BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WEST CENTRAL EDUCATION ASSOCIATION-DURAND

and

SCHOOL DISTRICT OF DURAND

Case 37
No. 58262
MA-10898

Appearances:

Mr. Fred Andrist, Executive Director, West Central Education Association, 105-21st Street North, Menomonie, Wisconsin 54751, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Stephen L. Weld,** 4330 Golf Terrace, Suite 205, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the District.

ARBITRATION AWARD

West Central Education Association-Durand, hereinafter the Union, with the concurrence of the School District of Durand, hereinafter the District, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to serve as Arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' collective bargaining agreement. The undersigned, Stephen G. Bohrer, was so designated. On February 15, 2000, a hearing was held in Durand, Wisconsin. The hearing was not transcribed. On April 24, 2000, and upon receipt of the last of the parties' written briefs, the record was closed.

ISSUE

The parties stipulated to the following issue:

Did the District violate Article X(D)(1) when it denied Administrative Leave to various individuals including Kris Sauve, Nancy Weber, Ramona

Carrier, Mary Seyer, Jon Dodge, Greg Fay, Julia Murray, Jackie Mickelson, Sally Meinen, Constance Carlisle-Larson, and Debra Hoage and, if so, what remedy is appropriate?

CONTRACT PROVISIONS

The following are provisions taken from the parties' 1999-2001 collective bargaining agreement, hereinafter the Agreement, and are cited, in relevant part:

ARTICLE II – BOARD FUNCTIONS

A. The Board of Education, on its own behalf, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules, and regulations to establish the framework of school policies and projects including, but without limitation because of enumeration, the right:

1. To the executive management and administrative control of the school system and its properties.

. . .

4. To establish and supervise the program of instruction and to make the necessary assignments for all programs that, in the opinion of the Board, benefit students.
5. To establish reasonable work rules.
6. To maintain efficiency of District operations.

. . .

B. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance, thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of the agreement and Wisconsin Statutes; and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the Untied States.

. . .

ARTICLE IV – GRIEVANCE PROCEDURE

. . .

C. Grievances shall be processed in accordance with the following procedures:

Step 1

a. An earnest effort shall first be made to settle the matter informally between the teacher and his or her immediate supervisor.

b. The employee representative may assist in processing the grievance at any step beyond this point.

c. If the matter is not resolved, the grievance shall be presented in writing by the teacher to the immediate supervisor and the WCEA-Durand (PRR Committee) within five (5) days after the facts upon which the grievance is based first occur or first become known. The immediate supervisor shall give his written answer in duplicate to the teacher within five (5) days of the time the grievance was presented to him in writing.

Step 2

a. If not settled in Step 1, the grievance may within five (5) days be appealed to the Superintendent of Schools by the aggrieved person. The Superintendent shall give a written answer not later than ten (10) days after receipt of the appeal. This written answer shall be presented in duplicate.

. . .

D. The parties agree to follow each of the foregoing steps in the processing of a grievance. If the Employer fails to give a written answer within the time limits set out for any step, the employee may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time limits shall be considered dropped.

. . .

ARTICLE X – ABSENCES

. . .

B. Military Leave:

1. Any regular employee who may enlist or be conscripted into the defense forces of the United States for service as training shall be granted military leave. Such application for reinstatement must be made not later than ninety (90) days after discharge.

. . .

C. Emergency Leave:

1. Two days emergency leave at full pay will be allowed each school year. Such leave will not be cumulative and shall be granted only at the discretion of the Superintendent. The following will serve as a guide in granting such leave:

a. Funerals: Up to two days may be authorized providing the death occurs in the immediate family. Immediate family to include the following: mother, father, children, sister, brother, husband, or wife. One day will be allowed for deaths of relatives. Relatives to include grandparents, in-laws, uncles, aunts, nephews, nieces, or any other member of a family household regardless of relationship.
b. Weddings: One day emergency leave may be allowed for weddings in the immediate family.
c. Births: One day emergency leave may be allowed for births in the immediate family.
2. Absences Not Covered:
a. Teachers will not be excused to participate in a remunerative activity.
b. Any other reasons not covered by the Board's policies and not approved by the Superintendent.
c. Pay deductions for days of absences not covered by sick leave or emergency leave policies shall be calculated at 190th of the annual salary.

D. Administrative Leave:
1. Up to 2 days additional leave may be granted at the discretion of the Superintendent of Schools.

E. Catastrophic Leave:
1. Additional leave not to exceed 15 days per year may be granted by the Superintendent of Schools for reasons of immediate family emergencies. Such leave will be subtracted from accumulated sick leave.

F. Maternity Leave:
1. A maternity leave shall be granted upon a physicians certification that a teacher is incapable of performing normal teaching duties due to pregnancy. A teacher on maternity leave shall be allowed to use accumulated sick leave during the period between the date the doctor certifies the teacher is incapable of performing normal teaching duties and the date the teacher's doctor certifies that such teacher is capable of resuming normal teaching duties.

G. Educational Leave:
1. It is agreed that professional improvement leave without pay for up to one year may be granted at the discretion of the Superintendent of Schools for the purpose of attending a college, university or other educational institution which will improve the teacher's ability to teach. However, it is agreed that a maximum of two teachers may be granted leave by the Superintendent of Schools during any one school year. It is also agreed that in the event the teacher does not attend a college, university or other educational institution as stipulated at the time of the leave, the teacher will not be re-instated.

Employees granted leave under this article will continue their seniority during their absence if requested by the employer or caused by military leave.

. . .

ARTICLE XII – TERM OF AGREEMENT

. . .

C. Neither party may present more than four (4) sections <denoted by capital letters>, excluding Appendix A, for modification or amendment in any one contract period.

D. This Agreement reached as a result of collective bargaining represents the full and complete agreement between the parties. It is agreed that any matters relating to this current contract term, whether or not referred to in this Agreement, shall not be open for negotiations except as the parties may specifically agree thereto. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's directions and control. However, the WCEA-Durand shall be notified in advance of any change having a substantial impact on wages, hours and conditions of employment for the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter.

BACKGROUND

The District operates a public school system in Durand, Wisconsin. The Agreement covers all classroom teachers, guidance counselors, speech therapists and librarians in the District. Since at least 1970, the parties' bargaining agreements have included Article X(D)(1) for Administrative Leave. That provision has remained unchanged up to and including the present Agreement. Approved Administrative Leave is paid leave. Mr. Terry Olson, hereinafter Olson, has been the Superintendent of Schools since the 1993-1994 school year.

During Olson's tenure, employees have requested Administrative Leave and other leaves through the use of a Prior Approval Absence Request form. That form calls for the dates on which the employee will be absent, a checklist of seven "reasons" for the absence and several lines for an explanation for the upcoming absence. The seven "reasons" listed are as follows: vacation time, sick leave, emergency leave, catastrophic leave, administrative leave, leave without pay and educational leave. An employee requesting leave completes the form by providing the dates that he or she will be absent and by writing a short narrative explaining the nature of the absence in the space provided. Normally, the requesting employee does not select from one of the seven above listed "reasons," but rather he or she leaves that part of the

form blank. After this, the form is sent to the employee's building principal, who signs it, dates it and sends it on to Superintendent Olson. At that point, Olson determines which "reason" to apply and makes a mark on the form corresponding with one of the seven available options before returning it to the requesting employee. The factors that Olson considers when making the determination of which of the seven "reasons" to apply are discussed below.

In the Spring of 1999, Olson determined that his discretion in deciding whether to grant paid Administrative Leave, as opposed to granting an unpaid leave such Leave Without Pay, was not being used properly. Olson informally discussed the idea of replacing Administrative Leave with some sort of personal leave with the Union's lead negotiator, Dave Schneider, during the latter part of the 1998-1999 school year. Schneider took this back to a Union committee, the committee discussed it and Schdeider informed Olson that the Union was not interested. Thereafter, Olson restricted the instances in which he would approve paid Administrative Leave. Olson testified that the basis for his more restrictive approach was that employees were expanding their reasons for this kind of paid leave, because of the ever increasing cost to administer this leave through paid substitutes, and because of the educational cost, i.e., a paid substitute is not always as beneficial to the students as the absent employee.

Following Olson's "change" in his approach to Administrative Leave, employees continued to submit their requests for time off on the above described forms and expected Olson to grant them "Administrative Leave" consistent with his prior decisions where Olson had granted Administrative Leave. Those employees included Kris Sauve, Nancy Weber, Ramona Carrier, Mary Seyer, Jon Dodge, Greg Fay, Julia Murray, Sally Meinen, Constance Carlisle-Larson, and Debra Hoage. Instead, Olson placed a mark upon the form for "Leave Without Pay."

On October 4, 1999, the Union sent a letter to Olson which is reproduced in pertinent part:

> Dear Mr. Olson:
>
> Members have been alerting us to the inconsistency that has developed both this year and last spring in the utilization of our leave days. Over the years we have come to rely on a certain interpretation of them. It appears to us that your discretion on the issue has changed. We do not believe that a fair labor practice would allow that. We have tried to address the issue with you but to no avail.
>
> An area of the contract such as this relies on the development of a past practice. It is clear to us that the District is deviating from the past practice of these leave days. If the District had a problem with the utilization of these days, the logical place was to address it in negotiations. Since the District did not seek to change the language in the last round of bargaining, the past practice must continue.

> Therefore, please find the enclosed grievance on the administration of leave days. We would rather discuss this matter with you and arrive at a mutually agreeable interpretation. Hopefully it would be one that could be consistently applied in the future. You however seem opposed to that. You have left us no other choice.
>
> . . .

The enclosed grievance states, in pertinent part:

> . . . the DEA is filing the following grievance in response to the inconsistent application by the Board and you in regard to the Durand administrative leave policy. Many DEA members are confused by the change in interpretation of the administrative leave policy in comparison to past years. We know of several members who have applied for administrative leave within the past year and have been denied their leave that in past practice has been accepted.
>
> Over the years we have come to rely on a certain interpretation of this district policy and it appears that the board and you have changed your discretion on this issue. This language has been in the master agreement for several bargains and a practice of application has been established. Beginning last school year, several people have been denied leave for days previously excused while no inclination was given that a change in interpretation was going to happen.
>
> Because the contract does not specifically outline what days are to be excused or not to be excused, the teachers must rely on the past practice of the district. If the teachers cannot rely on the consistent application of this past practice, this unfair labor practice leads to confusion and a lack of trust in the administration.
>
> . . .

On October 19, 1999, Olson wrote a letter to the Union and denied its grievance. That letter states, in pertinent part:

> . . .
>
> Item D, Administrative Leave, states the following:
>
> 1. Up to 2 days additional leave may be granted at the discretion of the Superintendent of Schools.
>
> With the lack of a specific definition, this item of the contract indicates the Superintendent of Schools may grant, at his discretion, up to 2 days per year of

> administrative leave. Once again, the word **may** allows for leave to be granted, but does not require that leave be granted for all requests. Further, the language specifically states this is at the discretion of the Superintendent of Schools.
>
> In reviewing the definition of the word discretion in the Webster's dictionary, it says in part, **an individual choice or judgment, power of free decision.** Therefore, the language pertaining to administrative leave allows for the Superintendent of Schools to make individual choices or judgments pertaining to requests for administrative leave.
> (Emphasis in original.)
>
> . . .

Additional background information is set forth in the parties' positions and in the discussion portion of this decision below.

POSITIONS OF THE PARTIES

The Union

The Union agrees with the District that Article X(D)(1) of the Agreement is clear and unambiguous. The issue, therefore, depends upon the application of the term "discretion." The term "discretion" does not give the District the ability to selectively approve or disapprove requests for Administrative Leave carte blanche. For example, when the parties agreed to this language, they did not agree to let the Superintendent base such decisions upon gender or race. Rather, the parties gave the Superintendent "discretion" to make decisions with the expectation that some sort of practice or policy would be established and that that practice or policy would be consistently applied.

The District acknowledged in testimony that it changed its "discretion" in granting or denying Administrative Leave. The District felt the need to "tighten it up." However, the Union disagrees with the District's interpretation that the term "discretion" provides a wide latitude. The word "discretion" must guarantee some consistency.

A Superintendent's use of discretion in granting leave must be exercised in an equitable and consistent manner, citing SOUTHERN DOOR COUNTY SCHOOL DISTRICT, WERC MA-8581 (GALLAGHER, 1995). That case involved requests for personal days and had language which stated: "Teachers may be excused during the work day, with prior approval from the district administrator, for necessary personal business which requires a teacher's presence during the school day and which cannot be rescheduled outside the normal school day." Applying the rationale from the SOUTHERN DOOR COUNTY case, and the case upon which it relies, it is apparent that past practice must weigh heavily in determining a Superintendent's approval

process, in particular where there has been a departure from the past practice. Interestingly, the issue in the SOUTHERN DOOR COUNTY case was over the approval of personal leave. In this case, Superintendent Olson stated that he would prefer a system which included the use of personal days over administrative leave. However, and in the Union's opinion, changing from administrative leave to personal leave will not resolve the problem of inconsistency. No matter what type of leave, the Superintendent does not have the latitude to be inconsistent.

Olson testified that many factors went into his decision of whether or not to grant Administrative Leave: going above and beyond the call, participation in Summer School and program effectiveness. However, it was never the Union's intent to allow the District to use Administrative Leave as some sort of meritorious leave.

Former Union contract negotiator, Don Rahman, testified that Article X(D)(1) has been in the parties' bargaining agreements since prior to Article XII(C) which deals with limited reopening language. Article XII(C) states that "no more than four sections for modification or amendment in any one contract period." This language indicates that the parties intended to rely on consistency from contract to contract. Current Union contract negotiator, David Schneider, testified that in the Spring of 1999, the Union did not agree to the District's suggestion to change Article X(D)(1). Following the Union's negative response to this, Olson was heard to have said "just forget it." It is undisputed that the District tried to negotiate over this issue, although it did not offer any specific language. Being unsuccessful in that attempt, the District tried to do what it could not do in negotiations. The District made it clear that it was unhappy with the past utilization of Administrative Leave and that it wanted to change this language. However, Article X(D)(1) from the outset has contained the word "discretion." The District had the ability to control its use from the beginning. The District established the practice and, therefore, the expectation. Then, when the District wanted to "tighten it up," they tried to bargain a change to that effect. The District has failed to bargain a change and instead changed its "discretion."

Deference should be given to prior interpretations of the same language and the denial of paid leave should be measured against the past practice of the parties, citing SOUTHERN DOOR COUNTY.

An examination of the forms submitted to Olson for approval of Administrative Leave shows that some were denied for exactly the same or very similar reason as those previously approved requests. In summary, and referring to Union Exhibits, they are:

Exhibit/ Date Appr	Name	Activity	Checked "Reason"
15. 12/13/99	Debra Hoage	Snowmobile trip	Leave Without Pay
16. 01/07/99	Debra Hoage	Snowmobile trip	Administrative Leave
17. 09/02/99	Kris Sauve	Convention	Leave Without Pay
18. 10/15/98	Kris Sauve	Convention	Administrative Leave
19. 11/09/99	Nancy Weber	Business meeting	Leave Without Pay

20.	04/27/99	Mary Seyer	Business meeting	Leave Without Pay
27.	09/13/99	Greg Fay	Trip	Leave Without Pay
28.	09/17/99	Jon Dodge	Trip	Leave Without Pay
30.	01/13/00	Nancy Weber	Trip	Leave Without Pay
35.	01/07/00	Jackie Mickelson	Trip	Leave Without Pay
36.	09/07/99	Jackie Mickelson	Trip	Leave Without Pay
63.	12/22/99	Constance Carlisle	Wedding	Leave Without Pay
64.	08/10/99	Sally Meinen	Wedding	Leave Without Pay
74.	01/28/00	Ramona Carrier	Athletic Contest	Leave Without Pay
75.	05/28/99	Julie Murray	Athletic Contest	Leave Without Pay
86.	05/10/99	Nancy Weber	Children's Education	Leave Without Pay

In the above #15, 16, 17 and 18 forms, a request was approved for Administrative Leave in one year and that the next year the request was not. In the remaining cases, the requests were denied while similar requests had been granted. On the other hand, and in summary referring to Union Exhibits, the following forms show that Administrative Leaves were granted in the past:

Exhibit/ Date Appr	Name	Activity	Checked "Reason"
22. 09/21/98	Mary Seyer	Business meeting	2 Admin Leave/3 LWOP
23. 01/12/99	Nancy Weber	Business meeting	2 Admin Leave/1 LWOP
26. 10/05/98	Jackie Mickelson	Business meeting	2 Admin Leave/2 LWOP
33. 01/12/99	Julie Murray	Trip	Administrative Leave
42. 12/09/98	Ruth Doughty	Trip	2 Admin Leave/1 LWOP
43. 01/07/00	Steven Dahl	Trip	Administrative Leave
53. 02/02/99	Judy Kink	Trip	2 Admin Leave/2 LWOP
66. 08/24/99	Julie Cyr	Wedding	1 Emer Leave/1 Cata Leave
73. 08/19/98	Jon Dodge	Wedding	Administrative Leave
82. 01/26/99	Ervajean Bostrom	Athletic Contest	Administrative Leave
96. 10/12/99	Ramona Carrier	Children's Education	Administrative Leave
122. 12/01/98	Sally Meinen	Children's Education	Administrative Leave
144. 12/02/98	S. Dzubay	Children's Education	Administrative Leave

Comparing the above two summaries, the inconsistency is apparent. The District must be consistent in its use of discretion and all of the above denied requests must be approved.

Where previous granted requests for leave are identical to current denied requests for leave, both in purpose and duration, it follows that discretion is not used in a consistent manner, citing SOUTHERN DOOR SCHOOL DISTRICT, WERC MA-7872 (JONES, 1993). The parties have come to an understanding of what to expect with Article X(D)(1) and it is clear and unambiguous. Where language is clear, it is the responsibility of the party wanting a change to negotiate that change in the language and not to change the parties' past practice.

Although the word "discretion" invites personal opinions and biases, the use of discretion must be consistent. Otherwise, inconsistency in the workplace is detrimental and leads to a variety of related problems. If either party cannot rely on a consistent application of contract language, a contract renewal season will take a backwards step. Instead of bargaining over a few issues each bargain, both parties must also investigate if the other intends to apply all language in the same manner for the next contract.

As for a remedy, the Union requests that the undersigned order the District to provide the Union with written clarification of the criteria upon which its decisions for Administrative Leave are based, that any person suffering a loss due to the District's improper and inconsistent application of Article X(D)(1) be reimbursed and that the undersigned order the District to pay those who did not suffer a monetary loss, but rather a loss in benefit, a day's pay for each day denied.

The District

Article X(D)(1) is not ambiguous. Contract language is ambiguous if plausible contentions may be made for conflicting interpretations thereof, citing Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 470 (1997) and cases cited therein. In this case, there are no plausible conflicting interpretations of this language. Superintendent Olson has discretion in granting or denying Administrative Leave requests.

If language is clear, arbitrators generally will not give it meaning other than that expressed; arbitrators recognize that past practice cannot vitiate plain and unambiguous language, citing Elkouri at 482. An arbitrator cannot ignore clear cut language and may not legislate, citing CLEAN COVERALL SUPPLY, 47 LA 272, 277 (WHITNEY, 1966). When contractual language is clear, it prevails over past practice, citing ILLINOIS DEPT. OF TRANSPORTATION, 76 LA 882 (WHITNEY, 1981). Caution must be exercised in reading into a contract implied terms, citing NATIONAL WEATHER SERVICE, 83 LA 305, 308 (KATZ, 1984). The mere failure of an employer over a long period to exercise a legitimate function of management is not a surrender of the right to start exercising such a right. Id. This is especially true where the terms regarding the particular issue are unambiguous; in those instances, past practice should not be used not give meaning to those terms. Id., at 308-309. Arbitrator Katz, in NATIONAL WEATHER, concluded that the use of the word "may" gave discretion to the Employer and, therefore, properly denied the grievance.

In MARSHALL JOINT SCHOOL DISTRICT NO. 2, (DAVIS, MAY 5, 1977)(unpublished WERC Award), no violation occurred when the Principal exercised his discretion to grant leave in a more restrictive fashion because the ability to change is an elemental part of the concept of "discretion."

In this case, the language in Article X(D)(1) is direct and concise. The word "may" and the phrase "at the discretion" clearly give the Superintendent the right to decide when to

grant or deny Administrative Leave. To find that language means that the Superintendent must follow certain guidelines would limit or take away the Superintendent's use of discretion. The parties, however, have agreed that it is the Superintendent who decides when Administrative Leave is granted or denied. The Agreement contains no limitations on that discretion.

Other arbitrators have regularly found that language which grants the employer discretion with regard to leave requests supercedes any real or imagined past practice.

Second, a comparison of other sections in Article X demonstrates that the parties meant for the Superintendent to have discretion in determining Administrative Leave, but not for Military Leave and Maternity Leave requests. Article X(B)(1), which deals with military leave, states that an enlisted or conscripted employee "shall" be given leave. Similarly, Article X(F), which deals with maternity leave, states that where a physician certifies a teacher as incapable of working due to pregnancy, leave "shall" be granted. These two provisions demonstrate that the parties bargained certain leaves which are not discretionary. In contrast, the Administrative Leave provision at issue plainly provides discretion.

In the alternative, even if the Superintendent's discretion was limited, the Union did not meet its burden in showing that the Superintendent's exercise of discretion was arbitrary, capricious or even unreasonable. The Union's specific examples where Administrative Leave was denied only demonstrate that the District denied Administrative Leave for activities for which it has granted Administrative Leave in the past, and vice versa. Further, Olson testified that he considers certain factors when determining whether to grant Administrative Leave: the availability of qualified substitutes, the number of teachers on leave for that time requested, the reason for the requested leave, whether there has been excessive use of sick leave, emergency leave, and catastrophic leave by the requesting employee and other fact specific considerations. Olson's decisions in this case were not "the result of an unconsidered, willful, and irrational choice of conduct," citing SCHOOL DISTRICT OF WEST ALLIS-WEST MILWAUKEE, WERC MA-5859 (ENGMANN, 1990). Therefore, his decisions were not arbitrary.

If a remedy is to be awarded, it should be limited to those instances grieved within the twenty day time limit as set forth in Article IV. In this case, nearly all of the alleged violations occurred twenty days prior to October 5, 1999, the date of the instant grievance. Therefore, those instances falling outside of this time limitation are barred and any award should have prospective application only.

The Union's Reply

The language in Article X(D)(1) is clear. The dispute lies in the word "discretion." The Union disagrees with the District's position that there are no contractual limitations to the District's discretion in granting or denying Administrative Leave. For example, the term "discretion" does not allow Olson to play favorites, to reward pet programs, or to deny Administrative Leave on the basis that someone has previously challenged him. Some

limitations on the use of "discretion" must exist. This is supported by Olson's consideration of various factors when considering these leave requests. However, even the factors considered by Olson are of low importance. The District clearly intended to "tighten up" the use of Administrative Leave. When the District went into the year planning to deny leaves that it had previously granted, it became apparent that the District's intent was arbitrary and capricious. The factors that Olson considered had nothing to do with the reason why he denied the requests for leave that are in dispute.

Whether a contract gives a superintendent the right to approve leaves or the right to use discretion, both situations must be based on some standard. That standard is past practice. Superintendent Olson must have thought so as well, otherwise he would not have brought up the subject in negotiations. The evidence shows that the District changed the past practice after Olson unsuccessfully tried to change the language of Article X(D)(1) in negotiations.

With regard to timeliness, the Union does not seek remuneration for those who are outside the time limits as set forth in the Agreement's grievance procedure. The Union merely used those prior situations to show that the District had changed its application of the Superintendent's discretion, which the District acknowledges. Rather, the Union seeks a "correction on those instances that prompted this action and all inappropriate actions by the District since then."

Finally, the case of SOUTHERN DOOR COUNTY is a clear example of how limitations should be placed upon a Superintendent's use of discretion. That case's holding is the more appropriate basis to make a discretionary decision, and not the assertion that the Superintendent can do whatever he wants to do. If the Superintendent is given that much latitude, it will only invite additional problems in the future.

The District's Reply

There are significant differences between the language in question in this case and the disputed language in the case of SOUTHERN DOOR COUNTY. The latter case's language stated:

> Personal Leave. Teachers may be excused from school during the work day, with prior approval from the district administrator, for necessary personal business which requires a teacher's presence during the school day and which cannot be rescheduled outside the normal school day.

However, the language in this case states:

> Up to 2 days additional leave may be granted at the discretion of the Superintendent of Schools. (Emphasis added.)

The instant case's language is more similar to the language interpreted in MARSHALL JOINT SCHOOL DISTRICT NO. 2. The language in the MARSHALL case stated:

> Non-sick leave - absence with leave for other purposes without salary deducts may be granted at the discretion of the building principal. (Emphasis added.)

The operative clause in MARSHALL and in this case are not just similar, they are identical. In the Union's case of SOUTHERN DOOR COUNTY, that arbitrator interpreted language that does not contain the word "discretion." Further, SOUTHERN DOOR COUNTY is distinguishable from MARSHALL in that the former case's language had already been interpreted by prior arbitrators and those arbitrators were shown deference. Moreover, the language interpreted in SOUTHERN DOOR COUNTY defines under what circumstances approval for leave is required. Thus, the administrator in SOUTHERN DOOR COUNTY had specific guidelines to follow. In MARSHALL, and in the instant case, the language does not impose guidelines. Rather, the granting or denying of leave is done at the Administrator's discretion.

The Union asserts that "discretion" requires consistency, that it cannot be applied carte blanche, and that a practice or policy must be established. In fact, and as was held in MARSHALL, the ability to decide, to select and even to change the criteria or factors used in selecting " . . . is such an elemental part of the concept of discretion" that the identical language had not been violated in MARSHALL when the District changed the guidelines used in exercising discretion.

Superintendent Olson considers a number of factors other than the employee's written narrative or reason for the absence when exercising his discretion in granting or denying Administrative Leave. As noted in the District's initial brief, factors such as the availability of substitutes, the number of regular teachers absent on a given day, the amount of time the requesting teacher has been out, the class or course involved and other fact specific criteria are used in making his decision. Olson has a contractual right to do so.

DISCUSSION

Article X(D)(1) of the Agreement states that Administrative Leave "may be granted at the discretion of the Superintendent of Schools." (Emphasis added.) The parties agree that in granting or denying this type of leave, the Superintendent of Schools has the right to apply his or her judgment. Where the parties disagree is in the role of past practice as it relates to the Superintendent's use of discretion.

I agree with the Union that Article X(D)(1) does not provide the District with a carte blanche or an unfettered power to grant or deny Administrative Leave. I disagree, however, with the Union's standard of past practice. I am persuaded that where an employer reserves the right in the collective bargaining agreement to determine through its own judgment or

discretion those instances which qualify for a requested leave, that decision will be upheld unless it is done in an arbitrary or discriminatory manner. HUDSON PULP & PAPER CO. 35 LA 581, 583 (HILL, 1960). Although that decision does not stand immune from challenge, it is not open to a full review on the merits and management retains a wide area of discretion. Id. A difference of opinion on the part of the Union, or the Arbitrator, as to the wisdom or the fairness of the decision to grant leave is insufficient to set it aside. Id.

The District's case of MARSHAL JOINT SCHOOL DISTRICT NO. 2 is also on point. In that case, Arbitrator Davis concluded that "discretion" means "the individual may well alter the manner in which he has exercised his discretion." Id. at p. 3. This is because "an integral part of having discretion is the ability to consider changing factors and then to change one's mind." Id. Davis specifically rejected the Union's argument that discretion precludes acting in a more restrictive fashion even where the decision is based upon the added factor of the employer's increased monetary costs. Id.

In my opinion, the standard of the HUDSON and MARSHALL cases applies to this case. So long as the District's use of discretion is not "arbitrary or discriminatory," the District is not precluded from taking a more restrictive approach to Administrative Leave. Since Article X(D)(1) does not restrict the circumstances under which "discretion" is to be applied when granting Administrative Leave, and since it does provide any guidelines for the District to apply its discretion, the District retains a wide latitude in its use of discretion.

The Union's case of SOUTHERN DOOR COUNTY SCHOOL DISTRICT, WERC MA-5610 (CROWLEY, 1989), and that case's progeny, are distinguishable. The language in that case stated:

> Personal Leave. Teachers may be excused from school during the work day, with prior approval from the district administrator, for necessary personal business which requires a teacher's presence during the school day and which cannot be rescheduled outside the normal school day.

Although Arbitrator Crowley found that the language clearly gave the Administrator discretion to grant or deny leave, he also found that "the necessary personal business requirement of [the contract] is broadly interpreted . . . " Id., at p.3. In other words, the phrase "necessary personal business" was not clear and was ambiguous. Hence, Crowley turned to the parties' past practice to interpret this ambiguous term. In this case, there is no "necessary business requirement," no stated guidelines, and no language that restricts "discretion" and which needs interpretation. Therefore, the Crowley decision is distinguishable. The other related cases cited by the Union, SOUTHERN DOOR COUNTY SCHOOL DISTRICT WERC MA-7872 (JONES, 1993) and SOUTHERN DOOR COUNTY SCHOOL DISTRICT WERC MA-8581 (GALLAGHER, 1995), are later cases between the same parties and examine the same language. Therefore, they are distinguishable for the same reasons as the Crowley decision. Those latter two cases are further distinguishable in that the interpreted language was previously interpreted by another arbitrator, Crowley, and his decision was shown deference by Arbitrator Jones and Arbitrator Gallagher.

Even if I considered the District's past practice, that past practice is not binding under the terms of this Agreement. Where a contract reserves discretion to management, the manner in which it chooses to exercise that discretion does not establish a binding past practice, and the fact that it has continued to exercise its discretion in the same fashion over a lengthy period of time does not bind it to continue to do so. LINCOLN COUNTY, WERC MA-10119 (SHAW, 1998). Therefore, the fact that Superintendent Olson may have exercised his discretion in the same fashion over a long period, does not mean that he is bound to do so in the future.

I disagree with the Union's allegation that the District is seeking something it sought unsuccessfully through contract negotiations. This is because the District already had Article X(D)(1) as part of the parties' collective bargaining agreement, the clear language of which supports the District. Hence, any evidence of bargaining history is not necessary to determine what Article X(D)(1) means.

Documents were submitted into evidence to represent that Administrative Leave was inconsistently granted by Olson to various employees. These employees did not testify. Olson sometimes approved Administrative Leave during year "A" while he did not during year "B" and regardless of the fact that an employee's stated reason for absence was sometimes the same for both years. I agree that, generally speaking, this may be very confusing and frustrating to employees. This may be especially true when an employee expects to get the same answer for the same requested reason from one year to the next. It arguably might be better to know exactly what can and what cannot be used as a reason for Administrative Leave so that employees can anticipate when they may be granted Administrative Leave. Further, developing guidelines for the use of Administrative Leave, such as those guidelines listed in Emergency Leave, may reduce the number of grievances filed over this particular subject matter. However, the absence of Administrative Leave guidelines does not mean that they are required or that a standard of past practice is implied.

The question, then, is whether Superintendent Olson's use of discretion when determining whether or not to grant Administrative Leave was arbitrary or discriminatory. I do not have evidence that Olson's decisions were the result of an impulse or based upon a whim. I also cannot conclude that favoritism or prejudice motivated Olson when he made his determinations and with regard to the employee requests for Administrative Leave before me. Olson testified that for each of the leave forms provided at the hearing, his decision was based on, along with saving money, other factors including the availability of substitutes, the number of absent teachers, and the circumstances surrounding an absent teacher or the particular course involved. While "circumstances surrounding an absent teacher" might be broad enough to include arbitrary or discriminatory factors, they have not been shown in this case to be so applied. Further, there is no evidence that Olson used these factors as pretext. The record does not support the Union's assertion that the factors Olson testified that he considered had nothing to do with the reason why he denied the disputed requests for leave. Consequently, I cannot conclude that Olson's decisions regarding these requests for leaves were arbitrary or discriminatory.

AWARD

Based upon the foregoing and the record as a whole, it is the decision and award of the undersigned Arbitrator that the District did not violate Article X(D)(1) when it denied Administrative Leave to various individuals including Kris Sauve, Nancy Weber, Ramona Carrier, Mary Seyer, Jon Dodge, Greg Fay, Julia Murray, Jackie Mickelson, Sally Meinen, Constance Carlisle-Larson, and Debra Hoage and, thus, that the grievance is dismissed.

Dated at Eau Claire, Wisconsin this 24th day of July, 2000.

Stephen G. Bohrer /s/
Stephen G. Bohrer, Arbitrator

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