BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MELLEN EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF MELLEN

Case 43
No. 56406
MA-10273

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, appearing on behalf of the Association.

Ms. Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, appearing on behalf of the District.

ARBITRATION AWARD

The parties named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to serve as an arbitrator in a dispute involving a request for leave without pay. The undersigned was appointed and held a hearing in Mellen, Wisconsin on September 23, 1998, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by December 3, 1998.

ISSUE

The issue to be decided is:

Did the District violate the collective bargaining agreement when it denied the Grievant, James Wiener, the use of a pay deduct day for April 6, 1998, for the purpose of a family vacation? If so, what is the appropriate remedy?

BACKGROUND

The parties refer to a day of absence without pay as either a pay deduct day or a docked day or unpaid leave. The Grievant is James Wiener, a teacher in the District for 19 years. For about the last ten years or so, he has used both personal leave and pay deduct days to extend the Easter break and take family vacations in Florida. He has used all three personal leave days available under the labor contract, and sometimes taken up to two unpaid leave days to create full weeks of vacation time.

In the school year of 1988-89 or 1989-90, when Eugene Johnson was the District Administrator, Wiener requested personal days in conjunction with unpaid leave days before the scheduled Easter break. Johnson approved that leave. In the early 1990's, Sally Sarnstrom was the District Administrator for two years. Wiener asked for personal days along with unpaid leave days to extend his family vacation to Florida. Sarnstrom approved those requests. Richard Stokes then became the District Administrator, and during the next three years, he also approved Wiener's request to use personal days and unpaid leave days to extend Easter break. Next, a temporary District Administrator, Don Kolich, was serving the District when Wiener took personal days and unpaid leave days over Easter. The record does not show Kolich's approval and the request for the spring of 1996 appears to have the approval of a principal, Mr. Wagner, on the form rather than Kolich's signature. At any rate, there was administrative approval of this leave request. One year, Wiener extended Presidents' Day by using three personal days and two unpaid leave days to take vacation. Wiener always used the personal days and unpaid leave days to take a family vacation to Florida.

None of those administrators expressed any dissatisfaction regarding the requests for leave.

Douglas Hamilton became the District Administrator in 1996-97. Wiener again applied for two personal days and two unpaid leave days for extending the Easter break to take a vacation in Florida. Hamilton approved those. Hamilton did not say anything to Wiener about this leave.

During the 1997-98 school year, Wiener found a note in his mailbox on the second day of school from Hamilton regarding the extension of holidays. Wiener met with Hamilton, who told him that he wanted to notify Wiener early on that he should not use personal days or unpaid leave days to extend holidays during the school year. Wiener mentioned that he had done so several times in the past and there was no cost to the District. A substitute, at $60 per day, makes less money than a regular teacher does. When teachers take personal days, they have the cost of the substitute deducted from their regular pay. When a teacher takes an unpaid leave, the District pays only the cost of the substitute. Hamilton said that he and the Board members were not as concerned with saving money as having the regular teacher in the classroom. Hamilton said he was told by the Board to tell Wiener that he was not to extend the holiday breaks by the use of personal days or unpaid leave days. Wiener asked Hamilton which Board members had said that, and Hamilton did not tell him. Hamilton testified that he

did not tell Wiener that he absolutely could not use an unpaid leave day to extend his vacation, but he strongly discouraged him from doing so.

Wiener knew that no restrictions had ever been placed on personal days, so in September of 1997, he applied for those three days in front of Good Friday for the next spring. He decided to wait to ask again for the unpaid leave day at a later time. Hamilton approved Wiener's request to personal days for April 7, 8 and 9 of 1998, but noted on the bottom of the request form the following:

> "Jim, I am approving your request even though the 9th is an inservice day. April 10th could be a make-up depending on the weather and would then be a scheduled day."

On January 20, 1998, Wiener requested an unpaid leave day for April 6, 1998, which Hamilton denied with the following note on the bottom of the form:

> "The intent of personal leave and unpaid days is not for vacation. The school calendar is approved a year in advance to accommodate family trips for parents, students and staff."

The language on personal leave (which will be noted later in the Discussion section of this Award) has been in the contract since the 1977-78 school year. Hamilton was not present when the language regarding personal days was negotiated into the contract. Hamilton talked with the Board about the intent of personal leave, and noted that the language was watered down by the way it was used over the years. There is no Board policy on the way personal days or unpaid days can be used.

On January 28, 1998, Wiener sent the following memo to Hamilton:

Facts:

A. A pay deduct leave day will serve as no cost to the School District of Mellen, actually the district is subject to save money.

B. I have no desire to make such a request again for the following reasons:

1. My daughter will be a senior during the school year of 1998-99 and will be going on the senior class trip during the Easter time period thus eliminating family travel during that school season.
2. With ratification of the new contract pending, particular language will delete personal days in front of or behind a scheduled vacation beginning with the 1998-99 school year.

C. I was informed that board members want the regular classroom teacher in the classroom as often as possible instead of a substitute teacher. The annual senior class trip that is sanctioned by the School District of Mellen not only allows for teacher chaperones to be away from their scheduled classrooms and students, it is also an extra expense to the district. That teacher chaperone still draws their regular salary while on the trip and in addition the district also must pay a substitute teacher while the regular teacher is away. I am one hundred percent in favor of the senior class trip because of the travel educational value it affords the students. However, I must also state that I have taken several students from the School District of Mellen on similar educational trips over the years. I believe that these students have received equal travel educational value as students receive on the senior class trip, and at no cost to the district. As I mentioned above, at a savings to the district.

Mr. Hamilton, I am officially making a second request to you for a pay deduct leave day for Monday, April 6, 1998 based on past practice and equality within our district. If you wish to discuss this more please contact me.

On January 28, 1998, Wiener filled out a second form requesting a pay deduct day for April 6th. Hamilton denied this request again, with the following note this time:

> "Using a pay deduction for an instructional day on a recurring basis for a vacation is not a reasonable request."

Wiener had also talked with Board members but they told him that Hamilton was in charge of this matter. They also told him that they wanted to keep the trained, regular teachers in the classroom rather than have a substitute teacher in the classroom. Hamilton denied the request because he wanted a regular teacher in the classroom, there was a shortage of substitutes at that time and Wiener's request was on a recurring basis.

The Union filed a grievance over the matter. There is no procedural issue in this case.

Hamilton first became concerned about the use of personal leave and pay deduct leave to extend holidays around the beginning of 1997. He noted that Mellen teachers have a greater amount of personal leave than other districts. There are 31 teachers at Mellen. Hamilton noted three critical times of the year – Easter, boys basketball tournament, and Christmas break – when the use of time off becomes of more concern to him than other times of the year.

When Hamilton approved Wiener's request for two personal days and two unpaid leave days for March of 1997, he told him that he would approve it, but that it was not a good time of the year to be gone and that he was concerned about the number of substitutes in the building.

When Kathy Kretzschmar asked for personal leave and an unpaid leave day for April of 1996, Hamilton also visited her and explained that it was hard to have a substitute around the holidays. She tried to change her plans but was unable to do so. Hamilton approved this leave request.

Hamilton stated that he talked with Wiener early on in the 1998-99 year because of his recurring pattern of taking vacation around Easter. Hamilton noted the difficulty of getting substitutes over the holidays, and the school has the senior trip, which requires three substitutes – one as a chaperone and two to replace the teachers on the class trip. The District is short of substitutes at that time of the year. Hamilton told Wiener that he objected to his taking vacations during the regular school year on a recurring basis. However, he would authorize pay deduct leave for special events.

The District has a short list of available substitutes – there are only about 11 people, some of whom also substitute in Ashland or Glidden. The substitutes are not all certified in all areas and do not always want to substitute in some areas. One of the substitutes is a Board member and is not supposed to work in the District except in a crisis because of a conflict of interest.

Seven out of 31 teachers were gone on April 6, 1998, before the Easter break. Only six substitutes were available, so other teachers rotated to take care of one teacher's class. There were other absences during that week, due to personal leave, sick leave, some workshops, and the senior trip which took two teachers out of the school. The District had to use the Board member who is on the substitute list even though it is not supposed to use that person.

Hamilton has not denied anyone the use of personal leave days. He has spoken with staff regarding the three critical times of Easter, Christmas and the basketball tournament, and he pointed out that they should get their leave requests in early and they would be honored on a first-come-first-serve basis. No one has requested to use unpaid leave days to extend vacations since Hamilton denied Wiener the use of an unpaid leave day.

The District does not have records for leave requests before the fall of 1995. In responding to the Union's request for information while processing this grievance, Hamilton supplied the following information to the Union's representative, Barry Delaney:

> "In 1995-96, James Wiener was the only person to use unpaid personal leave for the purpose of extending a scheduled school calendar vacation, 4 days, April 2, 3, 4, & 8. Paula Cramer was on unpaid medical leave January 1 through March 18, 1996. Bruce Seiffert used ½ day unpaid leave May 16 and Brian Basolo used ½ unpaid leave May 18.
>
> In 1996-97, two unit members used unpaid leave. James Wiener used two days of unpaid leave to extend vacation March 26 and 27. Kathy Kretzschmar used

> one day April 4 to extend vacation. Keith Ochsner used a ½ of unpaid leave to take his son to college January 30 and Lynette Teppo Smith used 6 days of unpaid leave for medical reasons February 27, March 3 & 4, April 10 & 14, and May 16.
>
> The school year 1996-97 was my first year with the District and I talked verbally with all four bargaining unit members prior to approving the unpaid leaves. I have only talked to two bargaining unit members in regard to taking unpaid leave and personal leave to extend a scheduled school calendar vacation, Kathy Kretzschmar and James Wiener. Kathy tried unsuccessfully to make other arrangements but did not apply for unpaid leave. James Wiener made no attempt to reschedule personal leave and also requested an unpaid personal day which was denied.
>
> In review, James Wiener is the only bargaining unit member to request personal leave and unpaid leave on a recurring basis for the past 3 years."

Hamilton is not aware of any records prior to the fall of 1995 and received the above information from the bookkeeper. He did not have personal knowledge of Wiener's prior use of personal leave and pay deduct leave, but was told by the bookkeeper and Board members about it.

Hamilton interprets the contract language regarding personal leave to mean that teachers do not have a floating holiday to use such leave. He stated he can turn down a request for personal leave if he could not get a substitute, although he tries to accommodate requests if possible. He believes that he has the discretion to grant to deny unpaid leave days.

The District has a form for leave, and one line includes a place for leave "other" or things not listed, and notes that it is a pay deduct leave.

During contract negotiations for a 1997-99 contract, the District proposed to restrict the use of personal leave by proposing the following language:

> Beginning in the school year 1998-99 the Board of Education will grant each teacher a maximum of three (3) days personal leave per year for the transaction of necessary personal business not covered under reimbursable leave. Personal leave may not be used on the day before or the day after school breaks or vacation periods, nor on in-service days and days when parent-teacher conferences are scheduled. Personal leave also may not be used in conjunction with days off without pay for the purpose or reimbursable leave. Personal leave also may not be used in conjunction with days off without pay for the purpose of an extended vacation during the school year.

The Board offered to put an extra $330 on the salary schedule for teachers in exchange for the above language, but the teachers rejected the offer and the proposed language was not put into the 1997-99 contract. Hamilton noted that the contract language for personal leave had been construed over the years to become a floating holiday.

Cliff Reithel has been a teacher in the District for 23 years and has been on the negotiating committee for the last nine bargains. He recalled that in the bargaining for a 1991-92 contract, former District Administrator Richard Stokes introduced language to restrict the use of personal days before and after holidays. The Union did not agree to that proposal. When the District proposed restrictions on personal days for the 1997-99 contract, the Union's negotiating committee took the issue back to the whole bargaining unit for a vote that was separate from the rest of the contract, and it was voted down although the unit approved of the rest of the contract. Reithel never heard of the District proposing any changes in the way that unpaid leave days were used. Reithel has not taken any unpaid leave but has taken personal days around a holiday to extend a vacation.

Reithel also stated that he believed that "special leave" as used in Article VI, Section I(4) means any day that teachers took off, whether a sick day, a personal day or a salary deduct day. He believes that is the way the contract has been interpreted for more than 20 years. However, he noted that there were no issues over "special leave" since no one had ever been denied any leave requests. Reithel admitted that requests for pay deduct days were subject to review and approval by administrators.

James Bodin has been a teacher in the District for 25 years and has been on the negotiating committee for 19 years. He also recalled that in 1991-92, the District proposed language to restrict the use of personal days but was unsuccessful in that attempt, as well as the attempt in 1997-99. The issue of pay deduct days also was discussed in the 1997-99 bargain, according to Bodin, because of the Board's proposal that personal leave could not be used in conjunction with days off without pay.

Bodin took a couple of semesters off without pay while doing his graduate and post graduate work, with the District's approval. He took personal leave and professional leave around Easter break for two years in a row. The personal leave was for his own vacation time. Bodin recalled that a former principal who went back to teaching took pay deduct days for a hunting trip around Thanksgiving, but no one knows whether those days extended the holiday or not. Bodin agreed with Reithel that the "special leave" in the contract could include any type of leave for any day that teachers are scheduled.

The parties ratified the 1997-99 contract in February of 1998 and signed it on March 24, 1998, before the date of April 6th, the date that Wiener requested as unpaid leave and the day that Hamilton had already denied.

Susan Witt has been a teacher in the District for 29 years. She used five unpaid leave days and three personal days for a vacation in 1990 for a trip abroad. Johnson approved her request for that leave.

Kathy Kretzschmar has taught for eight years in the District. In 1997, she used one unpaid leave day and three personal days to extend the Easter break. In 1998 school year, she used three personal days to extend the Easter break. Hamilton approved of all of those requests.

Lisa Marks has taught in the District for 16 years. She has used both personal days and unpaid leave days for vacations in the past. She could not recall exactly how many days or exactly when they were taken, but she thought she had taken two or three days – both personal and unpaid leave days -- to extend the Christmas holiday. She assumed that Johnson was the first District Administrator to approve her requests. Marks thought she also took personal and unpaid leave days to extend the Christmas holiday when Sarnstrom was the District Administrator. She may have also used some days in a similar manner when Stokes was District Administrator. She has used personal days as vacation to extend the Labor Day holiday for the last four years. The current administrators, including Hamilton always granted these.

Pat Kruzan has taught school for 24 years in the District. She used unpaid leave in 1983 when she went to Germany for two weeks with her parents. She needed 10 days to accompany her parents for medical reasons, and used four sick days, three personal days and three unpaid leave days. While in Germany, she spent some time sightseeing. Kruzan recalled that she used personal days twice to extend holidays – once around Christmas to take her in-laws to the airport and another time before Memorial Day to attend a wedding.

Charles Gretzlock has been a teacher in the District for 31 years. He has not used any unpaid leave days, but he has used personal days to extend a scheduled break. He used a personal day in 1996, 1997 and 1998 to extend the Labor Day holiday. Hamilton approved of all of those requests.

Before Hamilton became the District Administrator, none of the teachers who testified had ever been told that they could not use personal days or unpaid leave for vacation or in conjunction with a holiday or scheduled break. The teachers assumed that they had to have approval for pay deduct days from the administration.

THE PARTIES' POSITIONS

The Union

The Union argues that Article VI, Section I(4) is an unpaid leave that covers all unpaid leave where an employee is not requesting "special leave." Special leave means specific leave

that is covered elsewhere in the collective bargaining agreement, such as reimbursable absence, leave for graduate study, leave of absence for extended time, personal leave, professional business, maternity and child-rearing leave.

While the District has argued that the term "special leave" applies to personal leave or professional business leave because of the heading of the article, the Union points out that it would have been easy to say "personal leave or professional leave" instead of "special leave." Since the parties did not agree upon language using the terms of personal leave and professional leave, the term "special leave" must mean something else besides personal and/or professional leave. The negotiators are not illiterate people.

Moreover, the District provides leave request forms that bargaining unit members must fill out for taking different types of leave, including personal days, professional days, and pay deduct days. Employees have to ask for pay deduct leave. Obviously, an employee would not request a pay deduct day instead of a personal or professional day if he or she could receive part of his or her salary. Under the District's argument, paragraph 4 would serve no purpose.

The Union points out that long-term negotiators Bodin and Reithel testified that over the last 20 years, the term "special leave" was not interpreted by the parties to mean just professional or personal leave, but also covered other specific leave mentioned in the agreement, such as sick leave, other reimbursable leave, leave of absence of extended time and child-rearing time.

The District Administrator stated that Wiener was the only person to use "unpaid personal leave" to extend a vacation by four days. The District's argument that subsection 4 only applies to personal leave fails because the District could not have given Wiener four days off for vacation use where the contract limits personal leave to three days per year.

The Union notes that the record is full of testimony of teachers always being granted personal leave days for the use of vacation. Moreover, if it was acceptable for Wiener to use unpaid personal leave days in 1995-96, as well as six other years, why wasn't it okay to do so in 1997-98? Seven out of eight Union witnesses gave examples of employees taking paid personal days or unpaid personal days for vacations that extended a scheduled school calendar vacation. No one was ever denied a pay deduct day, much less one to be used as an unpaid personal leave day for vacation that extended a calendar scheduled vacation.

While the District proposed putting restrictions on the use of personal leave days during negotiations for the 1997-99 contract, the Union did not agree to such restrictions which the District is now trying to enforce on a pay deduct day after it was unsuccessful in negotiating restrictions.

In the event that Article VI, Section I(4) is found not to be the controlling factor in this grievance, there is certainly a long standing practice of teachers being able to use paid personal leave days and unpaid personal leave days (or pay deduct days) for the purpose of vacation during a school calendar scheduled vacation. There are no situations where a teacher has been denied a pay deduct day. Such a practice must be considered binding because it is unequivocal, in effect for more than 20 years, and is a fixed and established practice accepted by the parties.

The Union finds the District's reliance on Article VIII(C) to be without merit. The statement regarding past practices only comes into play when a past practice is in conflict with a provision of the collective bargaining agreement, and in such cases, the agreement's provisions prevail. The contract language does not say that all past practices will cease. The past practice of approving pay deduct days does not conflict with any provision of the agreement. The District also argued that only those grievances involving interpretation of contract language can be advanced to arbitration. Since Article VIII(C) deals with past practices, past practice issues are arbitrable.

The Union disputes the District's argument that it can change an unwritten agreement on how pay deduct days are to be used. The District must notify the Union and allow it the right to negotiate the issues. The Management Rights' clause of the contract says that the parties shall not construe the enumerated rights in a manner that conflicts with applicable statutes. Wis. Stat. 111.70 has been interpreted to mean that the employer must notify the union of a change the employer wants regarding wages, hours or working conditions and bargain with the union prior to implementation. Article VIII(D) of the contract makes the duty to bargain a requirement under the contract.

The Union contends that the District violated Sec. 111.70, Stats., and thus the agreement, where it never notified the Union that it was going to implement restrictions on the use of pay deduct days. Arbitrators have held that where a collective bargaining agreement requires the employer to negotiate changes in working conditions during the term of the agreement, it violates the agreement when it fails to do so and implements changes without allowing the union to negotiate the impact.

The Union asks for a cease and desist order which also provides that the District's approval of pay deduct days follow the past practice until such time the parties agree to change the practice.

The District

The District contends that the Grievant's claim does not fall within the negotiated definition of a grievance. Article III, Section B, states that: ". . . Only those grievances involving disagreement of interpretation and/or application of a specific provision of this

agreement can be advanced to binding arbitration." The Grievant seeks short term unpaid leave upon demand. There is no such provision in the collective bargaining agreement about such leave.

While the Union asserted in its written grievance that the denial of the Grievant's request was disciplinary, there is no evidence of any disciplinary action in the record. The Grievant thought that Hamilton's statement to him was a verbal reprimand, but the fact that he did not like being told something does not make the statement a disciplinary action.

The District was unsuccessful in trying to tighten down the personal leave language in the negotiations for the 1997-99 collective bargaining agreement and it recognizes that personal leave can still be used as vacation days to extend a school break period. However, the granting of a request for an unpaid leave day was subject to the discretion of the District, and it chose not to grant the request. The decision to exercise its discretion in an area not covered by the bargaining agreement cannot be considered as discipline. The Grievant went on his vacation even though the District told him that it was a bad time to be gone due to the shortage of substitute teachers.

In its written grievance, the Union also alleges that Article VI, Section C, paragraph 5 is relevant. The paragraph relates to the maintenance of staff absence records and correction of problems, and the District is not aware of any problems regarding the maintenance of the Grievant's absence records. The District states that the Union also alleges a violation of Article VI, Section I, entitled "Personal Leave and Professional Leave." The grievance is not about personal or professional leave and Section I is not relevant.

While the Union also alleges a violation of the spirit of past practice, the District denies a past practice of unpaid leave days upon demand. Even if there were such a past practice, Article VIII, Section C, states that the agreement supersedes all past practices with respect to wages, hours and/or conditions of employment. The agreement was executed on March 24, 1998, and was effective as of July 1, 1997. Any practice of unpaid leave on demand which may have existed as of the 1996-97 contract year was extinguished as of July 1, 1997. On that date, the District recaptured its management rights to use its discretion to approve unpaid leave days. Even the Union's witnesses agreed that the use of unpaid leave days was subject to the District's approval.

Accordingly, the District finds no specific provision of the collective bargaining agreement that can be used by the Union as the basis for its grievance, and argues that the grievance must be dismissed.

The District contends that it had the right to deny the request for unpaid leave in Article II, the Management Rights Clause, as well as its inherently reserved management rights. It is true that the District may not exercise its management rights in an arbitrary or capricious manner. The Grievant testified that he was being singled out. In fact, the Grievant was the biggest user of unpaid leave days for vacation over a school break period. He was the

only teacher who had done so for three years in a row prior to the 1997-98 school year. He was allowed to use his personal leave days for vacation, even though he might be missing an inservice day and possibly a student make-up day.

Hamilton reluctantly granted the Grievant's request for 1997 because he had already made his plans. But well in advance of the spring of 1998, the Grievant was on notice that he should not plan on using unpaid leave days over the 1998 Easter break. The Grievant was told that requests for unpaid leaves should be reserved for non-recurring special occasions, that the District wanted its regular teachers in the classroom as much as possible, and that the District is short of substitute teachers at that time of the year because of a senior trip. On April 6 through 9, 1998, at least four substitute teachers were required each day from a substitute teacher list that is fairly short. Some teachers were away for workshops, the class trip and absences because of illness. The District had to rotate teachers to cover one class, and a Board member ended up subbing even though it is a conflict for him to do so. Thus, the denial of the Grievant's request was based on a real concern and not arbitrary or capricious.

The Grievant admitted that a regular teacher does a better job than a substitute teacher. Although the Grievant also stated in his letters to Hamilton that the District would save money by hiring a substitute, the District is not interested in granting its teachers vacation when school is in session in order to save money. The District wants the best education for its students and believes that is best done by having its regular teachers in the classroom as much as possible.

The District also submits that the requested remedy is beyond the scope of the arbitrator's authority. Article III says that the arbitrator cannot subtract from, modify or amend any terms of the agreement. The Union seeks to add a provision for short-term unpaid leave to the agreement, specifically, short-term unpaid leave upon demand. The District believes the arbitrator is precluded from doing so by Article III. Such a provision must be obtained at the bargaining table, not through the grievance process.

IN REPLY

The Union

The only issue that Union wishes to reply to is the District's claim that Wieners' personal day request was denied partly because there are not enough substitutes around the Easter break. The Union believes that this is a bogus issue. The District scheduled the senior class trip for the week before the Easter break of 1998. On Monday, April 6, 1998 – the day that Wiener requested a pay deduct day – the District had to obtain two substitutes for two teachers who went on the senior class trip. Hamilton testified that the senior class trip had to occur between the basketball and baseball seasons. The basketball season ended the third week of March for the boys' team and the second week of March for the girls' team. The senior class trip could have been scheduled for the last part of March or the first part of April.

The Union submits that if the need for substitutes was a genuine problem for the week of April 6-9, the District would not or could not schedule the class trip for this week, since teachers would be going on the class trip and substitutes would be needed. Since the District scheduled the class trip for April 6-9 and not earlier in April or March, the issue of not having enough substitutes available around Easter vacation is a bogus issue.

The District

The District states in reply that the Union's omission of two sections – Article IV, Section 1 and Article VI, Section C(5) – means that the Union is apparently acknowledging that neither of those provisions were relevant to the instant dispute. The District wishes to point out certain inaccuracies in the Union's brief. Particularly, that the District expressed its concerns about the use of personal days and pay deduct days before the instant grievance, in both the 1991-92 and 1997-99 negotiations. Also, Kretzschmar named three, not five, other employees in addition to herself that have used pay deduct days to extend the vacation period. Smith's leave was for medical reasons, not for a vacation, and Kretzschmar had no idea of when the leave days fell.

The District states that the "special leave" referred to in Article VI does not refer to unpaid leave, and the most logical interpretation of Section I(4) is that it is a penalty provision for teachers who have not followed the proper procedures for requesting personal leave or professional leave.

The District further notes that even though there is no unpaid leave provision in the contract, the District has granted requests for unpaid leave on a case-by-case basis. Those leaves have been for various durations, at various times of the year for various reasons, including medical reasons. The Union has argued that there is a past practice of granting pay deduct days for vacation purposes in conjunction with a school break. The District has tried to accommodate requests on a case-by-case basis, but that accommodation does not rise to the level of a past practice.

For the sake of argument, if there is a past practice and it is subject to the arbitration step of the grievance procedure, there is no evidence of a practice of unpaid leave days upon demand. Most of the Union's witnesses testified that requests for unpaid leave days have always been subject to the approval of the Administration. Their testimony shows that the District has the authority to deny such requests.

For the sake of further argument, even if there were a binding past practice of granting unpaid leave upon demand, the District provided notice to the Union through the trail of correspondence in this grievance that such a practice would not continue. The bulk of that correspondence preceded the conclusion of the parties' negotiations for the 1997-99 bargaining agreement. The agreement was executed on March 24, 1998. The grievance belongs to the Union and it is the Union who must initiate a grievance. By February 24, 1998, the Union had received the District's response at Level 2. The Union was also aware of the District's

position from Level 1 of the grievance procedure. Therefore, the Union was put on notice of the District's position regarding the alleged past practice long before the end of negotiations, and it had an opportunity to negotiate with respect to the issue but chose not to do so.

The District submits that the Union's failure to bargain an unpaid leave provision into the contract, once placed on notice, is fatal to its case here. Since the past practice alleged would not serve to clarify ambiguous language, it is not necessary to have the Union's agreement to change it.

The District concludes by stating that it does not believe there is any past practice or contract language requiring it to grant a request for unpaid leave over the Easter break to extend a vacation. The District's denial of the request was reasonable, and not arbitrary or capricious.

DISCUSSION

This case raises several issues, the first of which is whether the collective bargaining agreement itself provides for unpaid leave. Under Article VI, Section F, teachers may be considered for an extended leave of absence for two years for education. That section does not apply to this case, although it provides for unpaid leave. This case is over short-term unpaid leave, a day or two here and there, to string along with other paid days off to make a vacation break.

Article VI, Section I is called "Personal Leave And Professional Leave." It states:

1. The Board of Education will grant each teacher a maximum of three days per year for the transaction of necessary personal business not covered under reimbursable leave.

2. Previous arrangements must be made with the Superintendent of Schools when such leave is desired.

3. When leave has been properly requested and granted the individual concerned will have only the salary of a substitute worker deducted from his or her pay.

4. Teachers failing to request special leave will have all the salary deducted for the days missed.

5. Personal leave is not cumulative. Arrangements for substitutes will be made only by the school administrative staff.

6. At the beginning of every school year each teacher shall be credited with three (3) days to be used for the teachers professional business; these professional days are noncumulative. Professional business days may be used for any educational purpose within the confines of the teacher's specific instructional area. The teacher planning to use a professional business day shall notify the administration at least one week in advance of his/her absence. Professional business days shall be used to visit or view other instructional techniques or programs.

Under paragraph 4 above, there is some ambiguity over what the parties meant by "special leave". The Union makes a valid point, that if the parties meant to restrict "special leave" to personal and professional leave, they could have easily said so. However, a fair reading of the article as a whole confirms the District's position that the article refers to personal and professional leave. It does not refer to all types of leave, as suggested by the Union, and other types of leave are stated elsewhere in Article VI, such as sick leave in Section C, extended leave in Section F, and maternity and child-rearing leave in Section L. Moreover, the District is correct when it states that paragraph 4 of Section I is a penalty provision for not following the procedure, and it would not apply in this case.

There is a strong past practice of teachers using unpaid leave and the District always granting it. Past practices are helpful in interpreting ambiguous language, but they may also establish conditions of employment where the contract does not address the matter. See CLARK COUNTY, Case 102, No. 55013, MA-9866 (Arb. Jones, 11/97). Past practices may even rise to become a binding commitment by both sides. See CITY OF LA CROSSE, Case 287, No. 54407, MA-9670 (Arb. Nielsen, 8/97). To be a binding past practice, the practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

I find that the past practice in question meets the criteria to be a binding practice. It has been unequivocal through several different District Administrators. It has been clearly enunciated and acted upon through these several administrators and several staff members. Nearly one-third of the bargaining unit can recall instances of using unpaid leave to extend a scheduled break such as Labor Day, Christmas or Easter, and they recalled using unpaid leave for a vacation, medical leave, and a variety of reasons. Wiener himself used unpaid leave for the last ten years in a row. No one was ever denied this leave until Hamilton denied it to Wiener. The practice goes back at least 15 years, and possibly more. The District did not have records going back that far, and bargaining unit members testified to events going back into the early 1980's. The District did, however, have a form for teachers to indicate what kind of leave they were taking. That form called for both teachers and support staff to designate how many days of pay deduct leave they were taking. Giving effect to this past practice promotes the parties' expectations and promotes stability in the bargaining relationship. Given the period of time and the number of different administrators, employees would expect leaves to be granted in a consistent manner and not by the personal preferences of different administrators.

The fact that teachers asked for and received approval of leave time is of no consequence in this grievance. Teachers asked for approval for personal days as well as approval for unpaid leave days, and the District acknowledged that it had little or no control over personal days. Moreover, approval was always given routinely. The parties have no examples of when someone was denied a request for either personal leave or unpaid leave.

The next question is whether Article VIII, Section C, under "Terms of Agreement," eliminates the past practice. That language states:

> This agreement supersedes all past practices or understandings with respect to wages, hours and/or conditions of employment.

Article VIII, Section D states the following:

> The provisions of this agreement shall be effective as of July 1, 1997 and shall continue in full force and effect until June 30, 1999 at which time the agreement shall expire without notice to or notice by either party, unless prior thereto the parties have mutually agreed, in writing, to only amend or modify this agreement. The MEA maintains all rights to bargain the impact of any Board decision significantly affecting wages, hours, and working conditions that the Board may make during the term of this agreement.

It is fair to say that the practice of taking unpaid leave to extend a vacation touches on matters of wages, hours and conditions of employment. Does the statement regarding the contract superseding all past practices wipe out all past practices per se – both those that would help to interpret the contract and those not mentioned in the contract? The parties did not further define which past practices they intended to eliminate by this statement. Moreover, there is no broad waiver of the right to bargain over wages, hours and conditions of employment. Article VIII should be read to include Section D. Significantly, right after the parties agreed that the contract superseded past practices, the parties also agreed to bargain the impact of any Board decision significantly affecting wages, hours, and working conditions that the Board may make during the term of this agreement. The parties have not agreed to a strong "zipper" clause, and the language of Article VIII should be narrowly construed where it tries to both eliminate certain past practices and retain the right to bargain over wages, hours and conditions of employment.

Since the parties would still have to bargain over decisions significantly affecting wages, hours and working conditions, the Union's position on Section C is preferred – namely, that those past practices in conflict with the contract are superseded by the contract. Accordingly, Article VIII does not eliminate this past practice.

There is still an issue regarding arbitrability. The grievance procedure, Article III, states:

> A. Purpose: To enable the Union to express a complaint with the assurance that the complaint will receive prompt attention. Only those grievances involving the administration of this agreement can be advanced to binding arbitration.
>
> B. Definition of Grievance: Any disagreement involving wages, hours and conditions of employment between the Union and the District can be grieved. Only those grievances involving disagreement of interpretation and/or application of a specific provision of this agreement can be advanced to binding arbitration.

The District has argued that because there is no specific provision providing for short-term unpaid leave upon demand, this grievance is not arbitrable under Article III. The question is whether Article III bars arbitration of a past practice that is a part of the parties' whole agreement? While the District raised no procedural objections, it has raised the issue of substantive arbitrability here, which it may do at any time up through the hearing. Union negotiators were long under the impression that Article VI provided for unpaid leave under the term "special leave," even though the precise question had never come up. The Union also points to Article VIII as a source for its grievance. The Union sought an interpretation of the District's application of Article VI, as well as Article VIII, as the parties debated the issue through the grievance procedure. Allowing the grievance to be arbitrated advances the purpose of Article III, Section A, wherein the parties have agreed that grievances involving the administration of this agreement can be advanced to binding arbitration.

Next issue. The District argued that even if there were a binding practice, the Union was put on notice by the processing of this grievance that the District was terminating the practice, and the Union failed to secure language to keep the practice. While it is generally recognized that past practices need not become enshrined and last forever, it is also recognized that the party wishing to end the practice repudiate it before or during negotiations for a successor contract. The reason to give notice is to allow the other party to attempt to have the practice written into the agreement, if it wishes to retain the practice. In cases where there is a past practice that is not in the written contract, many arbitrators hold that the practice cannot be terminated unilaterally during the term of the contract.

Arbitrator Richard Mittenthal has been widely quoted on this subject, particularly the following:

> "Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For . . . if a

> practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.
>
> "That inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiations of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding." Proceedings of the 20th Annual Meeting of NAA, 1, 35-36 (BNA Books, 1967); Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," Proceedings of the 14 Annual Meeting of NAA, 30, 56-57 (BNA Books, 1961).

The question is whether there was an effective and/or timely repudiation of the past practice. The quote above from Mittenthal appears to state that a timely repudiation of a past practice must occur during negotiations for the successor agreement. Other arbitrators have indicated that a repudiation of the past practice could take place before such negotiations, or at any time during the agreement, although the practice would be continued for the life of the current agreement.

An effective and/or timely repudiation of a past practice should, at a minimum, put one party firmly on notice that the other party will no longer adhere to the practice in the successor contract, or that it will no longer give its acquiescence to the practice. Further, the repudiation should be given in a manner that places the parties in a position whereby the party wishing to retain the practice knows that it has to bargain to obtain language securing the practice.

That did not happen in this case. While the Union was aware that Hamilton was objecting to the use of unpaid leave by the processing of the grievance, the Union was not clearly on notice that the District was repudiating the past practice and that it should seek to obtain language during negotiations. The Union's grievance committee notified Hamilton on February 11, 1998, that it wanted to initiate Level 2 of the grievance procedure. Hamilton gave a response at Level 2 on February 24, 1998, and the grievance committee appealed it to the Board on March 3, 1998. The Board denied the grievance on March 25, 1998, and the Union notified Hamilton on March 27, 1998, that it was appealing for arbitration. Among other things, the steps of a grievance procedure allow parties to reach an accommodation. So while the contract was being ratified – in February of 1998 – and executed on March 24, 1998, the grievance was still being processed through the steps. The Board had not even reached its decision until a day after the contract was executed.

More importantly, however, is the fact that the Board was in negotiations during this period of time and knew how personal leave had been administered and knew that it had to bargain for a change, even though the language was arguably in its favor. Thus, the District

was well aware that the past practice regarding personal leave weakened its position in enforcing restrictions on personal leave. The District was prepared to put money on the table to tighten the personal leave restrictions, but the Union rejected the money. While the District was negotiating hard for those restrictions, it knew that Hamilton and/or the Board was unhappy with the way unpaid leave was being used by some, particularly Wiener. It's proposal to the Union even tried to restrict the use of personal days in conjunction with days off without pay to extend a vacation (see the last sentence of the proposal).

Thus, under the facts and circumstances of this case, the District should have been the party to repudiate the past practice during the negotiations for the successor contract. I find that its handling of Weiner's grievance was insufficient to put the Union on notice that it was repudiating the past practice. The District needed to put the Union squarely on notice and give it the opportunity to bargain to obtain language to secure the past practice. The District's failure to do so means that the practice should remain in effect at least through the current collective bargaining agreement.

AWARD

The grievance is granted.

The District is ordered to maintain the past practice of allowing teachers to use unpaid leave without restrictions in a manner consistent with the past practice, including to extend a vacation around a scheduled school break, at least through the term of the current collective bargaining agreement.

Dated at Elkhorn, Wisconsin this 6th day of January, 1999.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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