BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between		
HOWARD-SUAMICO SCHOOL DISTRICT		Case 46
and		No. 46981 MA-7119
HOWARD-SUAMICO EDUCATION ASSOCIATION		

Appearances:

Lawrence J. Gerue, Director, United Northeast Educators, appearing for the Association.

Godfrey & Kahn, Attorneys at Law, by Dennis W. Rader, appearing for the Employer.

ARBITRATION AWARD

The Howard-Suamico Education Association, herein the Association, pursuant to the terms of its collective bargaining agreement with the Howard-Suamico School District, herein the Employer, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and decide a dispute between the parties. The Employer concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Green Bay, Wisconsin on April 9, 1992. A transcript of the hearing was received on April 30, 1992. The parties completed the filing of post-hearing briefs on June 19, 1992.

ISSUE:

The parties stipulated to the following issue:

> Did the Employer violate the collective bargaining agreement when Ms. Birdie Bannon was denied a second request for a "no reason/no deduction for substitute teacher" personal day?

RELEVANT CONTRACTUAL PROVISIONS:

> ARTICLE VI -- SALARY
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> . . .
>
> J. The normal work week shall be 7.5 hours per day, Monday through Friday, for a total of 37.5 hours per week.
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> . . .
>
> ARTICLE VIII -- ABSENCES
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> . . .
>
> C. Personal Leave-- The maximum of three (3) days per year will be allowed for personal leave which is non-cumulative. Personal leave is defined as family (as outlined in Section B above) and legal matters which cannot be

> conducted outside of the regular school day. Application for personal leave is to be made to the immediate supervisor as far in advance as possible. A teacher taking personal leave will be charged for the cost of the substitute for the second and third days.
>
> It is understood that one (1) of the three (3) personal leave days shall be a "No Reason" leave day to be granted upon request pursuant to the following guidelines: Forty-eight (48) hours written notice of intent to take such leave shall be given to the School Principal. Only two (2) teachers per elementary school can take such leave in any one (1) day, three (3) teachers in the high school and three (3) teachers in the middle school. This leave shall not be used to extend a holiday or vacation except by permission of the District Administrator or his/her designee.

BACKGROUND:

Bannon is a teacher for the Employer. In November, 1991 Bannon requested a partial "no reason" personal leave day. The request was denied on the grounds that she had requested and received time for a "no reason" personal leave earlier in the same school year, although the earlier leave had been for less than a full day. On November 18, 1991 the Association filed a grievance on Bannon's behalf. Subsequently, Bannon provided a reason for the partial personal leave day and the request was then granted.

The concept of a "no reason" day was first expressed in either the parties' 1985-86 or 1986-87 contract with the following language:

> It is understood that one (1) of the three (3) personal leave days shall be granted upon request pursuant to the following guidelines: Forty-eight (48) hours written notice of intent to take such leave shall be given to the School Principal. Only two (2) teachers per elementary school can take such leave in any one (1) day, three (3) teachers in the high school and three (3) teachers in the middle school. This leave shall not be used to extend a holiday or vacation except by permission of the District Administrator.

The parties added the phrase "no reason" leave day to the above language in the 1989-91 contract.

POSITION OF THE ASSOCIATION:

The disputed language is clear and unambiguous in its meaning. The listed conditions do not limit requests to one. Such a limitation was never discussed during the negotiations in either 1986 or 1989.

During the negotiations for the current contract, the Employer proposed the following addition to the disputed language:

> The one (1) "no reason"leave day can be divided and taken in two (2) separate requests of one-half (1/2) day each.

The Association did not agree to said proposal. The Employer is now attempting to impose a condition which it failed to achieve in bargaining.

The Employer never advised the staff as a whole of its interpretation, i.e., that requests for the no reason personal leave day can not exceed one. Neither was the Association ever advised of such an interpretation. The fact that administrators may have changed no reason personal requests to personal requests with reasons does not prove the existence of a practice, where such changes were not made known to either the Association or the affected employes. Even when an Association officer, Rick Schadewald, applied for a second no reason personal leave, the Principal did not explain the alleged policy to him, but rather, the Principal changed one of the requests to a leave with a reason without informing Schadewald of the change. Clearly such a background is inadequate to establish the existence of a binding past practice.

There have been at least two instances where administrators approved multiple requests for the no reason personal leave day.

No mention has been made of the fact that other personal leave days (those with a reason provided) can be taken in increments of as little as 15 minutes. The question must be asked whether it really makes that much difference if "reason" days can be taken in increments, but "no reason" days cannot be taken in increments.

The Association requests the arbitrator to find in favor of the grievance.

POSITION OF THE EMPLOYER:

The disputed language, when read as a whole, is ambiguous as to whether more than one no-reason leave is available. The language does not specify whether the day is to be taken in a 7.5 hour block or in increments of 15 minutes or more up to a total of 7.5 hours. Other contractual references to days refer to a continuous period of time within a calendar day. The burden is on the Association to prove that day in this provision means the sum of numerous requests of specific minutes.

Since the parties did not discuss in negotiations whether a no-reason leave could be taken in increments, it is appropriate to consider past practice, which in this case is dispositive of the issue.

For at least five years the Employer consistently has followed the same procedure in administering the no-reason leave. During that period of time numerous teachers have requested no-reason leave a second time in the same school year and have been advised of the policy of granting only one no-reason leave in a school year. Yet no grievance has been filed regarding this policy until the present case. The only documented deviation from this clear and consistent practice has been the granting of multiple no-reason leaves in two instances, and both instances were mistakes of the Employer. Clearly the practice is well established and has been accepted by the Association.

The Employer has been very reasonable and flexible in administering its interpretation of the no-reason leave provision. Administrators have omitted writing down reasons for leave when requested to do so by teachers, as well as changing no-reason leaves to leaves for reason after the fact when discretion allowed.

The Employer is not trying to get in arbitration what it was asking for in negotiations. Even the Association's negotiator admitted that the Employer never stated that it wished to restrict the practice, but rather, steadfastly argued that it wished to expand the number of requests for no-reason personal leave from one to two.

Finally, adoption of the Association's interpretation of the no-reason leave provision would be unduly burdensome on the Employer. During the past

five years, anywhere from 38 to 48 percent of the no-reason leaves have been taken during the month of May. Allowing no-reason leaves to be taken in increments could result in hundreds of requests during the month of May requiring the Employer to attempt to fill the positions with substitutes, creating complete chaos in the District.

The Employer requests that the grievance be denied.

DISCUSSION:

The contested language, i.e., the second paragraph of Section C., Article VIII, is not clear and unambiguous when read alone. Said language is silent with respect to the question of whether the no-reason personal leave day can be taken in increments or must be taken as a single day. Both parties offer interpretations of the language which are plausible, but those interpretations are conflicting. Further, those interpretations are based on unwritten practices or agreements rather than on contractual language.

The bargaining history concerning the no-reason personal leave day fails to provide a basis on which the dispute can be resolved. Although the no-reason personal leave day has been in effect since the 1985-86 contract, the parties did not discuss the administration of the no-reason personal leave day until their negotiations which culminated in their 1991-93 contract. During those negotiations, the Association proposed that two, rather than one, of the three personal leave days would be no-reason leave days. The Employer proposed that there would continue to be only one no-reason personal leave day which could be divided and taken in two separate requests of one-half day each, rather than being limited to one request. The Association considered the Employer's proposal to constitute a limitation, since it believed that the no-reason personal leave day, consisting of 7 & 1/2 hours, already could be taken in increments of 15 minutes. The Employer considered its proposal to constitute an expansion, since it had been allowing only one no-reason request for personal leave, regardless of whether that request was for a full day, i.e., 7 & 1/2 hours, or for only a portion of a full day. Thus, during the negotiations the parties realized that they did not share a common understanding of how the no-reason personal leave was to be administered.

The Employer's administration of the personal leave language appears to have been fairly consistent. Prior to the instant grievance, the Employer admits to having granted two teachers a second request for no-reason personal leave in the same school year. In view of the fact that teachers have taken over 642 no-reason personal leave days in the five years for which statistics are available, two exceptions seem to be a minimal rate of variance and would not be sufficient to overcome an established practice. Further, in one of those cases, Gordon Maki, the Principal who granted the second request in 1988, advised the teacher that the approval of the second request had been a mistake, but that he would not be kept from taking the leave at that point in time. The other case involved a part-time teacher who was allowed to take no-reason personal leave on two different dates in the 1989-90 school year when the secretary who maintained the leave records failed to timely note the second request. The undersigned is persuaded that the Employer's administration of the disputed language has been adequately uniform and consistent so as to be judged an enforceable practice if the Association was, or should have been, aware of the policy.

There is nothing in the record to contradict the testimony of the principals who testified that, except for the two cases discussed above, when teachers have submitted a second request for no-reason personal leave the teachers have been told that they are allowed only one such leave per school year and that they have to give a reason for either the already taken leave or the requested leave. It is clear from the testimomy of the various witnesses that, prior to the negotiations culminating in the present contract, the

parties never discussed the question of whether no-reason personal leave could be taken on one date or on more than one date in a given school year. The Employer's witnesses testified that the policy of permitting only one request per school year for no-reason personal leave was never explained to the faculty as a whole in either a verbal or a written form. However, during the second semester of the 1990-91 school year a dispute arose concerning a second request for the use of no-reason personal leave by Schadewald. Schadewald was a member of the Association's negotiating team for the 1989-91 contract and was the Association's chief negotiator for the 1991-93 contract. The matter was resolved by changing the first no-reason leave to a leave with a reason. Although Schadewald stated that he was unaware of said change, such a claim is not persuasive, since it is unlikely that his grievance would have been resolved without his being aware of the basis for the resolution. Regardless, even assuming both that Schadewald was unaware of the change in the type of personal

leave on his request form and that the Association never became aware of the Employer's policy of allowing each teacher only one no-reason personal leave in a school year, the Association admittedly learned of the Employer's policy during the negotiations which culminated in the 1991-93 contract. There is no dispute over the fact that during those negotiations the Employer took the position that its proposal, i.e., to allow the one no-reason personal leave day to be divided and taken in two separate requests of one-half day each, was an expansion, rather than a curtailment, of the existing practice. It is also undisputed that the Association never agreed either to said proposal or to the Employer's position that the existing practice allowed only one request for no-reason personal leave, regardless of whether said request was for a full day or a partial day. However, once the Association became aware of the Employer's method of administering the no-reason leave and then failed to negotiate a change in that method of administration, there would have to be strong and compelling reasons for the undersigned to now change the method of administration. Those reasons are not present in this case. Therefore, the Employer's policy of granting each teacher only one no-reason personal leave in a school year was not terminated, but instead, the policy continued in effect under the 1991-93 contract.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Employer did not violate the collective bargaining agreement when Ms. Birdie Bannon was denied a second request for a "no-reason/no deduction for substitute teacher" personal day; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin this 3rd day of September, 1992.

By _____
Douglas V. Knudson, Arbitrator