

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

HOWARD-SUAMICO BOARD OF EDUCATION
EMPLOYEES UNION, LOCAL 3055,
AFSCME, AFL-CIO

and

HOWARD-SUAMICO SCHOOL DISTRICT

Case 54
No. 49328
MA-7898

Appearances:

Mr. Robert W. Burns, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street,
Suite 600, P.O. Box 13067, Green Bay, WI 54307-3067.

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
936 Pilgrim Way, #6, Green Bay, WI 54304

ARBITRATION AWARD

According to the terms of the 1992-94 collective bargaining agreement between Howard-Suamico School District (hereafter District) and Howard-Suamico Board of Education Employees Union, AFSCME Local 3055, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them relating to funeral leave. The undersigned was designated arbitrator and hearing was held at the District's offices at Green Bay, Wisconsin on September 8, 1993. A stenographic transcript of the proceedings was taken and received by the undersigned on September 30, 1993. The parties submitted their initial briefs by November 30, 1993 and then reply briefs by December 15, 1993.

ISSUES:

The parties were unable to stipulate to the issues to be determined in this case although they stipulated that the undersigned could frame the issues. The Union suggested the following:

Did the Employer violate the collective bargaining agreement when it made Steve DeBauche take one day of personal leave for the funeral of his grandfather?

If so, what is the appropriate remedy?

The District suggested the following issues:

Did the Employer violate the collective bargaining agreement when it denied a requested fourth day of funeral leave to the Grievant within the same year?

If so, what is the appropriate remedy?

Based upon the relevant evidence and argument, I find that the District's issues accurately state the essence of the dispute before me and I shall therefore determine them. 1/

RELEVANT CONTRACT PROVISIONS:

ARTICLE X
Authorized Absence

...

Funeral Leave: Each employee shall be allowed up to three (3) workdays but not beyond the day after the funeral with pay for absences necessitated by the death of an employee's spouse, child, son-in-law, daughter-in-law, parent, father-in-law, mother-in-law, sibling, brother-in-law, sister-in-law, grandparent, grandchild, grandparent of spouse, former guardian, or any other relative who is a member of the employee's household without charge against sick leave. Funeral leave for aunts, uncles, nieces, and nephews will be limited to one (1) day.

...

BACKGROUND:

The parties have had a collective bargaining relationship since 1986. The 1986-88 collective bargaining agreement contained the same Article X "Funeral Leave" language, quoted above, and all successive agreements have contained identical language, including the effective labor agreement.

The parties engaged in protracted negotiations before executing the 1986-88 labor

1/ There was insufficient evidence to show that the District required DeBauche to take personal leave, as stated by the Union in its first issue.

agreement on October 21, 1987. Mr. James W. Miller, then Staff Representative for Wisconsin Council 40, was chief spokesman for the Union and Mr. Fred Steig, the current District Administrator, and Board Member Timothy Tousey spoke for and represented the Board of Education in those negotiations. 2/ Mr. Miller used the Green Bay School District contract covering custodial and other employees as the basis for the Union's proposals. The District resisted this approach, using its own Policies and Employee Handbook as the basis for its proposals but also referring to the District clerical unit and the Teacher unit contracts.

The Employee Handbook in effect prior to 1986 contained the following provision regarding leaves:

PERSONAL LEAVE

Personal leave days must be approved by your immediate supervisor and the District Administrator at least twenty-four (24) hours in advance. In cases of an emergency, the immediate supervisor should be contacted as soon as the employee is aware of the need to take personal leave. If there is a prolonged illness or more than one death in the immediate family during a year, additional emergency days can be taken in place of personal days with prior approval of the supervisor and District Administrator.

If personal leave days are used for other than the above stated purposes, the employee will be disciplined.

Twelve month employees (2,080 hours) are allowed a maximum of three (3) each emergency/personal days per year. School year employees are allowed a maximum of two (2) emergency/personal days per year. Personal leave days are non-accumulative.

Personal days: - must be used for family or legal matters that cannot be conducted outside of the regular work day. Employees will be paid one-half (50%) of their daily salary for personal days.

Personal days would include:

1. Weddings in the immediate family.

2/ The Union did not retain its bargaining notes after these negotiations concluded and Mr. James W. Miller was not called to testify herein. Union President Gary Caelwerts testified on behalf of the Union. Mr. Fred Steig retained some bargaining notes which were entered in this record, and Mr. Steig and Mr. Tousey appeared as witnesses herein.

2. Court appearances.
3. Funerals of family members not in the immediate household.

Emergency days - are to be used in case of serious illness or death in the immediate family. Immediate family includes - mother, father, sister, brother, husband, wife, children, mother/father/sister/brother/son/daughter-in-law, grandmother/father, grandchild, relative living in the house, foster parents or children, and step parents or children. Employees will receive full salary for emergency days.

During their initial negotiations, the issue of funeral leave was not a major issue between the parties. Union President Gary Caelwarts stated that since 1986 the Union has interpreted the contractual funeral leave language as allowing an unlimited number of three-day funeral leaves per year for relatives listed in Article X "Funeral Leave"; that he could recall no discussions that indicated that the Board wished to limit funeral leave to three days per year but he could not specifically recall any actual dialogue between the parties regarding the funeral leave issue; that he could not recall whether the Union ever raised the idea that it believed funeral leave should be granted per death or per occurrence; and that Caelwarts could not specifically recall that it was intended that the custodial unit should receive more funeral leave than the teacher and the clerical units. It is undisputed that funeral leave has never been discussed by the parties since the negotiations for the 1986-88 agreement.

District Administrator Steig stated that during his administration, leaves (including personal and funeral leave) have always been calculated on a per year basis (beginning July 1 of each year). Steig submitted some bargaining notes regarding the negotiations which resulted in the 1986-88 agreement as well as a document he had submitted to the WERC Mediator who ultimately settled the initial contract dispute between the parties. These documents and Steig's testimony undisputedly revealed that the Union at one point in negotiations proposed five days of funeral leave "for each death"; that the District rejected this amount of leave as well as the per death concept; that the District took the position at mediation that regarding funeral leave as well as other leaves the custodial unit should be held to the status quo (i.e., levels contained in the Employee Handbook) or the same levels as contained in the clerical unit contract; that the language ultimately agreed to by the parties was a modification of the Union's proposal; that that proposal did not contain language describing per death or per occurrence entitlement to funeral leave; that the parties agreed that funeral leave should replace emergency leave as a separate category of leave in the custodial unit contract. Steig stated that he specifically recalled telling Union Representative Miller, that the Board had no open-ended leaves for employees, that it would not agree to a per occurrence concept, that the Board felt the status quo was sufficient for the custodians and that the Board would not agree to give custodians more funeral leave time than teachers and clericals already had under their agreements. Mr. Tousey generally confirmed

Steig's testimony. Both Tousey and Custodial Supervisor Wenzel (also present at the negotiations which resulted in the 1986-88 contract) stated that they recalled that the parties agreed that the three days of funeral leave would be used on a per year basis. Mr. Steig and Mr. Wenzel stated that the Union dropped its emergency leave proposal in favor of getting a separate funeral leave provision for custodial employees.

Both the clerical and the teacher labor agreements contain language stating that the amounts of emergency leave and personal leave time granted must be taken on a "per year" basis. The maximum amount of emergency/personal leave for clerical unit employees appears to be three days of both types of leave, while the teachers have three days of personal leave and three days of emergency leave with an additional three days emergency leave which may be applied for if there is an "extended serious illness or any death in the immediate family." The custodial employees' contracts have contained two days of personal leave for full-time custodians from 1986 to date.

FACTS:

The record is clear that no custodial employee ever requested more than three funeral leave days in any year until Steve DeBauche did so, giving rise to the instant grievance. On August 5, 1992, with District approval, DeBauche took one day of funeral leave for the funeral of his uncle. Later, on March 9, 1993, DeBauche's grandfather died and he requested three additional days of funeral leave for March 10 through 12, 1993. Initially, DeBauche's second funeral leave request was honored but on April 2, 1993, the District issued DeBauche a memo indicating that the District believed that DeBauche had received one day more funeral leave than he was entitled to for the period July 1, 1992 to July 1, 1993. The District stated that it would have to dock DeBauche's personal leave by one day to make up for the extra day of funeral leave used.

Thereafter, DeBauche timely filed a grievance regarding this matter which sought the return of one personal day for his use in the current school year.

POSITIONS OF THE PARTIES:

Union:

The Union asserted that the language of Article X contains no limitation on the number of three-day funeral leaves a custodial unit employee may take in any year, contrary to the District's assertions. The Union contended that the relevant contract language is clear and unambiguous and it fails to limit the number of three-day funeral leave periods allowable per year.

The Union noted that its witness, Caelwatts, stated that the District never made it clear in negotiations that funeral leave should be limited to a certain number of days per year. The Union further argued that Mr. Steig's bargaining notes did not affirmatively support the District's case that it had clearly rejected a per occurrence approach. The Union also observed that there is no

tangible record evidence to support the District's claims that it would never have agreed to giving the custodians more funeral leave than clericals and teachers received.

The Union asserted that it was up to the District to insert clear contract language to limit funeral leave days per year. The Union pointed out that the District had placed clear limits on leaves in the teacher and clerical contracts but that it failed to do so here. Finally, the Union noted that no past practice has evolved applicable to the case because this is a case of first impression. In these circumstances, the Union sought definitive clarification of the contract and restoration of one day's personal leave to the Grievant.

District:

The District asserted that the funeral leave language in question is clear on its face and must be interpreted literally. That is, the District urged, because the language states that "up to three workdays" are to be granted "for absences necessitated by" the deaths of listed individuals, this necessarily means that a total of only three days of funeral leave per year can be requested and used. The District pointed out that the use of the plural "absences" supports this analysis and that if the parties had intended to grant three funeral leave days per death or per occurrence they could have and should have made this intent clear.

In the alternative, the District asserted that even if the undersigned finds the language in dispute to be ambiguous, extrinsic evidence supports a ruling in favor of the District. First, the District observed, all other leaves in the contract are handled on a per (contract) year basis. Second, evidence submitted regarding bargaining history and intent of the parties showed that the parties intended to allow three days of funeral leave per contract year. The District observed that its witness, Mr. Steig, stated that he recalled that the District specifically rejected the concept of providing funeral leave time on a per occurrence basis. Mr. Steig also stated that the District made clear to the Union that to provide funeral leave for each occurrence was contrary to the Board's policies which were status quo for the custodians prior to organization, and that such a benefit would exceed benefits already granted to other District units, as well as those granted externally to similar custodial units. The District observed that its other witnesses, as well as negotiation documents, confirmed Steig's statements. Third, the District asserted that the Union failed to prove (by testimonial and documentary evidence) that the parties had agreed to provide funeral leave on a per occurrence basis. The District noted that the Union's only witness on the point could neither recall the Union's proposals on funeral leave nor any dialogue between the parties regarding the issue.

The District further argued that if the contract were construed as a whole (in line with general arbitral principles), all leaves should be held to accrue on a per year basis. In this regard, the District observed that all other leaves listed in the custodial unit contract are accrued and used on a per year basis. In addition, the District noted, neither of the other District bargaining units has any open-ended leaves, all of their leaves being granted on a per year basis. The fact that the

Union failed to get per death or per occurrence language placed in the contract, the District urged, should lead to a conclusion that the Union, by its actions in this case, is attempting to get an advantage it could not obtain in bargaining. Such a modification of the agreement, the District argued, is not only specifically prohibited by Article XXIII of the contract but also wholly unsupported by the contract language, the testimony and other record evidence in this case. Therefore, the District urged that the grievance be denied and dismissed.

Reply Briefs:

Union:

The Union asserted that although either parties' interpretation of the disputed language may be reasonable, that the word "absences" could refer back to either "days" or "deaths" in sentence one of the Funeral Leave provision. The Union contended, therefore, that the District had the burden to make its intent clear in negotiations and to insert "per year" language if it wished to avoid the Union's reasonable interpretation. The Union noted that the District's bargaining notes, its other documents, and the testimony it had offered failed to support the District's claims that it informed the Union that funeral leave would be limited to three days per year. The Union also observed that jury duty is an open-ended leave in the custodial contract, which contradicted the District's claims and supported its arguments.

The Union strongly resisted the District's arguments that the Union ever dropped or changed its bargaining request that funeral leave be granted on a per occurrence basis. The Union urged that the District had wholly failed to prove its assertions on this point. In addition, the union contended that it was merely reasonably relying upon and pursuing a remedy in line with statements made to it by the District during bargaining, and it therefore denied that it was attempting to gain an advantage through arbitration which had been denied it in negotiations. Thus, the Union sought an Award sustaining and remedying the grievance.

District:

The Union, the District asserted, offered no evidence to support its expansionist view of the disputed funeral leave provision. In contrast, the District noted, it had offered on-point testimony from two witnesses as well as documentary evidence in support of its case. The District also contended that the fact that the Union had proposed "per occurrence" language during negotiations but had failed to succeed in placing this phrase in the contract, demonstrates the validity of the District's arguments. The District noted that evidence of internal contractual consistency also supports the District's case herein. Therefore, the District sought denial of the grievance in all respects.

Discussion:

The parties' dispute essentially revolves around the issue whether funeral leave must be granted on a per year or per occurrence basis. I note that neither per death/occurrence nor per year language expressly appears in the contract. In addition, the first sentence of Article X uses the language ". . . up to three (3) workdays . . . for absences necessitated by . . ." and it then lists the individuals for whose deaths up to three days of leave will be granted. The fact that this list of individuals is in the disjunctive (i.e., ". . . former guardian or any other relative . . .") tends to indicate that an employe could expect up to three days' funeral leave pay for each death of a listed individual. However, the use of the words "for absences" tends to indicate the opposite -- that up to three days of funeral leave will be granted for all such absences. In addition, the second sentence of the provision states that for all deaths of individuals listed in that sentence, one day of funeral leave will be granted.

Under generally accepted principles of construction, extrinsic evidence relating to the true intent of the parties in agreeing to ambiguous contract language should be considered to resolve the ambiguity, if possible. On this point, I note that the Union's sole witness possessed no documents and could not otherwise recall any specific discussions, facts or circumstances which would have supported the Union's assertions that the parties intended funeral leave to be granted on a per death basis. In contrast, the District offered both testimonial and documentary evidence to support its assertions that funeral leave was intended to be granted on a per year basis. Not only did Mr. Steig specifically state that the District rejected the Union's per death funeral leave proposal, he and Mr. Tousey stated that the District would never have agreed to this concept given the per year leave approach already in place in the District's other two collective bargaining units. The latter statements and position ring particularly true in the context of labor relations, where it is axiomatic that if an employer grants a greater benefit to one group it will be pressed by other organized groups to grant them the same benefit.

In addition, it is of great significance that the language agreed upon does not include a reference to per death or per occurrence which the Union had specifically proposed. As a general matter, where a party makes a specific proposal in negotiations which does not find its way into the final agreement, the presumption is that the proposal was dropped or relinquished. On this point, however, I also note that the District did not succeed in placing a reference to per year in the parties' agreement. Yet, Mr. Steig's mediation notes bolster District witness' statements and lead to a reasonable conclusion that one of the District's goal was to maintain the status quo on benefits in the custodial unit, just as Tousey and Steig testified. Furthermore, the District's practice of tracking leaves on a per year basis and the fact that all other contractual leaves in the District have traditionally included per year references, also tend to support the District's assertions in this case. Therefore, I find that great weight of the evidence in this case supports a conclusion that the parties intended to grant custodians funeral leave on a per year, not per occurrence, basis.

In light of my conclusion that the parties intended funeral leave to be handled on a per year basis, I find that the Funeral Leave provision allows up to three days of funeral leave per year for

all deaths. Thus, based upon the relevant evidence and argument herein, DeBauche was properly denied a fourth day of funeral leave in 1993 for the death of his grandfather. I therefore issue the following

AWARD

The Employer did not violate the collective bargaining agreement when it denied a requested fourth day of funeral leave to the Grievant within the same year.

Dated at Madison, Wisconsin this 12th day of January, 1994.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator