

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
	: Case 12
WATERFORD EDUCATION ASSOCIATION	: No. 45811
	: MA-6795
and	:
	:
WATERFORD JOINT SCHOOL DISTRICT #1	:
	:

Appearances:

Ms. Esther Thronson, Executive Director, Southern Lakes United Educators, appearing on behalf of the Association.
Mr. Barry Forbes, Wisconsin Association of School Boards, Inc., appearing on behalf of the District.

ARBITRATION AWARD

The Association and the District named above are parties to a 1989-1992 collective bargaining agreement which calls for final and binding arbitration of certain disputes. The Association requested, with the concurrence of the District, that the Wisconsin Employment Relations Commission appoint an arbitrator to hear and resolve a dispute concerning non-cumulative leave time. The undersigned was appointed, held a hearing on July 19, 1991, in Waterford, Wisconsin, and gave the parties the full opportunity to present their evidence and arguments. The parties exchanged briefs on September 23, 1991.

ISSUE:

The District raises one procedural issue:

Is the grievance filed by Martha Eckhart MacWilliams timely under the Article 7 grievance procedure?

The parties stipulated to the following issue:

Did the District violate 3.2 of the collective bargaining agreement when it denied the use of non-cumulative leave to Martha Eckhart MacWilliams? If so, what shall the remedy be?

CONTRACT LANGUAGE:

7. Grievance procedure

7.1 The purpose of this procedure is to provide, beginning at the lowest possible administrative level, an orderly method of resolving differences arising from interpretation and/or administration of this agreement during its term.

. . . .

7.3 Procedure

7.31 Step 1 - Any teacher within the bargaining unit may discuss the grievance with the Principal directly with the object of resolving the matter informally. The teacher may waive this step in the procedure and proceed immediately to Step 2.

7.32 Step 2 - Any teacher within the bargaining unit shall submit a written grievance to the Principal within fifteen (15) school days from the time the teacher knew or should have known of the events giving rise to the grievance. A written grievance shall state the facts giving rise to the grievance, shall identify all provisions of this agreement alleged to be violated, shall indicate the relief requested, and shall be dated and signed by the grievant.

- a) If the grievant does not comply with this above procedure the grievance is waived.
- b) Within five (5) school days after receipt of a written grievance, the Principal shall communicate his decision to the grievant together with supporting reasons.

7.33 Step 3 - If the grievance is not resolved satisfactorily, the grievant shall appeal to the District Administrator within five (5) school days after receipt of the decision at Step 2. The appeal shall be written and shall include a copy of the written grievance and decision at Step 2.

- a) If the grievant does not comply with this above procedure, the appeal is waived.
- b) The grievant within ten (10) school days shall have the right to a meeting with the District Administrator to resolve the grievance. The grievant shall be given at least a two (2) day notice of the meeting.
- c) Within five (5) school days after the meeting, the District Administrator shall communicate his decision in writing to the grievant together with supporting reasons.
- d) He shall furnish one (1) copy to the grievant.

. . .

3. Absence

3.1 Sick Leave

. . .

3.12 Sickness is defined as personal illness, disability, or emotional upset caused by serious accident or illness in the immediate family.

For purposes of sick leave, immediate family is defined

to include only spouse, brother(s), sister(s), children, parent(s) and parent(s)-in-law.

. . .

3.2 Non-cumulative and Personal Leave

3.21 The Board will allow two days of non-cumulative leave each year in addition to sick leave. Written notice stating the reason(s) is to be made to the administrator before the day(s) to be taken off. In case of an emergency, verbal request shall be made to the administrator who shall approve or disapprove the request. Non-cumulative leave is interpreted to include:

- a) Funerals in the immediate family (as defined in 3.12) or whereby attendance would be appropriate. Weddings in the immediate family (as defined in 3.12).
- b) Visiting another school for purpose of professional inquiry.
- c) Attendance at a convention, workshop, conference or seminar relating to the instructor's area of teaching.
- d) The maximum number of teachers that can be granted leave under section on any given day is 2 per section.

3.22 The Board will grant one (1) personal leave day to each teacher each year provided the teacher gives twenty-four (24) hours advance notice of the intent to take such leave. The maximum number of teachers that can take such leave on any day shall be two (2). No personal leave may be granted on a day immediately before or after a holiday or vacation period.

BACKGROUND:

This grievance is over the use of non-cumulative leave days in conjunction with weddings.

The parties bargaining history over Section 3.21 shows that in the 1980-81 school year, three non-cumulative leave days were allowed. The use of the non-cumulative leave included leave for personal business that could be conducted only during school hours and under such circumstances that the presence of the individual requesting personal leave was required. In the collective bargaining agreement for 1981-1983, the language was changed to the current language, with the non-cumulative days being reduced to two days and a separate section created for personal leave, with less restrictions on the use of personal leave. Linda Kouzes, a teacher in the District for 25 years, was on the negotiating team when the change occurred. Kouzes recalled that the teachers traded off one non-cumulative day for a personal day, because they were not getting time off for funerals of close friends or aunts and uncles, and they were being denied days for workshops and conferences under some circumstances. Kouzes was aware that there were restrictions on non-cumulative days before the personal day was added in exchange for one non-cumulative day,

but did not know whether three non-cumulative days could be used for a wedding before 1981. Kouzes stated that in negotiating the non-cumulative leave, it was not the intent of the teachers' negotiating team to allow the District Administrator to screen requests for non-cumulative leave based on travel or their involvement in wedding plans.

District Administrator Richard (Dale) Marta recalled that during the bargaining of 1981-82 when the language was changed, it was the intent of the Association to take personal leave for any reason without permission or approval. The prior language in 1980-81 had included non-cumulative leave for personal business, but it was a narrow definition of personal business that could be conducted only during school hours and no other time and which required the presence of the individual requesting it. The change to personal leave days in the 1981-83 contract broadened the use of personal leave, and the only restrictions on it were that a teacher had to ask in 24 hours in advance, no more than two teachers could be off on personal leave at the same time, and it could not be used to extend a holiday or vacation period.

Martha Eckhart MacWilliams was a new teacher in the District in the 1990-91 school year. She attended an orientation session for new teachers, which was conducted by Marta. During the orientation, Marta explained parts of the collective bargaining agreement and talked about the use of non-cumulative leave and personal leave, because those leave provisions have been a source of problems in the District. Marta explained that he approves or disapproves of leave requests. MacWilliams asked whether one could use non-cumulative leave for one's own wedding, and Marta answered that a person could use one day of non-cumulative leave for preparation of her own wedding.

In November of 1990, MacWilliams (then Eckhart) told Carl Breitlow, the principal of the Fox River Middle School, that she was getting married and wanted an explanation of the non-cumulative leave provisions as written. Breitlow explained that as a general past practice, one non-cumulative day and one personal day could be used.

On November 29, 1990, MacWilliams sent Marta a letter requesting time off in March for her wedding on March 9, 1991. She stated that she wanted to take Friday, March 8th, and Monday, March 11th, as non-cumulative days, and requested personal leave for March 12th. Marta told Breitlow that MacWilliams could use a non-cumulative day on March 8th before the wedding and a personal day the following Monday, March 11th.

On either December 3 or 4, 1990, MacWilliams could not get to school due to a snow storm. At first, she planned on being paid that day by taking it as a personal day, but about December 11th, she changed her mind and asked to be docked and leave it as an unpaid day because she wanted to save her personal day for her wedding. Marta approved the unpaid day for December.

MacWilliams reapplied to Marta for two non-cumulative days for her wedding and asked for a written response to her second request. On February 19, 1991, Marta wrote her the following note:

At the time of your request last fall, it was communicated to you that there is only one non-cum day granted for a wedding. That was granted for March 8th. Your personal day was granted for Monday, March 11th.

This is consistent with our master agreement, and how it has been applied in the past.

What Carl has told you is correct.

On February 28, 1991, MacWilliams filed a grievance alleging a violation of Section 3.21 of the bargaining agreement. Breitlow responded on March 1, 1991, denying the grievance and raising the issue of timeliness as follows:

This is considered my official response to the grievance you have filed with me as per section 7.32 of the Waterford Graded school District master contract.

Specifically, your grievance is that you have requested two noncumulative days for your wedding the weekend of March 9. Mr. Marta has declined to consider two non-cum days and hence your grievance.

In my response to your grievance, I will not address the issue of non-cumulative days and their interpretation as per the contract. I will, instead, address a procedural question of the grievance procedure. You had first made this request of Mr. Marta some time in early December, at which time Mr. Marta conveyed, through me, that it was the district's past practice to award only one non-cum day for a wedding. I explained this to you; that you would have one personal day and one non-cum day. Your response at that time was, well, OK, I'll just have to get by without the Tuesday, indicating to me that you fully understood what we were discussing. In recent weeks, you have approached me on this issue several times, and on each of those occasions I am sure I have referred back to the original response, which again, you verbally received from me in December, and you acknowledged, that yes, we had discussed the question and that you did understand what I was saying at that time.

Therefore, as per section 7.32 of the master contract which states, "any teacher within the bargaining unit shall submit a written grievance to the principal within 15 school days from the time the teacher knew, or should have know, of the events giving rise to the grievance." As stated in subsection A, if the grievant does not comply with this procedure, the grievance is waived.

Based on the procedural aspects, as outlined in our master contract, you have not followed the fifteen day time frame for the grievance, and I therefore find that your grievance is null and void.

The grievance was appealed to arbitration.

Marta considers the language of Section 3.21 which refers to funerals and weddings as attendance at the actual event. However, his predecessor allowed someone to use non-cumulative leave for preparation of a daughter's wedding. Then Marta received a request for the preparation of an individual's own wedding, and felt he could not turn it down, based on the prior use of non-cumulative leave for a daughter's wedding.

Marta has also allowed two days of non-cumulative leave if one has to travel some distance. In Marta's words, "A wedding in Texas differs from a

wedding in East Troy." For instance, Kouzes received two days to travel to Texas for her daughter's wedding. Kouzes took one non-cumulative day for a step-son's wedding which was held in Elkhorn. Joanne Ebbers received two non-cumulative leave days for a wedding in Florida. On another occasion, Ebbers was denied an additional non-cumulative day. In records going back to 1981, people were given one non-cumulative day off for either their own wedding or preparation of a family wedding, unless travel was involved, except for Nora Judd, who received two non-cumulative days plus one personal day for her own wedding, and Dianne Kaufman and Robert Schnell, who married each other in Minnesota and were given two non-cumulative days each. Marta considers the three days given to Judd an error, and the only deviation from the practice regarding leave time for weddings. In all but two cases -- those of MacWilliams and Ebbers -- people received the number of days they requested for weddings or preparation for weddings.

June Beutler, a teacher in the District for the past eight years, asked for two days of non-cumulative leave in 1988 for a funeral in Ashland. Her principal told her that she probably could not get two days. She took the time off, her paycheck was not docked, and she does not know whether this was counted as two non-cumulative days or one non-cumulative day and one sick day. She assumed she was given the two non-cumulative days. Beutler sat in on a meeting between another staff member and a principal, Gary Tilleros, when that staff member's father-in-law died. The staff member was given one non-cumulative day for the funeral, but was told that if she wrote a letter explaining the circumstances, she might be given two days. The staff member took only one day.

THE PARTIES' POSITIONS:

The Association:

The Association rejects the notion that the fall inservice date should be the date that the Grievant knew or should have known of the events giving rise to the grievance, as new teachers in their first inservice are not knowledgeable about their collective bargaining agreement. MacWilliams gave written notice of her need to two non-cumulative days for her wedding on November 29, 1990, and received a reply from Marta on February 19, 1991. MacWilliams submitted her grievance to Breitlow on February 28, 1991, which was denied on March 1, 1991. On March 4, 1991, she forwarded the grievance to Marta, and the Association joined the grievance on March 11th. The grievance was presented to the School Board on April 19, 1991, and denied on April 23. The Association appealed for arbitration, and asserts that the grievance is timely.

The Association notes that when the contract language of 1980-81 was changed, from allowing three non-cumulative days to two non-cumulative days and one personal day, the intent was to expand the opportunity for use of the third leave day. The Association argues that the District has narrowed the meaning Section 3.2 and denied the use of the two non-cumulative days. The Association disagrees that the District did it often enough to establish a past practice, as most people who asked for two days received them. Moreover, there is clear and unambiguous language and no need to rely on past practice.

The Association contends that the District has been arbitrary in handling requests for leave days. Non-cumulative days are available for specific purposes, and there should be no discretion as to whether one or two days are taken. The Administrator's review of a request or notice is to see that it falls within the limits of the use of non-cumulative days, and the Administrator has no right to diminish that benefit.

The District:

The District contends that the grievance was not filed in a timely manner, as MacWilliams knew of the District's policies and practices as early as her new teacher orientation in August of 1990. She asked a question regarding her situation, and Marta responded that teachers are allowed one day of non-cumulative leave to prepare for weddings unless travel to and from the wedding necessitates an additional day. She did not file a grievance within 15 working days of this event. MacWilliams then requested the use of two non-cumulative leave days in writing on or before November 29, 1990, and was told by Breitlow within a day or so that she would be allowed only one non-cumulative day and one personal day. She did not file a grievance at that point. The District notes that MacWilliams was reminded of this decision when she asked for use of her personal leave to cover her absence on December 4, 1990, and she decided on December 11, 1990, to take the absence as an unpaid leave. She did not file a grievance within 15 working days at this time.

Giving the Grievant the benefit of the doubt and assuming that she did not know of the District's decision to allow her only one day of non-cumulative leave until December 11, 1990, and taking the Christmas break into account, the District finds that the grievance should have been filed by January 9, 1991. The Grievant did not file a grievance until March 1, 1991, which was dated February 28, 1991, and several months late. Thus, the District asks that the grievance be denied on grounds of timeliness.

The District asserts that Section 3.2 of the collective bargaining agreement is ambiguous, that it established a long past practice allowing teachers the use of one day of non-cumulative leave to attend weddings except where travel necessitates an additional day, and that it correctly applied both the contract language and the past practice to the Grievant. While the Association argues that the contract language requires the District to allow teachers two days of non-cumulative leave to attend weddings, the language allows teachers two days of non-cumulative leave per year for the lists events and says nothing about the number of days allowed for weddings, funerals, etc. The contract does not say that two days of leave are allowed per wedding; it says two days of leave are allowed per year.

The District contends that the contract is also ambiguous regarding the purposes for which the leave is allowed. It allows for attendance of weddings in the immediate family, and MacWilliams did not ask to attend the wedding of a spouse, brother, sister, child, parent or in-law, but asked for days preceding and following her own wedding, scheduled on a Saturday which would have been her day off. While nothing in the contract allows leave to wedding preparations, the District's practice has been to allow such leave. But it is not the practice of the District to allow leave following a wedding. With the exception of Judd, which was a mistake in the application of the District's practice, the District has a clear and longstanding practice of allowing one non-cumulative day to teachers to prepare for their own wedding or that of an immediate family member, and an additional day is allowed only for greater travel.

The District does not contest the one day leave for MacWilliams to prepare for her wedding, and there is no suggestion that more time was needed for travel. MacWilliams asked for an additional day for unspecified purposes following the wedding. She received the same leave as other teachers in similar situations, and there is no contract violation.

DISCUSSION:

The grievance is timely filed. The fact that the District warned

MacWilliams of its interpretation of the use of non-cumulative leave did not mean that she had to file the grievance upon learning the District's interpretation. The event giving rise to the grievance did not occur until March 11, 1991, the date which MacWilliams asked for as a non-cumulative leave day but which was denied by the District. Where an employer announces its intention to do a certain act, but does not do the act until a later date, arbitrators have held that the occurrence giving rise to the grievance is the later date. 1/ To hold that an employee must file a grievance upon learning of an employer's intent would encourage the filing of premature grievances, as an employer has an opportunity to change its mind between the announcement of intent and the actual event.

The Arbitrator does not find that the contract language of Section 3.2 is so ambiguous that it is necessary to resort to past practice for a correct interpretation. Even if the contract language were found to be ambiguous, the District's past practice is of little value. It is well established that in order to give effect to a past practice, the practice must be unequivocal, clearly enunciated and acted upon, readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The District's practice is not unequivocal, as shown by the case of Nora Judd who received two non-cumulative leave days and one personal day in conjunction with her wedding. It is not clearly enunciated nor readily ascertainable, as shown by the travel restrictions. Does any employee know how many miles must be traveled in order to qualify for the non-cumulative leave under the District's interpretation? Must the travel always be out of state? June Beutler was told she probably could not get two non-cumulative leave days to attend a funeral in Ashland. Yet, it is more miles from Waterford to Ashland than to points in neighboring states such as Iowa, Illinois, Indiana, or even Michigan.

The travel restrictions imposed by the District are completely arbitrary and have no place in the context of a collectively bargained provision negotiated by the parties that provides for two days of non-cumulative leave for certain events. The parties bargained for two days, and all other restrictions are stated within Section 3.21. The restrictions are contained in Section 3.21(a), (b), (c), and (d). The list is a restriction in and of itself -- non-cumulative leave can only be used for those specific reasons. The subsections contain further restrictions, such as the language referring to the immediate family in Section 3.21(a), the attendance at a convention or workshop, etc., must relate to the instructor's area of teaching under Section 3.21(c), and the maximum number of teachers to be granted leave is two per section under Section 3.21(d). The parties thus bargained for the restrictions on the use of non-cumulative leave time. The built-in restriction is the two days. For the District to place additional restrictions, such as the distance traveled for a wedding or funeral, violates the collective bargaining agreement.

The District cannot place additional restrictions on the use of the leave without violating the contract. The District's determination that the use of such leave applies to preparations for weddings or how much travel is involved is no more appropriate than for the District to determine how close one feels about a relative before allowing funeral leave. Where the parties bargained for two days of non-cumulative leave, with certain restrictions, the District

1/ See Genesco Community Unit School District, 75 LA 131 (Berman, 1980) and cases cited therein.

is obligated to provide that leave. Any other restrictions, such as whether the leave is taken before, during, or after the event of a funeral or wedding, are inappropriate, just as the restrictions regarding travel are inappropriate in the context of negotiated leave time.

Also troubling in the District's interpretation of the language of Section 3.21 regarding the approval or disapproval for leave by the District Administrator. The language does not say that the District Administrator is to approve or disapprove of all requests for non-cumulative leave, but confines such approval or disapproval to cases of emergencies. This is an escape hatch for someone who cannot give the written notice or a verbal request before the days are to be taken off, as required by the second sentence of Section 3.21. The parties have bargained for advance notice, and left the escape hatch for emergency cases, which are likely to occur in the case of funerals. They did not bargain for routine approval or disapproval of all requests; indeed, the language states that the Board will allow two days of non-cumulative leave each year. The District is entitled to have prior knowledge of what leave time is to be used for, and there is nothing improper about having to advise an employer the circumstances under which an employee is taking such leave time, as noted in the second sentence of Section 3.21. However, further restrictions are unwarranted, as the parties bargained for the restrictions in the contract.

In conclusion, the Arbitrator finds that the grievance filed by Martha Eckhart MacWilliams is timely under Article 7, and that the District violated Section 3.2 of the collective bargaining agreement when it denied the use of non-cumulative leave to her. The appropriate remedy is for the District to provide MacWilliams with one paid day of leave of her choice, with advance notice to the District, and with the limitation that no more than two teachers are on leave per Section 3.21(d).

AWARD

The grievance is sustained.

The District is ordered to restore to the Grievant, Martha Eckhart MacWilliams, the available non-cumulative leave time by granting her one paid day of leave with the restrictions as noted above.

Dated at Madison, Wisconsin this 4th day of December, 1991.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator