BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MATC TEACHERS' UNION LOCAL 243, WFT/AFT, AFL-CIO	Case 78 No. 45795 MA-6757
and	
MADISON AREA TECHNICAL COLLEGE	

Appearances:
Mr. Steve Kowalsky, Staff Representative, Wisconsin Federation of Teachers, appearing on behalf of the Union.
Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Jon Anderson, appearing on behalf of the Employer.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and College or Employer respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on January 30, 1992 in Madison, Wisconsin. The hearing was transcribed. Afterwards, the parties filed briefs and the Employer filed a reply brief, whereupon the record was closed April 10, 1992. Based on the entire record the undersigned issues the following Award.

ISSUES

The parties were unable to agree upon the issues and requested the arbitrator frame them in his Award. 1/ The arbitrator hereby adopts the Employer's suggested framing of the issues as his own.

1/ The Union states the issues as:

1. Was the grievance timely filed?

2. Did the District violate Article VIII, Section B,, paragraph 6, of the labor agreement when it assigned Ms. McKay three fourths (3/4) of a sick leave day for the 1990 semester session?

3. If so, what is the appropriate remedy?

(Footnote 1/ continues on page 2.)

PERTINENT CONTRACT PROVISIONS

The parties' 1989-91 collective bargaining agreement contained the following pertinent provisions:

Preamble

> . . .This agreement that is entered into shall supercede and cancel all previous agreements, verbal or written or based on alleged practices between the

parties. Any amendment or agreement supplemental thereto shall not be binding upon either party unless executed in writing by both parties.

. . .

Article V
Grievance Procedure

. . .

Section C-Procedure

Step 1-Any teacher within the bargaining unit may discuss the grievance with the Division Chairperson or Area Coordinator directly and individually and/or accompanied by the Union Representative with the object of resolving the matter informally. The teacher may waive this step in the procedure if he/she so desires and proceed immediately to the first formal step.

a. The grievance shall be presented within thirty (30) school days from the time the teacher knew or should have known of the existence of the grievance. If this procedure is not followed, the grievance is waived.

(1/ continued)

While the Employer states the issues as:

1. Was the grievance timely filed?

2. Did the District violate the provisions of Article VIII, Section B of the 1989-91 labor contract when it assigned Ms. McKay three-fourths (3/4) of a sick leave day for the 1990 summer session?

3. If so, what is the appropriate remedy?

. . .

ARTICLE VIII
Leaves of Absence

. . .

Section B-Sick Leave

1. Teachers covered by this agreement shall be granted a total of ten (10) days sick leave at full compensation for each contract year of the term of their employment which shall be totally accumulative to 190 days. The ten (10) days shall accrue at the beginning of each school year. In the event the teacher leaves the employment of the Board, a deduction

shall be made from the last pay check to reimburse the Board for used but unearned sick days.

2. A newly employed teacher will accrue ten (10) days for the first contract year immediately.

3. No later than thirty (30) days after the beginning of each new school year, each teacher shall receive an accounting in writing of the total number of sick leave days he/she has accumulated to that time.

4. In the case of a teacher who is absent due to illness where it is necessary to reschedule the class for students and the teacher is in essence also making up the work-absence, no deduction from sick leave shall be made.

5. In computing prorata sick leave, each of the ten (10) months from August through May equals one day. Service for one-half a month or more will be granted for one day; for one-fourth to one-half a month a half-day sick leave will be granted.

6. Summer school teachers will have one additional day of sick leave added to their accumulative sick leave allowance for each additional four weeks or additional fraction thereof that they work beyond the regular 190 day school year.

7. Teachers covered by this agreement who are teaching less than 100 percent but more than 50 percent shall have their sick leave pay computed on a prorated basis commensurate with the percentage of time paid for in the individual's teaching contract.

8. A contractual teacher who earns sick leave in excess of 190 days shall receive a cash sum equivalent to the teacher's regular salary times fifty percent (50) of any unused excess days which payment is to be made annually in the second bi-weekly pay day in the month of September of the next fiscal year.

BACKGROUND

This case involves the manner in which the District has calculated the amount of sick leave to be credited to teachers teaching summer school under the terms of the parties' collective bargaining agreement. Specifically, the case concerns the amount of sick leave which teacher Carston McKay accumulated during the summer session of 1990.

McKay taught one class for six weeks during 1990 summer session. This teaching load was equal to a 53.3 percent load under her teaching contract with the District. Afterwards, the District assigned her sick leave account with three-fourths (3/4) of a day of sick leave, specifically .75, for the 1990 summer session.

Payroll supervisor Patty Pilsner testified that an undated document entitled "Sick Leave Record School Year 1990-91" was placed in McKay's mailbox at work on September 18 or 19, 1990. A cover letter dated September 20, 1990 was also attached to this document. The information contained on both

documents was virtually identical. Both documents indicated in pertinent part that McKay had received .75 of a day of sick leave for the summer of 1990.

In a memo dated October 29, 1990 and stamped "Received" by the District October 30, the Union filed a grievance which asserted that McKay's summer school sick leave had been calculated incorrectly by the District. The grievance was not resolved and was ultimately appealed to arbitration.

The record indicates that in addition to teaching during the 1990 summer session, McKay also taught during the 1978, 1979, 1981 and 1983-1988 summer sessions. She was assigned three-fourths of a day of sick leave for each of these summer sessions.

So far as the record shows, the District has computed earned sick days for summer school teachers the same way since 1974. Specifically, it has prorated summer school sick leave accrual in relation to a full-time contract. It used the same methodology in computing McKay's sick leave for the 1990 summer session.

POSITIONS OF THE PARTIES

The Union initially challenges the Employer's assertion that the grievance was untimely filed. In doing so, it asserts that the applicable date for timeliness purposes is September 20, 1990, the date typed on the sick leave memo. Counting from that date, the Union submits it filed the grievance in a timely fashion (i.e. within thirty days). With regard to the merits, it is the Union's position that the District did not properly calculate summer sick leave credit for the grievant. In support thereof, it relies exclusively on the language contained in Article VIII, B, paragraph 6. The Union reads this clause as providing one day of sick leave for each four weeks of summer session or additional fraction thereof. Since McKay worked six weeks in the summer of 1990, the Union believes she should have received two days of sick leave rather than three-fourths of a day as the Employer gave her. The Union asserts that paragraph 6 is clear and unambiguous so there is no need for the arbitrator to even look at any District past practice. However, if the arbitrator does look at the District's past practice, the Union contends he should still find the contract language controlling for the following reasons. First, the Union submits that the "Preamble" clause in the parties' contract serves as a bar to considering the District's practice. Second, the Union believes there is no contractual support for the District's practice. It notes in this regard that paragraphs 5 and 7 of Article VIII do not apply to paragraph 6. Thus, in its view the District's formula for summer school proration is not derived from the contract. It therefore contends that the District did not properly calculate summer school sick leave credit pursuant to Article VIII, Section B, paragraph 6. In order to remedy this contractual violation, the Union requests that the grievance be sustained and the grievant, plus all similarly affected teachers, be made whole. As part of this remedy, the Union requests that the District be ordered to recalculate sick leave for all summers that such leave was computed incorrectly for McKay and similarly affected teachers, with any additional earned sick leave added to each teacher's respective accumulative sick leave allowance.

The District believes that the grievant's claim must be denied on both procedural and substantive grounds. With regard to the former, the District raises a procedural defense that the grievance was untimely filed. The basis for this contention is the Employer's assertion that the grievant knew or should have known of the existence of this grievance no later than September 18, 1990. In its view, the 30-day time limitation for filing grievances started to run on that date. Since the grievance was filed on October 30, it believes the grievance was not timely and has therefore been waived. With

regard to the merits, it is the District's position that it correctly calculated the sick leave earned by the grievant during the summer session of 1990. According to the District the contract language, when read as a whole, is ambiguous as to the amount of sick leave a teacher teaching less than a full load during the summer session is entitled to receive. Relying on this premise (i.e. that the language is ambiguous), it believes the District's past practice governs the interpretation of the ambiguous language. The District asserts that its long-standing past practice (i.e. over 18 years) has been to prorate summer school sick leave accrual in relation to a full-time contract. For example, if a teacher works half-time in summer but full-time during the school year, the District has granted them half-sick leave for the summer. It submits that the Union was aware of this well-established practice inasmuch as both teachers and union officials had inquired about it in the past and did not challenge it (i.e. the District's practice) until the instant grievance. The District asks the arbitrator to give effect to this long-standing and unrefuted practice which, in its view, is not inconsistent with the contract. The District argues in the alternative that if the arbitrator finds that Article VIII, Section B, paragraph 6 is not ambiguous, he should find that the District's unrefuted past practice has amended the parties' contract language to comport with the District's clear, consistent and uniform practice. Next, the District contends that its past practice should not be disturbed through the arbitration process. Instead, if the practice is changed, it should be resolved at the bargaining table - not in arbitration. Finally, the District dismisses as meritless the Union's contention that the "Preamble" clause in the contract bars consideration of the District's practice. According to the District, the Preamble does not bar consideration of past practice in situations where, as here, the language is ambiguous. The Employer therefore requests that the grievance be denied. Should the arbitrator find a violation however, the Employer requests that the remedy be applied prospective only.

DISCUSSION

Procedural Arbitrability

Since the District contends that the grievance was untimely filed, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance is procedurally arbitrable.

The first level of the contractual grievance procedure (Article VIII, Section C, Step 1) establishes a timetable for filing grievances. Specifically, it provides that "the grievance shall be presented within thirty (30) school days from the time the teacher knew or should have known of the existence of the grievance." In order to be timely then, a grievance must be "presented" (i.e. filed) within thirty (30) school days from the time the teacher had knowledge of the matter.

The question here is when the instant grievance arose. The facts pertinent in making this call are as follows. Payroll supervisor Patty Pilsner testified that an undated document containing various sick leave information was placed in McKay's mailbox at work on September 18 or 19, 1990. Attached to this memo was another memo dated September 20, 1990. Both documents indicated in pertinent part that McKay received .75 of a day of sick leave for the summer of 1990. Based on these facts, the Employer contends the grievance arose September 18 (when, according to Pilsner, this document was placed in McKay's mailbox), while the Union submits the grievance arose September 20 (the date of the cover memo).

In deciding which date is applicable here (i.e. September 18 or September 20), the undersigned is presented with a choice of relying on Pilsner's memory as to when the memo in question was placed in McKay's mailbox

or the dated memo. Given this choice, I pick the latter over the former. In my view, there is no need to rely on Pilsner's memory to determine when McKay received the notice in question when a dated memo exists. A common presumption is that memos and letters are dated correctly. Applying this presumption here means that a memo dated September 20, 1990 was presumably placed in McKay's mailbox on either that day or thereafter. Certainly there is nothing in the instant record which would lead the undersigned to conclude that a memo dated September 20, 1990 was placed in McKay's mailbox any earlier than that date (specifically, September 18 or 19, 1990).

Based on the foregoing, it is held that the occurrence which triggered the running of the contractual time limitation was the memo dated September 20, 1990. Pursuant to the contractual time limitation, a grievance concerning the amount of summer session sick leave which McKay earned in 1990 had to be filed thirty school days after that date. The instant grievance, which was filed by the Union on October 29 and received by the District on October 30, 1990, was within that time frame by one day (if September 20 is included in the computation) and two days (if it is not). That being the case, the instant grievance is found to be procedurally arbitrable.

Merits

Attention is now turned to the substantive merits of the grievance. In this case the Union challenges the amount of sick leave credited to the grievant for the summer of 1990. The District credited the grievant's sick leave account with three-fourths of a day (i.e. .75) of sick leave. According to the Union, this figure was incorrect and should have instead been two days.

In resolving this issue, the Union urges the undersigned to focus on one particular provision in Article VIII, B, namely paragraph 6, and to apply that provision to the instant facts. The Employer rejects this narrow focus on just paragraph 6 and urges the undersigned to instead review Article VIII, B as a whole and then apply it (i.e. the entire Article) to the instant facts. These conflicting approaches to resolving this contractual dispute will be reviewed below.

Attention is focused first on Article VIII, B, paragraph 6, the provision relied upon by the Union. That paragraph provides:

> Summer school teachers will have one additional day of sick leave added to their accumulative sick leave allowance for each additional four weeks or additional fraction thereof that they work beyond the regular 190 day school year.

By its express terms, this clause establishes that summer school teachers are entitled to one day of sick leave for each four weeks of summer school taught. In the instant case, the grievant taught summer school for six weeks and was credited with .75 of a day of sick leave for her work. The Union disagrees with the Employer's calculation of sick leave. It reads the aforementioned paragraph as providing the grievant with two days of sick leave credit for her summer school teaching (i.e. one day for the first four weeks and one day for "each...additional fraction thereof"). On its face, the Union's interpretation certainly seems plausible. In contrast, there is nothing in the paragraph just noted that supports the calculation made by the District (i.e. .75 of a day of sick leave for six weeks of summer school teaching).

Having said that though, it is a well-established arbitral principle that the meaning of each contract provision must be determined in relation to the

contract as a whole. Thus, the above-noted paragraph cannot be isolated from the rest of the agreement as proposed by the Union. Instead, it must be reviewed in its overall context. That being so, a review of the totality of Article VIII, B follows.

The first paragraph of Article VIII, B grants teachers ten (10) sick days at the beginning of each school year. Paragraphs 2, 3, 4 and 8 are inapplicable to this case. Paragraph 5 sets forth a mechanism for prorating sick leave for the months of August through May (i.e. the school year term). On its face, it does not apply to the calculation of summer school sick leave. Paragraph 6, as noted above, deals with summer school teachers and their accrued sick leave. Finally, paragraph 7 provides that sick leave pay is prorated.

The undersigned is of the opinion that paragraphs 6 and 7, when read together, create the following ambiguity. It is clear under paragraph 7 that sick leave payout will be on a prorated basis commensurate with the percentage in the teacher's teaching contract. This means that a teacher teaching say, half-time, would receive half of the sick leave pay granted a full-time employe. Paragraph 6 though does not say anything about those summer school teachers who teach less than a full load during the summer. Specifically, it does not say whether or not their sick leave accrual is to be prorated. That being the case, the parties have not included language in either paragraph 6 or anywhere else in Article VIII, B that answers the question of whether sick leave accrual is to be prorated for those summer school teachers who teach less than a full load during the summer. This means that the contract language is simply unclear concerning same.

To illustrate this point, it is noted that paragraph 6 could be interpreted, as argued by the Union, to mean that there is no prorating of summer sick leave accrual for those summer school teachers who teach less than a full load. Were there no prorating of summer sick leave accrual for these teachers however, every summer school teacher, whether having a one percent load or a one hundred percent load, would be entitled to one day of sick leave for each four weeks of summer school taught. Such an interpretation would give a summer school teacher greater sick leave accrual rights than a teacher working during the regular school year. In the opinion of the undersigned, such a result does not make sense.

As a practical matter, the conclusion reached above that the contract language is ambiguous disposes of the Union's argument concerning the contract's Preamble. The Union points to that language in the contract's Preamble which provides: "This agreement. . . shall supercede and cancel all. . . alleged practices between the parties" and argues that this language serves as a bar to a consideration of the District's evidence of practice. I disagree. In my view the limitations found in the Preamble apply only to matters not covered by the labor contract and not to practices which interpret and apply ambiguous contract language. Inasmuch as ambiguous contract language is involved here, and a practice may cast light on that ambiguous language, it is held that the Preamble does not bar consideration of the District's practice.

Having found that the contract language is ambiguous as to the amount of sick leave a teacher teaching less than a full load during the summer session is entitled to accrue, attention is now turned to an alleged past practice concerning same. Evidence of the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract is ambiguous or silent on the topic. It is generally accepted by arbitrators that an alleged past practice, in order to be binding on both parties, must be unequivocal, clearly enunciated and

acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

Here, the practice meets this test. The record indicates that the District has followed the same procedure in crediting summer school sick leave for many years. Specifically, it has prorated summer school sick leave accrual in relation to a full-time contract every year since at least 1974. For example, if a summer school teacher taught half-time in the summer, they received half-sick leave for the summer. The District has consistently followed the same method of calculating sick leave for summer school teachers for the last 18 years. The record indicates that during that period, both teachers and union officers inquired how summer school sick leave time was determined and did not object to the District's interpretation. Additionally, there is no question that the grievant was aware of the District's practice inasmuch as she had received prorated summer sick leave for eight previous summer sessions. This consistent, unrefuted and long-standing practice demonstrates the way paragraph 6 has come to be mutually interpreted, namely that summer sick leave accrual is prorated for those teachers teaching less than a full load.

That is exactly what the District did here. As previously noted, McKay worked six weeks at 53.3% of a full load in the summer of 1990 (i.e. about half-time). Had she taught a full load during the summer, she would have received 1.5 days accrued sick leave. However, since she worked half-time, the District prorated this amount by half to three-fourths of a day. This prorated figure (i.e. three-fourths of a day) comports with the existing practice. That being so, it is held that the District correctly calculated McKay's accrued summer sick leave for 1990.

In summary then, it is held that the contract language is in fact ambiguous concerning whether or not summer sick leave accrual is to be prorated for those teachers teaching less than a full load; that a well-developed past practice has existed for over 18 years whereby the Employer has prorated summer sick leave accrual for those teachers teaching less than a full load; and that the Union was aware of this practice and never objected to same. Altogether, these facts establish how Article VIII, B, paragraph 6 is to be interpreted. Applying that interpretation here, it has been held that the District correctly calculated the sick leave earned by McKay during the summer of 1990.

In light of the above, it is my

AWARD

1. That the grievance was timely filed;

2. That the District did not violate the provisions of Article VIII, B of the 1989-91 labor contract when it assigned Ms. McKay three-fourths (3/4) of a sick leave day for the 1990 summer session;

3. That the grievance is therefore denied and dismissed.

Dated at Madison, Wisconsin this 8th day of June, 1992.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator