BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WEST BEND EDUCATION ASSOCIATION	
and	Case 65 No. 43695 MA-6048
WEST BEND SCHOOL DISTRICT	

Appearances:

Ms. Anne L. Weiland, Attorney at Law, W182 N9052 Amy Lane, Menomonee Falls, Wisconsin 53051, appeared on behalf of the District.

Mr. John Weigelt, Executive Director, Cedar Lakes United Educators, 411 North River Road, West Bend, Wisconsin 53095, appeared on behalf of the Association.

ARBITRATION AWARD

On February 27, 1990 the West Bend Education Association and the West Bend School District jointly requested the Wisconsin Employment Relations Commission to provide an arbitrator to hear and issue a final and binding award on a pending grievance. On March 1, 1990 the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on March 6, 1990 at the District offices, West Bend, Wisconsin. Briefs and Reply briefs were submitted and exchanged by May 15, 1990.

This award addresses the dispute between the parties over whether or not Avis Wallesverd is entitled to be paid family illness leave to provide care for her daughter, following childbirth.

BACKGROUND AND FACTS

The facts of this case are not in dispute. Avis Wallesverd has taught for the West Bend Schools for 20 years. As of the date of the grievance, her husband was also employed by the District. Mrs. Wallesverd's daughter, who resides in Eau Claire, Wisconsin delivered a baby on Sunday, April 23. On Monday morning, April 24, Ms. Wallesverd approached the building secretary to inform her that she would be taking family illness leave and would require a substitute teacher. The secretary replied that she wasn't sure family leave was available to Wallesverd. According to the grievant, she expressed surprise in that she had taken such a leave following the birth of her daughter's first child. That leave had been routinely approved by Principal Osterhaus.

Following this conversation the building secretary contacted Principal Osterhaus, who called Wallesverd to his office that afternoon. Osterhaus indicated that her intended use of the leave was not a legitimate use of the benefit and that the family illness provision was not applicable. At Osterhaus' suggestion, Wallesverd wrote to Superintendent Dwain Ehrlich requesting the leave.

Ehrlich responded to Wallesverd's April 24 request with a letter of denial. Prior to Wallesverd receiving that letter, she and Ehrlich met on the afternoon of Tuesday, April 25. During the course of that meeting Wallesverd expressed her view that she was entitled to the leave, and that historically such leave had been granted. She pointed to her own prior use of the leave and to that of employe Elaine Ripple. While Ehrlich's precise remarks are somewhat in dispute, it appears that he advised Wallesverd to go and attend to her daughter and that he would investigate the practice. According to Wallesverd, Ehrlich indicated that "If others had gotten it (leave) he would look into it". It was Mrs. Wallesverd's testimony that the implication of Ehrlich's remarks were that she would be paid.

Mrs. Wallesverd's daughter was released from the hospital after supper, Tuesday, April 25. Mrs. Wallesverd and her husband left for Eau Claire after work on Wednesday, April 26. They both took Thursday and Friday, April 27-28

off. Mr. Wallesverd used two contractually provided Personal Days. While in Eau Claire Mrs. Wallesverd cared for her daughter, prepared meals, and did housework.

Following his conversation with Wallesverd, Dr. Ehrlich investigated the practice of granting family illness leave. He confirmed Mrs. Wallesverd's prior use. Elaine Ripple is in another bargaining unit and is governed by different contract language. Ehrlich otherwise found no incidents of either the granting or denial of family illness leave. Ehrlich talked with a number of principals who indicated that when family illness leave was requested they inquired into the basis for the request. They also expressed the view that the contract is clear and that Wallesverd's request does not satisfy the contractual requirement.

On April 27, Ehrlich denied use of family illness days by the following letter:

> Dear Avis:
>
> I have reviewed your letter of April 25, 1989 requesting two family illness days in order for you to attend your daughter after childbirth.
>
> As a result of your personal contact, I have discussed this matter with Elaine Ripple at the high school and have examined our past practice. The language that is in the contract for teachers is different from that in the contract for aides. The original language on family illness did not include a provision for absence during the birth of a child. This language was negotiated into the contract by the WBEA in the 1975-76 negotiations. In 1986-87, I note that you were granted two days of family illness leave by the principal and your husband was granted two days of personal leave by Bob Malsch. As I read the contract and review the intent of the language, I cannot approve the days that you have requested for family illness leave.
>
> My decision is based upon the language in the contract and past practice of the district. You will need to use other language in the contract such as personal days or deduct days in order to accommodate your absence.

This rejection was grieved, processed through the parties grievance procedure, and is the basis for this proceeding.

Mrs. Wallesverd was not paid under the family illness leave provision. When her paycheck arrived she had been paid for one day of Personal Leave, which exhausted her Personal Leave for the year, and had one day's pay withheld.

A number of witnesses testified relative to the administration of this benefit. Ms. Wallesverd testified that she had not previously been asked the basis for her requests to use such leave, and that she had previously taken two (2) days to attend to her daughter following the birth of the first child, 1/2 day to attend to her daughter, then in high school, when her daughter broke a vertebrae, 1/2 day when her husband had knee surgery, and 1/2 day to take her Mother to a retina specialist.

Elaine Ripple, a Resource Aide, also testified. Ripple, who is covered by a different collective bargaining agreement, indicated that she has used family illness leave on occasions, one of which parallels the facts underlying this dispute. Ripple also indicated that she receives the incoming phone calls from teachers utilizing the leave and arranges for substitutes. According to Ripple she does not ask why the leave is being requested and is not aware of any leave request having been turned down. Ripple indicated that Gloria Hughes, an aide, had used this leave when her daughter had a baby. She also testified that Keith Millar, a teacher, used leave for the birth of his own child. According to Ripple, Miller took one day off, returned for one day, and took another day off. Ripple also testified that Glenn Pusch, a teacher, took family illness leave. District records confirm that Pusch took two such days in 1987-88. The records show only that the leave was for family illness. According to Ripple she received a telephone call from Dr. Ehrlich, wherein he inquired whether or not the District provided family illness leave for child birth. She replied that "we probably have" but that she would have to go back and check the records. He responded "that's all right". No record check was made at the time.

LaVonne Hollady, secretary to the Principal of Fairpark Elementary School for twenty-two and one-half years testified that a teacher requesting the use of family illness leave is not asked about the severity or form of illness. Hollady was not aware of anyone being denied such a leave. Marcia Christianson, Chief spokesperson for the Association testified that she was not aware of anyone being denied family illness leave and that the District has

never asked people to prove a need to use such leave.

Doug Stewart, chairman of the grievance committee testified that he was not aware of anyone being denied use of the leave. He further testified that he has advised teachers that it is appropriate for them to use this leave to transport an ill parent to Milwaukee, to attend to someone else's bypass surgery, to care for a sick child, to take someone else for tests. Stewart indicated that he has used the leave to care for his wife when she suffered a severe sinus infection rendering her unable to walk unassisted, to care for sick children, to transport his wife to and from surgery and attend to her, and to take his son for consultation and counseling with a medical specialist. His use of the leave has never been questioned.

Dr. Ehrlich testified following all of the foregoing testimony. According to the Superintendent use of the leave was pretty much as indicated. If someone indicated an illness in the family it was assumed legitimate and approved.

ISSUE

The parties were unable to agree upon an issue. The Employer advances the following:

> Is the grievant entitled to two days of paid absence under Article IX, Section 2 of the Teachers' Agreement for the purpose of attending her adult daughter on the fifth and sixth days after the normal delivery of her daughter's child?

The Union offers;

> Did the District violate the contract in refusing to pay Avis Wallesverd for those days on which she was using family illness leave?

I think that the issue as framed by the District most accurately characterizes what it is that I have been asked to decide.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article IX. Absences

. . .

2. Family Illness

> A maximum of three (3) days leave per year will be allowed for severe illness of immediate family members; provided, however, that one of the three (3) allowed days may be used, if available, for a teacher's absence on the day that his wife bears a child. This leave shall not affect determination of sick leave days, nor will it be accumulative. (The immediate family is limited to husband, wife, father, mother, son, daughter, and those individuals to whom the employee is legal guardian.) This leave will not be granted for babysitting purposes.

POSITIONS OF THE PARTIES

The Association argues that the contract language is ambiguous and has been clarified by practice to the benefit of the Association. Neither side can explain the one day proviso and its relationship to the three day benefit. The fact that Ehrlich contacted a number of people to inquire as to the application of the language shows he was unclear as to what it meant. The Association points to Christianson's testimony as support for the proposition that the intent was to allow for leave at the direction of the individual. That intent is reflected in the practice.

Had Dr. Ehrlich really taken an in depth look at the practice he would have found that the leave had always been granted. It is the view of the Association that by granting Wallesverd the leave the first time, the District was on Notice as to that use of the leave. The Association further argues that as the sole known prior application of this language, Wallesverd's first use of the leave may itself rise to the level of a practice.

The practice is particularly relevant because there is no test or standard of what constitutes a severe illness.

The Association points to a 1981 District proposal which would have required substantiation of the use of the leave. That proposal was dropped. Having dropped the proposal the District has waived its right to require substantiation.

It is the District's view that the contract provides for family illness leave for a teacher whose wife bears a child, and then for one day only. Structurally, the contract provides for a general family illness leave. Childbearing leave is a subordinate and specific benefit with restrictions, attached to its use. If the general reference to severe illness includes childbirth, the subsequent specific clause loses meaning. The District urges a construction of the agreement that gives meaning to all provisions.

The District produced a bargaining proposal made by the Union that would have provided three days leave for "severe illness or childbearing" for immediate family members. The childbearing portion of the proposal was dropped from the 1975 proposal. That proposal was accompanied by the following rationale: "childbearing is now considered an illness and should be treated as such in this Agreement." Having dropped the proposal, the Association can hardly claim to be entitled to the leave.

It is the District's view that the evidence of past practice does not contradict the District's interpretation. The non-teacher incidents were governed by a different collective bargaining agreement. Wallesverd's single prior use does not constitute a practice.

Finally, the District argues that the result sought by the Association would be absurd. A grandmother would be entitled to more time off, following the birth of a child, than would a new father.

DISCUSSION

I think the family illness clause is sufficiently ambiguous to justify an examination of its history and application. Specifically, the use of the term "severe" raises the question of just how serious an illness must be to warrant access to this leave.

The parties submitted an excerpt of their 1967-68 collective bargaining agreement. That document contains a requirement that a "serious illness" exist to justify a leave captioned "critical illness in the immediate family". There is no one day proviso in the 1967-68 agreement. In 1968-69 the parties had restructured this clause into essentially its present form, but without the one day proviso. The clause was retitled "Family Illness". The clause remained in that form until 1975 when the Association proposed the change noted by the Board. The Association did not get the change proposed, but rather the parties compromised on the one day proviso. The language agreed to in 1975 is, for all purposes relevant to this dispute, the language now being construed.

The District contends that the language is structured such that a general family leave benefit is provided, with a narrow and subordinate leave for child bearing. The derivative benefit is alleged to inure solely to the husband of a woman who has a baby. The 1975 bargaining history is alleged to hammer this construction home. As things stood in 1975, the Board's argument is compelling. But this is not 1975, and much has transpired in 15 years.

Since 1975, it appears that Family Illness Leave has been freely granted. No witness can recall the denial of such a leave, when requested. All witnesses testified that the basis of the leave, i.e. "serious illness of immediate family members" is not subject to inquiry or verification. Records of the District confirm that the underlying basis for the leave is not recorded. Witnesses testified that this leave has been used for attending to a daughter who had given birth, attending to a daughter who had a broken vertebrae, attending to a husband/wife undergoing surgery, taking a family

member to a doctor, care for a sick child/spouse. The District does not dispute these uses of the leave.

It appears to me that the District has, for some period of time been on constructive, and quite possibly actual, knowledge as to how this leave is being used. In 1981 the District made a proposal which would have authorized the principal or superintendent to require substantiation of any one of a number of leave provisions, including family illness leave. The proposal was withdrawn. Having made the proposal it would appear that in 1981 the District gave thought to its need for substantiation of leave.

Whether or not childbirth constitutes a serious illness within the meaning of the Family illness clause is hard to assess in the abstract. The Leave recipient is not released to perform a medical role. Almost by definition the School District personnel are not individuals capable of delivering primary medical care. Their role is a support and ancillary one. Childbirth is a medically significant event. The medical community urges hospitalization both during and following birth. A six to eight week recovery period, which parallels that for surgical procedures, is considered standard for uncomplicated vaginal delivery. Even an uncomplicated delivery brings physical trauma to mother and child and is accompanied by postpartum fatigue, discomfort, and depression. The fact that childbirth is a common phenomenon should not detract from the fact that is a serious and potentially threatening experience. As a practical matter, attendance at childbirth fits comfortably within the spectrum of uses permitted by the District.

The District argues that its prior granting of this leave to Mrs. Wallesverd does not rise to the level of binding practice. I agree with this contention. However, the prior granting of this leave is consistent with the generous allowance of the benefit and inconsistent with the District's actions in this case.

The District points out that the School Aides are covered by a different collective bargaining agreement, and contends that their use of this leave is irrelevant to this proceeding. However, their use of the leave directly parallels the facts of this case. The clause found in the Aides' contract is essentially identical to that cited in this case except that it lacks the one day proviso. The proviso is certainly significant, but for benefit administration purposes the District treats childbirth as a sufficiently "serious illness" within the meaning of the Aides' contract to warrant leave. The District's argument ignores myriad other uses of the leave.

In the view of the District, sustaining this grievance yields the absurd result of providing a grandmother with a greater leave benefit than that received by the father of a newborn child. While this consequence may or may not fairly be characterized as absurd I believe it represents the evolution of the benefit as used/administered by the parties. I view my task as identifying what the contract provides, not reforming the document to what I may regard as a more suitable benefit.

In summary, I believe this benefit has evolved to the point where it includes leave to attend to an adult daughter following childbirth.

AWARD

The grievance is sustained.

REMEDY

The grievant is to be allowed use of Family Illness Leave for the days in question and to be made whole for any loss of wages and/or benefits she has suffered.

Dated at Madison, Wisconsin this 13th day of July, 1990.

By _____
William C. Houlihan, Arbitrator