BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SANDRA CHOPIN	Case 53 No. 45937 MA-6810
and	
MONONA GROVE SCHOOL DISTRICT	

Appearances:
Julian, Olson & Lasker, S.C., Attorneys at Law, by Mr. Jeff Scott Olson, on beh
Godfrey, Neshek & Worth, S.C., Attorneys at Law, by Mr. Dale L. Thorpe, on beh

ARBITRATION AWARD

Ms. Sandra Chopin, hereinafter the Grievant, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Grievant and the Monona Grove School District, hereinafter the District, in accordance with the grievance and arbitration procedures contained in the labor agreement between the District and the Monona Grove Education Association. The District subsequently concurred in the request and the undersigned was designated to arbitrate in the dispute. A hearing was held before the undersigned on September 12, 1991 in Monona, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by October 4, 1991. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

At the arbitration hearing the parties stipulated there were no procedural issues, and also stipulated to a statement of the substantive issue:

> Did the District violate Article XII, paragraph 1 of the collective bargaining agreement, which states in relevant part: "Each teacher shall receive yearly notice of his/her accrued disability and emergency leave." If so, what remedy is appropriate under the contract? 1/

1/ It is noted that despite having stipulated to the issue at hearing, the District submitted a somewhat different statement of the issues in its brief and the Grievant did not include a statement of the issues in her brief.

CONTRACT PROVISIONS

The following provisions of the 1989-91 Agreement are cited:

ARTICLE XII

ABSENCE FROM SCHOOL

1. Disability and Emergency Leave

Each teacher is entitled to leave of absence for disability and emergency with full pay up to eleven (11) working days in each school year in which he or she is serving in the Monona Grove Public Schools. The eleven (11) days of sick leave will be credited at the beginning of each school year, provided that, should any teacher not complete the year's contract, there shall be a pro-ration of actual days employed (at the rate of one (1) day sick leave for each eighteen (18) days) and a pro-rated reduction of pay for all excess sick leave granted, if any, to be automatically deducted from any final payment due the teacher. Unused leave of absence for disability and emergency shall be accumulated from year to year, up to one hundred thirty (130) days, as long as the teacher remains in the service of the School District. If a teacher who has accumulated one hundred thirty (130) days of disability and emergency leave at the start of the school year becomes disabled during said school year and said disability continues beyond exhaustion of all accumulated emergency leave, the teacher shall receive up to eleven (11) additional days of paid leave, including if the disability continues into the next school year. For services prior to the date of this contract, each teacher shall be credited for such unused disability and emergency leave as he or she has accumulated since the initial date of his/her present employment under the policies of the School District in effect during the years of continuous employment. Each teacher shall receive yearly notice of his/her accrued disability and emergency leave. For the purpose of this contract, "Emergency" may be interpreted to include such cases as home emergencies, quarantine, by order of the Health Department, serious illness of a member of the employee's immediate family or permanent household requiring the personal care of that member by the employee, or for court cases due to no negligence on employee's part. For all other emergency leave a statement of circumstances shall be submitted in writing by the employee, endorsed by the principal, or other supervisory officer and forwarded to the Central Office for consideration.

. . .

ARTICLE XIII

GRIEVANCE PROCEDURE

1. Purpose

The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any such differences through the use of the grievance procedure.

2. Definition

For the purpose of this Agreement, a grievance is defined as an allegation as to the meaning, interpretation and application of the provisions of this Agreement.

3. Steps

FIRST STEP: Within ten (10) days after the facts upon which the grievance is based first occurs or should have reasonably become known, the employee shall make an appointment with his/her immediate supervisor. An earnest effort shall first be made to settle the matter informally between the employee and his/her immediate supervisor. If the matter is not resolved, the grievance shall be presented in writing by the employee to the immediate supervisor within ten (10) days. The written grievance shall give a clear and concise statement of the alleged grievance including the facts upon which the grievance is based, the issue involved, the specific section(s) of the Agreement alleged to have been violated, and the relief sought. The immediate supervisor shall give his/her written answer within five (5) school days of the time the grievance was presented to him/her in writing; with a copy sent to the chairperson of the Grievance Committee.

SECOND STEP: If not settled in Step 1, the grievance may within five (5) school days be appealed, in writing by the Grievance Committee to the Superintendent of schools. The Superintendent shall give a written answer no later than ten (10) school days after receipt of the appeal.

THIRD STEP: If not settled in Step 2, the grievance may within ten (10) school days be appealed, in writing to the Board of Education. The Board shall give a written answer within thirty (30) school days after receipt of the appeal.

FOURTH STEP: If not settled in Step 3, the Grievance Committee shall make a written

> recommendation to the Association within five (5) school days. If the Association determines that the grievance is meritorious and that submitting it to arbitration is in the best interests of the school system, it may submit the grievance to binding arbitration within fifteen (15) school days after receipt of the recommendation by the Grievance Committee. The Association shall submit such grievance to arbitration by filing a written request with the WERC to appoint an arbitrator from the Commission or its staff. The arbitrator will confer with the Board and the Association and shall hold hearings promptly and shall issue his/her decision on a timely basis. The arbitrator's decision shall be in writing and will set forth his/her findings of fact, reasoning and conclusions of the issues submitted. The arbitrator shall not entertain any issues or arguments not raised in writing in Steps 1, 2, 3 or 4 of the grievance procedure, nor have any power to alter or change any of the provisions of this Agreement or to substitute any new provisions for any existing provisions, nor to give decisions inconsistent with the terms and provisions of this Agreement. The decision of the arbitrator shall be final and binding on the parties except as forbidden by law. In the event there is a charge for the services of the arbitrator, including per diem expenses, the parties shall share such expenses equally.

BACKGROUND

The Grievant, Sandra Chopin, was employed by the District as a Consumer Education teacher during the 1989-90 school year. On February 1, 1990, Chopin was injured while teaching, resulting in pinched nerves. She missed work the next day and was out the rest of the semester. Chopin filed for Worker's Compensation (WC) and began receiving Worker's Compensation payments.

On March 6, 1990, Mark Finger, then Director of Business Services for the District, sent Chopin the following letter:

> Dear Sandy:
>
> It has come to our attention that your recent accident, resulting in an injury reported under worker's compensation, has caused you to miss work for more than three days. The school district insurance company has or will be sending you a check for lost wages. After you receive this check(s) please send it/them over to the district office so that final payroll adjustments can be made in order to coordinate your continuing monthly salary with the worker's compensation benefit. This will also allow us to reinstate sick leave days as appropriate under the law.

We will be returning the check(s) to you along with a regular paycheck once the necessary salary and sick leave adjustments have been made. If you have any questions, please contact me at the district office.

Sincerely,

Mark A. Finger /s/
Mark A. Finger
Director of Business Services

On May 14, 1990, Finger sent Chopin the following letter:

Dear Sandy:

Enclosed is a worker's compensation check made out to you that I just received from CIGNA. I have made a copy for our files so that salary adjustments can be made on your June, July and August checks as would be appropriate. You may cash the check at this time but I do want to point out that future payroll adjustments will be made based on the amount of workers compensation that you have received to date. Sick leave will also be used and reinstated as appropriate. I have not seen a medical report but apparently the third party doctor has verified this workers compensation eligibility.

If you have any questions at this time please feel free to call.

Sincerely,

Mark A. Finger /s/
Mark A. Finger
Director of Business Services

Among other things the check stubs for the District's payroll checks list for "year-to-date" the employe's sick leave days that are "allotted", "used" and "current". The check stub for Chopin's payroll check for the pay period ending May 15, 1990 listed her as having 70.50 sick leave days "used" and .00 "current".

Finger sent Chopin the following letter dated June 4, 1990 indicating 37.5 days of sick leave were being reinstated:

Dear Sandy;

Enclosed is your June paycheck in the gross amount of $793.63. Your Tax Sheltered Annuity and other deductions have been taken which results in the net

> pay. July and August checks in identical gross amounts will be sent to you on June 15. This is the amount that we reviewed together last Friday. A summary of how salary paid out dovetails with the workers compensation payments is as follows:
>
> | | |
> |---|---|
> | Salary Received Through 5/15/90 | $27,335.11 |
> | Salary Received In June, July, and August Paychecks | 2,380.89 |
> | Workers Compensation | 6,759.00 |
> | * Total | $36,475.00 |
>
> * This amount equals your 1989-90 contracted salary.
>
> You were off a total of 83.5 contract days from 2/2/90-6/7/90. Of these days 37.5 days will be reinstated to relate to the worker's compensation payments received.
>
> Sincerely,
>
> Mark A. Finger /s/
> Mark A. Finger
> Director of Business Services

Chopin had a question as to Finger's computation of 37.5 days and called Finger to find out why all of her sick leave had not been reinstated. Finger told her the sick leave was used to fund the salary offset she received in addition to the Worker's Compensation.

Chopin's paycheck stub for the pay period ending July 31, 1990 (sent on June 15th) listed her as having 11.0 sick leave days "allotted" for the coming year, 33.00 days "used" and 37.50 days "accrued".

On August 28, 1990 Chopin sent the District's Superintendent, Dr. Larkin, a written request to take an 18-week medical leave due to her injury, and stated in her request that "I want to use my sick days when workmans comp (sic) stops."

By the following letter dated September 17, 1990, Finger advised Chopin her request for an 18-week medical leave of absence had been granted:

> Dear Sandy:
>
> On Wednesday, September 12, the Monona Grove Board of Education accepted your request for a medical leave of absence for 18 weeks (through the end of the first semester). You will be paid for the remaining days of sick leave that are on the school district records until such days have been depleted.
>
> If you are receiving worker's compensation checks you must send in copies of the check stubs in order to have any sick leave days reinstated. Please send in any copies verifying worker's comp covering the period of time from August 23, 1990 forward.
>
> Sincerely,

Mark A. Finger /s/
Mark A. Finger
Director of Business Services

Chopin's paycheck stub for the payroll period ending September 14, 1990 listed her as having 11.00 sick leave days "allotted", .00 days "used" and 48.50 days "accrued" for the 1990-91 school year.

Chopin was on her medical leave of absence and received her October paycheck from the District in the same amount as her September check. Chopin then received a call from the District's new Director of Business Services, Deborah Byers, who had replaced Finger. Byers informed Chopin there was a mistake and that Chopin needed to return her October paycheck. Chopin took her October check to Byers' office, but Byers was not in and Chopin left the check. Chopin called Byers later that day and was told her sick leave had run out and she would not be receiving another check, and Byers said she would send Chopin a memo to explain it. Byers then sent Chopin the following memorandum dated October 15, 1990:

TO: Sandra Chopin

FROM: Deborah Byers
Director of Business Services

DATE: October 15, 1990

RE: Sick leave

It has come to my attention that you have been overpaid for sick days to which you are entitled. At the beginning of the 1989-90 school year, you had 70.5 days available for sick leave. This number included 59.5 days left over from 1988-89 to which we added 11 days for the 1989-90 school year. From September 1, 1989 through February 1, 1990, you used 14.5 days of sick leave plus 1 period. From February 2, 1990 through June 7, 1990, you were off for 83.0 days plus 4 periods. At the end of that time, Mr. Finger communicated with you and told you that the District would reinstate 37.5 of those days because you had collected part of your salary from Workers' Compensation. Your sick leave, as of the end of the 1989-90 school year was as follows:

July 1, 1989	70.5 days	
Sept. 1, 1989 - February 1, 1990		(14.5 days + 1 period)
Feb. 2, 1990 - June 7, 1990		(83.0 days + 4 periods)
Total		(27.0 days + 5 periods) (or 28.0 days)

Reinstated days	37.5 days	
Total	9.5 days	

Therefore, at the beginning of the 1990-91 school year, your account had 9.5 days + .5 days credited for the 1990-91 year. The contract states that you will have your sick days prorated for the time that is worked at the rate of one day for each 18 days worked. 9.5 days of sick leave means that you have worked for 9.5 days

> and we will credit you for .5 additional sick days.
>
> In September, you received a check for $3,000.08 or 1/12 of your 1990-91 salary. That is equivalent to 15.83 days of employment. Provided that the check issued for the month of October is returned to the District, you owe us for 5.83 days or $1,104.67. Your per diem rate is $189.48 ($36,001/190 days). Please advise the District in writing of the manner in which you wish to repay this money.

The District recouped the $1,104.67 from Chopin's last paycheck.

On or about November 9, 1990, a written grievance was filed on Chopin's behalf and included the following as an alleged contract violation:

> The Monona Grove School district violated Article XII, paragraph 1 of the contract which states: "Each teacher shall receive yearly notice of his/her accrued disability and emergency leave". The District did not give Sandra Chopin accurate information.

The grievance also included the following statement:

> Sandy feels that because of the inaccurate calculations and documented information she received from the school district, she should not have to pay the district back and that she should be allowed to return to school immediately. On October 2, Dr. Toutant determined that Sandy has 7 1/2% permanent partial disability as a result of the injury sustained at school. Sandy is no longer receiving workman's compensation and without her salary this is causing a great financial hardship on her family.

The grievance was denied by the District and proceeded through Steps 2 and 3 in the same form and was denied at those steps as well. The parties were unable to resolve their dispute and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Grievant

The Grievant cites the wording of Article XII, paragraph 1, of the Agreement that "Each teacher shall receive yearly notice of his/her accrued disability and emergency leave." The Grievant asserts that the District commonly carried out its contractual obligation in that regard by including this information on the teachers' paycheck stubs. The Grievant notes that on June 4, 1990 Finger sent her an itemization of the salary and WC benefits she had been receiving and would receive throughout the balance of that summer and also stated that 37.5 sick leave days would be reinstated to Chopin's account for her WC temporary total disability benefits. Her June 15, 1990 paycheck stub (for payroll period ending July 31) showed that Finger had carried out that intention and reinstated the 37.5 sick leave days available for use. The Grievant asserts that believing she had the 37.5 sick leave days available to use and that she would earn additional sick leave days at the rate of 1 per 18 days of work or covered sick leave days, on August 28, 1990 she requested an 18-week medical leave of absence. The Grievant contends she would not have requested a full semester's leave had she not believed she had the sick leave days listed on her pay stubs. Had she known she had few or no sick leave days

available to use at the beginning of the 1990-91 school year, she would only have requested a leave until her period of disability ended and her WC temporary total disability benefits ended. She then could have returned to work and lived on her earned salary.

The Grievant notes that her request for a semester's leave was granted in a letter from Finger dated September 17, 1990 wherein he stated "You will be paid for the remaining days of sick leave that are on the School District records until such days have been depleted." She asserts that she believed that the number of sick leave days on the District records was reflected on her September 14, 1990 paycheck stub which listed 48.5 sick leave days accrued. Her Septembe up 15.83 days of accrued sick leave in her September check. Byers' memo of October 15, 1990 indicated the same and also noted that the District had made errors in her June and September pay stubs in reporting the number of days of accrued sick leave available to be used. Byers' memo explained that as of June 7, 1990 the Grievant did not have a 0 accrued sick leave days balance, as her paycheck stub reported, but a negative balance of 28. With the 37.5 sick leave days reinstated in mid-June, this gave the Grievant a total of 9.5 days for the 1990-91 school year according to Byers. Adding the additional half-day of sick leave which would be earned by the 9.5 days of sick leave, the Grievant was credited with 10 days of sick leave properly used in September. Since she had been paid for 15.83 days, the District wanted her to pay back $1,104.67, as well as to return her October check and not receive any further sick leave checks for the balance of the semester. The Grievant alleges that had the District's initial projection of 37.5 sick leave days been correct, she would have been able to earn 2.08 additional sick leave days (one sick leave day accrued for each 18 days of work or covered sick leave). Thus, she would have been able to take 39.58 sick leave days during the fall semester, rather than the ten days later computed by the District.

The Grievant contends that the value of the sick leave days she relied on receiving due to the District's failure to give her accurate information on her pay stubs, and did not receive, is the value of the difference between the number of sick leave days she could have used had the pay stubs been accurate (39.58) and the number of sick leave days the District gave her credit for (10), or 29.58 sick leave days. At $189.48 per day that value which she relied on receiving when she requested her semester's leave, but did not receive because of the District's error, is $5,604.82.

The Grievant asserts that the District violated the contract since its normal vehicle for giving notice to teachers of their accrued sick leave was the paycheck stubs and the contract required an accurate statement. In her case, the check stubs were not accurate, and even if the violation was due to negligence, that is not a defense to the District's failure to fulfill an affirmative contractual duty. The Grievant asserts that she relied on the District's representations and took a full semester's leave, when she could have taken a shorter leave which would have permitted her to return to work after her WC benefits terminated when she was no longer disabled. The only way she can be made whole is to be paid the value of the sick leave days she was promised and then had taken away, $5,604.82. While the remedy requested is an extraordinary one, it will only be required where a teacher relies on an erroneous statement of accrued sick leave to his or her detriment. She asserts that this case is not like that in which an employer makes a good faith error in paying an employe too much money on a paycheck. The difference here is that the District had an affirmative duty under the contract to give its employes accurate notice of their accrued sick leave balances and it chose to carry out that duty via the pay stubs. Due to the inaccuracies in her June and September paycheck stubs, on which she reasonably relied, the Grievant took a semester off. She asserts that the District's contractual violation caused her to forfeit this money unwittingly by requesting a full semester's leave and that

the only way she can be made whole is for the District to be ordered to pay her the $5,604.82 she lost in sick leave benefits.

District

The District first takes the position that the Arbitrator may not entertain any issues or arguments that were not raised prior to the arbitration at the grievance level. It cites Article XIII, 3, of the Agreement, at Step 4, which provides "The arbitrator shall not entertain any issues or arguments not raised in writing in STEPS 1, 2, 3 or 4 of the grievance procedure." The District asserts that during the arbitration hearing it objected to the Grievant's attempts to take issue with the accuracy of the calculation in Byers' October 15, 1990 memorandum, Grievant's medical condition, the amount of medical compensation she received, and the amount of leave she had coming. Those issues were never raised in Steps 1, 2 or 3 of the grievance process. Hence, they are not issues which can be "entertained" at the arbitration level and must not be considered.

With regard to the notice requirement of Article XII, 1, of the Agreement, the District takes the position that there was no violation of the contractual requirement. It asserts that the Grievant was given the required notice via Byers' phone calls to Chopin and the follow-up memorandum of October 15, 1990. Therefore, Chopin received the notice both orally and in writing.

The District contends that the Grievant's argument that the contract was violated because the District did not provide "accurate" notice imposes a requirement not agreed to by the parties to the contract. The contract does not specify when the required notice must be given, the form of the notice, the effect of the mathematical error, the effect of inaccurate notice or the remedies available to either the teacher or the District due to error or inaccurate notice. The contract is silent on all of those points, however, the contract is very specific in setting forth exactly how many sick leave days and the rate of accumulation to which a teacher is entitled.

The District asserts that the Grievant admits she received notice but that she argues that a mathematical error in her favor made by the District was a windfall benefit to her and she should not have to pay it back. The four corners of the contract were complied with as the required notice was given and there is no justification for the Grievant's request. The District asserts that when there is a mistake, the contract must be consulted to determine the correct course of action. The District alleges that the Grievant asserts that the mistake was made in her favor and that she should be allowed to keep the benefit of that mistake. If the District took such an approach, and the notice had been an understatement of the Grievant's accumulated sick leave, the District questions whether it would then have been justified in giving her less than she was due under Article XII, 1, of the Agreement.

The District contends that the Agreement does not specify a time for performance of the "yearly" notice and cites Wisconsin contract law as requiring that if a specific time performance is not set forth in the Agreement, the law will imply that performance shall be made within a "reasonable time." It then argues that given the contractual silence, that "reasonable time" implication should be read in light of the more general "substantial performance" doctrine under Wisconsin contract law. Under that doctrine, and in the face of contractual silence, the contract has been considered substantially performed where a party has met the "essential purpose of the contract." The District then argues that the incidental notice requirement of the contract is subordinate to the more important issue of whether the proper benefits were given to the Grievant and the essential purpose of the contract has been fulfilled. It asserts that by giving the

notice literally within days of when the mistake was discovered, the District substantially performed its contractual obligation by meeting the essential purpose of the contract. It concludes that no one is disputing that the Grievant in fact received all the sick leave benefits she had coming. The burden is on the Grievant to prove a violation of the contract and the District asserts that she has failed to do so.

With regard to a remedy, the District takes the position that the Agreement between the District and the Association limits the scope of the grievance process to allegations as to the "meaning, interpretation and applications of the provisions of this Agreement" and nothing more. Citing Article XIII, 2, of the Agreement, the District asserts that under that provision the entire grievance and arbitration process is limited to the contract and what it requires as to remedies that are available under the contract. It argues that it is a basic principle of arbitration law, as upheld by the U.S. Supreme Court's decision in Alexander v. Gardner-Denver Company, 415 U.S. 36 (1976), that an arbitrator only has the authority to interpret the collective bargaining agreement and may not reach beyond the contract in creating a remedy. The District argues that this limitation is important because the essence of the Grievant's claims is a cause of action in tort which is more properly brought before a court of law. Although guised as a contract violation, the Grievant is attempting to make arguments such as reasonable reliance, change of position, duty of the District, etc., and is attempting to use the arbitration process to pursue a tort action. The arbitration process is not available for that purpose and those tortious allegations are not relevant or subject to review at the grievance or arbitration level. The District concludes that even if the Grievant is able to prove a violation of contract, the remedy available is not that she is somehow entitled to retain the excess benefits beyond what the contract requires, rather the only remedy if a violation is proved, are the benefits specified under Article XII, Section 1, of the Agreement. According to the District, there is no dispute that the Grievant received the full and complete benefits due her under that provision. Thus, there is no contractual basis for the remedies requested by the Grievant in that she does not wish to pay back the District for the excess benefits received.

DISCUSSION

Article XII, 1, of the Agreement provides, in relevant part, that "Each teacher shall receive yearly notice of his/her accrued disability and emergency leave." The District asserts that since that wording does not specify when or how notice is to be given, or that the notice must be accurate, Byers' oral communications and written memorandum of October 15, 1990 constituted sufficient notice to comply with the Agreement. It also asserts that the figures listed on Chopin's paycheck stubs as to the number of sick leave days she had to use were not intended to be the notice.

There are a number of problems with the District's assertions with regard to whether it complied with the contractual notice requirement. First, Byers could not say how such yearly notice was normally given by the District other than the paycheck stubs. There is no evidence that teachers were normally provided with any special notice of their sick leave usage and accumulation beyond that provided on the stubs. Therefore, it would appear the information on the paycheck stub was intended to satisfy the notice requirement. Second, the District would ignore the inaccurate information stated on the paycheck stubs, and assert that Byers' conversations with Chopin advising her of the error and her memorandum on October 15th should be considered the real notice. In other words, the inaccurate notices should be ignored. The District also argues that the contract does not require that the notice be accurate. Both arguments are unrealistic and overlook the basic purpose underlying such a notice requirement, i.e., to inform the employes as to the amount of sick leave they have available to use. It seems a reasonable assumption that in including the requirement in the Agreement the parties foresaw there would be instances where teachers would need that information in order to plan medical treatment, medical leaves, and recovery periods in a manner that would economically impact on them the least. The requirement that the notice be accurate is necessarily inferred by the purpose underlying the notice requirement.

Thus, to interpret the contract as not requiring the notice to be accurate would defeat the reason for having the notice requirement. Such an interpretation is to be avoided. While there is no doubt that the District made an honest mistake in calculating the sick leave Chopin had available for the 1990-91 school year, nevertheless, it must be found to have violated the notice requirement in Article XII, 1, of the Agreement by providing the inaccurate information on her paycheck stubs.

There is the question as to the appropriate remedy in this case. The District asserts that Chopin received all of the sick leave she had coming under the Agreement and cannot be entitled to more than what the Agreement provides. The Grievant asserts she relied on the figures provided by the District in deciding to take a full semester off for a medical leave and is now entitled to the difference between what sick leave she actually received and what she would have received had the District's figures been accurate (29.58 days or $5,604.82). The District cites Article XIII, 2, of the Agreement as limiting the Arbitrator's authority with regard to remedy. That provision, however, defines a grievance and does not necessarily address or limit the remedy if a violation is found. The District also cites the U.S. Supreme Court's decision in Gardner-Denver, supra, for the principle that an arbitrator may not reach beyond the contract in creating a remedy. It is, however, the Court's earlier decision in United Steelworkers v. Enterprise Wheel & Car Corp., 80 S. Ct. 1358, 363 U.S. 593 (1960) that is most often discussed in examining an arbitrator's remedial powers, and its decision in Gardner-Denver has for the most part been viewed as concerning the propriety of an arbitrator's consideration of external law in deciding whether the collective

bargaining agreement has been violated. 2/ Elkouri and Elkouri, in How Arbitration Works, recite the relevant language from the Court's decision in Enterprise Wheel, along with the following comment:

> **Scope of Remedy Power**
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> In its Enterprise decision the U.S. Supreme Court spoke of the remedy power of arbitrators:
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> > "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."
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> This statement of broad but nonetheless restricted remedy power obviously fails to provide a clear and unequivocal guide. This is further illustrated by the fact that one federal court has acted on the view that arbitrators have power to use a given type of remedy unless it is expressly precluded by the agreement while another federal court does not appear willing to go nearly so far to find remedial authority in the arbitrator.
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> In the realm of state law broad remedial authority exists in the arbitrator under the Uniform Arbitration Act, which specifies certain grounds for court vacation of awards but which expressly adds that "the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."
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> The views of arbitrators themselves differ widely as to how broad their remedial power is or

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2/ See, e.g., How Arbitration Works, Elkouri & Elkouri, 4th ed., p. 286 and 375; Fairweather's Practice and Procedure in Labor Arbitration, 3rd ed., Ch. 15; Remedies in Arbitration, Hill and Sinicropi, 2nd ed., Ch. 3 and Ch. 5.

should be.

. . .

> If a given type of remedy has been widely used by arbitrators, an exceedingly strong case may be made in support of an arbitrator's right to use the remedy (absent express denial of such right by the agreement or submission). Compensatory damages to employees who have suffered financial loss from the employer's violation of their rights under the agreement provides the most prominent illustration. 3/

In this case the District asserts that Chopin suffered no damages since she received all of the sick leave she was entitled to under the Agreement. The Grievant claims she reasonably relied on the faulty information from the District to her detriment and that the District should be required to provide the sick leave it led her to believe she had available to use. Essentially, the Grievant's claim amounts to an estoppel theory, a doctrine that is frequently applied by arbitrators. 4/ The evidence supports the application of

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3/ Elkouri & Elkouri, at p. 286-287 (footnotes omitted), See also pp. 401-04, regarding "Principles of Damages".

4/ See the discussion in Elkouri and Elkouri, How Arbitration Works, 4th ed., and the cases cited therein:

> **Waiver and Estoppel**
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> Frequently one party to a collective bargaining agreement will charge that the other party has waived or is estopped from asserting a right under the agreement. Arbitrators generally do not appear to be concerned with all of the fine legal distinctions between the term "waiver" and the term "estoppel," but they have often applied the underlying principle.
> (399)
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> . . .
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> See, for example, Dayton Tire & Rubber Co., 46 LA 1022, 1026-27 (Dworkin); Central Greyhound Lines, 46 LA 1078, 1081 (McCoy). In the latter case, Arbitrator Whitley McCoy stated:
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> > I am unable to avoid the force of the Union's argument. It is certainly founded upon Article VII (d), Article 31, and well established principles of law. This is not a claim founded upon tort or upon general principles of contracts. It is a claim for breach of Article 31 of this labor Contract Estoppel enters the case only as a means of establishing what are the facts as a matter of law. On principles of promissory estoppel the Company is not permitted to deny the fact that as of April 16 the Grievants were properly to be considered as Extra Board Operators.
> >
> > The principle was applied in International Harvester Co. and UAW, 17 LA 101, where there are quotations on

estoppel in this case. As previously concluded, the District provided Chopin with erroneous information on her paycheck stub after Finger's letter of June 4, 1990 advised her that 37.5 days of sick leave were being reinstated. On August 28, 1990 Chopin sent the Superintendent a written request to take an additional 18-week medical leave, which noted that she wanted to use her accrued sick leave after her WC benefits ended. Chopin credibly testified that she relied on the mistaken information that she had 37.5 days of sick leave available in deciding to request a full semester's leave rather than a shorter leave. To allow the District to subsequently correct its error after having given Chopin the inaccurate information and granted her request for the semester medical leave absence, would result in a hardship on Chopin through no fault of her's.

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page 103 from American Jurisprudence, A.L.R., The American Law Institute's Restatement of the Law of Contracts and Williston on Contracts.

(1081)

Thus, the necessary elements of estoppel - action or non-action which induces reliance by another to his detriment, are present. 5/ Therefore, the District is estopped from asserting that Chopin received more sick leave than the Agreement provided and should be required to pay back that excess amount. 6/ However, as the District notes, Article XIII, Grievance Procedure, 3, Step 4, expressly limits the Arbitrator to only those issues or arguments raised in writing in Steps 1, 2, 3 or 4 of the grievance procedure. The evidence indicates that the Grievant limited her request prior to the arbitration hearing to not having to pay back the 5.83 days she received over and above what she had coming once the mistake was discovered. Hence, that is the relief considered and found to be appropriate at this level and the Grievant's request for additional relief is not considered.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

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5/ See Mercado v. Mitchell, 83 Wis. 2d 17 (1978):

> There are three elements to equitable estoppel: (1) action or inaction which induces, (2) reliance by another, (3) to his detriment.
> (26-27) (Footnotes omitted)

See also Pilgrim Investment Co. v. Reed, 156 Wis. 2d 677, 686 (Ct App 1990), citing, Nolden v. Mutual Benefit Life Insurance Co., 80 Wis. 2d 353, 369 (1977); and Black's Law Dictionary, 4th ed., pp. 648-49.

6/ Arbitrator Dworkin reached a similar result in his award in Dayton Tire & Rubber Co., 46 LA 1022, 1026-27 where he concluded the Company was estopped from correcting its mistake as to an employe's seniority date. See also Peabody Galion Corp., 63 LA 144, 147 (Stephens, 1974) and Nickels Bakery, Inc., 33 LA 564 (Duff), cases in which the Arbitrators held that the employer could correct its mistake once discovered, but could not recoup the overpayment reasoning that where the mistake is on the company's part and the employe could reasonably believe he was being properly paid, the company should be the one to suffer for its mistake, not the employe.

AWARD

The grievance is sustained. The District is directed to immediately repay Sandra Chopin the $1,104.67 it had deducted from her pay.

Dated at Madison, Wisconsin this 21st day of January, 1992.

By David E. Shaw /s/
David E. Shaw, Arbitrator