BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TOMAHAWK EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF TOMAHAWK

Case 43
No. 53419
MA-9350

Appearances:

Mr. Gene Degner, Director, Northern Tier UniServ-Central, appearing on behalf of the Association.

O'Brien, Anderson, Burgy & Garbowicz, Attorneys at Law, by Mr. Steven C. Garbowicz, appearing on behalf of the District.

ARBITRATION AWARD

Tomahawk Education Association, hereinafter referred to as the Association, and School District of Tomahawk, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The District filed a request, with the concurrence of the Association, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Tomahawk, Wisconsin, on February 1, 1996. The hearing was transcribed and the parties' filed post-hearing briefs, the last of which was received on April 11, 1996.

BACKGROUND:

The basic facts underlying the grievance are not in dispute. The grievant has been employed as a teacher for the District for the last seven years. On August 17, 1995, the grievant filed a written request for personal leave for March 14 and 15, 1996. On August 28, 1995, the request was denied. The grievant wanted to attend the boys' WIAA basketball tournament, but March 15, 1996, was the CWE convention in Wausau, Wisconsin, which is essentially an in-service day for the District's teachers. The grievant filed a grievance over the denial of his request for personal leave which was processed through the grievance procedure to the instant arbitration.

ISSUE:

The Union perceives the issue as:

> Did the District violate the intent of the collective bargaining agreement when it denied the grievant, Peter Rortvedt, the use of personal leave to attend the WIAA state basketball tournament on March 14-15, 1996? If so, what is the appropriate remedy?

The District views the issue as:

> Has the District violated Article 12, Section B of the Master Contract by denying Peter Rortvedt's request for personal leave on March 14th and 15th of 1996?
>
> If so, what is the remedy?

The undersigned frames the issue as follows:

> Did the District violate the collective bargaining agreement when it denied the grievant's request for personal leave for March 14 and 15, 1996?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 6

STANDARDS CLAUSE

> Except as this Agreement shall hereinafter otherwise provide, all wages, hours and conditions of employment that are mandatory subjects of bargaining, applicable on the effective date of this agreement to employees covered by this Agreement, as

established by the rules, regulations and/or policies of the Board in force on said date, will continue to be so applicable during the term of this agreement.

. . .

ARTICLE 12

TEMPORARY LEAVE

. . .

B. Personal Leave

A teacher may use not to exceed three days of accumulated sick leave in any one school year for personal leave with prior approval of the District Administrator or principal. Personal leave may not be used to extend a vacation or for personal monetary gain.

. . .

ASSOCIATION'S POSITION:

The Association contends that the District's denial of the grievant's personal leave request violated the collective bargaining and the past practice which gives meaning to the language of the contract. It submits that Principal Stahmer denied the use of personal leave pursuant to a directive given to him by the District Administrator because March 15, 1996, fell on the Central Wisconsin Educators convention that was held that day in Wausau, Wisconsin, and the District Administrator's directive further provides that personal leave be denied before events such as workshops, in-services, etc., according to a memo dated July 30, 1993. It claims that the denial was based on the directive and not because of the purpose of the leave. It points out that in 1994-95, the grievant made a request for the same two days which coincided with the WIAA tournament, and initially, the request was approved but later denied. It alleges that the District Administrator worked out a compromise whereby the grievant would take professional leave on Friday to visit a school in Madison and personal leave on Thursday. This scenario, according to the Association, granted the grievant a personal day the day before the convention and professional leave the day of the convention even though the grievant clearly indicated that he was not going to meet with the Madison teacher very long. It argues that this clearly points out the arbitrariness of the decision to deny personal leave because the grievant was going to be gone either way. The Association also points out that personal leave requests have been changed to emergency leave, further supporting this arbitrariness.

The Association argues that the agreement defines only two exceptions to personal leave usage--to extend a vacation or for monetary gain. It maintains that if other exceptions were intended, they would have been included in the scope of the collective bargaining agreement. It notes that the District attempted to expand the exceptions in the last round of negotiations but failed to get its position in the contract. The Association contends that the District waived its right to change restrictions on the usage of personal leave during the bargaining process. It observes that the evidence establishes that prior to the 1993-96 contract, personal days were used the first and last week of school, prior to conventions, the day of conventions, the day of parent/teacher conferences, etc. It refers to the District's proposal in negotiations for the 1993-96 agreement on personal leave which states the following:

> A teacher may use, not to exceed two days of accumulated sick leave in any one school year for personal leave with prior approval of the District Administrator or principal. Personal leave may not be taken the first or last week of the school year, or immediately prior to or after holidays, spring break, teacher's convention, teacher work days, inservice days, or days scheduled for parent-teacher conferences.

It states that this proposal was dropped by the District and does not appear in the contract. According to the Association the practices giving meaning to the language are governed by Article 6, the Standards Clause and thus, the standards that were in effect at the time the parties reached a new agreement remained in effect for the 1993-96 agreement. It asserts that the District's withdrawal of its proposal constituted a waiver of its right to change personal leave usage.

It insists that after the agreement was ratified, the District Administrator issued a letter on July 30, 1993, stating the same basis for personal leave denial as the District's dropped proposal, and this is an attempt to subvert the bargaining process and negate a past practice. The Association argues that the 1994-95 personal day and professional day granted to the grievant was a facade to help the District Administrator follow his own directive. It states that the use of emergency leave was also used to allow the District Administrator to demonstrate the authority he wanted. It points out that the employes were absent on those days so the reason for not being absent, such as continuity, were not followed, which shows that the District Administrator was being arbitrary in his decision to deny personal leave. It alleges that the history of personal leave and the testimony demonstrate that liberal personal leave was granted, and the District Administrator chose to make a discretionary decision contrary to past practice and his attempt to eliminate the past practice on the use of personal leave goes against every arbitral authority. The Association refers to a number of arbitration decisions and states that where past practice is used to

interpret ambiguous contract language, that practice cannot be changed except by written contract language. It asserts that as the District proposed and then dropped language, it waived its right to change the practice for the 1993-96 contract and the past practice of allowing personal leave at any time during the school year must stand until a new agreement is reached. The Association maintains that the District has attempted to achieve through the July 30, 1993 memo something it could not obtain in negotiations. The Association seeks a finding that the District violated the parties' agreement and asks that it be ordered to cease and desist such violations and be ordered to make the grievant whole.

DISTRICT'S POSITION:

The District contends that it has not violated any provision of the parties' agreement by denying the grievant's request for personal leave. It points out that Article 12, Section B limits when personal leave can be taken as it cannot be used to extend a vacation or for other monetary ventures. It submits that the language requires the prior approval of the District Administrator or Principal and nothing mandates that the Administrator or Principal must automatically approve every request for personal leave, but approval is subject to the discretion of the District Administrator or Principal. The District claims that its application of this language has been clear and consistent and in an effort to make the approval or denial of personal leave consistent, the Administrator testified he prepared the memo of July 30, 1993, to let all know when personal leave would be approved and when it would not. It submits that this is to avoid arbitrary or capricious denials or approvals of personal leave.

The District submits that Article 2, subparagraph C of the agreement supports its right to issue the directive as to when personal leave will or will not be granted. It maintains that while the grievant testified that he took personal leave in the past to attend basketball tournaments, this was not personal leave but administrative leave which coaches are allowed to take. It states that it is interesting to note that most of the teachers who testified, some with 20 or more years with the District, had no knowledge of "coaches" leave. It alleges that the Union is confusing coaches leave with personal leave but these differ greatly. It observes that teachers with over 20 years of employment with the District had no knowledge that a professional leave existed despite the fact that all had taken professional leave at one point or another. The District denies it has violated any past practice by denying the grievant's personal leave in the instant case as the grievant is confusing coaches leave and professional leave with personal leave. It claims that the evidence shows that denial of personal leave is the past practice in the District. It argues that the July 30, 1993 memo relates directly to the education of children in the District and it has been and continues to be the policy that education is best accomplished with regular teachers in the classroom. It notes that the directive of July 30, 1993, does not allow personal days immediately prior to or after holidays, spring break and teachers conventions, all of which are within the contractual prohibition that vacation may not be extended by personal leave. It states that the only days in question are teacher work days, in-service days or parent/teacher conference days. It

observes that it makes no sense to schedule a teacher work day if teachers are not going to be there. It claims that the District spends thousands of dollars for in-service meetings and it would be fruitless if teachers did not attend and parent/teacher conferences would be completely defeated if the regular teacher wasn't present.

The District points out that the purpose of the directive is not to reduce the use of personal leave and, in fact, the usage has increased in the past 5 years. It claims that the directive merely implements prior District policy and practice and has not had an impact on the usage of personal leave.

The District contends that the directive is to make approval or denial of personal leave equitable and consistent. It submits that it has not taken away any benefit from employes. With respect to the granting of emergency leave, the District observes that these are within the discretion of the District Administrator or the Principal and none of these were available to the grievant as this was not an emergency nor was it to cover unusual circumstances and personal leave was properly denied.

In response to the Union's assertion that the District is subverting the bargaining process by implementing provisions which were not agreed to, the District relies on the Management Rights clause to support its position. It admits the directive closely related to negotiation proposals but it insists that it was simply making the application of the collective bargaining agreement more uniform. The District takes the position without the directive, the granting or denial of personal leave will be in a state of chaos and each principal's decision may be different and this would create a hardship for the staff.

The District concludes that very little was made of the Superintendent's directive of July 30, 1993, by the Association's grievance committee and nothing was done to clarify the purpose of it. It argues that past practice does not exist as to personal leave and it asks that the grievance be denied.

DISCUSSION:

The Association argues that the denial of the grievant's personal leave request rests on both the contract language and past practice. The Association asserts that the agreement provides only two exceptions, i.e. vacation extension and personal monetary gain, to deny a personal leave. The first sentence of Article 12, Section B provides that personal leave requires prior approval of the District Administrator or Principal. If there were only two exceptions and all other personal leave was automatically granted then the approval language would be a nullity. Parties generally do not include language in their contract that has no meaning. The plain meaning of this language provides the District Administrator the discretion to grant or deny personal leave. The record

establishes that personal leave has been denied when no substitute was available. 1/ Obviously if all teachers asked for a personal day on the same date, the District Administrator has the discretion to deny all or some of them so school can take place. It would also appear that on some dates, even if a substitute is available, a substitute really would not be able to perform for the regular teacher such as parent/teacher conferences, teachers' work days, in-service days and teachers' conventions. Thus, the language that personal leaves are subject to the prior approval of the District Administrator allows the District Administrator the discretion to deny personal leave for other reasons than the two exceptions specifically listed in the contract.

The Association has argued that the District in negotiations for the 1993-96 contract sought these restrictions on when personal leave would be taken but later withdrew its proposal so these cannot be asserted now. Generally, an arbitrator cannot grant a party that which it could not obtain in bargaining, however, where a proposal merely fleshes out what one party asserts the contract already provides, then this general rule is not applicable. The unsuccessful attempt to obtain a clause severely restricting the other party does not compel the conclusion that a limited restriction does not inhere in the contract. 2/ Here, the proposal was a reflection of the discretion that flows from the contractual language giving the District Administrator the right to approve personal leave. The dropping of the proposal did not deprive the District Administrator of this right and therefore the Association's reliance on negotiating history to support abrogation of this right is misplaced and is not persuasive.

The Association has referred to Article 6, the Standards Clause, as supporting its position but the first clause of Article 6 states "Except as this Agreement shall hereinafter otherwise provide . . ." and clearly Article 12 provides the rights and restrictions on personal leave so Article 6 is not applicable. Article 6 relates to mandatory subjects of bargaining that were in effect but not otherwise provided in the subsequent agreement and personal leave does not fall in this category.

Thus, it is concluded that the Association's argument that the plain language of the contract has been violated must fail as the plain language gives the District Administrator the discretion to grant or deny personal leave.

The Association's second main argument relates to the abuse of the discretion to grant or deny personal leave. The District Administrator must exercise his discretion in an equitable and consistent manner and cannot deny personal leave on mere whim or in an arbitrary or capricious fashion. The Association has asserted that the past practice has been to liberally permit the use of personal leave and has been permitted during the first and last weeks of school, prior to and during

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1/ Tr. 34.

2/ Elkouri & Elkouri, How Arbitration Works, (4th Ed., 1985) at 359.

conventions, prior to holidays, on teacher work days, prior to and after vacation and parent/teacher conferences. 3/ It would appear that a personal leave prior to and after a vacation violates the express provisions of Article 12, Section B and a violation of the contract cannot establish a past practice. The past practice here is not the normal past practice that gives meaning to ambiguous contractual terms but rather it is a standard against which the denial of personal leave can be assessed for consistency. In other words, if a request for personal leave is granted for a particular reason on a consistent basis, it would be an abuse to deny a similar request, all other factors being relatively equal. The Southern Door County School District cases cited by the Association stand for this proposition. Each request requires a review of the facts to determine whether the District Administrator abused his/her discretion in denying or granting a leave. The grievant in this case asked for March 14 and 15, 1996, for personal leave. The request was denied by the Grievant's Principal and it had to do with the timing of the leave as the CWE convention also occurred on March 15, 1996. I find no abuse of discretion in the denial of a personal day on March 15, 1996. In-service time benefits the teacher as well as the District and the District spends considerable sums to provide the in-service, so denial is appropriate. A review of the past practice indicates that personal days have been approved in the past but it is unclear as to the reason. Coaches have been given professional leave and in 1995, the grievant was given professional leave for the convention day. The Association argued that the Superintendent granted a personal day and professional day as a facade in order to negate a past practice. The preponderance of the evidence failed to establish that the Superintendent did anything as the Principal approved the leave and professional day. 4/ The record fails to establish that personal leave was given in the normal course on the CWE convention day, so there is no established past practice indicating the denial of the grievant's request was arbitrary or capricious. Therefore, it is concluded that the denial of the grievant's personal leave request for March 15, 1996, did not violate the contract.

With respect to March 14, 1996, the personal day was denied based on the directive; however, the Superintendent stated the directive was interpreted as the day of and not the day before. 5/ The Superintendent testified that nothing presented at the hearing shows that principals denied it the day before or the day after. 6/ Additionally, the grievant was given a personal day in 1995 on the day prior to the CWE convention. The Principal was unable to articulate any reason for denying the day before the convention day. 7/ On the basis of this evidence, the undersigned finds that the denial of a personal day on March 14, 1996, was arbitrary and not a proper exercise

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3/ Ex. 14.

4/ Ex. 12.

5/ Tr. 118.

6/ Id.

7/ Tr. 143-144.

of the Superintendent's or Principal's discretion to deny personal leave. Thus, the denial of the request for March 14, 1996, violated Article 12, Section B of the contract. Inasmuch as March 14, 1996, has passed, the relief of a personal day cannot be granted unless the grievant took the day off without pay, otherwise the only appropriate relief is to declare that the grievant should have been given a personal day for March 14, 1996, and under the same or similar circumstances in the future, denial would be an abuse of discretion.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The District did not violate the collective bargaining agreement when it denied the grievant's request for personal leave for March 15, 1996, but did violate the collective bargaining agreement when it denied the grievant's request for personal leave for March 14, 1996.

Dated at Madison, Wisconsin, this 26th day of June, 1996.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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