BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SOUTHERN DOOR SCHOOL DISTRICT and SOUTHERN DOOR EDUCATION ASSOCIATION	Case 28 No. 51357 MA-8581

Appearances:

Mr. Joseph Innis, District Administrator, Southern Door School District, 8240 Highway 57, Brussells, Wisconsin, 54204, on behalf of the District.

Mr. Dennis W. Muehl, Executive Director, Bayland Teachers United, 1136 North Military Avenue, Green Bay, Wisconsin, 54303.

ARBITRATION AWARD

According to the terms of the 1991-93 collective bargaining agreement between Southern Door School District (hereafter District) and Southern Door Education Association (hereafter Association), the parties jointly requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them regarding whether the District violated the collective bargaining agreement when it refused to grant Bonnie Fett one-half day paid personal leave. The Commission appointed Sharon A. Gallagher to hear and resolve the dispute. A hearing was held at Brussels, Wisconsin on January 31, 1995. No stenographic transcript of the proceedings was made. The parties chose not to submit written briefs in this case. Rather, the parties orally argued the case at the hearing on January 31st. The record was thereupon closed.

Stipulated Issues:

The parties stipulated that the following issues should be determined in this case:

> Did the District violate the collective bargaining agreement when it denied one-half day paid personal leave to grievant Bonnie Fett?
>
> If so, what is the appropriate remedy?

Relevant Contract 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.

F. All other absences, other than sick, personal, or emergency leave, will be considered a leave of absence without pay.

. . .

Background:

There have been no less than three arbitration awards issued to the parties regarding the subject of paid personal leave since 1989. The District has lost all three of these awards. In addition, the contract language of Article VIII, Section E, has remained unchanged during the entire period from 1981 through May 20, 1994. 1/ The three awards were placed in the record in this case by

1/ The parties stipulated that they have changed the language of Article VIII, Section E in the 1993-95 labor agreement.

the Union without objection from the District. The case citations for these awards are as follows: Southern Door County School District, Case 17, No. 42213, MA-5610

(Crowley, 8/89); Southern Door County School District, Case 24, No. 47241, MA-7208 (Nielsen, 9/92); and Southern Door School District, Case 25, No. 49228, MA-7872 (Jones, 10/93). The Association also submitted six exhibits, without objection by the District, which detailed the use of personal leave by bargaining unit members in the District from 1983 through 1993.

Facts:

On May 4, 1994, teacher Bonnie Fett submitted a "Staff Absence Report", stating that she wished to take one-half day of leave on the date of May 20, 1994. Ms. Fett gave the Staff Absence Report to her building principal on May 4, 1994. In the section entitled "explanation" on the absence report form, Ms. Fett stated:

> I will be attending a three day mom and son cub scout camp at Mt. Gardner Dam. We are going as a whole scout troop. The group is leaving early afternoon.

It is undisputed that Ms. Fett did not speak to her building principal about her absence request. Ms. Fett also admitted that she forgot to indicate on the Staff Absence Report that she wished to take one-half day of paid personal leave. On the Staff Absence Report, reasons for absence are listed as follows:

> III, Doctor or Dentist (yourself)
> Professional Leave
> Emergency Leave
> Attendance Day
> Jury Duty
> Personal Leave
> Leave Without Pay
> Other

After submitting her request for leave to her building principal, the principal did not ask Fett her reason for requesting leave. Nor did District Administrator Innis inquire regarding her preference for the type of leave she wished to take on May 20, 1994. Rather, District Administrator Innis, upon receiving Ms. Fett's Staff Absence Report form, merely checked the type of leave, "Leave Without Pay" and sent the form back to the principal for distribution to Ms. Fett. Ms. Fett stated that she received the completed form initialled by District Administrator Innis (with no date next to his initials) sometime during the week of May 20th. On May 25, 1994, Ms. Fett filed the instant grievance.

Ms. Fett stated that she had filled out staff absence report forms previously during her twenty years of employment with the District, but that she had most often filled them out for illness and she could not explain why she neglected to indicate that she wished to take "personal leave" on the Staff Absence form. Nonetheless, Ms. Fett stated that she believed she had complied with all parts of Article VIII in filling out the staff absence form for her absence of May 20, 1994.

Ms. Fett explained that her request for leave on the afternoon of May 20th, was so that she could attend a mother-son camping outing sponsored by the Cub Scouts. Ms. Fett had made arrangements to leave with eleven other mother and son pairs at 1:00 p.m. on May 20th. The camp at Gardner Dam, which is north of Keshena, Wisconsin, is approximately two hours' drive from the Brussels area. Ms. Fett stated that the group had decided to use four cars to travel to the camp and that time was required after arriving at the camp to set up a camp site for the entire group before opening ceremonies began at 5:00 p.m. on that Friday, May 20th. Ms. Fett stated that her son could not attend the camping weekend without her, as the mother's presence was required by the Cub Scouts. Ms. Fett stated that the camping weekend was designed to be a learning experience for the sons and their mothers and that it was intended to be a time of sharing and being close to their children.

District Administrator Innis stated that he never asked Ms. Fett to clarify her request for leave although it came to him without a preference for the type of leave requested. Mr. Innis stated that he completed Ms. Fett's form for her, by indicating she wished to take leave without pay and sent it back through channels to the Grievant prior to May 20, 1994. Finally, Mr. Innis stated that he believed that based on Ms. Fett's description of the time off she wished to take, only two types of leaves could be involved, leave without pay or personal leave, and that is why he checked the box for leave without pay.

Positions of the Parties:

Union:

The Union argued that this case is the fourth in a series of disputes between the parties regarding the use of paid personal leave under Article VIII of the agreement. The Union noted that the parties have agreed upon a change in the contractual language regarding personal leave for the period after the 1994 school year. The Union argued however that the three prior arbitration awards should control this case.

The Union noted that Ms. Fett's request for one-half day personal leave, on its face, would lead any reasonable person to conclude that Ms. Fett was requesting paid personal leave for the afternoon of May 20th. The Union also observed that the contract language, unchanged since prior to 1989, as well as the past practice require that the undersigned grant one-half day paid personal leave to Ms. Fett.

The Union asserted that Fett had demonstrated that the leave she was requesting was "for necessary personal business which requires a teacher's presence during the school day and which

cannot be rescheduled outside the normal school day", thus meeting all requirements of Article VIII, Section E. Therefore, the Union asserted that District Administrator Innis was not privileged to deny Fett paid personal leave. The Union therefore sought reimbursement to the Grievant for one-half day paid leave as a remedy in this case.

District:

The District urged that it had not violated the collective bargaining agreement by denying Bonnie Fett one-half day paid personal leave. The District noted that prior approval of the District Administrator was not given for paid leave for the afternoon of May 20. In addition, the District contended that the leave which Ms. Fett had requested was not necessary for personal business and that her presence was not required at 1:00 p.m. on May 20, 1994. Finally, the District argued that Ms. Fett had not requested personal leave at all on the Staff Absence Report form she had submitted, as she had failed to fill out her preference regarding the type of leave on the form she submitted on May 4, 1994.

The District urged that if it were required to grant personal leave for requests similar to Bonnie Fett's, this would open the door wider to the granting of any type of personal leave for any reason at all. Thus, the District urged that the grievance should be denied and dismissed in its entirety.

Discussion:

On August 1, 1989 WERC Arbitrator Lionel Crowley issued the first award between the parties relating to the personal leave language of Article VIII, Section E. 2/ I note that District Administrator Innis has been employed as Administrator since before 1989. In the award, Crowley observed that while the language requires the prior approval of the district administrator before personal leave may be taken with pay,

. . .

> The administrator must exercise such discretion in an equitable and consistent manner. Each request must be viewed on its own facts but equitable treatment requires granting or denial of a request in accordance with past practice. Past practice here is not reviewed to vary the clear and unambiguous language of the contract but is

2/ The parties' personal leave language has remained unchanged in the parties' various labor agreements from the parties' initial agreement, entered into in 1981-83, through the contract in effect for the 1993-94 school year.

> applicable to the consistency of the exercise of discretion by the administrator in granting or denying leaves. Additionally, the practice here does not relate solely to a management right where the administrator has the sole discretion to change but rather this involves a benefit to employes where the exercise of discretion must be consistent and the practice is reviewed to see if the exercise of discretion is in fact consistent. Although the District has argued that the present administrator has exercised his
>
> discretion consistently and is not bound by his predecessors, the undersigned does not find the latter argument persuasive. The Association's and employes' expectations and understandings as to the granting of leaves is not subject to the personal interpretation by each administrator but rather depends on the interpretation of the contract and its consistent application no matter how many changes occur in the administration. Otherwise, the Association would have to continually bargain on personal leave with each change in administrator. Thus, the entire past practice must be considered and not just the past practice of the present administrator. The bargaining history supports this conclusion. It appears that in the past, personal leave was granted for a wide variety of reasons including son's graduation, sister's wedding, vacation, antique show, family reunion, Lions convention, wallpaper and no reason. Even accepting the District's argument that past practice should involve the present administrator only, the evidence indicates a wide range of reasons for approval of personal leaves. The District points out that some teachers did not request personal leave in circumstances similar to the grievant's. These requests were to accompany a spouse on a trip or to see a relative or to excuse reporting to work due to weather. These are not exactly similar to the grievant's case and the fact that the other teachers chose not to seek pay does not establish that the grievant is not entitled to a personal leave under her circumstances. . . . (footnotes omitted).

After reviewing the personal leaves granted in the past, Crowley stated

> . . . 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.

Thus, the District was ordered to reimburse teacher Terry Jane Bobbe for one day's pay to attend and sing at her alma mater university's Sesquicentennial celebration.

On September 3, 1992, WERC Arbitrator Dan Nielsen issued a second award in favor of the Association on the issue of paid personal leave. I note that in that award, Nielsen recounted the following facts relating to the bargaining history and Crowley's (Bobbe) Award:

> While the Bobbe dispute was pending, the parties were in negotiations over the 1989-91 contract. The District proposed to limit the use of personal days to one per year. The dispute over the contract was ultimately resolved in mediation by an interest arbitrator, with the personal leave language remaining unchanged. This settlement took place after the Award in the Bobbe case.
>
> In negotiations over the 1991-93 contract, the Board again sought to place a one day cap on personal leave, as well as limiting the purposes for which personal leave could be used:
>
> > "…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, inservice days, and on days immediately before or after any holiday or vacation periods."
>
> The 1991-93 contract was settled without any change in the personal leave language.

Nielsen also agreed with Crowley's analysis and reasoning in his award, as follows:

> The District in this case invites a second look at this issue. As the undersigned indicated at the hearing, the traditional principles of labor relations dictate deference to a prior interpretation of the same language. More importantly, the parties' own contract dictates this deference. The parties have agreed, in Article IV, that the "decision of the arbitrator shall be final and binding on both parties." To relitigate 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." In extreme cases, it may be appropriate to revisit an issue, as where the prior Award patently ignores the contract language. Here,

> Arbitrator Crowley applied a fairly standard analysis, and reached a result which is not at odds with the express contract terms and is completely consistent with the agreement reached by the parties in their 1983-84 bargain, ie that the standard for approving leaves would be defined by past practice.
>
> The conclusion that the Crowley Award controls is buttressed by the bargaining history on personal leave since the Award was issued. The Board was plainly displeased with the broad scope of the personal leave provision, and made proposals in both the 1989-91 negotiations and the 1991-93 bargaining to limit the amount of leave available and the purposes for which the leave might be used. Despite these efforts, the language remained intact through the two sets of negotiations following the issuance of the Crowley Award. Where an interpretation has been made, and the parties do not change the language in subsequent negotiations, it must be assumed that both have acquiesced in the interpretation.
>
> Thus the undersigned rejects the District's argument that a denial of personal leave must be sustained unless it is arbitrary. Instead, a denial of paid leave for personal business must be measured against the past practice of the District.

After having analyzed the past practice and Grievant Skadden's requests to take one and one-half days of paid personal leave to participate in Farm Mediation Program training, Nielsen held,

> Applying the standard developed in the 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.

Nielsen therefore ordered the District to make Grievant Skadden whole by paying her one and one-half day's pay.

On October 5, 1993, WERC Arbitrator Raleigh Jones issued yet a third arbitration award to the parties on the issue of paid personal leave. Jones recounted the facts surrounding Tom Mueller's grievance, in relevant part, as follows:

> 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 the 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. . . .

Jones described in detail both the Crowley and Nielsen awards, quoting from each liberally. Jones also noted certain facts relating to the bargaining history surrounding Article VIII, Section E, as follows:

> 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.

Jones ruled in favor of the Association, again applying the Crowley analysis and rationale to reach his conclusion. Jones stated,

> 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."

. . .

Jones concluded and held,

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 facts of this case demonstrate that nothing of substance has changed since the issuance of the Crowley Award in 1989 which would require the application of a different analysis or standard to Ms. Fett's grievance. In this regard, I note that Ms. Fett's request for one-half day of leave to attend a mother-son Cub Scout camping trip is within the range of the types of events (in both purpose and duration) for which paid personal leave has been granted by the District from at least 1983 through 1993. I note specifically, also that the record showed that the Cub Scout outing required Ms. Fett's presence during the school day and that it could not be rescheduled outside the normal school day.

The only remaining issue is whether the fact that Feff neglected to indicate that she wished to receive paid personal leave for one-half day on May 20, 1994, requires a conclusion that she cannot receive backpay for that one-half day. On this point, I find it significant that Fett gave her leave request form to her building principal without discussing it with him/her; that Fett's building principal forwarded Fett's request to District Administrator Innis without questioning Fett and without signing or dating the form; that Fett's reason for leave was clearly stated on the face of the form and that that reason could only have fallen within the categories of unpaid leave or paid personal leave; and with full knowledge of the ambiguity on the form, Innis took it upon himself, without speaking to Fett in advance regarding her preference, to mark the form as a request for unpaid leave and to send it back through channels just prior to

May 20th. Had Innis or the building principal taken the time to question Fett regarding the type of leave she was requesting, Fett would have told them she wished to request paid personal leave for May 20th. 3/ By taking the decision out of Fett's hands and making the choice for Fett without her knowledge or consent, District Administrator Innis attempted to foreclose Fett's right to request and receive paid personal leave under the contract. In these circumstances, Innis cannot now argue, on behalf of the District, that Fett waived her right to pay for the one-half day of leave on May 20th. 4/

Based upon the above analysis and the relevant evidence and argument herein, I issue the following

---

3/ Fett stated that although she forgot to mark the form as a request for paid personal leave, she intended to and believed she had fully conformed to the contractual requirements for requesting paid personal leave for her May 20th absence.

4/ I am unpersuaded by the District's Pandora's Box argument, made at the hearing. Although the parties stipulated that the language of Article VIII has been changed in the parties' successor labor agreement, they did not reveal the substance of that change in this case. Nonetheless, and given the clear language of Article IV making arbitration awards final and binding between the parties, after four arbitration awards, each clearly ruling against the District in a wide variety of situations and using the same arbitral analysis, there can be no doubt how the District must administer Article VIII.

AWARD

The District violated the collective bargaining agreement when it denied one-half day paid personal leave to grievant Bonnie Fett.

The District shall, therefore, make Ms. Fett whole by paying her one-half day's pay and all benefits thereon.

Dated at Oshkosh, Wisconsin this 31st day of March, 1995.

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