BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SOUTHERN DOOR EDUCATION ASSOCIATION	Case 25 No. 49228 MA-7872
and	
SOUTHERN DOOR SCHOOL DISTRICT	

Appearances:
Mr. Dennis Muehl, Executive Director, Bayland Teachers United, appearing on behalf of the Association.
Mr. Joseph Innis, Superintendent, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the District or Employer, respectively, were parties 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. Hearing was held in Brussels, Wisconsin, on August 12, 1993. The hearing was not transcribed and the parties did not file briefs. Based on the entire record, the undersigned issues the following Award.

ISSUE

The undersigned has framed the issue as follows:

> Did the Employer violate the collective bargaining agreement, specifically Article VIII, Section E, when it denied Tom Mueller's request for a paid personal leave day for May 14, 1993, to attend the State Lion's Club convention? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The parties' 1991-93 collective bargaining agreement contained the following pertinent provisions:

ARTICLE IV - GRIEVANCE PROCEDURE

. . .

When a request has been made for arbitration, the following procedures shall be established.

. . .

5. The decision of the arbitrator shall be final and binding on both parties.

. . .

ARTICLE VIII - ABSENCES

. . .

E. Personal Leave. Teachers may be excused from school during the work day, with prior approval from the district administrator, for necessary personal business which requires a teacher's presence during the school day and which cannot be rescheduled outside the normal school day.

. . .

BACKGROUND

There is no dispute about the facts giving rise to the grievance. Starting in 1986 and continuing through 1992, teacher Tom Mueller was granted a day of paid personal leave every May to attend the State Lion's Club convention. Thus, he was granted a day of paid personal leave for this purpose for seven years in a row. When the personal leave was granted in 1992, District Superintendent Joe Innis told Mueller that this was the last time he would be allowed to take personal leave for the Lion's Club convention and if he requested it in 1993, it would not be granted. In the spring of 1993, Mueller requested a personal leave day for May 14, 1993, to attend the Lion's Club convention. Innis denied the request, but allowed Mueller to take that day off as leave without pay, which he did. A grievance was filed on the denial of the personal leave day and is the subject of the instant arbitration.

The record indicates that in 1989, a dispute arose over teacher Terry Bobbe's request for a paid personal leave to attend a reunion of her university choir. The District denied the request, instead granting leave without pay, and a grievance was filed which was ultimately heard by Arbitrator Lionel Crowley. Arbitrator Crowley issued his award August 1, 1989, granting the

grievance. In his award, Crowley reviewed the uses of paid personal leave during 1988-89 which included attending the Lion's Convention, taking a car in for service, a business meeting, various family celebrations, moving, graduations and Christmas concerts. He concluded as follows:

> Given the above instances, the undersigned finds that the necessary personal business requirement of Article VIII is broadly interpreted so that separating recreation from business is difficult if not impossible. . . . Although this is a close case, the evidence demonstrated that there was not valid distinction between the grievant's request for personal leave and the District's past practice as evidenced by those leaves that were granted. In short, the administrator did not exercise his discretion in a consistent manner in denying the grievant's request. Thus, the undersigned concludes that the District violated the agreement by denying the grievant's request for personal leave.

In order to remedy this contractual breach, the Arbitrator directed the District to make the grievant whole by paying her for the day in question.

The record further indicates that in 1992, a dispute arose over teacher Nancy Skadden's request for a paid personal leave to attend farm mediation training in Madison. The District denied the request, instead granting leave without pay, and a grievance was filed which was ultimately heard by Arbitrator Daniel Nielsen. Arbitrator Nielsen issued his award September 3, 1992, granting the grievance. He concluded as follows:

> The District has a reasonable concern about overuse of personal leave for an ongoing activity such as farm mediation. However, the instant grievance does not directly involve that issue. The request in this case was for a day and a half for participation in a training program. Applying the standard developed in 1983 negotiations and articulated in the Crowley award, the undersigned concludes that this request was consistent with past requests for personal leave, both in its general character and in its duration. Thus the District violated the contract by denying the request. The appropriate remedy is to pay Nancy Skadden for the day and a half she spent in the training program.

The contractual personal leave language has not changed since it was first included in the parties' 1981-83 contract. In recent years though, the District has tried unsuccessfully at the bargaining table to change it. In the 1989-91 contract negotiations, the District sought to limit the use of personal days to one per year. This proposed change was not incorporated into the parties' 1989-91 contract. In the 1991-93 contract negotiations, the District again sought to place a one-day cap on personal leave and also sought to limit the purposes for which personal leave could be used. The specific language proposed by the District was as follows:

> . . .Teachers shall be allowed one day of personal leave per year. It is expressly understood that personal leave will not be approved for reasons of recreation, union business, to seek employment elsewhere, physical examinations, in-service days, and on days immediately before or after any holiday or vacation periods.

This proposed language was not incorporated into the parties 1991-93 contract. In the currently ongoing 1993-95 contract negotiations, the District has again proposed that the above-noted language be incorporated into the parties' 1993-95 contract. As of the time of the hearing, the parties' 1993-95 contract had not been settled.

POSITIONS OF THE PARTIES

The Association contends the grievant's request for a paid personal leave day for May 14, 1993 to attend the State Lion's Club convention should have been granted. The Association's position is that the Crowley and Nielsen awards are controlling here. In its view, those awards established a standard for determining whether personal leave is granted, namely whether the request (for personal leave) is similar to past requests which have been approved. Under the Association's application of this standard the grievant's request should have been granted since the request was to go to the Lion's convention, and this same request had been approved for each of the previous seven years. The Association therefore requests that the grievance be sustained and the grievant paid for May 14, 1993. As part of the remedy, the Association also requests that the arbitrator grant interest on the one day's pay due to the District's continued violation of the personal leave language.

It is the District's position that it did not have to grant the grievant's request for a paid personal leave day for May 14, 1993 to attend the State Lion's Club convention. According to the

District, the grievant does not qualify for personal leave because he did not meet two of the contractual requirements, to wit: 1) the condition that the administrator approve the request and 2) the condition that the grievant's presence (at the Lion's Club convention) be required. It therefore submits that the requested leave was properly denied. The District contends the reason it denied the requested leave in 1993 was that it felt the Lion's Club convention had simply turned into an annual vacation for the grievant. The District submits that the administrator did not exercise his discretion (to deny the requested personal leave) in an arbitrary or unfair manner, so the arbitrator should defer to his judgment. Next, the District asserts there is a factor in this case that distinguishes it from the grievant's past personal leave requests or those involved in the Crowley and Nielsen awards. That factor, according to the District, is that when the administrator granted the grievant's 1992 personal leave request to attend the Lion's Club convention, he told the grievant he would not get personal leave in 1993 for that same purpose. The District believes this one year's advance notice was sufficient and ought to be controlling. Finally, the District notes that it has tried unsuccessfully to change the personal leave language in contract negotiations. For all these reasons, the District believes the grievance should be denied.

DISCUSSION

At issue here is whether the Employer complied with the contract or violated same when it denied the grievant's request for a paid personal leave day for May 14, 1993 to attend the State Lion's Club convention.

My analysis begins with a review of the pertinent contract language. Both sides agree that the contract language applicable here is Article VIII, Section E. That clause provides as follows:

> E. Personal Leave. Teachers may be excused from school during the work day, with prior approval from the district administrator, for necessary personal business which requires a teacher's presence during the school day and which cannot be rescheduled outside the normal school day.

By its express terms, this clause establishes three conditions to qualify for personal leave: 1) "prior approval from the district administrator", 2) "necessary personal business which requires a teacher's presence", and 3) "cannot be rescheduled outside the normal school day."

This language has been interpreted and applied in two prior arbitration awards. In the first award, Arbitrator Crowley

interpreted this language, and in particular addressed the range of discretion granted the district administrator to approve or deny personal leave requests. He determined that the administrator's discretion was not unlimited. Rather, the administrator was required to exercise his authority "in an equitable and consistent manner." He then opined that the measure of equitable treatment was to be the standards established by the District itself in granting or denying prior requests for personal leave. He then reviewed the reasons given for personal leave in the past and concluded that personal leave had been granted "for a wide variety of reasons." He also found that the "necessary personal business requirement" of the above-noted language had been "broadly interpreted so that separating recreation from business is difficult if not impossible." Applying this rationale he measured the denial of personal leave against the District's past practice and found that the administrator did not exercise his discretion (to deny the grievant's request) in a consistent manner.

In the other award issued just last year, Arbitrator Nielsen was invited to reexamine Crowley's interpretation and result. He declined to do so for three reasons. First, he found that Crowley applied a fairly standard analysis and reached a result not at odds with the express contract terms and consistent with the agreement reached by the parties in their 1983-84 bargaining (i.e., that the standard for approving leaves would be defined by past practice). Second, he found that traditional principles of labor relations as well as the parties' own contract dictate deference to a prior interpretation of the same language. In this regard he cited the language found in Article IV wherein it states "the decision of the arbitrator shall be final and binding on both parties." He held that reexamining the issue of how wide ranging the administrator's discretion is in denying leave requests is to treat the Crowley Award as something less than "final and binding." Third, he found this conclusion was buttressed by the bargaining history on personal leave since the Crowley Award was issued. He noted that the Board was displeased with the broad scope of the personal leave provision because it made proposals in both the 1989-91 and 1991-93 negotiations to limit the amount of leave available and the purposes for which the leave might be used, but the personal leave language remained unchanged through the two sets of negotiations following the issuance of the Crowley Award. He held that where an arbitrator's interpretation has been made, and the parties do not change the language in subsequent negotiations, it must be assumed that the parties have acquiesced to the arbitrator's interpretation. He then went on to measure the denial of personal leave in that case against the District's past practice and found that the grievant's request was consistent with past requests.

In this case the District invites yet a third reexamination of this issue. I decline to reexamine the matter anew for the

same reasons Arbitrator Nielsen set forth in his award. Contractually speaking, nothing has changed since that award was issued. Specifically, the applicable contract language has not changed even though the District has tried unsuccessfully to do so. That being the case, the undersigned will use the same standard to resolve this case as was utilized by the two preceding arbitrators, namely that the administrator's denial of personal leave will be measured against the District's past practice.

In the two previous awards, the arbitrators determined the District's past practice by looking at how teachers other than the grievant therein had been treated when they requested personal leave. Here, though, there is no need to look beyond the grievant himself because his own experience is directly on point. Specifically, he was granted a day of paid personal leave for seven years in a row (1986 to 1992) to attend the State Lion's Club convention. His request for a day of paid personal leave for this same reason in 1993 was denied. Since his request for personal leave this year was for the same reason and duration as the past seven years running, it is clear that the grievant's personal leave request in 1993 was identical to his personal leave requests which were made and approved in the past.

The reason the District denied the requested leave is that, in its view, the grievant's yearly attendance at the State Lion's Club convention had turned into an annual vacation. That is certainly one way to characterize it (i.e., the grievant's annual attendance at the Lion's Club convention). Another way to characterize it is the proverbial mixing of business and pleasure. It does not matter how it is characterized though because, as Arbitrator Crowley noted, the personal leave language has been broadly interpreted in the past "so that separating recreation from business is difficult if not impossible."

The District asserts that what distinguishes the 1993 personal leave request from those that preceded it is that when the administrator granted the grievant's 1992 request, he told him it was the last year it would be granted. The District believes this one year's notice ought to be controlling. I disagree. What controls here is how the personal leave language has been previously applied by the parties themselves and interpreted by arbitrators; not what the administrator said to the grievant in 1992.

Applying the standard which has been used in two prior arbitration awards (i.e., measuring the denial of personal leave against the District's past practice), I find that the grievant's personal leave request in 1993 was identical with his past requests for personal leave, both in purpose and duration. Since the previous personal leave requests had been granted, it follows that the administrator did not exercise his discretion in a consistent manner when he denied the grievant's 1993 request. It

is therefore held that the District violated the contract, specifically the personal leave clause, by denying the grievant's request for personal leave. The appropriate remedy for this contractual breach is to pay the grievant for the day in question.

The Association has asked for interest on the award. The overwhelming majority of arbitrators do not award interest as part of a make-whole remedy unless the agreement provides for same or there are special circumstances. Here, the agreement does not provide for interest on an award. Additionally, in my opinion the instant circumstances do not warrant the granting of interest. Consequently, the undersigned has not included interest as part of the remedy.

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

AWARD

That the Employer violated the collective bargaining agreement, specifically Article VIII, Section E, when it denied Tom Mueller's request for a paid personal leave day for May 14, 1993, to attend the State Lion's Club convention. In order to remedy this contractual breach, the District is directed to make the grievant whole by paying him for May 14, 1993.

Dated at Madison, Wisconsin this 5th day of October, 1993.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator