BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 3055, AFSCME, AFL-CIO

and

HOWARD-SUAMICO SCHOOL DISTRICT

Case 73
No. 57909
MA-10775

Appearances:

Mr. Robert Baxter, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2065 East Baraboo Circle, DePere, Wisconsin 54115, for Local 3055.

Davis & Kuelthau, S.C., by **Attorney Robert W. Burns,** 414 East Walnut Street, Suite 240, Green Bay, Wisconsin 54301, for the School District.

ARBITRATION AWARD

Local 3055 (hereinafter the Union) and the Howard-Suamico School District (hereinafter the District) are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances on which the Union and the District are unable to agree as to settlement. On August 23, 1999, the Wisconsin Employment Relations Commission received a request from the Union to appoint either a Commissioner or a member of its staff to serve as the sole arbitrator to issue a final and binding arbitration award in the above-entitled matter. The Commission designated the undersigned A. Henry Hempe to hear and decide this matter. An evidentiary hearing was conducted on October 11, 1999 Howard-Suamico School District Administrative offices. The proceedings were transcribed. Briefs were exchanged by the parties and submitted to the arbitrator on November 30, 1999. Reply briefs were exchanged by the parties and submitted to the arbitrator on December 22, 1999.

ISSUE

The parties did not agree on a statement of the issue.

The Union frames the issues as follows:

> Did the employer violate the collective bargaining agreement and/or past practice by denying the grievant, Wayne Falk, his vacation requests?
>
> If so, what is the appropriate remedy?

The District phrases the issues as follows:

> Was the grievance timely? If timely, did the District violate the Collective Bargaining Agreement in its approval and disapproval of the Grievant's vacation request? If so, what is the appropriate remedy?

I outline the issues as follows:

> 1) Was the grievance timely?
>
> 2) If so, did the District violate the Collective Bargaining Agreement by failing to approve all of the grievant's vacation requests?
>
> 3) If so, what is the appropriate remedy?

FACTS:

Wayne Falk is an 11-year employee of the Howard Suamico School District. He currently is one of two night janitors assigned to the high school building, known as Bay Port. Mr. Falk's hours of work run from 3:30 p.m. to 12:00 a.m., Monday through Friday.

The labor contract applicable to Mr. Falk provides that employees submit their vacation requests for the following school fiscal year to the supervisor by April 1. On March 17, 1999, Mr. Falk submitted his vacation request for **1999-2000** to his immediate supervisor, Larry Dunning. Mr. Falk's request included some fourteen Fridays: two in September, one in October (in conjunction with a request for the prior day as well), two in December, four in January, four in February, and one in early March. Mr. Dunning is in charge of the building facility where Mr. Falk is assigned. It appears he endorsed Mr. Falk's request and sent it up to Mr. Dunning's supervisor, Facilities Manager Ken Baron.

This vacation request was almost identical to the one Mr. Falk had submitted for the previous year, **1998-99**, as well as 1997-98. Although both had been approved, in an October 9, 1998 meeting with Mr. Falk, District Facilities Manager Kenneth Baron expressed the District's concern with the number of consecutive Fridays Mr. Falk had requested as vacation time for that year and further advised Mr. Falk that a similar request the following year would not be approved.

On April 28, 1999, Facilities Manager Baron discussed Mr. Falk's pending vacation request for **1999-2000** with Mr., Falk. He reminded Mr. Falk of their meeting the previous October, explained the difficulty of finding substitutes on Friday evenings, and asked him to consider substituting a few Mondays for some of the Fridays he had requested. Mr. Baron indicated to Mr. Falk that his request for nine consecutive Fridays would not be approved, and that Mr. Falk should take a few days to consider how he wished to modify his vacation request. Mr. Falk recalls the conversation, but doesn't recall that any deadline for a response from him was mentioned.

On April 30, 1999 Union Steward Gary Caelwaerts met with Mr. Baron and told him that Mr. Falk was upset about not being able to take his vacation as he chose. Mr. Caelwaerts indicated that a grievance would be filed on Mr. Falk's behalf. In a memo memorializing that meeting, Mr. Baron wrote that he " . . .explained (his) reasoning on the potential denial of Wayne's vacation requests," to Mr. Caelwaerts, listing "(d)ifficulty in finding substitutes, overtime considerations, and the need to have a person familiar with the security system and building operations." Mr. Baron's memo further indicates that he told Mr. Caelwaerts that Mr. Falk had been requested to think about ways he could change his vacation request.

On June 10, 1999, Mr. Baron returned Mr. Falk's **99-00** vacation request to him on which the District had indicated approval for only five of the vacation days requested. Three Fridays had been approved as requested (two in September, and one in October). One Monday in mid-January had also been approved, as well as a Thursday in October directly preceding the approved Friday. The remaining eleven days that had been requested but not approved consisted of Fridays starting with two in December, four in January, four in February, and one in March.

On June 11, 1999 the Union filed the instant grievance.

At hearing, Mr. Falk explained the basis for his vacation request. Mr. Falk related that his wife is employed outside the home on a day shift, that there are four minor children of their marriage, and that snowmobiling is a major activity for the family. Mr. Falk further noted that the weather limits snowmobiling to only two or three months per year, that the family owns a cottage "up north," and that commuting to the cottage requires a four-hour drive. Thus, Mr. Falk asserted, if he isn't able to leave for the cottage before midnight of a given Friday evening, his snowmobiling with his family is reduced to only one day on that weekend. If, on the other hand, he is able to leave for the family cottage at or shortly after 3:00 p.m. on a Friday, Mr. Falk said that he and his family are able to snowmobile together Friday evening, all day Saturday, and part of Sunday.

At hearing, Facilities Manager Baron explained that Mr. Falk's duties at Bay Port included security (lock-up) responsibilities, and that Mr. Falk was normally the last District employee in the building. Mr. Baron described the Bay Port building as having been constructed in 1963 with several additions having been subsequently added. He said the building is " . . . a series of hallways within hallways," and attested that it is a confusing building for newcomers to navigate. Mr. Baron contended that finding substitutes to replace Mr. Falk on his Friday vacations in **1998-99** was time-consuming. Sometimes he was unable to find replacements and had to call in existing staff who had already worked a full day and assign them an additional split shift. This, said Mr. Baron, necessitated payment of overtime.

Mr. Baron emphasized the difficulty in finding a consistent pool or person to be in the building on a Friday evening with security responsibility. Mr. Baron stated that "(t)he staffing we get from outside is very inconsistent, it may or may not be the same person, usually it's not, and it takes a person so long just to familiarize themselves with the inside of that building that it's just too hard to bring a stranger in off the street."

Finally, it appears that only two persons or less were scheduled to be on vacation on the days requested by Mr. Falk. It also appears that the District had approved vacation requests by other employees in one-day increments, including Mondays and or Fridays, going back at least to 1995.

POSITIONS OF THE PARTIES

Union

Timeliness of Grievance

The Union argues the Falk grievance was timely filed.

In support of its contention, the Union notes the parties' collective bargaining agreement requires that the grievance be presented to the Supervisor " . . .within five (5) workdays of the time in which the employee knows of should have known of the suspected improper application."

The Union next points to June 10, 1999 as the day on which Mr. Falk was informed in writing that eleven of his requested Friday vacations were not approved.

Therefore, the Union asserts, its submission of the grievance on June 11, 1999 was timely.

Merits of Grievance

1) Language Clear and Unambiguous.

The Union finds the contract language to be clear and unambiguous. The Union points to Article XI of the parties' collective bargaining agreement:

> "Employees must submit for approval to the Supervisor a 'Request for Use of Vacation Form' by April 1st. Modifications to the approved vacation can only be made with prior approval of the Supervisor and Director of Business Services. Throughout the year only three (3) people may be on vacation at the same time."

The Union reads this as providing only two limitations as to when an employee can take vacation: 1) the request must be submitted by April 1; but 2) no more than three persons can be off at one time.

In the instant matter, the Union notes that the vacation request was submitted prior to April 1. It further notes that two or less persons were scheduled to be on vacation on the Fridays denied to Mr. Falk.

The Union also asserts that Mr. Falk's immediate supervisor approved Mr. Falk's vacation request.

Under these circumstances, the Union argues the arbitrator must enforce the contract according to its plain and unambiguous terms. To the Union this means the arbitrator should sustain the grievance.

2) Past Practice

The Union additionally argues that past practice also supports its position. It claims that since at least 1995 employees have been allowed to take vacations in single day increments that included Fridays and Mondays.

The Union believes that the District created a past practice by approving Mr. Falk's previous vacation requests for **97-98 and 98-99** - requests the Union identifies as virtually identical with Mr. Falk's **99-00** request.

3) Bargaining History

Finally, the Union argues that a 10-year bargaining history between the parties supports the Union's position. Starting with the parties' collective bargaining agreement for 1990-92, the Union claims the bargaining history concerning vacation rights is interrelated with the

Management Rights clause and its reference to subcontracting. Specifically, the Union contends that in exchange for the Union receiving broader contract language for vacation usage, the Union agreed to an expansion of management's right to subcontract bargaining unit work.

The Union asserts that the District is attempting to roll back the Union's gain from this bargain by now making vacation usage more restrictive. The Union accuses the District of unilaterally attempting to restore the cap on the number of vacation days an employee may take during the school year.

District

1) Timeliness of Grievance

The District notes the grievance language of the parties' collective bargaining agreement provides that an employee must "present a grievance in writing within five workdays of the time the employee knows or should have known of the suspected improper application." According to District Assistant Superintendent of Business John Keller, this means the union's five-day period is "(a)ny suspicion on their part or any action that they perceive to be a violation of the contract."

According to the District, several events should have alerted the union to the District's alleged violation well before to the District's formal, written disapproval of June 10, 1999: 1) Mr. Baron's verbal alert to the grievant on October 9, 1998 indicating that the District did not intend to approve as many consecutive individual Friday vacations for the grievant the following year; 2) Mr. Baron's verbal discussion with the grievant on April 28, 1999 suggesting that the grievant reconsider his vacation request for the following school year; 3) the meeting between Mr. Baron and Union Steward Gary Caelwaerts on April 30, 1999 during which Mr. Caelwaerts relayed the grievant's distress from his meeting with Mr. Baron two days earlier and Mr. Caelwaerts' further statement that the Union intended to file a grievance.

The District argues that the contract language " . . . does not require there be specific knowledge of a violation, " for a grievance to be filed. Instead, the District asserts, the grievance must be filed within the requisite time on even a "suspected improper application . . . " The timelines, says the District, are mandatory, not optional.

Merits of Grievance

1) Management Rights:

The District argues that it has the right to schedule employees by virtue of the Management Rights clause. Claiming that management's freedom to exercise sole discretion is limited only by the terms of the collective bargaining agreement, the District asserts that any limitation must be apparent and cannot be assumed. It is enough, says the District, for management to show that the action was not arbitrary or capricious.

The District cites arbitral precedent in which the employer's right to deny employee vacation requests was upheld where the arbitrator found the employer had reasonable grounds for not granting the employee's request. The District argues that it also has good reasons for denying the grievant's vacation request. Those reasons, says the District are threefold: security, staffing and overtime costs.

2) District Facing Operational and Security Concerns:

As to operations and security, the District argues that it is difficult for a stranger to supervise the high school building if unfamiliar with it. The District also points to the lock-up responsibilities of Mr. Falk that would have to be performed by a relative stranger to the building in Mr. Falk's absence.

3) Difficulty in Finding Subs on Consecutive Fridays:

The District points to Assistant Superintendent Keller's report that finding Friday night substitutes to cover for the grievant on consecutive Friday nights is difficult, if not impossible. The District believes its past experience fully supports this report.

4) Overtime Costs:

The District rejects a suggestion by a Union witness that the District merely assign two other District janitors an additional half shift each to cover for the grievant on Friday evenings. The District argues that such action would still result in significant overtime costs to the District that are unnecessary.

5) Subcontracting Provision:

The District points to Assistant Superintendent Keller's testimony that the greater leniency as to the District's right to subcontract bargaining unit work resulted from the District's agreement to eliminate its restriction on the number of vacation days to be taken during the school year.

The District argues that the rule of no more than three on vacation at one time is self-regulatory, but doesn't mean that the District is required to let three people off at the same time. The District continues to believe it has the right to approve or disapprove the proposed vacation periods of any employee.

6) Past Practice Does Not Support Union Case:

The District emphatically denies that any past practice supported the Union's contention herein. The District notes that none of the exhibits submitted by the Union reveal that any employee except the grievant has requested vacation time off for nine consecutive Fridays.

Moreover, the District continues, merely because the grievant's vacation requests have been granted in the past couple of years does not create a past practice. The District argues these may simply result from the exercise of management discretion reflecting convenient methods at the time. Even the failure of an employer to exercise a legitimate function of management over a long period of time is not a surrender of the right to start exercising such right, according to arbitral authority cited by the District.

Union Reply

In response, the Union reasserts its belief that the grievance was timely filed, arguing that Mr. Falk could not be sure the collective bargaining agreement would be violated by the District until his vacation request was actually denied until he received the vacation denial in writing. "Probably violating the Collective Bargaining Agreement," asserts the Union, "is not the same as violating it."

As to the merits, the Union disagrees that the Management Rights clause of the contract allow the District to approve or disapprove vacation requests (if the request is timely and will result in no more than three persons on vacation at the same time). Moreover, the Union does not believe any record evidence supports the District's contention that it has operational problems on the Fridays that Mr. Falk requested vacation time. The Union notes that Mr. Falk did not ask for vacation during periods that had been off-limits in the past.

The Union is unimpressed with District concerns as to security and overtime cost in connection with finding substitute coverage for Mr. Falk while he is vacationing on Friday nights. The Union argues that the District has never undertaken any cost analysis comparing the cost of using school employees to provide such coverage with the cost of using outside, temporary help.

The Union is similarly unimpressed with the District's contention that it is difficult to locate substitute Friday night janitorial coverage from outside employment agencies.

As the past practice, the Union states the only past practice it cites is that of granting individual vacation days to employees as well as Mr. Falk's past vacation schedules that have been approved.

District Reply

The District repeats its earlier arguments as to grievance untimeliness, noting the sequence of meetings that led to the written notice to Mr. Falk on June 10, 1999 denying part of his vacation request.

As to the merits, the District agrees that the contract language is clear and unambiguous. The District points to the contract's vacation language and argues that the District must still approve any proposed vacation schedule. According to the District, the

number of people on vacation at one time and the timeline for submission of vacation schedule requests are *additional* restrictions to the vacation provision, not the *only* criteria for approval.

The District reiterates its arguments against the Union's assertion of past practice. First, says the District, one year does not establish a past practice; second, the only employee to benefit was the grievant; third, the benefit was not mutually accepted by the parties, for the grievant was warned in 1998 that he would not be allowed to take a similar vacation schedule in the following year.

Moreover, says the District, even if the arbitrator finds a past practice to exist, changing needs of the District justify its denial of some vacation requests. Citing arbitral authority, the District contends that where there is a change in conditions, the practice may change. The changes experienced by the District relate to building security, staffing, and overtime costs, according to the District.

The District concludes with the view that its authority to approve vacations has never been eliminated. It has always had such authority and still does, the District says.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE II
MANAGEMENT RIGHTS

> The Board possesses the sole right to operate the school system and all management rights repose in it. These rights include, but are not limited to, the following:
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> . . .
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> D. To hire, promote, transfer, schedule and assign employees in positions within the school system;
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> . . .
>
> G. To maintain efficiency of school system operation;
>
> . . .
>
> K. To determine the kinds and amounts of services to be performed as pertain to school system operations; and the number and kind of classifications to perform such services;
>
> . . .

M. To determine the methods, means and personnel by which school system operations are to be conducted;

N. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

. . .

ARTICLE XI
VACATIONS

. . .

Employees must submit for approval to the Supervisor a Request for Use of Vacation by April 1st. Modifications to the approved vacation schedule can only be made with the prior approval of the Supervisor and Director of Business Services. Throughout the year only three (3) people may be on vacation at the same time. This vacation schedule will be on a trial basis for the 1996-97 contract year. The District and the Union will meet no later than January 31, 1997, to discuss continuation of this schedule for the 1997-98 contract year. At least two (2) employees will be permitted to take vacation at any one time during the 1997-98 contract year if the parties do not agree to continue the vacation schedule discussed above.

. . .

ARTICLE XXIII
GRIEVANCE PROCEDURE

Definition of Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract. A grievant may be an individual, a group of employees or a representative of the Union.

All grievances which may arise shall be processed in the following manner:

Step 1: The aggrieved employee and/or steward shall present the grievance in writing to the Supervisor within five (5) workdays of the time in which the employee knows of or should have known of the suspected improper application. The aggrieved employee, with the representation of h/er steward if s/he so elects, shall attempt to resolve the grievance with the Supervisor, who may call higher level supervisors into the discussion. If it is not resolved at this level within five (5) workdays of its' initial presentation, the grievance may be processed further by the employee as outlined in Step 2.

Step 2: The grievance shall be presented by letter to the Board of Education within ten (10) workdays of the Director of Business Services or h/er representative's answer at Step 2.

Step 3: The grievance shall be presented by letter to the Board of Education within ten (10) workdays of the Director of Business Services or h/er representative's answer at Step 2.

Step 4: Within ten (10) workdays of the Board of Education's answer at Step 3, the grievance may be submitted by the employee to the Wisconsin Employment Relations Commission for arbitration by one of its members. The Arbitrator, after hearing both sides of the controversy, shall hand down h/er decision in writing and such decision shall be final and binding on both parties to this Agreement. (The cost, if any, of the Arbitrator shall be divided equally between the Employer and the Union).

Time Limits: Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been resolved on the basis of the last preceding answer of the Employer. Grievances not responded to by the Employer within the designated time limits in any step of the grievance procedure shall be considered denied by the Employer, and appeals taken from such a denial to further steps of the procedure must be within the time limits set for appeal after an answer to the grievance. The parties may mutually agree in writing to extend the time limits in any step of the grievance procedure.

AWARD

Timeliness of Grievance

The parties disagree on the threshold issue of whether or not the grievance herein was timely filed.

The relevant contract language describes the grievance procedure and is found in Article XXIII of the collective bargaining agreement:

ARTICLE XXIII
GRIEVANCE PROCEDURE

Definition of Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract. A grievant may be an individual, a group of employees or a representative of the Union.

All grievances which may arise shall be processed in the following manner:

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The District points to the sequence of discussions regarding the grievant's proposed vacation schedule that took place between the grievant and Facilities Manager Kenneth Baron, as well as between the Union Steward and Mr. Baron. The District contends that these discussions should have triggered grievant's suspicion that the District was improperly applying the vacation provision of the labor agreement.

In response, the Union argues it cannot aggrieve what has not yet occurred. It acknowledges the testimony of Union Steward Gary Caelwaerts that he believed the District would probably violate the collective bargaining agreement, but asserts that "probably violating" is not the same as actually violating.

I agree. In my opinion, the District's interpretation adds a new element to the existing grievance procedure reflected neither in its actual words nor in any bargaining history offered by the District. For the District's view that that the time limits for grievance filing begin to run as soon as the grievant *suspects there will be an improper application*, would, in effect, add a requirement that a grievant obtain a declaratory review of the *suspected* action in advance of its *actual* occurrence. Under this circumstance, the grievance procedure would not be limited to a review of past alleged improper applications of the labor contract, but include the obligation for a grievant or the Union to launch a preemptive strike when it *suspects* the District is about to improperly apply a contract provision.

Certainly there can be both benefits and disadvantages to this kind of approach. However, I do not believe it is reflected by the language the parties agreed to put into their collective bargaining agreement. Step 1 requires presentation of the grievance in writing within 5 workdays of the time " . . .the employee *knows of* or should have *known* of the suspected improper application." Significantly, the language does *not* provide for presentation of the grievance within 5 workdays of the time the employee *suspects* or should have *suspected* an improper application. Neither does the language provide for presentation of the grievance within 5 workdays of the time the employee *suspects there will be* an improper application of contract language or suspects there is a *potential* improper application.

Instead, Step 1 requires *knowledge*, *actual or presumptive*, of an event that has already occurred, i.e., a suspected improper application. Thus, as used in the context of this sentence, I find the most logical construction to be that the word "suspected" was intended by the parties to modify the adjective "improper," and is synonymous with the word "alleged." The obligation thus fastened on the grievant is to file the grievance within 5 workdays of the time the employee knows (*actual knowledge*) or should have known (*presumptive knowledge*) of the application suspected to have been improper (*alleged improper application*.)

In the instant matter, the grievant filed his vacation request on March 17, 1999. He knew it might be problematic because of the short discussion he'd had with Facilities Manager Baron on the preceding October 9. Clearly, however, Mr. Falk had hopes that that discussion would either be forgotten or reconsidered by Mr. Baron.

On April 28, 1999, the grievant and Mr. Baron had another discussion during which Mr. Baron asked the grievant to reconsider his requested vacation. He told the grievant his initial requested vacation would not be approved and gave the grievant a few days to think the matter over. No time limit appears to have been imposed on the grievant for a response.

Two days later Mr. Baron had his discussion with Union Steward Caelwaerts. Mr. Caelwaerts advised Mr. Baron that Mr. Falk was upset. According to a memo of the meeting prepared by Mr. Baron, Mr. Caelwaerts ". . . indicated a grievance would be filed on behalf of Wayne." The memo further indicates that Mr. Baron explained his "reasoning as to the ***potential*** *denial* of Wayne's vacation requests . . ." (Emphasis supplied.) The memo concludes with Mr. Baron telling Mr. Caelwaerts that Mr. Baron had asked ". . . Wayne to think about some ways he could change his vacation to still be able to have some long weekends but not to expect to be able to have eleven (sic) consecutive Fridays off."

The words of the memo indicate a less than settled situation. Clearly, Union Steward Caelwaerts mentioned filing a grievance on Wayne's behalf. Just as clearly, though, Mr. Baron's use of the term "potential denial" suggests that the denial had not yet taken place. Had Mr. Caelwaerts filed a grievance on Mr. Falk's behalf within five days of that discussion, it would have been premature under the contract. The denial of the requested vacation had not yet been consummated. It was still in a *potential* state.

Finally, having heard nothing further from Mr. Falk, Mr. Baron sent him a written notice in which he denied the consecutive Fridays Mr. Falk had requested as vacation time. It is undisputed that a grievance was filed the following day on behalf of Mr. Falk.

On this state of the record, and based on the foregoing discussion, I find the grievance to have been timely filed.

Merits of the Grievance

Each party agrees that the vacation provision found in the collective bargaining agreement is clear and unambiguous, yet each reaches a competing interpretation.

The Union focuses exclusively on the vacation provision and asserts that it restricts vacations in only two ways: 1) it imposes a deadline by which the vacation must be requested, and 2) allows no more than three bargaining unit members on vacation at one time.

The District takes a broader view, and describes these two restrictions as *additional*, not *exclusive*. The District contends it has never surrendered the right to approve vacation schedules. According to the District, that is a right necessarily inferred from the Management Rights enumerated in the parties' labor contract.

If the vacation provision in dispute is viewed independently of the balance of the agreement, the interpretation urged by the Union is considerably strengthened. For as the Union argues, that provision contains only two apparent limitations: a deadline for submission of vacation requests and a cap on the number of employees permitted to vacation at one time.

But the basic rules of contract interpretation indicate that the document must be construed as a whole to determine the true intent of the parties. 1/ Contract provisions should not be considered in a vacuum and given meaning in isolation from " . . . the purpose and agreement of the parties as evidenced by the entire agreement." 2/ A construction that enforces one article by denying enforcement of another is to be avoided, if reasonably possible.3/ Instead, a construction should be sought that harmonizes the various contract provisions. The arbitrator is thus able to give to each article and clause the meaning and enforcement intended by the parties.

1/ Elkouri & Elkouri, How Arbitration Works, 5th Ed., at 492, (citations omitted).

2/ Elkouri, supra at 493, citing GREAT LAKES DREDGE AND DOCK CO., 5 LA 409, 410 (KELLIHER, 1946).

3/ Supra at 493.

In the instant matter, giving Article XI (Vacations) the interpretation advocated by the Union seriously impinges on the provisions of Article II (Management Rights). Article II is explicit in its expression of those rights:

> The Board possesses the sole right to operate the school system and all management, (sic) rights repose in it. These rights include, but are not limited to:

. . .

D. To hire, promote, transfer, schedule and assign employees in positions within the school system;

. . .

G. To maintain efficiency of school system operations.

. . .

K. To determine the kinds and amounts of services to be performed as pertain to school system operations; and the number and kind of classifications to perform such services.

. . .

M. To determine the methods, means and personnel by which school system operations are to be conducted;

N. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

The exercise of management rights in the above shall be done in accordance with the specific terms of this Agreement and shall not be interpreted so as to deny the employee's right of appeal.

Under this Article, management is specifically given the right to schedule and assign employees in positions within the school system (subs. D). It is further specifically empowered to determine the methods, means and personnel through which school operations are to be conducted (subs. M). To focus solely on the wording of the contract's vacation provision (Article XI) as the Union suggests, would necessarily result in rendering these management rights provisions a nullity in this instance.

Nor does it appear that the District has exercised its management rights in a whimsical fashion in this matter. District management has determined that janitorial personnel are to be assigned cleaning and security functions at the high school building 5 nights per week, Monday through Friday. The grievant, however, has requested a vacation schedule consisting of 9 consecutive Fridays.

The requested schedule was denied by District management for several reasons: 1) difficulty (or impossibility) of obtaining temporary, Friday-only substitutes, 2) excessive overtime costs if permanent daytime district employees are assigned to cover the grievant's Friday-night vacations, and 3) the desirability of assigning the Friday-night work to employees familiar with the building.

I find these reasons neither arbitrary, nor capricious. In my opinion, the District acted reasonably in this case when it denied the grievant a portion of his requested vacation schedule. For while the right to take a vacation at a time personally selected is a valuable right, it is a right that is limited in this case by the management rights provisions of Article II.

The Union points to alternate ways it believes the District could provide adequate substitutes for Friday night janitorial service. Perhaps so. Perhaps not. However, in the words of Arbitrator Klamon, "It is not our job nor is it the job of the Union to substitute our judgment for that of management in this case." TIN PROCESSING CORP, 15 LA 733 (KLAMON, 1950).

The Union also contends that the bargaining history between the parties supports its position herein. More specifically, the Union alleges that in exchange for more lenient subcontracting language, the District agreed to less restrictive vacation language. The District agrees there was a *quid pro quo* in connection with vacation schedules, but denies it bargained away its right to approve requested vacation schedules.

Review of past collective bargaining agreements between the parties reveals that the District did bargain away the prior restriction on the number of vacation days that an employee could take during a school year. In exchange, the District appears to have received the right to subcontract services for employees on vacation, sick leave, funeral leave, personal leave, jury duty, military leave and recreational leave. I find nothing in the record, however, to support the view that the District bargained away its management right to approve vacation schedules, except that no limitation was placed on vacation days taken during the school year. 4/

4/ The vacation quid pro quo apparently included the provision that "(t)hroughout the year only three people may be on vacation at the same time." Contrary to the Union's reading of this provision, however, this does not mean any timely requested vacation must be automatically approved if no more than 3 persons would be on vacation during the particular period requested.

The Union also asserts past practice supports its position in this matter. It points to single day Monday/Friday vacation increments having been approved by the District for the grievant and other employees since 1995. It also claims that the grievant made similar vacation schedule requests that were approved for the 1997-98 and 1998-99 school years.

But, in my view, the Union's reliance as to past practice is misplaced. In the first place, the disagreement between the parties in this matter centers not on whether an employee may take individual days of vacation, but rather whether the grievant can take part of his vacation in increments of 9 consecutive Friday nights. In addition, it appears that in the past

two years no employee except the grievant ever requested nine consecutive Fridays as vacation time. 5/ Moreover, although the grievant did receive 8 consecutive Fridays as vacation time in 1997-98 and 9 in 1998-99, I do not regard a two or even three-year example with only one employee as sufficiently well established or of sufficient long standing to qualify as a "past practice." "Being the product of managerial discretion in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion." 6/ Finally, it should be noted that ordinarily even an established past practice does not defeat clear and unambiguous contract language – in this case the management rights clauses of Article II. See BASF WYANDOTTE CORP., 17 LA 829, 833 (CARAWAY, 1952).

5/ The record shows that in 1995-96 the grievant and a Steve DeBauche each requested and received respective vacation schedules that included four consecutive Fridays. In 1996-97, Randy Caelwaerts requested and received five consecutive Fridays as part of his vacation schedule, the grievant requested and received four. In 1997-98, the grievant requested and received 8 consecutive Fridays as part of his vacation schedule. In 1998-99, the grievant requested and received 9 consecutive Fridays as part of his vacation schedule, but was warned approval for that many consecutive Friday nights would not be granted the following year.

6/ FORD MOTOR CO., 19 LA 237 (SHULMAN, 1952).

Summary

I can well understand and appreciate the grievant's desire to maximize his weekend recreational activities with his wife and children. Unfortunately from his standpoint, the grievant has a work schedule obligation to his employer that conflicts with his recreational wishes. The alternatives the grievant and his Union suggest as to how the grievant's recreational purposes might be achieved are simply not currently compatible with the District's determination of how it wishes to manage its affairs, assign its employees, and schedule its employees' hours of work. Given the leverage provided by the management rights clauses article (Article II), the grievant's apparent refusal to reconsider his requested vacation schedule, while understandable, was not well advised. Perhaps further discussions between the grievant and the District's Facilities Manager can produce a vacation schedule for next year that represents an acceptable compromise to each party.

Neither am I persuaded that any past practice contended by the Union is of sufficient length or strength to overcome the District's management prerogatives set forth in Article II.

Finally, it does not appear to me that the *quid pro quo* asserted by the Union involved an abandonment by the District of its right to approve vacation schedules, except for the

removal of a limitation on the number of vacation days that may be taken during the school year.

AWARD

Based on the aforesaid discussion, the grievance is dismissed.

Dated at Madison, Wisconsin this 21st day of March, 2000.

A. Henry Hempe /s/
A. Henry Hempe, Arbitrator

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