

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WHITE LAKE SCHOOL DISTRICT

and

NORTHERN TIER UNISERV COUNCIL

Case 16
No. 55295
MA-9954

Appearances:

Ms. Carol Nelson, Executive Director, Northern Tier UniServ, 200A South Lake Avenue, P.O. Box 9, Crandon, Wisconsin 54520-0009, on behalf of the Union.

Mr. Robert W. Burns, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, on behalf of the District.

ARBITRATION AWARD

According to the terms of the 1995-97 collective bargaining agreement between White Lake School District (District) and Northern Tier UniServ Council (Association), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute between them regarding the proper interpretation of Article 11 of the collective bargaining agreement. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was scheduled and held on August 25, 1997 at White Lake, Wisconsin. A stenographic transcript of the proceedings was made and received by September 8, 1997. The parties agreed that their initial briefs should be postmarked October 10, 1997 and that the undersigned should exchange those for the parties. The parties reserved the right to file reply briefs within ten working days after their receipt of initial briefs. All documents in this case were received by November 7, 1997 whereupon the record was closed.

ISSUES

The parties were unable to stipulate to an issue for decision herein. However, they agreed to allow the undersigned to frame the issue based upon the relevant evidence and argument in this case as well as the parties' suggested issues. The Association's suggested issue is as follows:

Did the District violate the collective bargaining agreement when it failed to credit all teachers with fifteen days of sick leave at the beginning of each school year? If so, what is the appropriate remedy?

The District's suggested issue is as follows:

Did the District violate the collective bargaining agreement by accumulating sick leave to a maximum of sixty days per teacher? If not, what is the appropriate remedy?

Having considered the parties' suggested issues as well as the relevant evidence and argument in this case, I find that the following issue should be determined herein:

Did the District violate Article XI or past practice when it credited teachers with 15 days of sick leave at the end of the 1996-97 school year and/or failed to notify each teacher of their accumulated sick leave balances at the beginning of the 1996-97 school year? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISION

ARTICLE XI LEAVES OF ABSENCE

A. Personal Illness: For absences caused by illness or physical disability of the teacher, each teacher at the beginning of the school year shall be granted fifteen (15) days per year of paid leave under this policy. Unused sick leave will accumulate to a maximum of sixty (60) days. The teacher shall call in before 7:15 A.M. on the day s/he will be absent. Teachers shall be given a written accounting of their accumulated sick leave at the beginning of each school year. The Board agrees to provide the long term disability insurance benefit (after sixty (60) calendar days) through the W.E.A. Insurance Trust, Policy Number 683. (No teacher who has accumulated more than sixty (60) days prior to the ratification of the 1985-86 contract agreement shall lose any of those days by virtue of the implementation of this section.)

...

BACKGROUND

During bargaining for the 1985-86 contract, the Association and the District agreed that teachers who then had accumulated more than sixty days of sick leave prior to the ratification of that contract would not lose any of those days due to the implementation of the language now contained in Article XI, Section A. Teacher Alan Anderson was among those teachers grandfathered at this time. The remainder of the District's teaching staff who were either hired after the 1985-86 contract went into effect or who had not at that time accumulated more than sixty days of sick leave were bound by the general language of Article XI, Section A.

In the early 1990's the Association proposed to increase the maximum sick leave accumulation for all employees from sixty days to seventy-five days. Board of Education member Sidney Kindle stated that the Association had tried to increase the maximum sick leave accumulation for teachers in the 1980's and that the Board had refused. No change in the language of Article XI occurred and the Association dropped its proposal to increase the sick leave accumulation for teachers who were not grandfathered under the parenthetical material contained in Article XI, Section A. Also in the early 1990's when the Association made the proposal to increase sick leave accumulation, it also asked that teachers be paid for unused sick leave. This proposal was not agreed to by the Board; and it was ultimately dropped by the Association without much discussion on the subject.

Association Representative Rod Wiedmann stated that the instant grievance was brought due to a situation involving former teacher Alan Anderson. Anderson became ill and used up his sick leave so that he had less than sixty days of accumulated sick leave prior to the time he was to apply for a long-term disability. As the District's LTD policy required an employee to have sixty consecutive sick leave days off prior to eligibility for LTD, a question arose whether Anderson would lose pay or whether he would be paid fully prior to going on LTD. Superintendent Harold Brennan (District Administrator for the past eight years) stated that Anderson received additional sick leave time because he was subject to the grandfather clause contained in Article XI, Section A and that had this not been the case, Anderson would not have received any additional sick leave days prior to going on LTD. During Brennan's tenure, no District teacher, unless they are subject to the parenthetical grandfather clause contained in Article XI, A, has had more than sixty days of accumulated sick leave available to them at any time.

Wiedmann believed that the first two sentences of Article XI, A indicate that teachers who have sixty days of accumulated sick leave at the end of any school year should receive an additional fifteen sick leave days at the beginning of the following school year for a total of seventy-five. Wiedmann believed that Article XI creates two different categories of teachers – those under the grandfather clause who can receive a maximum of seventy-five sick leave days accumulation and those not subject to the grandfather clause of Article XI, A -- and that teachers

not subject to the grandfather clause of Article XI, A should receive up to sixty sick leave days accumulation in addition to 15 days of leave for their use each year.

Superintendent Brennan stated that for the eight years he has been with the District, he has administered Article XI, A in the same fashion: that if a teacher had sixty sick leave days accumulated and used fifteen during the year then at the end of each school year, the District would credit that teacher with another fifteen sick leave days up to a maximum of sixty. Brennan believed that the same result would pertain if one added the fifteen days at the end of the school year or at the beginning of the next school year, as teachers do not work during the Summer and get no sick leave during that time. Teacher contracts are issued in March of each school year. On those contracts, the District notifies the teacher of how many unused sick days they have as of the date of that individual teacher contract. Teachers are given no other notification regarding their accumulated sick leave during the school year.

It is undisputed that the Association has never requested that the District give specific notification of sick leave accumulation at the beginning of each school year. No grievance has been filed regarding this issue during Brennan's tenure as administrator. If teachers use sick leave after the issuance of their individual teacher contract, those days are deducted from the amount shown on each teacher's individual teacher contract.

There were twenty teachers in the District during all times relevant hereto. Two teachers (Frey and Maule) had sixty days of accumulated sick leave as of the issuance of their 1996-97 teacher contract (issued on March 15, 1996); five other teachers had between fifty-six and fifty-nine days of accumulated sick leave as of the issuance of their individual teacher contracts on March 15, 1996; and there were two teachers who were hired at the beginning of the 1996-97 school year whose teacher contracts did not show any accumulated sick leave as of the issuance of their contracts, although they were credited with fifteen days at the end of their first year of teaching (less deductions for any sick leave used). (New teachers receive a notice of their accumulated sick leave on the next individual teacher contract issued to them in March of their second year of employment.)

District Bookkeeper Linda Perry (who has been in her position for a year and a half) essentially confirmed Superintendent Brennan's explanation of the District's sick leave procedures. She also stated that she was shown how to administer the accumulation of sick leave in the District by her predecessor and that she has continued to perform her duties of keeping track of sick leave usage and accumulations in the same fashion as her predecessor to date.

The Union filed the instant grievance on April 16, 1997. On August 14, 1997 Superintendent Brennan wrote to UniServ Director Carol Nelson in response to an information request regarding this case and stated the following:

...

Each school year end, 15 days sick leave is added on to the amount of sick days unused for that year, not to exceed 60 total accumulation.

...

POSITIONS OF THE PARTIES

Association

The Association argued that the contract language in dispute in this case is clear and unambiguous. The Association urged that Article XI, Section A, clearly creates two types of sick leave: 15 days of current sick leave for use at the start of each school year; and accumulated sick leave (unused sick leave at the end of a school year). In this regard, the Union noted that current sick leave can only become accumulated after the lapse of a one year period; and that current sick leave must be credited to each employe at the beginning of each school year, per Article XI, or a violation of the contract occurs.

Therefore, the Association contended that the District has not administered contractual sick leave properly. On this point, the Association noted that both the District Bookkeeper as well as the Superintendent were confused regarding how they should be administering the policy; that the District representatives have not recognized the difference between accumulated sick leave and current sick leave days; and that the District has not been crediting teachers with 15 current days of sick leave at the beginning of each school year, as the contract requires. The Association asserted that the contract clearly shows that employes are to use their current sick leave first and that they can then use accumulated sick leave when their current leave has been exhausted. The Association contended that because the contract makes no distinctions in regard to sick leave between new teachers and staff teachers, the District is not free to treat these groups differently. Thus, the Association sought an Award sustaining the grievance and granting affected teachers fifteen days of current sick leave to be credited retroactively as of the beginning of the school year.

The District

The District argued that the language of Article XI, Section A is clear. In this regard, the District noted that the contract language states that unused sick leave "will" accumulate to a "maximum" of 60 days; that the contract does not use the word "may"; and that it does not refer to the number "75" in regard to sick leave accumulation. In addition, the District urged that the evidence regarding teachers who have been "grandfathered" is not relevant to this case. In the District's view, only if the Arbitrator found the language of the contract to be confusing or ambiguous could she examine past practice and bargaining history regarding sick leave.

In any event, the District argued that should the Arbitrator examine past practice and bargaining history, that these would prove to be consistent with the District's position herein. In this regard, the District noted that testimony from District Administrator Brennan, District Bookkeeper Perry, as well as evidence from the 1996-97 teacher contract negotiations and Association Representative Weidmann all supported the District's view of this case.

In regard to bargaining history, the District also noted that evidence is consistent with the District's position in this case. The District noted that District School Board member Sidney Kindle stated that the Association had tried to increase the number of accumulated sick days when the parties last negotiated and that the Board, in clear terms, refused to change the language of the labor agreement allowing only sixty days of maximum accumulation of sick leave. Thus, the District urged that the Arbitrator should not allow the Association to achieve by this grievance what it could not obtain in bargaining, essentially changing the contract without any *quid pro quo* for the change. The District sought denial and dismissal of the grievance in its entirety.

REPLY BRIEFS

Association

The Association argued that the contract clearly requires the District to credit each teacher with fifteen days of sick leave at the beginning of each school year. However, the Association pointed out that in his August 14, 1997 letter, District Administrator Brennan admitted that the District credits teachers with fifteen days of sick leave at the end of each school year. Thus, the Association noted that the District essentially admitted violating the contract on this point.

The Association argued that the phrase "unused sick leave will accumulate to a maximum of sixty (60) days" should be read to mean exactly what it states. In other words, the Association urged, sick leave days cannot be unused until the end of a particular school year and only at this time could unused sick leave accumulate to a maximum of sixty days. The fact that that the District has used one system for newly hired teachers while it has applied a different system of sick leave accumulation and distribution to long-time teachers are practices which the contract clearly does not address. The Association noted that new teachers as well as veteran teachers should be given fifteen days of sick leave at the beginning of each year of employment. Thus, a teacher who has been working for several years could have seventy-five total available sick days for use in any particular year if they accumulated sixty unused sick days and were properly granted (as the contract requires) fifteen days at the beginning of the school year.

The Association argued that the "grandfather clause" in Article XI is not relevant to this case and that the District's arguments thereon should be disregarded. In addition, the Association contended that the treatment of Alan Anderson is similarly not pertinent to this case

as Anderson was among the teachers who had more than sixty days of accumulated sick leave prior to the ratification of the 1985-86 contract. Furthermore, the Association asserted that evidence given by District Bookkeeper Linda Perry should also be given little if any weight based upon the fact that Perry had only worked for the District for one and one-half years at the time of the instant hearing. In any event, the Association argued that where the contract is clear and unambiguous, past practice should not be considered.

Therefore, the Association sought that the grievance be sustained and an award issued stating that the District had violated the collective bargaining agreement by failing to grant fifteen days of sick leave for use at the beginning of each school year to all members of the Association.

The District

The District urged that the record evidence in this case shows that the District has consistently applied the sick leave language of Article XI. In this regard, the District noted that District Administrator Brennan's testimony was clear and that a fair reading of the entire transcript shows the District has consistently complied with the plain language of the contract in Article XI. Thus, the District took issue with the Association's assertions in its initial brief that District witnesses were confused regarding how the sick leave accumulation and usage have been administered in the past.

The District also took issue with the Association's citation and use of the case DOBB'S HOUSE, INC., 64 LA 643 (1975), stating that this case was distinguishable from the instant case. The District further noted that the testimony of District Administrator Brennan as well as Bookkeeper Perry was unrefuted by the Union; and that Perry also testified that she has handled sick leave in the same way that her predecessor did. Therefore, the past practice evidence showed that only a maximum accumulation of sixty days was allowed in the past by the District for many years. Furthermore, the District argued, Association witness Weidmann failed to identify any instance in which the District had granted accumulation of sick leave in excess of sixty days except for the case of former teacher Alan Anderson.

The District contended that its long-standing practice of applying the new allotment of sick leave days at the end of the school year only up to a maximum of sixty is a simple and sensible practice and that whether new sick leave days are credited at the end of the school year or the beginning of the next school year is irrelevant. The District urged that the Association's argument that the District's procedure and practice regarding Article XI results in implementing two systems, is an argument which elevates form over substance. In the District's view, the end result is the same for both types of teachers: Both new teachers and experienced teachers will start the school year with at least fifteen days of sick leave, but not more than sixty accumulated days. The District urged that this is the logical application of the contract language which is

supported by past practice and by the "grandfather" language contained in Article XI (which was bargained to protect prior accumulation beyond sixty days.) Thus, the District urged that the grievance should be denied and dismissed in its entirety.

DISCUSSION

The District has implied that the Association should have filed a grievance long ago regarding its interpretation of Article XI and that because the Association failed to previously grieve the District's failure to issue notices of sick leave accumulation at the beginning of each school year, the allegation regarding notice is not properly before the Arbitrator in this case. In this regard, I note that the grievance was filed on April 16, 1997 and that it read in relevant part as follows:

...

STATEMENT OF GRIEVANCE:

The District did not grant 15 days of sick leave at the beginning of the current school year to employees who had 60 days of accumulated sick leave from prior years.

PERTINENT CONTRACT PROVISIONS:

Article XI, Leaves of Absence, A, C, D, E

REMEDY REQUESTED:

1. Grant 15 days sick leave at the beginning of each school year for all teachers covered by this Agreement.
2. Recalculate sick leave for this year to be added to the maximum allowed accumulation.
3. Any and all appropriate remedies.

...

I note that the grievance asserts a violation of Article XI, Section A. Although the grievance does not specifically seek an order requesting that the District notify teachers of their accumulated sick leave at the beginning of each school year, the grievance does seek "any and all appropriate remedies." The District's alleged failure to notify teachers of their accumulated

sick leave balances at the beginning of each school year is the type of violation that re-occurs in each school year. The instant grievance was filed in early April, 1997 at the same time that individual teacher contracts were issued by the District containing the sole notice of each teacher's sick leave accumulation balance. In these circumstances, I find the District's arguments in this area unpersuasive and that the grievance is properly before me.

Article XI states that "unused sick leave will accumulate to a maximum of sixty (60) days." This provision makes clear that teachers not covered by the parenthetical "grandfather" clause of Article XI may only accumulate and carry over from year to year up to sixty days of sick leave which remains unused at the end of a school year. 1/ The contract clearly distinguishes between unused sick leave which may be accumulated and current sick leave, up to 15 days of which is available for use each year if a teacher becomes ill and requests to be absent from work.

In this regard, I note that although the contract states that each teacher "shall be" granted 15 days of paid sick leave" at the beginning of the school year (emphasis added), it fails to address how much current sick leave a teacher may receive if a teacher fails to complete his/her contract work during the school year. In addition, I note that the Association appears to use the verbs "granted" and "credited" interchangeably.

Given the silence of the contract on these important points, a deeper analysis of the terms used in Article XI is necessary to try to determine the parties' intent. The American Heritage Dictionary (Houghton-Mifflin, 1976), defines "grant" as follows:

1. To allow to have; consent to the fulfillment of: grant a wish.
2. To permit or accord, as a favor or privilege: grant a kiss. . .

In contrast, to give a person "credit" for something such as sick leave has a connotation of immediate entitlement. In the instant case, Article XI uses the verb "grant" not "credit", to describe how employees are to receive current sick leave. In my view, there is a significant difference between the verb "grant" and "credit". The fact that the instant contract uses the verb "grant" tends to support a conclusion that although all teachers are to be "granted" 15 days of sick leave for their use in each school year if they become ill, they must work the entire year before they are credited with a full 15 days of sick leave against which the days they have used that year can be deducted, leaving unused sick leave (if any) which can then be accumulated to a maximum of 60 days.

The District has argued that because the contract lists a maximum accumulation of sixty sick days, the Association's arguments herein would essentially require a modification of the contract language to include a maximum of 75 accumulated sick days. I agree. If one were to read the instant contract as requiring that teachers be credited with 15 days of sick leave at the

beginning of each school year no matter how many days they worked, this would result in non-grandfathered teachers who had previously accumulated 60 sick days, receiving 75 days of sick leave up front for their use in a particular year. I do not believe the parties ever intended some teachers to receive such a windfall. 2/

As noted above, given the silence of the contract in the important areas of proration and usage, the evidence of past practice and bargaining history proffered by the District becomes relevant to fill in the contractual blanks. In this regard, I note that Board Member Kindle stated (without contradiction) that the Board consistently refused over the years to raise the sick leave accumulation amount to 75 days. In addition, there is no dispute that for at least the past eight years since Superintendent Brennan has been with the District, the effect of the District's sick leave procedure has been to credit teachers who completed the school year with 15 days of sick leave from which the District then made deductions for sick leave used during that year. Unused sick leave was then added to any accumulated sick leave, not to exceed 60 days' accumulation and any sick leave unused at the end of a year in excess of 60 days was lost. 3/ This evidence of past practice and bargaining history supports my analysis of Article XI -- that the parties intended that a full 15 days of current sick leave should be credited to teachers only upon completion of the school year and that deductions therefrom should then be made, with any remaining amount (not over 60 days) then being accumulated.

It is true that under my analysis of the language of Article XI, a teacher who has completed the school year, who had previously accumulated 60 sick leave days and who was ill for 15 school days and requested sick leave therefor would have the use of 15 days of current sick leave in that school year and still maintain 60 days of accumulated sick leave for his/her future use. However, my analysis does not mean that any non-grandfathered teachers will, pursuant to this Award, be allowed to accumulate more than 60 sick days as the contract clearly forbids sick leave accumulation beyond 60 days.

In all of the circumstances of this case, I believe that the District has properly administered Article XI sick leave in accord with past practice and the parties' true intent regarding Article XI, with the exception of the District's failure to notify teachers at the beginning of each school year of the amount of their accumulated sick leave. 4/ I therefore issue the following

AWARD

The District did not violate the collective bargaining agreement and past practice when it credited teachers with 15 days of current sick leave at the end of the 1996-97 school year. However, the District violated Article XI when it failed to notify teachers of their accumulated sick leave balance at the beginning of the 1996-97 school year. The District shall issue

corrected notices of accumulated sick leave to all teachers as soon as practicable for the 1996-97 and 1997-98 school year. In the future, the District shall follow the contract and give all teachers notification of accumulated sick leave (if any) at the beginning of each school year.

Dated at Oshkosh, Wisconsin this 9th day of January, 1998.

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

ENDNOTES

1/ I note that the Alan Anderson case arose and was apparently settled sometime toward the end of the 1995-96 school year and that the Anderson case did not involve accumulated sick leave notification. As such, the Anderson situation is not relevant to this case.

2/ Logically and practically, sick leave is a benefit that is earned by time on the job. It is given to employees who become ill and request sick leave only upon completion of the necessary time on the job.

3/ Contrary to the Association's assertions, the District's practices effectively treat all teachers the same for purposes of accumulation of sick leave.

4/ The District's practice of listing sick leave accumulation on teachers' individual contracts for the coming year is insufficient to give proper and accurate notice as required by the clear terms of the contract. As such, that practice should be discontinued.

