BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TOMAHAWK EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF TOMAHAWK

Case 44
No. 53790
MA-9461

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 Garbowicz, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the District or Employer, respectively, were signatories to a collective bargaining agreement which provided 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. A hearing, which was transcribed, was held on April 17, 1996 in Tomahawk, Wisconsin. Afterwards, the parties filed briefs which were received by June 19, 1996. The record in the matter was closed on June 26, 1996 when the undersigned was notified that the parties would not be filing reply briefs. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Association framed the issue as follows:

> Did the District violate the collective bargaining agreement by charging the grievants, Karen Jarvensivu and Mary Brendemuehl, with a sick day for Labor Day in 1995? If so, what is the appropriate remedy?

The District framed the issue as follows:

> Did the District violate Article 15 (A) of the Master Contract?

Having reviewed the record and arguments in this case, the undersigned finds the

Association's proposed issue appropriate for purposes of deciding this dispute. Consequently, the Association's proposed issue will be decided herein.

PERTINENT CONTRACT PROVISIONS

The parties' 1993-96 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 12

TEMPORARY LEAVE

A. Sick Leave

1. Each teacher shall be credited at the start of the school year with ten (10) days of personal sick leave in advance for that school year, the total number of days to accumulate to one-hundred twenty (120) days. Any teacher who has reached the maximum of 120 shall be credited with the 10 advance days at the beginning of the school year, but not to exceed 120 accumulated days at the end of that school year. If the teacher leaves the system during the school year, the number of days credited at the start of the school year shall be prorated.

2. Each teacher shall be allowed personal sick leave without deduction of salary according to the number of days he or she is credited with at the time of leave. A teacher shall not abuse sick leave rights as set forth in this Article.

. . .

ARTICLE 15

SCHOOL CALENDAR

A. The school calendar shall be negotiated for the ensuing school year(s). Days missed due to inclement weather or emergency situations will be made up with students present (unless otherwise noted in this Article.) When such days will be made up will be negotiated.

The contracted work year for the teachers shall be 190 days. Those

> 190 days shall consist of 180 contact days (two of which may be parent-teacher conference days), two paid holidays consisting of Labor Day and Memorial Day, one day during the State Wisconsin Education Association Council convention, one day for the Central Wisconsin Education Association convention, one mid-year workday, one inservice and two workdays prior to the start of the student school year, one workday at the end of the student school year, and one day consisting of a total of six hours of administratively approved and directed inservice between July 1 and June 30 of the contract year. . .

BACKGROUND

Article 15 (A) of the parties' 1993-96 labor agreement provides that the District's teachers will have a contracted work year of 190 days. That provision specifies in pertinent part that two of the 190 days will be the paid holidays of Labor Day and Memorial Day. The 1993-96 agreement was the first labor agreement to spell out Labor Day and Memorial Day as the paid holidays. Prior to that, employes were given two paid holidays but they were not specified as such in the labor agreement. When the parties negotiated their 1993-96 agreement and named Labor Day and Memorial Day as the two paid holidays, they did not discuss whether there were any eligibility requirements for getting the two paid holidays.

The District's teacher attendance records from 1985 through 1995 show that when teachers missed work either the day before or the day after Labor Day or Memorial Day, a day was not deducted from the employe's accumulated sick leave. According to the District's records, this happened 32 times during that time frame and each time no deduction was made from the employe's accumulated sick leave. The District's teacher attendance records further show that if a teacher missed work both the day before and the day after Labor Day or Memorial Day, a day was sometimes deducted from the employe's accumulated sick leave. This happened to Mary Corttrell and Lori Lemke in 1985-86, to Wolfgang Cahn in 1988-89, and to Anna Erickson and Deborah Jones in 1991-92. In these five instances where employes missed work both the day before and the day after Labor Day or Memorial Day, a day was deducted from their accumulated sick leave. In other words, they were charged a sick day for the holiday. Other employes who missed work both the day before and the day after Labor Day or Memorial Day did not have a day deducted from their accumulated sick leave. This happened to Leneya Schwartz in 1985-86, to Nancy Herbison, Deborah Jones, Joyce Sherman and Tula Theiler in 1986-87, to Anna Erickson in 1987-88, to Anna Billek and Linda Stefonek in 1988-89 and to Robert Skubal in 1993-94. In these nine instances where employes missed work both the day before and the day after Labor Day or Memorial Day, a day was not deducted from their accumulated sick leave. In other words, they were not charged a sick day for the holiday. The record indicates that Herbison and Skubal worked part of the day before and the day after the holiday.

FACTS

The facts that led to the filing of the grievance are undisputed. In March, 1995, veteran teachers Karen Jarvensivu and Mary Brendemuehl signed individual teaching contracts with the District for the 1995-96 school year. These individual teaching contracts provided in pertinent part that each would: "Perform services as a teacher in the Tomahawk School System for a term of 190 days, commencing in August, 1995."

Sometime after they signed these individual teaching contracts, both teachers requested sick leave for the first month of the 1995-96 school year for maternity reasons. Their requests were granted.

At the start of the 1995-96 school year, Jarvensivu and Brendemuehl were credited with ten days of sick leave for that school year. Both teachers missed work the entire month of September, 1995 for maternity reasons. During that time, each of them used the ten days of sick leave they were credited for the 1995-96 school year, plus the sick leave they had previously accumulated. Each teacher ultimately exhausted their accumulated sick leave while off work in September, 1995. When this happened, each went from paid leave status to unpaid leave status. The record does not indicate exactly when that point occurred.

When Jarvensivu and Brendemuehl returned to full-time teaching status in October, 1995 following the birth of their children, they learned that the District had paid them for Labor Day but had treated it as a sick day. Thus, the District had charged them each a sick day for Labor Day. Since both employes had exhausted their accumulated sick leave while off work, each employe ran out of sick leave one day earlier than if they had not been charged a sick day for Labor Day. The reason the District charged each employe with a sick day for Labor Day was that each had not worked the day before and after Labor Day, and the District asserted its long-standing practice was to charge an employe a sick day for a holiday (and deduct a day from the employe's accumulated sick leave) if the employe did not work both the full day before and after a holiday.

Both teachers subsequently grieved being charged a sick day for Labor Day. The grievance was processed through the grievance procedure and was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

The Association's position is that the District violated the collective bargaining agreement by charging Jarvensivu and Brendemuehl a sick day for Labor Day, 1995. In its view, the employes should not have been charged a sick day for the holiday. It makes the following arguments to support this contention. First, the Association notes that no (teaching) work was done or could have been done on Labor Day since school was not in session that day. The Association submits it was both punitive and an abuse of administrative practices to charge the

employes with a sick day for a day when no work was available. Second, the Association argues that Article 15 (A) is clear and unambiguous in providing that teachers get two paid holidays (one of which is Labor Day) as part of their contracted work year of 190 days. The Association asks the arbitrator to enforce the provision establishing "two paid holidays" exactly as written. According to the Association, Article 15 (A) does not impose any kind of eligibility requirement in order to receive the holiday such as working the day before and after a holiday or being in pay status on those days. The Association contends that since no eligibility requirement exists in Article 15 (A), none should be imposed. The Association also notes that both of the grievants were returning teachers who had signed contracts for the entire 1995-96 school year. The Association submits that once an employe signs a teaching contract for the entire year, they are to be paid for both named holidays. Finally, the Association argues in the alternative that if the applicable contract language is found ambiguous and the arbitrator looks to past practice for guidance, the Association asserts there is no binding past practice on the matter. According to the Association, there is no past practice because it did not know until this grievance arose that the District was charging any employes a sick day for a holiday when they did not work both the full day before and after the holiday. In order to remedy this alleged contractual breach, the Association asks the arbitrator to order the District to add one more day to each grievant's sick leave account.

The District's position is that it did not violate the labor agreement by charging Jarvensivu and Brendemuehl a sick day for Labor Day, 1995. In its view, it had the right to charge the employes a sick day for the holiday because of an existing District practice. The District addresses the scope and duration of the alleged practice as follows. First, with regard to its scope, the District acknowledges that if an employe has worked either the day before or after a holiday, or even part of a day before or after a holiday, it has not deducted a sick day for the holiday. The District asserts however that if an employe has not worked the full day before and after a holiday, then it has charged the employe a sick day for the holiday. Second, with regard to the duration of the alleged practice, the District contends this has been the District's practice since 1989 although some instances go back to 1985. The District therefore relies on what happened to Mary Corttrell and Lori Lemke in 1985-86, to Wolfgang Cahn in 1988-89, and to Anna Erickson and Deborah Jones in 1991-92 (i.e., that each was charged a sick day for the holiday when they did not work the full day before and after the holiday.) The District argues that notwithstanding the Association's assertion to the contrary, the Association knew or should have known of this practice. The District therefore contends that its actions here (i.e., charging the employes with a sick day for Labor Day when they did not work the full day before and after that holiday) were consistent with that practice. Next, responding to the Association's contention that holiday pay is guaranteed after a teacher signs a teaching contract, the District contends that the contract does not say that and no reasonable interpretation of Article 15 (A) would reach that conclusion. The District avers that if the Association's interpretation of Article 15 (A) is adopted, this "would require the District to simply write out a check for two paid holidays to the employe once the personal teacher's contract is executed." Finally, as support for its position here, the District

relies on the case of Cadott Education Association v. WERC. 1/ According to the District the issues which were present in that case are present here so that case should control the outcome of this grievance. Based on the foregoing then, the District argues that its actions herein did not violate the contract. It therefore requests that the grievance be denied.

DISCUSSION

The factual context for this matter is as follows. Both of the grievants missed work the entire month of September, 1995 for maternity reasons. Given their absence for the entire month, neither employe worked the day before and the day after Labor Day. Labor Day was a school holiday and school was not in session that day. The District subsequently paid each employe for Labor Day but treated it as a sick day. Thus, it charged each employe with a sick day for Labor Day and deducted a day from their accumulated sick leave.

At issue herein is whether the District could charge each employe with a sick day for Labor Day. The District contends that it could while the Association disputes that assertion. If it is found that the District could not contractually charge the employes with a sick day for Labor Day, then the District violated the contract. On the other hand, if the District could contractually charge the employes with a sick day for Labor Day, then no contractual violation occurred.

In contract interpretation cases such as this, the undersigned normally focuses attention first on the contract language and then, if necessary, on the evidence external to the agreement such as an alleged past practice. In this case though, I have decided to structure the discussion so that this normal order is reversed. Thus, I will address an alleged past practice first. My reason for doing so is as follows. If I addressed the contract language first and found it to be clear and unambiguous, there would be no need to look at an alleged past practice for guidance in resolving the dispute. Were this to happen, the case could be decided without any reference whatsoever to the alleged past practice. The obvious problem with this is that the Employer essentially sees this case as a past practice case. I have therefore decided to utilize this format so that the Employer's past practice contention is not dodged.

Past practice is a form of evidence commonly used to fill contractual gaps. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract contains gaps or is silent on a particular point. In order to be binding on both parties, an alleged past practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered as the type of mutually-agreeable item that is entitled to

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1/ 197 Wis. 2d 46 (1995).

arbitral enforcement.

The District contends that its practice is that if an employe does not work both the full day before and after a holiday, then the employe has been charged a sick day for the holiday. The District asserts this has been the District's practice since 1989 although some instances go back to 1985.

After reviewing the record evidence in detail, the undersigned is not convinced that a practice exists here which is entitled to arbitral enforcement. My rationale follows. The District's teacher attendance records from 1985 through 1995 indicate that there have been over a dozen times when teachers missed work the day before and after a holiday. On five occasions the employes who did so had a day deducted from their accumulated sick leave. 2/ Thus, these five employes were charged a sick day for the holiday. However, on nine other occasions the employes who missed work the day before and the day after a holiday did not have a day deducted from their accumulated sick leave. 3/ Thus, these nine employes were not charged a sick day for the holiday. The foregoing numbers certainly do not show a consistent practice. Instead, all they show is that on some occasions the District has charged employes who missed the day before and after a holiday with a sick day for the holiday, while in others it has not charged similarly situated employes with a sick day. These instances (i.e., five with one result and nine with the opposite result) conflict and cannot be reconciled. The undersigned cannot rely on the five instances cited by the District and ignore the other nine instances any more than I could do the converse. Since the instances reflected in the record are decidedly mixed, it is held that no past practice relative to the issue herein has been shown to exist. Consequently, there is no binding past practice which is entitled to contractual enforcement.

Having thus held that there is no binding past practice, attention is now turned to the contract language. Both sides agree that the contract language applicable here is Article 15 (A), second paragraph. It provides in pertinent part:

> The contracted work year for the teachers shall be 190 days. Those 190 days shall consist of 180 contact days (two of which may be parent-teacher conference days), two paid holidays consisting of

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2/ In making this statement, the undersigned is referring to Mary Corttrell and Lori Lemke in 1985-86, to Wolfgang Cahn in 1988-89, and to Anna Erickson and Deborah Jones in 1991-92.

3/ In making this statement, the undersigned is referring to Leneya Schwartz in 1985-86, to Nancy Herbison, Deborah Jones, Joyce Sherman and Tula Theiler in 1986-87, to Anna Erickson in 1987-88, to Anna Billek and Linda Stefonek in 1988-89 and to Robert Skubal in 1993-94.

Labor Day and Memorial Day,. . .

On its face, this language provides that Labor Day and Memorial Day will be two of the 190 days which are part of the teacher's contracted work year. This language also clearly provides that those two days are "paid holidays."

Both of the teachers involved here were, technically speaking, "paid" for Labor Day. This is because when they received their paycheck for that week, they were not docked a day's pay for Labor Day. What the District did instead was to charge them each a sick day for the day (i.e., for Labor Day). As previously noted, there is no past practice which allows the District to do that (i.e., charge them each a sick day for a holiday). That being the case, the question is whether the contract language allows it.

I begin my analysis of this question by noting that some labor contracts contain eligibility requirements which have to be satisfied in order to get holiday pay. When they exist, holiday pay is conditioned upon some specified work requirement. An example of same is a requirement that employes must work a certain number of days surrounding the holiday such as the day before and the day after a holiday.

This particular contract however does not contain any express eligibility requirements for holiday pay. Specifically, it does not say that employes have to work the day before and after a holiday in order to be paid for the day. Additionally, it does not say that employes have to work the day before and after a holiday or they will be charged a sick day for the holiday.

While no eligibility requirement is expressly specified in Article 15 (A) for holiday pay, the undersigned concludes that one eligibility requirement is nonetheless implicit. In my view, the eligibility requirement for holiday pay that is implicit is that the employe must be in pay status at the time of the holiday. Were it otherwise and an employe did not have to be in pay status as of the time of the holiday, an employe who did no work whatsoever during the year would still have to be paid for the two holidays. The following example is used to illustrate this point. Assume that a teacher signs an individual teaching contract in April for the upcoming school year but then is a no-show at the start of the school year. Further assume that this individual never works a day throughout the entire school year. The undersigned is persuaded that the parties did not intend to automatically give such a person two days of pay for Labor Day and Memorial Day simply because they signed a teaching contract. Instead, the more likely expectation is that the parties intended that if a teacher works or is in pay status for the entire contracted work year of 190 days, then Labor Day and Memorial Day will be counted as two of those days and the teacher will be paid for same. Based on the foregoing then, it is held that in order to get holiday pay, the employe must be in pay status at the time of the holiday.

Having so found, the question which remains is whether the grievants were in pay status at the time of the holiday. I find that they were. While both employes went on unpaid leave on an

unidentified date in September, it can be surmised from the record that this occurred sometime after the day following Labor Day. First, each employe had been credited with ten days of sick leave for the 1995-96 school year pursuant to Article 12(A). This allotment of sick leave alone kept both employes in pay status from Monday, August 21 through Friday, September 1 (i.e., ten working days). Labor Day was Monday, September 4, so each employe needed just one more day of sick leave to ensure they were in pay status for the day after Labor Day (Tuesday, September 5). Second, the record indicates that each employe had some accumulated sick leave in addition to the ten days just referenced. The employes must have had at least one day (in addition to the ten days just noted) because there is no contention to the contrary. It is therefore held that both employes were on paid sick leave the day before and the day after Labor Day. That being so, I find that both employes satisfied the only eligibility requirement of Article 15(A) for holiday pay, namely the implicit requirement that an employe be in pay status at the time of the holiday.

In sum then, it has been held that there is no binding past practice which allows the District to charge employes a sick day if they do not work the day before and after a holiday. Additionally, it has been held there is no contract language which allows it either. This is because there is no express language in Article 15 (A) which allows the District to charge employes a sick day when they do not work the day before and after a holiday. While there is an implicit requirement in Article 15 (A) that an employe must be in pay status at the time of the holiday, both of the grievants herein satisfied that requirement because they were on paid sick leave the day before and the day after Labor Day. Given the foregoing, the District could not contractually charge the grievants with a sick day for Labor Day. Since it did though, the District violated Article 15(A). 4/ In order to remedy this contractual breach, the District is ordered to add one day

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4/ In reaching this conclusion, the undersigned has considered the Cadott complaint case cited by the Employer. After doing so, I find that the District's reliance on that case here is misplaced. While the facts in the Cadott case are almost identical to those involved herein, the legal issue in that complaint case under MERA differs from the contractual issue involved here. In Cadott, the question was whether the District failed to bargain with the

to each grievant's sick leave account.

In light of the above, it is my

Association over eligibility for holiday pay. The Commission, as well as the reviewing courts, held that the District had not failed to bargain on this issue because the contract addressed employe holiday pay rights. Thus, Cadott was a refusal to bargain case. This case however is not a refusal to bargain case but rather an action to determine whether the parties' contract has been violated. Given this fundamental difference, the Cadott case has no bearing here and offers no guidance on the question of whether this contract has, or has not, been violated.

AWARD

That the District violated the collective bargaining agreement by charging the grievants, Karen Jarvensivu and Mary Brendemuehl, with a sick day for Labor Day in 1995. In order to remedy this contractual breach, the District is ordered to add one day to each grievant's sick leave account.

Dated at Madison, Wisconsin, this 14th day of October, 1996.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator