ask that -- A reprimand in itself I didn't think would make any difference, because (the Grievant) made it very clear to me this was going to come up every year and she would be taking vacation. I didn't think a punishment in terms of suspension or loss of pay would make sense, because suspension from work would involve more of an interruption of the students' education, and suspension of pay is clear to me that she would take the vacation without pay anyway. So that wasn't an alterna- tive. 8/

Roberts affirmed Bothwell's reasoning as the basis for accepting his recommendation that the Grievant be discharged. Roberts summarized the basis for the District's policy on leaves thus:

> Q What, if any, is yours and the District's reasoning for granting leaves of absence for vacation purposes on a narrow basis . . . ?
>
> A Well, we understand that many of the aides work short hours, and that for a year-round commitment, for a 180-day commitment, that there's some latitude that we can provide in appreciation for the fact that they're giving up every day a part of the day to serve our students. And it was just something that we felt that we could do for people with, show our appreciation, I suppose.
>
> Q Why wouldn't you just grant any of them all the time?
>
> A Because it would be quite a disruption with 300 some odd aides working various hours and jobs, just the trouble that we have in getting aides, especially lunch room aides. Sometimes it's almost impossible to find them, much less substitute. It would create a severe hardship on the educational system as far as I could see. 9/

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

After a review of the record, the Union argues that Section 17.02 "does indeed make the Employer responsible for determining whether a 'justifiable reason exists for granting a leave of absence'". Because the Employer "erred by not properly determining that (the Grievant's) request was justifiable", it follows, according to the Union, that the Employer has violated Section 17.02. The Union asserts that the record demonstrates that the Grievant has taken leave at Easter for fifteen years; that the amount of work time lost is minimal; that there is no evidence her absence imposes a hardship on the District; that each teacher she has worked for has supported her leave; that she has always given ample notice of her intent to take the leave; and that she has always arranged to have a qualified substitute fill in for her. With this as background, the Union argues that the District has failed to adopt a reasonable rule to cover the Grievant's situation, as is required by Section 23.01, but has instead "only recently" applied "an unreasonable and unwritten

7/ Tr. at 61.

8/ Tr. at 55.

9/ Tr. at 20-21.

'rule of thumb'". The rule of thumb, according to the Union, has not been made generally known to employes or the Union until its application in this case, and is an unreasonable "proscription on pre-planned, annual leaves of absence". The rule of thumb violates Section 17.02 because of its proscription of recurring requests, each of which must be judged on its individual merit, according to the Union. The Union summarizes this point thus:

> We are not arguing that the grievant has an absolute right to be off work for four days every spring. Our point here is that the Agreement requires management to examine every request and look for "justifiable reasons," even if the request comes from the same employee at about the same time every year. It may be that one year (the Grievant's) request would be properly denied because a qualified substitute was not available, or the teacher determined, because of particular problems in the classroom, that a leave of absence would be intolerably disruptive.

Because the Employer applied a blanket rule to the Grievant's request, it follows, according to the Union, that the required case by case review never occurred. Beyond this, the Union contends that the Employer's concern about the effect of granting the leave is misplaced, since "there is no showing or reasonable expectation that any number of other teacher aides even want a yearly leave of absence". The "work now, grieve later" rule should not be applied in this case, the Union contends, because doing so would subject the Grievant to "an irretrievable loss". Even assuming the Employer had proper cause to discipline the Grievant, the Union asserts that "discharge was far too severe a step" given the Grievant's seniority and work record. Arbitral precedent establishes the significance of mitigating circumstances and the absence of progressive discipline, according to the Union. The Union states the remedy appropriate to the District's violation of the contract thus:

> (W)e ask that the Arbitrator order the Waukesha School District to cease and desist from applying its "rule of thumb" concerning annual requests for a leave of absence. We ask further that the Employer be ordered to immediately reinstate (the Grievant) to her position as a reading aide at Heyer School; that the Employer be ordered further to make the grievant whole for all lost pay, benefits and job rights; and that all references to her discharge be declared null and void and purged from all files maintained by the Waukesha School District.

The Union notes in conclusion that Section 23.02 governs the appropriate make-whole element of the remedy.

THE EMPLOYER'S POSITION

After a review of the record, the Employer argues initially that "the Grievant, knowing the consequences, violated a directive of the District which was clear and unambiguous", thus committing "gross insubordination" by refusing to comply with the District's denial of her leave request. Noting that "(t)he essential facts are not in dispute", the Employer argues that "(h)er refusal to obey a direct order is ample cause alone to discharge the Grievant". Beyond

this, the District contends that "(t)he Grievant has waived her right to challenge the District's decision and direct order because she engaged in self-help rather than work and grieve". Arguing that the rationale for the "work and grieve" principle is well established in arbitral precedent, and has been applied to facts nearly identical to those at issue here, the District concludes that the principle must be applied to this case, particularly in light of the Union's awareness of the Grievant's intended response to the denial of her leave request. Even assuming the Grievant has not waived her right to challenge the District's actions, the Employer contends that its denial of the request was reasonable. The record demonstrates, according to the Employer, that the Grievant's requests had been denied twice in the past, and that the Grievant need not have taken the vacation she ultimately took. Beyond this, the Employer contends that the sanction of discharge was appropriate to the Grievant's actions. Specifically, the Employer argues that a suspension could not have been effective, given the Grievant's limited hours and willingness to take four days off without pay. In addition, the Employer asserts that arbitral precedent establishes that the discharge must be upheld "(u)nless there is compelling evidence that the District abused (its) discretion". Because, according to the Employer, the record contains no compelling evidence that the District abused its discretion, it follows that the discharge must be upheld. Beyond this, the District contends that the record fails to disclose factors mitigating the severity of the discharge sanction, and does disclose two factors underscoring the severity of the Grievant's conduct. The first factor is that the disobedience was "cold and calculated with Union knowledge". The second factor is that the "insubordination was open and readily known". Beyond this, the District contends that the Grievant was fully warned of the consequences of her actions, or should have been aware of those consequences, thus precluding the feasibility of progressive discipline. Concluding that the Grievant "engaged in gross insubordination which seriously and intentionally threatened the District's authority to manage the School", the District requests that the grievance be denied.

DISCUSSION

The stipulated issue questions whether the Employer had proper cause to discharge the Grievant. That issue is ultimately governed by Section 23.02, which grants the Employer the right to "discharge . . . employees for proper cause". Each party has, however, asserted that there are threshold issues within the stipulated issue. Specifically, the Employer has asserted "(t)he Grievant has waived her right to challenge the District's decision", and the Union has contended the Employer's denial of the leave violated the contract. If the waiver argument is accepted, no further discussion of the grievance is necessary. Similarly, if a valid grievance is posed here, it is necessary first to determine if the Employer violated the contract by denying the requested leave. If the Employer lacked the discretion to deny the leave, there can be no proper cause for the discharge.

The Employer contends that the Grievant's failure to "work now, grieve later" constitutes a waiver of the right to challenge the District's actions. "Waiver" has been defined as "(t)he intentional or voluntary relinquishment of a known right". 10/ Section 24.01 of the contract defines a grievance as "an alleged violation of a specific article or section of this Agreement". The grievance alleges District violation of Articles XVII and XXIII, focusing on the District's denial of the requested leave and on the propriety of the discharge. The Grievant testified that she originally intended to resign, and then file a grievance on the District's denial of her leave request, but was advised that she could not resign without giving up the right to grieve the matter. 11/ There is, then, no basis in the record to conclude the Grievant or the Union intentionally or voluntarily gave up the right to grieve the District's actions. The asserted violation of the "work now, grieve later" principle concerns the merit of the grievance, not the right to assert it.

10/ Black's Law Dictionary, Revised Fourth Edition, (West, 1968).

11/ See Tr. at 75, and at 83-84.

The Union has contended that the District's denial of the leave violated Section 23.01 and Section 17.02. Section 23.01 is not relevant to the issue posed here. That section concerns the Employer's authority to "adopt reasonable work rules". The Union asserts that this section is relevant here because the "rule of thumb" referred to by Roberts in denying the requested leave is unreasonable. The "rule of thumb" is nothing more than a statement of the principle guiding the Employer's determination. The determination of whether to grant a requested leave is specifically governed by Section 17.02. Whether the "rule of thumb" satisfies the requirement stated in Section 17.02 that the Employer determine "whether or not justifiable reason exists for granting a leave of absence" is the determinative issue here. The Union's citation of Section 23.01 adds nothing to the determination posed by Section 17.02. For the purposes of resolving the issue posed here, it can be assumed that the contract requires the Employer to act reasonably in making the determination required by Section 17.02.

As noted above, Section 17.02 requires the Employer to determine "whether or not justifiable reason exists for granting a leave of absence". The Employer contends it made this determination by applying an informal policy which demands that employe leave requests be evaluated on the facts of each request with those requests of a unique or pressing nature being granted and those requests of a routine nature being denied.

The "justifiable reason" determination required by Section 17.02 requires that the Employer balance, in a reasonable fashion, the employe's interest in the time off against the institutional interest in losing the employe's services for that time. The issue posed here is whether the "rule of thumb" effected that balance regarding the Grievant's request.

The informal policy can not be found unreasonable in itself without re-writing the contract. If leave requests were routinely granted, there would be no reason for Section 17.02, which requires a specific determination. Thus, the issue posed here is whether the Employer unreasonably applied the policy by denying the Grievant's February 9, 1989, leave request.

Contrary to the Union's assertions, the Employer's denial of the Grievant's leave request can not be characterized as an unreasonable balancing of the Grievant's and the District's interests. The District acknowledged that the Grievant has a significant personal interest in the leave by rescinding its rejection of her 1988 request. Roberts specifically notified the Grievant, however, that he would not honor further requests. In doing so, he notified her that he believed the District's institutional interests against granting her recurrent leave request outweighed the personal interests he honored by granting her 1988 request. He noted at the hearing that those institutional interests focused on continuity and stability in the provision of instructional services. Granting her recurrent leave request would, according to Roberts, make it administratively difficult, if not impossible, to secure the continuous service of the District's three hundred aides. The Employer's "rule of thumb" seeks to balance employe interests in leaves against this institutional interest by assuring aides that unique circumstances requiring a leave will be honored, while assuring the District that such circumstances will not be so routine or recurrent that a significant disruption in instructional services could result. The present record affords no persuasive basis to doubt the reasonableness of the District's application of this policy to the Grievant.

The reasonableness of the Employer's application of Section 17.02 is that it is capable of being applied to all unit employes. Honoring the Grievant's 1989 request arguably would have created an individual right not capable of being applied to all unit employes without eliminating the discretion provided in Section 17.02. The Union has attempted to minimize the District's institutional interest in the leave request by contending that it is not asserting that the Grievant has an absolute right to four days of leave every spring, and by noting that the Grievant had the support of her supervising teacher and had arranged for a substitute. With the Employer's interests thus minimized, the Union asserts the Grievant's need to take the vacation at that time outweighs the Employer's interests on the facts posed here, and that only the Employer's arbitrary use of a policy which is insensitive to the facts posed here accounts for the Employer's denial of the leave.

The Union's assertion can not be accepted without granting the Union the absolute right it argues it is not asserting, and without denying the institutional interests the District asserts. That the Union claims not to seek such a right is essential to granting any persuasive force to its claims. The contract does not contain a provision granting the Grievant an absolute right to four days of leave each spring immediately before Good Friday. Section 24.01 precludes arbitral creation of such a right. That the Union's arguments ultimately pose such an absolute right is traceable less to a flaw in the Union's logic than to the facts of the grievance.

The Union's attempt to focus on the Grievant's efforts to minimize the impact of her absence can not obscure the fundamental fact that the Grievant's February 9, 1989, letter stated the same request she had made for fifteen years. Roberts had noted in his January 29, 1988, letter that he could not continue to grant the repetitive request. The Grievant responded by repeating the very request Roberts had informed her one year earlier would be denied. The request does not cite any unique or extenuating circumstances. Rather, the request notes "(a)s in the past 15 years, I am asking for 4 extra days of vacation time . . ." The request asserted a right to leave, and Roberts denied that right. The Union's arguments attempt to downplay the nature of the right asserted because the contract recognizes no such absolute right. The February 9, 1989, request, however, belies this attempt by making a request, which if honored, establishes the right the Union argues it does not seek.

The right the Grievant seeks to establish is not capable of being extended to other unit employes without denying the District's institutional interests in securing the regular and continuous attendance of its workers. The District's institutional interests, as noted above, focus on assuring the continuous performance of instructional duties. Bothwell's and Roberts' testimony establish the District values stability and continuity in aide/student contact, and seeks to minimize the use of substitutes. This value can not be characterized as unreasonable, and has two components -- the aide services offered by the Grievant as an individual and the services offered by aides as a group. That the Grievant is acknowledged to be an excellent aide lends weight both to her personal interest in the leave and the District's institutional interest in losing her work. That she has secured a substitute eliminates the District's interest in losing her work only if it is assumed the Grievant's personal contribution as an aide is irrelevant or is fully made up for by the substitute. This assumption ignores the District's interest in providing continuous aide service, but is arguably offset by the Union's argument that the Grievant's quality of work should be recognized by granting a leave which is obviously important to her. The issue posed in balancing the interests involved would pose a closer issue except for the fact that the requested leave ignores the District's interest in securing the continuous service of aides as a group. As detailed above, granting the Grievant's request can not meaningfully be extended to other unit employes. That the District may not, at present, have conflicting requests for the time off requested by the Grievant does not address the District's institutional interest. If the repetitive nature of a leave request, or the presence of teacher support, or the availability of a substitute are the determinative criteria in granting leaves, the District's concern that there is scant basis to deny a leave is well founded.

The ultimate interpretive issue posed by Section 17.02 is not whether an individual arbitrator would grant the leave requested by the Grievant. The issue posed is whether the Employer's determination that no justifiable reason existed for granting the leave was reasonable. Arguably, the Grievant's leave request is sufficiently unique that it could be distinguished from other potential requests. However, the Employer's conclusion that it was not can not be characterized as unreasonable, and that determination does not violate Section 17.02.

The final issue to be addressed is whether the Employer had "proper cause" under Section 23.02 to discharge the Grievant. Fundamentally a "proper cause" determination requires that the Employer demonstrate that the Grievant committed an act in which the Employer has a disciplinary interest, and that the discipline imposed reasonably reflected that interest.

That the Employer has a disciplinary interest in an employe's reporting for work when assigned to is self-evident. This interest extends to securing the Grievant's attendance as an individual aide and to securing the attendance of aides as a class. The Grievant was aware that her leave request had been denied, and was aware that she would be disciplined for taking the unapproved leave. At most, the only factual dispute is whether she fully realized she would be fired for taking the leave. This dispute is irrelevant to this aspect of the cause analysis. She knowingly refused to report for work when assigned to, without a valid excuse. The Employer's disciplinary interest in her conduct can not be doubted, either with respect to the Employer's interest in securing her attendance or with respect to the Employer's securing the attendance of aides as a class.

The remaining point of contention is whether the Grievant's discharge reasonably reflected the Employer's disciplinary interest in the Grievant's conduct. As a threshold point, the Union argues that the Employer did not inform the Grievant, prior to her departure, that taking the leave would put her job at risk. This point does not, however, have persuasive support in the record. Bothwell testified that he had informed the Grievant in late February that if she took the leave, she would leave him no option but to fire her. The timing and the substance of the Grievant's husband's March 2, 1989, letter support Bothwell's account. In that letter the Grievant's husband specifically noted "I would hope that this does not jeopardize her position". The Grievant testified that she was not aware her job was at risk until a day or two before her departure. This testimony does not, however, stand alone, and is contradicted elsewhere in the Grievant's testimony. As noted above, the Grievant, in discussing her husband's letter, stated:

> At that point I was really torn, because I wanted to keep my job, and yet I could see his point. And that's when he decided to write the letter, because I just felt, you know, torn in both directions. 12/

This testimony is consistent with the tone of her husband's letter and with Bothwell's testimony. As of March 2, 1989, then, the Grievant was aware that taking the leave would jeopardize her position.

With this as background, the Employer's conclusion that no lesser penalty was appropriate cannot be characterized as unreasonable. As Bothwell and Roberts each noted, the Grievant's willingness to take the leave without pay undercuts the effectiveness of a suspension. More significantly here, the all or nothing nature of this litigation has been determined by the Grievant. Progressive discipline is grounded in the assumption that an employe must be afforded an opportunity to correct conduct deemed inappropriate. In this case the Grievant had at least two opportunities to alter her plans, and to challenge the Employer's "rule of thumb" without putting her job on the line. On March 25, 1986, and on January 29, 1988, the Employer's Executive Director of Operations informed the Grievant of the "rule of thumb" and of the Employer's wish that she amend her vacation plans. The Grievant could have grieved either prospective denial to put the "rule of thumb" at issue before putting her job on the line. In each case, she chose to make vacation plans and seek the leave at a time the plans could not be changed. Against this background, it can not be said that the Grievant lacked opportunity or notice to change her vacation plans. Against this background, it could reasonably be concluded that the Grievant was willing to take the unapproved leave at the risk of her job. The all or nothing character of this litigation has been determined by the Grievant's choice, and the Employer's conclusion that discharge was the only available option can not be characterized as unreasonable. It follows that the discharge reasonably reflected the Employer's disciplinary interest in the Grievant's taking of an unapproved leave.

That the Employer's determination can not be characterized as unreasonable does not make the determination pleasant. It is apparent the present litigation has hurt individuals on each side of the litigation. This can not be avoided. It can, however, be stressed that the present matter says something about the nature of the Employer's and the Grievant's contractual rights and obligations but nothing about the Grievant's performance as an aide. It should be stressed that there has been no issue raised concerning her competence as an aide or her work record, which has been characterized as "excellent".

AWARD

The District discharged the Grievant for proper cause.

The grievance is, therefore, denied.

12/ Tr. at 74, cited at Footnote 3/.

Dated at Madison, Wisconsin, this 5th day of January, 1990.

By _____
Richard B. McLaughlin, Arbitrator