BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHWEST UNITED EDUCATORS

and

ST. CROIX FALLS SCHOOL DISTRICT

Case 40
No. 55146
MA-9909

(Grievance of Trudy Lorenz)

Appearances:

Mr. Alan Manson, Executive Director, Northwest United Educators, appearing on behalf of the Association.

Mr. Michael Julka, Attorney at Law, appearing on behalf of the District.

ARBITRATION AWARD

The Association and the District were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on July 16, 1997, in St. Croix Falls, Wisconsin. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on November 10, 1997. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties stipulated the following substantive issue:

> Did the Employer violate Article XV, D of the collective bargaining agreement by denying emergency leave to Trudy Lorenz for November 18, 1996? If so, what is the appropriate remedy?

In addition, the District raised the following procedural issue:

Whether the grievance is arbitrable given the procedural defects at Level One and Level Two?

PERTINENT CONTRACT PROVISIONS

The parties' 1995-1997 collective bargaining agreement contained the following pertinent provisions:

ARTICLE VIII - GRIEVANCE PROCEDURE

A. Definitions.

. . .

3. Days. The term "days" when used in this article shall mean calendar days, excluding Saturdays, Sundays, and vacation days occurring during the regular school term. Days indicated at each level should be considered a maximum. By mutual agreement, the time limits specified may be extended.

. . .

D. All grievances shall be filed on a timely basis. If the grievance is not appealed within the time limits set forth herein, it shall be determined as settled on the basis of the last answer given. If the Principal, immediate supervisor, Superintendent, or Board does not respond within the prescribed time limits, the grievance may be advanced to the next step, if appealed within the prescribed time limits.

E. Grievances shall be reduced to writing beginning with level two using the following format:

. . .

F. Initiation and Processing.

1. Level One. The grievant will first discuss the grievance with the

Principal or immediate supervisor.

2. Level Two. If the matter is not resolved, the grievance shall be presented in writing by the teacher to the immediate supervisor within fifteen days from the time the grievant knew or should have known all of the alleged violation. The immediate supervisor shall give his/her written answer within fifteen days of the time the grievance was presented to him in writing.

3. Level Three. If not settled in level two, the grievance, within ten days after the supervisor's response, should be formally filed in writing with the Superintendent of schools. The Superintendent shall give a written answer no later than fifteen days after the receipt of the appeal.

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ARTICLE XV - LEAVES OF ABSENCE

A. Sick Leave.

Sick leave shall be granted at the rate of twelve (12) days per school year, 13 days for 11 month contracts and 14 days for 12 month contracts, cumulative to 105. A teacher beginning his/her employment in the district shall report to one day of work to qualify for sick leave. All sick leave will be accredited to each teacher the first day of school or the first day they report to work. Any disability payments received under the Workman's Compensation Act may be endorsed over to the Board by the teacher and the teacher shall in lieu thereof receive sick leave.

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D. Emergency Leave.

1. In case of serious illness, injury, or death to a member of a teacher's immediate family, the teacher when practicable shall provide prior notice to his/her supervisor to take up to five (5) days off in order to handle the emergency situation. The aforesaid five (5) days are

noncumulative and are for a period of one year only. One of these days may be used for the funeral of a close friend.

2. "Immediate Family" is defined as the teacher's own immediate family, his/her parents, grandparents, grandchildren, brother or sister, or those of his/her spouse.

3. Leave for emergencies other than those described above shall be granted at the discretion of the Superintendent and may apply on accumulative sick leave.

BACKGROUND

The District operates a K-12 public school system. The Association represents a bargaining unit of certified teaching personnel in the District. The Association and the District have been parties to a series of collective bargaining agreements, including the Agreement which, by its terms, was effective July 1, 1995 through June 30, 1997.

The various collective bargaining agreements referenced above have contained an emergency leave provision. The emergency leave provision in the parties' 1975-1977 agreement provided as follows:

B. Emergency Leave. On written request to the superintendent of schools, in the event of compelling personal reasons or legal business requiring employees' attendance, or in the event of the death or serious illness of a teacher's spouse, child, son-in-law, daughter-in-law, parent, father-in-law, mother-in-law, brother, sister, brother-in-law, sister-in-law, or a member of the immediate household, teachers may be granted up to five (5) days emergency leave. Teachers may be granted, with a written request, up to two (2) days' leave in th [sic] event of a death of a teacher's friend or relative outside the teacher's immediate family as designated above. The days taken under this section shall be counted as sick days. No more than five (5) such days shall be taken in a given year without the special consent of the school board.

The emergency leave provision was replaced with the following in the 1981-83 agreement:

D. Emergency Leave.

1. In case of serious illness, injury, or death to a member of a teacher's immediate family, the teacher when practicable shall provide prior notice to his/her supervisor to take up to 5 days off in order to handle the emergency situation. The aforesaid 5 days are noncumulative and are for a period of one year only.

2. "Immediate Family" is defined as the teacher's own immediate family, his parents, grandparents, grandchildren, brother, or sister, or those of his spouse.

3. Leave for emergencies other than those described above shall be granted at the discretion of the superintendent and may apply on accumulative sick leave.

Except for the recent addition of an additional sentence in D, 1 providing for emergency leave use for the funeral of a close friend, the emergency leave provision in the Agreement has remained unchanged since 1981.

The instant grievance involving emergency leave is the first to arise since the emergency leave language was placed in the parties' 1981-83 agreement.

The record indicates that in the past, emergency leave has been granted for the following events: a parent's, spouse's or child's scheduled surgery; a sick child; the birth of a child; and a spouse's scheduled doctor appointments. With respect to the last event (i.e. a spouse's scheduled doctor appointments), the record indicates that retired teacher Donna Thill was granted emergency leave on 35 different occasions between 1985 and 1992 to take her husband to scheduled doctor appointments for cancer treatments. The District does not keep records for emergency leave usage longer than one year. The District's records for the 1996-97 school year indicate that four emergency leave requests were changed by management to sick leave. Those same records indicate that two sick leave requests were changed by management to emergency leave.

FACTS

On Saturday, November 9, 1996, 1/ veteran teacher Trudy Lorenz accompanied her husband Dan Lorenz to Neenah, Wisconsin, to attend the State Volleyball Tournament. They stayed overnight in a motel. During the night, Dan experienced trouble breathing, whereupon Trudy called 911. Emergency medical personnel responded to the call and took Dan to a hospital in Oshkosh where he was admitted on an emergency basis. Dan was later diagnosed as having a pulmonary

embolism which is blood clots in the lungs. He remained hospitalized for this condition for the remainder of the week.

Trudy Lorenz stayed in Oshkosh through Monday, November 11 to be close to her husband. In doing so, she missed work on Monday, November 11. She drove back to her home in Osceola, Wisconsin later that same day. She returned to work on Tuesday, November 12.

After returning to work, Lorenz wrote her principal, Fred Yarolimek, a letter wherein she requested that the status of her absence on November 11 be changed from sick leave to emergency leave. She had originally been scheduled for sick leave for that day for an orthodontist appointment. This letter further indicated: "It may be necessary for me to take an additional emergency day to complete his discharge from the hospital." Principal Yarolimek later granted Lorenz' request to change the status of her November 11 absence from sick leave to emergency leave.

On Saturday, November 16 Lorenz drove to Oshkosh, picked up her husband who was released from the hospital, and drove back to their home in Osceola. It took 12 hours to complete this 600 mile round trip. Before leaving Oshkosh, Dan's attending physician gave him orders that he was to go to his local physician in Osceola on Monday, the 18th. Dan's doctor appointment for that day had been arranged by the Oshkosh physician.

On Monday morning, November 18, Lorenz called Principal Yarolimek and told him that she needed a substitute teacher for the day because she was going to be absent. Yarolimek asked her if she was sick and she replied in the negative. She indicated she needed to take her husband to a prearranged doctor's appointment. They did not discuss what type of leave was applicable to the absence. Lorenz in fact took her husband to the doctor that day.

Lorenz subsequently submitted a request for emergency leave for Monday, November 18. On the request form, her stated reason was: "To take my husband to his Dr. for his serious illness of blood clots in his lungs." After receiving Lorenz' request for emergency leave, Yarolimek responded with a note saying: "We can't count taking you (sic) husband to an appointment as emergency in this case, based on what you have as a reason. I'll count it as sick leave." Lorenz informed NUE Executive Director Alan Manson of the foregoing sometime around November 25.

In a letter dated December 6, Manson inquired of Yarolimek whether, in fact, Lorenz' request for emergency leave for November 18 was being denied. In a letter dated December 10, Yarolimek responded as follows: "This is in response to your December 6th letter questioning the status of Trudy Lorenz's November 18 absence. We do not interpret her reason for being absent an emergency."

On December 20, Manson called Yarolimek but did not reach him. Yarolimek was unavailable, so Manson left a message for him on the District's answering machine that he was to call Manson back so they could discuss Lorenz' emergency leave request. Later that day, Manson filed the instant grievance concerning Lorenz' denial of emergency leave for November 18.

On January 9, 1997, Yarolimek responded to the grievance in writing and denied same. In doing so, he asserted that the grievance was untimely filed because, according to his calculations, the Level Two grievance was received five days late. He also indicated that he did not feel that an emergency situation existed as of November 18.

Manson appealed the grievance on January 17, 1997, to Level Three of the grievance procedure. District Administrator Michael Cox denied the grievance on January 24, 1997. In doing so, he indicated as follows: "I cannot see where this should be considered an emergency situation". He also indicated: "If you can provide further or additional information from Mr. Lorenz's doctor that would make me believe this was an emergency situation, I would be willing to look at it again."

By letter dated January 29, 1997, Manson appealed the grievance to Level Four of the grievance procedure (i.e., the Board of Education). Cox responded to that letter with a letter dated February 19, 1997. Therein, Cox wrote:

> "Emergency" is defined by the dictionary as a sudden, urgent, and usually unforeseen occurrence. From what has been provided to us at this time, it does not seem to fit the definition of an emergency. We understand that this was a post-hospital checkup; and therefore, we believe the serious illness ended with his release from the hospital. . .We feel this request for leave is after the fact, beyond the "serious state", and no longer an emergency situation. We would request medical evidence to the contrary if it can be provided.

The instant grievance was addressed at a March 11, 1997 School Board meeting. At that meeting, Manson read the following note from Dan Lorenz' Osceola physician aloud to the Board: "On November 18, 96, Mr. Lorenz had [unintelligible] pulmonary embolism and his wife's presence was necessary." Manson then handed this note to one Board member, Dr. Beyer, who handed it back to Manson. The District did not receive a copy of this note (which was dated March 5, 1997), until the arbitration hearing.

Lorenz was paid for her absence on November 18, 1996, but the District deducted one day from her accumulated sick leave. Lorenz finished the 1996-97 school year with one remaining day

of emergency leave that was not utilized.

POSITIONS OF THE PARTIES

Association's Position

The Association initially challenges the District's assertion that the grievance is procedurally defective. In its view, it complied with the contractual grievance procedure. It

asserts that the reason no "teacher" presented the grievance at Step 2 was because the grievance procedure allows NUE to be a grievant. The Association avers that the fact that the internal references to "teacher" and "grievant" in the grievance procedure are not consistent does not overcome the definition of NUE as a grievant, and the ability of NUE to file and process a grievance. The Association asserts that if the definition of NUE as a grievant is to be given any significance, it must be accepted that "teacher" as used in Level Two, includes NUE when NUE is acting as the grievant. With respect to the District argument that the grievance processing timelines were not met, the Association believes it is noteworthy that the Employer does not seem to be able to identify an exact timeline, and that in any event the alleged several day tardiness of the grievance in no way compromised the Employer by imposing any burden or additional loss on the Employer. The Association therefore contends that the Employer's procedural objections to the grievance should be dismissed.

With regard to the merits, the Association's position is that the District violated the labor agreement by not approving emergency leave for Lorenz for November 18, 1996. As the Association sees it, the basic question which the arbitrator is to answer is whether Trudy Lorenz' spouse Dan was suffering a "serious illness" within the meaning of Article XV, 1 on November 18, 1996. The Association answers that question in the affirmative. It believes that a reasonable person would conclude that Dan Lorenz' pulmonary embolism constituted a serious illness. The Association argues that the District's decision denying emergency leave under the circumstances is not supported by either: 1) a reasonable interpretation of the phrase "serious illness" in Article XV, D, or 2) by a comparison of the facts of this case with those in which emergency leave has been granted for other bargaining unit employes in the past. It addresses these points as follows.

With regard to the first point, the Association believes that the Employer is attempting in this case to change the standard under which emergency leave has been provided to bargaining unit employes. The Association notes that Article XV, D, provides that emergency leave can be used for "serious illness, injury or death to a member of a teacher's immediate family." As the Association sees it, the District is attempting to add a new and additional factor, namely the requirement that the serious illness, injury or death be "sudden, urgent and usually unforeseen." The Association

characterizes this additional requirement as a "suddenness" or "unexpectedness" factor. The Association submits that whatever the origin or source of this additional factor, there is no evidence of it (i.e. suddenness) being a part of the parties' bargaining history. It notes in this regard that there is no discernable evidence of this new factor being in the original language which the parties negotiated. The Association believes that the easiest way to explain the Employer's denial of emergency leave in this case is to conclude that a relatively new superintendent is seeking to apply his own "common sense" or "dictionary" definition to the word "emergency" in the Article XV, D title "Emergency Leave." The Association argues that adding a new suddenness restriction to the language is improper because it essentially narrows the operative definition of emergency leave. The Association asserts that if the Employer wants

to change the definition of emergency leave as it exists in the existing contract, it should attempt to do so at the bargaining table. The Association argues it is a violation of that language to simply unilaterally adjust it (as happened here) so that it results in a denial of emergency leave.

With regard to the second contention previously referenced, the Association calls attention to the manner in which the emergency leave clause has been applied in the last 15 years. According to the Association, a review of past uses of emergency leave by bargaining unit employes shows that some were of significantly less risk to life than was the case here (i.e. a diagnosed pulmonary embolism for which a person was hospitalized for a week). The Association calls specific attention to retired teacher Donna Thill's use of emergency leave 35 times over seven years to take her husband who had cancer to his scheduled doctor appointments. Given the foregoing, the Association believes emergency leave should have been granted to Lorenz on November 18, 1996.

In order to remedy this alleged contract breach, the Association asks that the Arbitrator order the District to grant Lorenz one day of emergency leave for November 18, 1996. It also seeks to have the District provide a letter of apology to Lorenz which acknowledges that in violating the terms of the contract the District caused her unwanted and harmful additional emotional distress.

District's Position

The District initially contends that the grievance should be dismissed on procedural arbitrability grounds. It contends the grievance is not procedurally arbitrable due to the following three independent procedural defects. First, it avers that Manson never discussed the grievance with Principal Yarolimek before he filed it. The District asserts this violated Level One of the grievance procedure. Second, the District calls the arbitrator's attention to the fact that Level Two of the grievance procedure specifies that "the grievance shall be presented in writing by the teacher" (emphasis added). It asserts that never happened here because NUE filed the grievance, not Lorenz. The District argues that since no "teacher" presented the grievance in writing, this procedural

requirement was not followed either. Third, it contends that the grievance was untimely filed. It avers in this regard that Lorenz learned of Yarolimek's denial of her emergency leave request on either November 21, 22 or 25. Counting from any of those dates, the District asserts that the written grievance dated December 20 (and received by Principal Yarolimek on January 6, 1997), was from three to five days late. It therefore contends that the grievance was not filed within the prescribed time limits established in Level Two of the grievance procedure. It urges dismissal of the grievance for any or all of these procedural defects.

With regard to the merits, the District's position is that it did not violate Article XV, D, of the labor agreement when it denied emergency leave to Lorenz for November 18, 1996. It makes the following arguments to support this proposition. First, it starts by reviewing what it believes are the three elements to qualify for emergency leave: 1) a "serious illness"; 2) it must affect a member of the teacher's immediate family, and 3) the leave must be "in order to handle the emergency situation." The District concedes that in this case, the second element is not at issue, but it avers the other two (elements) are in issue. With regard to the first element, it acknowledges that a pulmonary embolism can qualify as a serious illness under some circumstances, but it contends that being subject to that condition does not mean that someone is continuously seriously ill. It cites the following circumstances to support its contention that Dan Lorenz was not suffering from a "serious illness" on November 18, 1996: 1) Trudy Lorenz did not see her husband all week until she picked him up; 2) no complications arose on the 300- mile trip back to Osceola from Oshkosh; and 3) the Oshkosh physician did not deem it critical that Lorenz be seen by his Oshkosh physician until Monday (even though they returned to Osceola on Saturday). With regard to the third element (i.e. an "emergency situation"), the District contends that an emergency situation must exist in order for a person to qualify for emergency leave. According to the District, Dan Lorenz' pre-arranged doctor's appointment on November 18, 1996, simply did not constitute such an emergency situation. It characterizes the doctor's appointment in question as simply a "prescheduled appointment for a pre-existing condition." The District contends that all three of these elements must be met in order to qualify for emergency leave. It submits that it is not enough that just a "serious illness" be involved; an "emergency situation" must also be present. The District argues that Lorenz' absence on November 18 to attend her husband's pre-arranged doctor appointment was simply not an emergency situation regardless of whether the Osceola physician believed Lorenz' presence was necessary.

Next, the District calls the arbitrator's attention to the fact that when the grievance was being processed, it made repeated written requests for Manson to provide additional information from which the District could re-evaluate whether emergency leave was warranted. It notes that when Manson finally presented some additional information, it was simply the doctor's slip (NUE Exhibit 8). According to the District, that medical slip adds nothing to the resolution of the issue here. The District further notes that no copy of that document was given to the Board until it was introduced at the arbitration hearing. The District argues "it would be a travesty of justice for the arbitrator to now base an interpretive decision upon information first entered into the record at the arbitration hearing."

Finally, with regard to past practice, the District "implores the arbitrator to do a careful qualitative analysis of the record in that regard before coming to any specific conclusions about the practices of the parties." That said, the District contends that District Exhibit 3 (i.e. the District's records for the 1996-97 school year) provides the best guidance as to the District's history of

granting or denying emergency leave. It emphasizes the following three points about

that exhibit. First, the District does not maintain emergency leave records beyond one year. Second, the instances referenced in District Exhibit 3 are illustrative of how emergency leave has been handled since Cox became Superintendent in 1994. Third, it contends that the four instances referenced in that exhibit where requests for emergency leave were changed by management to sick leave closely approximate the factual circumstances surrounding Lorenz' absence on November 18, 1996. The District therefore requests that the grievance be denied.

In the event however that the arbitrator finds that Lorenz is entitled to an emergency leave day for November 18, 1996, the District believes that the only remedy appropriate is the bookkeeping adjustment of debiting her 1996-97 emergency leave account by one additional day and crediting her sick leave account for that year with one additional day. It contends that the letter of apology which the Association seeks is unprecedented and uncalled for.

DISCUSSION

Procedural Arbitrability

Since the District contends the grievance is procedurally defective, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance is procedurally arbitrable.

The facts pertinent in making this decision are as follows. Several days after receiving Lorenz' request for emergency leave for November 18, Yarolimek responded with a note indicating he believed it did not constitute an "emergency" and that he would count it as sick leave. Sometime around November 25, Lorenz advised Manson of same. By letter dated December 6, Manson inquired of Yarolimek whether, in fact, Lorenz' request for emergency leave for November 18 was being denied. By letter dated December 10, Yarolimek responded that emergency leave was, in fact, being denied since he did not view her reason for being absent as an emergency. Association representative Manson filed the instant grievance on December 20. Yarolimek received the grievance on January 6 following the Christmas break. Manson did not discuss the grievance with Yarolimek before he filed it. Manson called Yarolimek on December 20, but did not reach him; Manson left a message asking Yarolimek to call back so they could discuss the matter.

The District contends there are three procedural defects with the grievance: 1) Manson's failure to discuss the grievance with Yarolimek before he filed it; 2) no "teacher" presented the grievance in writing; and 3) the grievance was untimely filed. These contentions will be addressed in the order just listed.

Level One of the grievance procedure provides that "the grievant will first discuss the grievance with the Principal or immediate supervisor." In this case, the "grievant" is not an individual teacher, but rather the Association. This language obligated Manson to "discuss" the grievance with Yarolimek before it was filed. That never happened, so technically the Association did not comply with Level One. I find this technical non-compliance is not fatal though to the processing of the grievance because Manson made a good faith effort to have the discussion referenced in Level One. He did this when he called Yarolimek on December 20 and left a message for him to call back. This put the "discussion" ball in Yarolimek's court, so to speak. At that point, Manson had two choices: he could wait for Yarolimek to return his phone call after the Christmas holidays, or he could file a written grievance. His decision to go with the latter rather than the former is understandable since the time limit referenced in Level Two (which will be addressed in detail later) starts running regardless of when and if the discussion referenced in Level One is held.

The District's second procedural objection involves that portion of Level Two of the grievance procedure which specifies: "the grievance shall be presented in writing by the teacher. . ." (emphasis added). The District contends this language was not followed in this case since no teacher presented the grievance; rather, Manson did. The record indicates that Manson filed the instant grievance as an Association grievance. Article VIII, A,2, specifically gives NUE the right to file and process grievances. When it does so, such as here, NUE is the grievant. I find that if the definition of NUE as a grievant is to be given significance, it must be assumed that when the word "teacher" is used in Level Two, it includes NUE when NUE is acting as the grievant. I therefore find that the fact that no teacher filed the instant grievance does not constitute a procedural defect.

The remaining procedural objection is whether the grievance was timely filed. Level Two specifies that the grievance is to be presented "within fifteen days from the time the grievant knew or should have known of the alleged violation." The question here is what occurrence triggered the running of the 15-day time limitation. Specifically, was it when Yarolimek wrote a note to Lorenz indicating that he believed her absence on November 18 did not constitute an emergency, was it the day Lorenz advised Manson of same, was it December 6 when Manson wrote Yarolimek and inquired whether, in fact, Lorenz' request for emergency leave for November 18 was being denied, or was it December 10 when Yarolimek wrote Manson that Lorenz' emergency leave request for November 18 was, in fact, being denied since he (Yarolimek) did not view the reason for her being absent that day as an emergency. After considering all the foregoing dates, I find that the last occurrence just referenced is the one which triggered the running of the 15-day time limitation. My rationale is this. I begin by noting again that this is an Association grievance. Consequently, in this case, the "grievant" referenced in Level Two is not Lorenz, but Manson. Thus, it does not matter when Lorenz "knew or should have known of the alleged violation" because she was not the grievant. It also does not matter what day Lorenz first told Manson about the matter. In my opinion, what is

important is the date that Yarolimek responded to Manson's letter inquiring whether, in fact, Lorenz' request for emergency leave for November 18 was being denied. That occurred December 10 when Yarolimek wrote Manson and stated that Lorenz' emergency leave request was being denied. This means that the 15-day time limitation started to run on December 10. The instant grievance was filed within that time period whether one counts from the date the grievance was filed (December 20), or the date Yarolimek received it after the Christmas break (January 6). I therefore find that the grievance was timely filed.

Having addressed and disposed of the three procedural objections, it is held that the grievance is procedurally arbitrable and properly before the arbitrator.

Merits

At issue here is whether the Employer complied with the contract or violated same when it denied Lorenz' request for emergency leave for November 18, 1996. The Association contends emergency leave should have been granted whereas the District disputes this contention.

In contract interpretation cases such as this, I normally focus attention first on the contract language and then, if necessary, on the evidence external to the agreement such as bargaining history or 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 the bargaining history and the alleged past practice before looking at the contract language. My reason for doing so is this: if I address the contract language first and find it to be clear and unambiguous, there would be no need to look at any evidence external to the agreement (i.e. bargaining history and an alleged past practice) for guidance in resolving this contract dispute. Were this to happen, the case could be decided without any reference whatsoever to either the parties' bargaining history or the alleged past practice. The problem with this approach is that both sides made extensive arguments in their briefs about the bargaining history and an alleged past practice. I have therefore decided to use this unique structural format so that these matters are directly addressed.

Attention is focused first on the parties' bargaining history. Bargaining history is a form of evidence arbitrators commonly use to help them interpret ambiguous contract language. In this case, the documentary evidence shows how the emergency leave language came to be incorporated into the agreement. However, in my opinion that evidence does not help resolve the instant interpretation dispute because it (i.e. the bargaining history evidence) does not establish that the parties reached a specific understanding concerning the interpretation of that language. As a result, this case will not be decided on the basis of the parties' bargaining history.

The focus now turns to the parties' past practice argument. Past practice is a form of evidence commonly used or applied to clarify ambiguous contract language. 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 to the contract in the situations just noted. Said another way, the actual practice under an agreement may yield reliable evidence of what a particular provision means.

The record indicates that emergency leave has been granted in the past for the following events: a parent's, spouse's, or child's scheduled surgery; a sick child; the birth of a child; and a spouse's scheduled doctor appointments. With respect to the last situation just noted (i.e. a spouse's scheduled doctor appointments), retired teacher Donna Thill was granted emergency leave on 35 occasions over seven years to take her husband to the doctor for cancer treatments.

Most of the situations just referenced where emergency leave was granted occurred prior to 1994 when the District's current superintendent (Cox) assumed office. Since then, it appears that emergency leave has been granted less frequently. For example, District Exhibit 3 indicates that in the 1996-97 school year, emergency leave was granted on two occasions and denied on four occasions.

After reviewing the record evidence in detail, I am not convinced that the incidents contained in the record show a consistent practice concerning the granting of emergency leave. Instead, I find that the incidents contained in the record are mixed in terms of result and factually distinguishable from the situation herein. That being so, it is held that no past practice relative to the issue here has been shown to exist. Consequently, there is no past practice which can assist me in resolving the instant dispute.

Having so found, attention is turned to the pertinent contract language. Both sides agree that the contract language applicable here is the Emergency Leave provision found in Article XV, D. Section 1 of that provision provides as follows:

> In case of serious illness, injury, or death to a member of a teacher's immediate family, the teacher when practicable shall provide prior notice to his/her supervisor to take up to five (5) days off in order to handle the emergency situation. The aforesaid five (5) days are noncumulative and are for a period of one year only. One of these days may be used for the funeral of a close friend.

This clause allows teachers to take up to five (5) days off per year "to handle" (certain) "emergency situation(s)." The emergencies which are listed are: "serious illness, injury or death to a member of the teacher's immediate family." Although the three categories of "serious illness, injury or death"

are not specifically identified as "emergencies" in Section 1, they are in Section 3 of the Emergency Leave provision wherein it provides: "Leave for emergencies

other than those described above shall be granted at the discretion of the Superintendent. . ." (emphasis added). There is no requirement anywhere in the emergency leave provision that any of the three emergencies listed in Section 1 be sudden or unforeseen.

I read Section 1 to create three elements which must be met in order to qualify for emergency leave: 1) there must be a "serious illness, injury or death", 2) "to a member of the teacher's immediate family", and 3) "in order to handle the emergency situation."

In this case, the second element is not at issue because Dan Lorenz constitutes a member of Trudy Lorenz' immediate family pursuant to the definition of "Immediate Family" contained in Article XV, D, 2. The other two elements are in issue though.

Attention is focused initially on the first element. As it relates to this case, the question is whether Dan Lorenz had a "serious illness" on January 18, 1996. For background purposes, it is noted that the District granted Lorenz emergency leave for November 11, 1996, the first working day following Dan's admission to the hospital for his pulmonary embolism. Since the District granted Lorenz emergency leave for that date, the District agreed that Dan's pulmonary embolism constituted a "serious illness" as of that date. The District asserts that as of November 18 though, Dan's medical condition no longer qualified as a "serious illness". I disagree. In order for me to find that Dan did not have a serious illness on November 18, I would essentially have to find that his "serious illness" ended with his release from the hospital on November 16. I cannot do that because the record indicates he was still being treated for a pulmonary embolism on November 18. While his medical condition on that day was not serious enough to require further hospitalization, it was still serious enough that the Oshkosh physician wanted Lorenz' Osceola physician to see him on that date (which happened to be the first work day after Dan returned home). In my view, the proximity between Dan's doctor appointment on November 18 for a pulmonary embolism and his hospitalization for the same condition are so close (i.e. just two days apart), that I cannot say that his "serious illness" ended with his release from the hospital. I therefore find that Dan Lorenz' pulmonary embolism still constituted a "serious illness" on November 18.

The focus now turns to the third element (i.e. the phrase "in order to handle the emergency situation"). I read the reference in Section 1 to the "emergency situation" to refer back to the three emergencies listed in the first line of Section 1 (i.e. "serious illness, injury or death"). Thus, if a "serious illness" exists, the "emergency situation" is the "serious illness". I do not read the phrase "emergency situation" to create a separate or independent requirement that the reason for the absence be an emergency within the common meaning of that term (i.e. sudden and unforeseen).

There simply is no such requirement in the language that the "emergency situation" be sudden and unforeseen. This means that if a "serious illness" exists, it (i.e. the "serious illness") does not also need to be an "emergency" within the subjective opinion of management. Applying this reasoning to the instant facts, I find that the "emergency

situation" on November 18 was to take Dan Lorenz to his doctor for treatment for his pulmonary embolism. Insofar as the record shows, no one else in the Lorenz family could do this (i.e. take Dan to the doctor). That being so, Lorenz' absence that day was "to handle the emergency situation" of taking her husband to his doctor appointment. The fact that Dan's doctor appointment for that day was prearranged (i.e. scheduled in advance by the Oshkosh physician) does not affect the outcome here. As just noted, this is because there is no requirement in Section 1 that "the emergency situation" be sudden or unforeseen.

Having found that Lorenz met all three of the elements needed to qualify for emergency leave, she should have been allowed to use emergency leave on November 18, 1996. Since she was not, the District violated the contract, specifically the emergency leave provision, when it denied Lorenz emergency leave for November 18, 1996. 2/ In order to remedy this contractual violation, the District shall grant Lorenz one day of emergency leave for her absence on November 18, 1996. It shall do this by crediting her sick leave accumulation with one additional day and debiting her 1996-97 emergency leave account by one additional day.

The Association also asks, as part of the remedy, for a letter of apology. In my opinion, the instant circumstances do not warrant the granting of such a letter. Consequently, the undersigned has not included the letter of apology as part of the remedy.

Based on the foregoing, and the record as a whole, the undersigned issues the following

AWARD

That the Employer violated Article XV, D, of the collective bargaining agreement by denying emergency leave to Trudy Lorenz for November 18, 1996. In order to remedy this contractual breach, the District is directed to grant her one day of emergency leave for that day.

Dated at Madison, Wisconsin, this 29th day of January, 1998.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

ENDNOTES

1/ All dates hereinafter refer to 1996 except where indicated.

2/ In reaching this decision, I have found it unnecessary to rely on the disputed doctor's slip (NUE Ex. 8). As a result, no comment is made concerning same.

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