BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARKESAN DISTRICT EDUCATION ASSOCIATION

and

MARKESAN SCHOOL DISTRICT

Case 6
No. 60006
MA-11486

Appearances:

Mr. John D. Horn, UniServ Director, Three Rivers United Educators, 104 West Cook Street, Suite 103, P.O. Box 79, Portage, Wisconsin 53901-0079, appearing on behalf of the Association.

Melli, Walker, Pease & Ruhly, S.C., 10 East Doty Street, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664, by **Attorney Douglas E. Witte,** appearing on behalf of the District.

ARBITRATION AWARD

The Markesan District Education Association, hereafter Association, and the Markesan School District, hereafter District or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. Pursuant to a request of the parties, the Wisconsin Employment Relations Commission appointed the undersigned to hear and decide a grievance. A hearing, which was not transcribed, was held on July 10, 2001, in Markesan, Wisconsin. The record was closed on August 21, 2001, upon receipt of post hearing written arguments.

ISSUE

The parties were unable to stipulate to a statement of the issue. The Association frames the issue as follows:

Did the District Administrator violate Article IX – Absences of the collective bargaining agreement and the past practices within it when she unilaterally ended the use of Non-compensated Leave?

If so, what shall the remedy be?

The District frames the issue as follows:

Did the District violate Article IX of the collective bargaining agreement by denying Tom Hendee an unpaid leave of absence?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

The parties' July 1, 1999 through June 30, 2001 collective bargaining agreement contains the following provisions:

ARTICLE II – BOARD FUNCTIONS

Section 2.1 The Board of Education, on its own behalf, hereby retains and reserves unto itself, without limitation, 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:

. . .

2. To establish and require observance of reasonable work and schedules of work;

…

Section 2.2 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 this Agreement and Wisconsin Statutes; Section 111.70, and then only to the

extent such specific and express terms hereof are in conformance with the Constitution and laws of the United States. The exercise of any of the retained and/or enumerated functions or rights are specifically exempt from being covered by or subject to the grievance procedure, except where modified by this Agreement.

. . .

ARTICLE IX – ABSENCES

Teachers will be provided leave benefits according to a choice of one of two optional leave formats. Option One is the default option and is the one provided unless an individual teacher specifically on an annual basis by written request chooses Option Two. Option Two requests are due in the District Office at the close of the first inservice day at the beginning of the school year (August).

OPTION ONE

Section 9.1 Sick Leave Each teacher under contract shall be granted one day of sick leave for each month (21 days) worked. Sick leave shall be cumulative up to ninety (90) days. Teachers with less than five (5) accumulated sick days at the beginning of the school contract term will be granted days in excess of their accumulated total to guarantee a maximum of five (5) days on the first contract day. Additional days will be granted on a one for each month (21 days) worked after termination of the number of months needed to satisfy the number of days granted up to a total of five (5).

Section 9.2 Emergency Leave and Urgent Personal Leave Teachers will be granted emergency leave, and the granting of the leave and the length of the leave shall be determined by the administration. Emergency is defined as serious illness or injury to a member of an employee's immediate family. Immediate family is defined in Section 9.3(1).

Teachers will be granted urgent personal leave. Urgent personal leave is to be used for matters that require immediate attention that cannot be attended to except during the school day. Urgent personal leave will be limited to one day per year, but may be extended at the discretion of the administration. Only two teachers per day from each unit, elementary K-5, middle 6-8, and high school 9-12, may use urgent personal leave. If more than two teachers from each unit apply for urgent personal leave per day, the leave will be granted to the first two teachers who applied for the leave.

The following provisions shall apply to both emergency and urgent personal leave:

a. The leave shall be with pay, and the number of days of the leave shall be deducted from the number of sick leave days possessed by the employee.

b. In no case shall the paid leave exceed the employee's total number of accumulated sick leave days.

c. In all cases, the employee is expected to make whatever arrangements are necessary to enable him to return to work as quickly as possible.

d. If at all possible, requests for urgent personal leave shall be made in advance to the administration.

Section 9.3 Funeral Leave

1. Employees will be granted a maximum of three (3) days with pay for necessary time off from work for each incident involving death in the immediate family. Immediate family is defined as spouse, child, parent, brother, sister, and any member of family living within the household.

2. Additional time off with pay for a period not to exceed five (5) work days may be granted as emergency leave in cases of death of a member of the immediate family.

3. Employees shall be granted leave at the discretion of the administration in the event of death of a close friend or relative outside of the employee's immediate family as defined in Paragraph One. Such leave for which compensation is received shall be deducted from accumulated sick leave benefits.

Section 9.4 Maternity Leave A pregnant teacher shall give substantial advance notice to the superintendent of the expected date of delivery. Before the teacher can commence maternity leave, she must present a doctor's certificate to the Board stating: (1) the expected date of delivery, (2) the last possible date the teacher can perform her teaching duties, and (3) the date which he believes leave should commence.

Option One, Two or a Combination of One and Two at Time of Request

1. A pregnant teacher shall take an unpaid maternity leave of absence beginning when her physician certifies that she is unable to perform her teaching duties and continuing until her physician certifies that she can perform her duties on a regular and full time basis or at some later time at the discretion of the superintendent.

2. Upon certification by her physician that she is unable to perform her teaching duties, the teacher shall commence use of her sick leave until her physician certifies that she is able to perform her duties, or at some time later at the discretion of the superintendent.

After the birth of the child, the teacher shall return to work as soon as the doctor certifies she is able to perform her teaching duties or at some time later at the discretion of the superintendent.

Section 9.5 Jury Duty Teachers will be granted compensated leave to serve jury duty if called by a court of competent jurisdiction provided the teacher remits to the District any compensation received by him/her for the service minus compensation received for expenses.

OPTION TWO

Section 9.1 Sick Leave Each teacher under contract shall be granted one day of sick leave for each month (21 days) worked. Sick leave shall be cumulative up to ninety (90) days. Teachers with less than five (5) accumulated sick days at the beginning of the school contract term will be granted days in excess of their accumulated total to guarantee a maximum of five (5) days on the first contract day. Additional days will be granted on a one for each month (21 days) worked after termination of the number of months needed to satisfy the number of days granted up to a total of five (5). Sick leave days under this option may be used for the purpose of attending to sick immediate family members.

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Section 9.4 Jury Duty Teachers sill be granted compensated leave to serve jury duty if called by a court of competent jurisdiction provided the teacher remits to the District any compensation received by him/her for the service minus compensation received for expenses.

Section 9.5 Personal Leave Teachers will be granted one paid personal leave day to be used at their discretion to handle all matters relating to, but not limited to:

1. Personal and family matters;
2. Funerals other than immediate family;
3. Conferences other than those approved or directed by the district administrator;
4. Emergencies.

. . .

ARTICLE X – TERMS OF AGREEMENT

Section 10.1 The terms of this Agreement will be effective as of the 1st of July 1999 and shall continue and remain in full force and effect as binding on the parties until the 30th of June 2001.

. . .

Section 10.3 This Agreement reached as a result of collective bargaining represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. It is agreed that any matters relating to the 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 direction and control provided, however, that the MDEA shall be notified in advance of any changes having a substantial impact on the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter.

RELEVANT BACKGROUND

Since at least 1986, the District has had an "Employee Absence Request/Record Form" that is used by teachers requesting permission to be absent from work. The bottom of this form indicates two classifications of leave, i.e., Compensated or Non Compensated. When approving an absence request, the former District Administrator indicated the classification of the leave and, usually, the length of the leave. The top of the form, which is filled-in by the teacher, requests "Reason(s)" for the absence.

Using the "Employee Absence Request/Record Form," Association bargaining unit member Cherie Miller requested permission to be absent on the following days: April 4 and April 7-11, 1986; March 15-19, 1993; January 27 and 28, 1994; March 23, 24, and 25, 1994; August 25, 1995; March 28 and 29, 1996; November 5 and 6, 1998; January 29 and 30, 1998; January 14 and 15, 1999; March 25 and 26, 1999; February 4, 2000; and April 13 and 14, 2000. Miller's forms contained the following "reasons": "out-of-state"; "vacation"; "out-of-state trip"; "extended trip"; "out-of-state commitment"; "extended family trip out-of-state"; "trip to Utah"; and "extended vacation." The former District Administrator approved all of these absence requests, indicating that the classification of leave was "Non Compensated." The District Administrator also indicated the type of leave as being vacation or non-compensated leave.

Using the "Employee Absence Request/Record Form," Association bargaining unit member Karen Jensen requested permission to be absent on the following days: March 16, 17 and 18, 1988; one day in April, 1990; three days in February, 1996; and five days in February and March of 2001. Jensen's forms contained the following "reasons": "to visit and spend time with family" and "going to Florida – a late honeymoon." At least one of her forms did not contain a "reason." With the exception of the 2000 requests, the former District Administrator approved all of Jensen's requests. The requests approved by the District Administrator were all approved as non-compensated days, with the exception of one day that was approved as a compensated "bonus day." The current District Administrator, Susan Alexander, approved the 2001 requests as non-compensated days.

On September 3, 1998, using the "Employee Absence Request/Record Form," Association bargaining unit member Tom Hendee requested permission to be absent on November 30 and December 1-4. On December 15, 1999, using the "Employee Absence Request/Record Form," Hendee requested permission to be absent on November 29 through December 3. The former District Administrator approved the September, 1998 request in December of 1998 and the December, 1999 request in December of 1999. On each form, the District Administrator approved the request as non-compensated personal days. These forms contained the following "reasons": "personal" and "R&R Trip."

On November 2, 2000, Hendee submitted an "Employee Absence Request/Record Form" for November 26 through 30, 2001 for a "Trip Canada (R-R)." On November 6, 2000, Alexander met with MTEA representatives and teacher Tom Hendee to discuss several requests for use of non-compensated leave. During this meeting Alexander agreed to three employee requests to use non-compensated leave during the 2000-01 school year.

On November 7, 2000, Alexander issued the following:

Memo to: Tom Hendee
From: Susan H. Alexander
Date: November 7, 2000
Re: Non-Compensation Request

I am denying your request for non-compensated time for the dates of November 26-30, 2001. If you have any questions, please contact me or stop to see me.

On November 9, 2001, MDEA President Jerry Chisnell issued the following:

M E M O R A N D U M

TO: Susan Alexander, District Administrator
FROM: Jerry Chisnell, MDEA President
DATE: November 9, 2000
SUBJECT: Non-Compensated Leave

I would like to thank you for meeting with us informally on Monday, November 6, 2000 regarding the issue of non-compensated days. Our agreement that you must approve the requests for non-compensated leave from Cherie Miller, Tom Hendee, and Karen Jensen, has created an atmosphere that should lead to continued problem solving on this issue.

As you know from our discussions, the MDEA takes the position that non-compensated leave is a part of the current Agreement, as a past practice under specific provisions of the Agreement, including, but not limited to, the Article on absences. Thus, the only way that this practice can be changed is through the collective bargaining process. We also understand that you may have a different perspective on this issue. We are interested in on going discussions prior to the bargain to better prepare us for a mutually beneficial agreement on the issue during the bargain.

If you wish to discuss this letter for any reason please let me know.

On February 2, 2001, Alexander received the following:

To: Susan H. Alexander
From: Tom Hendee
Date: 01/31/01
Re: Uncompensated Leave of Absence

I am requesting an uncompensated leave of absence for the time period of November 26-30, 2001 in order to go on a Canadian deer hunt. The guide service requests confirmation in the near future in order to hold a spot for me during the hunt. For the past three years my request has been granted. I would appreciate it if the practice that was honored by the former administration and the current administration would also be honored for this request. I would appreciate a response by February 15, 2001. Thank you for your time and consideration.

The District Administrator responded with the following:

Memo to: Tom Hendee
From: Susan H. Alexander
Date: March 2, 2001
Re: Non-Compensation Request

Pursuant to your request of February 2, 2001, all past practices have been rescinded including the practice of granting non-compensated vacation days. Thus, your request is denied.

On or about March 2, 2001, Chisnell issued the following:

Memo to: Lou Mullin
From: Jerry Chisnell
Date: March 2, 2001
Re: Tom Hendee's request for non-compensated leave

Pursuant to our conversation on the phone on, it is my understanding that we were unable to come to a solution regarding the request for Tom's leave. I have discussed this with Tom and he is in agreement that a solution will not take place through informal discussions. Please consider this to be written notification that it is Tom's request to end Step One – Informal Resolution, Article III, Section 3.3 Grievance Process Procedure of the 1999-2001 MDEA Contractual Agreement.

On or about March 9, 2001, Chisnell issued the following:

Lou Mullin, Principal
Markesan District Schools
Markesan, WI 53946

Re: Tom Hendee's request for non-compensated leave

Dear Mr. Mullin,

On March 2, 2001 Tom Hendee was notified that his request for non-compensated leave days was denied.

On March 2, 2001 I spoke to you about the issue in an attempt to come to a solution.

We were unable to come to a solution. That day I gave you written notification the informal process was ending.

The denial of non-compensated personal leave is a violation of the collective bargaining agreement including, but not limited to, Article IX, Absences and the past practice within it.

Please consider this the Association's grievance of the non-compensated leave.

To remedy this grievance, make Tom Hendee and all other similarly situated employees whole in every way, include granting the requested leave.

Mullin responded with the following:

MEMO

TO: Mr. Jerry Chisnell, MDEA
Mrs. Thomas Hendee, Instructor – Markesan District Schools

FROM: Mr. Louis Mullin, High School Principal

DATE: March 12, 2001

RE: Letter received March 9, 2001 at 3:44 P.M.
Denial of Non-compensated leave – Article IX

Article IX Absences:

Article nine addresses options available and outlines in some detail conditions under which absences are to be considered. No evidence is found under which non-compensated leave is addressed and/or considered.

Consideration of the total contract, likewise, fails to address non-compensated leave. Board policy, Chapter VI Personnel, L.2a. does, however, note "the superintendent may grant employees short duration non-compensated absences at his discretion."

Failure of the contract to address non-compensated leave and the obvious reference in board policy necessitates that such decisions be made by the superintendent and therefore, the grievance is found without merit or standing.

On March 20, 2001, Chisnell issued the following:

Susan Alexander, District Administrator
Markesan District Schools
Markesan, WI 53946

Re: Tom Hendee's request for non-compensated leave

Dear Mrs. Alexander:

On March 2, 2001 Tom Hendee was notified that his request for non-compensated leave days was denied.

On March 2, 2001 I spoke to Lou Mullin about the issue in an attempt to come to a solution. We were unable to come to a solution. That day I gave Mr. Mullin written notification the informal process was ending.

On March 9, 2001 the Association filed a grievance on this issue with Mr. Mullin. On March 15, 2001 we received written notification dated March 12, 2001, that this grievance was denied by Mr. Mullin.

The denial of non-compensated personal leave is a violation of the collective bargaining agreement including, but not limited to, Article IX, Absences and the past practice within it. Please consider this the Association's appeal to the District Administrator, pursuant to Article III, Section 3.3, Step Three.

To remedy the grievance, make Tom Hendee and all other similarly situated employees whole in every way, include granting the requested leave.

On March 29, 2001, Alexander issued the following:

MEMO

To: Mr. Jerry Chisnell, MDEA
Mr. Thomas Hendee, Science Teacher – Markesan District Schools

From: Mrs. Susan H. Alexander, District Administrator

Date: March 29, 2001

Re: Response to the third step of the grievance process

Request: *A non-compensated five-day personal leave for November 26-30, 2001*

Support for the request: *This is a past practice that Mr. Hendee and the MDEA are asking to have continue.*

Response: This request is being denied. It is a past practice, which we no longer wish to continue. Under Section 10.3 of the collective bargaining agreement, we are notifying the MDEA that starting July 1, 2001, we will not be granting noncompensated personnel leave. This practice denies Markesan students the opportunity to study directly with their teacher and is, therefore, not a practice that should be continued. The education association will be given an opportunity to discuss this matter.

On April 16, 2001, Chisnell issued the following:

Cal Reistad, School Board President
Markesan District Schools
Markesan, WI 53946

Re: Tom Hendee's request for non-compensated leave

Dear Mr. Reistad,

On March 2, 2001 Tom Hendee was notified that his request for non-compensated leave days was denied.

On March 2, 2001 I spoke to Lou Mullin about the issue in an attempt to come to a solution. We were unable to come to a solution. That day I gave Mr. Mullin written notification the informal process was ending.

On March 9, 2001 the Association filed a grievance on this issue with Mr. Mullin. On March 15, 2001 we received written notification dated March 12, 2001, that the grievance was denied by Mr. Mullin.

On March 20, 2001 the Association forwarded the grievance to Susan Alexander. On March 27, 2001 the Association met with Mrs. Alexander regarding this issue. On March 29, 2001 the Association received written notification, that the grievance was denied by Mrs. Alexander.

The denial of non-compensated personal leave is a violation of the collective bargaining agreement including, but not limited to, Article IX, Absences and the past practice within it. Please consider this the Association's appeal to the Board of Education, pursuant to Article III, Section 3.3, Step Four.

To remedy the grievance, make Tom Hendee and all other similarly situated employees whole in every way, including granting the requested leave.

The President of the Markesan District Board of Education, Molly Stegeman, responded with the following:

Response to Step Four of the Grievance Procedure

To: Mr. Jerry Chisnell, President of the MDEA

Re: The Thomas Hendee Grievance

Dear Mr. Chisnell:

The Board of Education of the Markesan District Schools met on April 25, 2001 to consider the grievance of Mr. Thomas Hendee, science teacher in the Markesan School District.

The Association claims that the denial of Mr. Hendee's request for non-compensated personal leave violates Article 9 of the Collective Bargaining Agreement and the past practice within it. The Board finds no specific right to non-compensated leave for personal reasons in Article 9, or any other provision of the collective Bargaining Agreement. Therefore, there is no violation of the contract.

While Mr. Hendee has had other requests for non-compensated personal leave granted, the Board denies that granting such previous requests created a past practice under Article 9 or any other provision of the contract.

To the extent any past practice was created, the District exercised its rights under Section 10.3 of the contract to discontinue any such practice. Indeed, Ms. Alexander's letter to you dated March 29, 2001 states the reason for discontinuing this practice and invited you to discuss this matter. The District remains willing to discuss this issue with you.

Nevertheless, the Board's decision is to deny Mr. Hendee's grievance as it finds no contractual violation.

Thereafter, the matter was scheduled for arbitration.

At hearing, the parties stipulated that Option 2 was added to Article IX in the 1993-95 agreement. The parties further stipulated that, since that time, there has been one bargained change in that Article; that this change is in Option 2; and that this change permitted the use of sick leave for immediate family illness.

POSITIONS OF THE PARTIES

Association

For many years, the District has provided non-compensated leave upon request of teachers. It is not evident that the District denied any non-compensated leave request prior to denying the request of Tom Hendee, which denial is the subject of this grievance. Notwithstanding the District's arguments to the contrary, the Association has never taken the position that the past practice includes unlimited non-compensated leave. The evidence of the practice, however, clearly supports leaves of a week or more. Thus, Tom Hendee's leave request clearly falls within the established practice.

When MDEA President Chisnell learned of this denial, he discussed the issue with the new District Administrator. During this discussion, the District Administrator agreed that she had to approve non-compensated leave requests.

Throughout this entire process, the District Administrator pursued the complete elimination of non-compensated leave. If the real issue involved only the new District Administrator's desire to establish criteria for approving non-compensated leave, then we would have a different case.

This decision was not based upon the personal preference of the District Administrator, but rather upon the Association's demonstration to her that a past practice existed. At hearing she confirmed that she was advised that it was best to continue "what they were used to." These discussions between the Association and the District Administrator led to an understanding that the past practice of non-compensated leave must continue.

Although the Association was not aware of the Board policy on non-compensated leave prior to this grievance, the District has recognized the non-compensated leave practice in its written Board Policy, as well as in the administratively produced "Employee Absence Request/ Record Form." The District also recognized this policy, when during prior contract negotiations, the Association was assured by the then District Administrator that it had a right to take non-compensated leave. The current District Administrator confirmed her understanding of the existence of the practice when she denied Hendee's grievance.

The record demonstrates the existence of the following practice: An employee requests leave, stating the reason for the leave; the District Administrator views the reasons for the leave; and the District Administrator signs off on the leave as either compensated or non-compensated. This practice is clear, consistent and mutually understood. This practice cannot be altered unless the parties have agreed to alter this practice.

Upon initial review of Article IX, it would appear that the inclusion of a paid personal day under Option 2 would make the use of non-compensated leave an undesirable "benefit" and, thus, the continuation of the practice would be of little significance. However, as the record reveals, Option 2 essentially does not exist because it has less desirable benefits and, thus, is not selected by the Association's bargaining unit members.

The contract is silent on non-compensated leave. The practice, however, gives meaning to ambiguity in Article IX, specifically under the discretion offered the District Administrator under Emergency and Urgent Personal Leave. Thus, the practice is best described in Elkouri as a "gap-filling" practice. Non-compensated leave fills the gap as to what type of leave an employee will get if they need time for planned personal leave that does not fall under paid Emergency or Urgent Personal Leave under Option 1 of Article IX.

There are two parts of Section 10.3 that need to be addressed. First, what does the term "Board direction and control" mean? Given the Board policy that codifies the past practice of the parties, at a minimum, Section 10.3 would require formal Board action to make such a change. The Board has not raised the change in non-compensated leave at the table during negotiations leading to the current agreement or indicated that it wished to end "past practices."

Second, the parties have an understanding with respect to the meaning of "opportunity to discuss." As Connie Hynnek testified, the Association's reluctant agreement to the placement of issues in Board policy was made only with the assurance of the Board that any changes would be made at the bargaining table. As the District Administrator testified at hearing, the only discussion of this issue was within the context of this grievance and the issue has not been discussed during bargaining. The only proper forum for these discussions, as listed in the District's opening statement and List of Issues for the current bargain, is at the bargaining table.

CITY OF STEVENS POINT, DEC. NO. 21646-B, relied upon by the District, read in its entirety, reinforces the Association's position in the instant matter. Unlike STEVENS Point, this case does not involve a past practice that is in conflict with contract language. Rather, as discussed above, this past practice gives meaning to and fills in the gaps in existing contract language, i.e., Article IX.

STEVENS Point may be applicable if a voluntary agreement is reached on a successor agreement and the successor agreement is silent with respect to non-compensated leave. However, these are not the facts of this case. Under the facts of this case, the District Administrator cannot unilaterally end the past practice of non-compensated leave and the status quo practice must be maintained during the contract hiatus period.

WERC precedent supports the Association's position that only through negotiations may changes be made in wages, hours and conditions of employment. The grievance must be sustained. Tom Hendee must be granted his non-compensated leave request and the District should be ordered to maintain the practice and policy of non-compensated leave until a change in the practice and policy is bargained.

District

According to the Association, the only right the District has concerning employee requests for leave is to decide whether the leaves will be paid or unpaid. Under such a theory, an unlimited number of teachers could be gone for an unlimited number of days. There is no authority in the law, contract, Board Policy, or common sense to support such a claim.

Under Article II of the collective bargaining agreement, any limitation on the Board's right to establish and require observance of reasonable work and schedules of work must be set forth by specific and express terms of the agreement and Wisconsin Statutes. It is reasonable for the District to expect teachers to teach and not take unpaid vacations during the school year. Neither contract, nor statute, limits this reasonable expectation.

The Association has not claimed that the District has violated any specific or express provision of this agreement because non-compensated leave is not found anywhere in the agreement. Likewise, the Association has not claimed that the District's denial of this non-compensated leave violates Section 111.70, Stats.

To argue that because previous requests for non-compensated leave had been granted, apparently without exception, that the District is forever bound to grant any and all requests, ignores the plain language of Board policy. This policy expressly provides the District Administrator with discretion to grant or deny non-compensated leave. The Association has not alleged, nor shown, that the District Administrator has exercised this discretion in a discriminatory, arbitrary or capricious manner.

Moreover, just because the previous District Administrator may not have denied requests in the past does not mean that the current District Administrator may not deny such requests. Non-use of a right does not cause the loss of the right.

The Association's argument that the practice of taking unrestricted non-compensated leaves has been written into the Board policy is unsubstantiated by any record evidence. As is the argument that the Board policy was agreed to by the District and the Association.

The Association ignores Section 10.3 of the collective bargaining, which section provides the District with the right to terminate a past practice that exists outside the terms of

the parties' agreement. Even in the absence of a contractual right to terminate a past practice, Commission law provides, at a minimum, that a past practice can be terminated at the end of the agreement. See, CITY OF STEVENS POINT, DEC. NO. 21646-B.

The District informed the Association of its elimination of the past practice of granting all non-compensated leaves and invited discussion. It then became the Association's obligation to initiate the discussions. It is not the District's obligation to do so. Assuming arguendo, that there was a change that had a "substantial impact," the District made the change consistent with its Section 10.3 authority.

The Association's evidence shows that, during the 1999-2001 negotiations, the Association was given assurance that no changes would be made to the post service medical benefits addressed in Section 6.2 of the Board policy. No similar assurances were given regarding non-compensated leave.

Assuming arguendo, that such an assurance had been made, the "unchanged" Board policy would provide the District Administrator with discretion to approve or not approve non-compensated leaves. Moreover, if an agreement similar to the post service medical benefits agreement had been made, such an agreement would only prevent a change before the expiration of the 1999-2001 contract.

Notwithstanding the District's Section 10.3 right to change any term or condition not covered by the contract at any time, the District Administrator made the change effective upon expiration of the existing 1999-2001 contract. Tom Hendee's request was made during the term of the 1999-2001 contract, but would not be taken until after the change was effective.

The District Administrator did agree to approve leaves that occurred during the 1999-2001 contract, but not, as the Association argues, because she agreed the past practice must continue. Rather, as she explained at hearing, she just felt that it would be better to make a change at the end of a contract.

If the Association wants to continue the practice of taking unrestricted non-compensated leave, then it will have to negotiate such provisions into a successor agreement. At the present moment, such leave is subject to the discretion of the District Administrator under Board policy.

The Association has failed to establish that the District violated any provision of the contract by denying non-compensated leave to Tom Hendee, or to any other member of the Association's bargaining unit. Any past practice regarding non-compensated leave was properly rescinded under the contract and in accordance with Commission precedent. The District has acted consistent with rights it has retained under the contract. The grievance should be dismissed in its entirety.

DISCUSSION

Issue

The parties were unable to stipulate to a statement of the issue. The Association frames the issue as follows:

> Did the District Administrator violate Article IX – Absences of the collective bargaining agreement and the past practices within it when she unilaterally ended the use of Non-compensated Leave?
>
> If so, what shall the remedy be?

The District frames the issue as follows:

> Did the District violate Article IX of the collective bargaining agreement by denying Tom Hendee an unpaid leave of absence?
>
> If so, what is the remedy?

A review of the grievance documents establishes that the Association grieved the denial of Tom Hendee's request for non-compensated leave for the 2001-02 school year. However, in grieving this denial, the Association argued that the denial violated Article IX of the collective bargaining agreement, as well as the past practice contained within that Article. Thus, the issue is appropriately stated as follows:

> Did the District violate Article IX of the collective bargaining agreement, or any binding past practice, when it denied Tom Hendee's request for non-compensated leave for November 26-30, 2001?
>
> If so, what is the appropriate remedy?

Merits

The parties agree that the collective bargaining agreement is silent with respect to the issue of non-compensated leave, but since at least 1980, the Board Policies have included the

following language: "The superintendent may grant employees short duration non-compensated absences at his discretion. Salary will be deducted on a per diem." For the purposes of this decision, the term "Superintendent" and "District Administrator" are used interchangeably.

It is undisputed that, for approximately 25 years, the District's former District Administrator had granted requests for non-compensated leaves of absence for a variety of personal reasons, including vacations. It is not evident that the District's former District Administrator ever denied a request for non-compensated leave. Thus, as the Association argues, there has been a clear and consistent practice of granting requests for non-compensated leave.

The Association argues that, under the practice, the District is required to approve non-compensated leave requests of the type requested by Hendee. The District responds that, given the Board Policy, the District's approval is discretionary. Thus, the District denies that, under the practice, approval is a matter of right. Accordingly, there is an issue as to whether or not the parties have a mutual understanding with respect to the "practice."

Association Representative Connie Hynnek has been involved in the consensus bargaining of the last three collective bargaining agreements and is involved in the consensus bargaining of the successor contract. Hynnek's uncontradicted testimony establishes that, when the Association attempted to obtain additional paid personal leave during the negotiation of the 1999-01 collective bargaining agreement, the former District Administrator responded that paid personal leave is provided for under Option 2 of Article IX and that teachers may take non-compensated personal leave. It is not evident that this District Administrator made any statement indicating that non-compensated personal leave was subject to the discretion of the District Administrator.

Upon consideration of the evidence of practice and bargaining history, the undersigned concludes that, at the time that the parties entered into their 1999-01 collective bargaining agreement, there existed a clear, consistent and mutually understood past practice. This practice was that the District Administrator would grant non-compensated leave requests of the type previously approved by the District Administrator, i.e., non-compensated personal leave requests ranging from one to six days.

Consistent with the Board policy, the "non-compensated" leave provided under the "practice" is of "short duration." Hendee's request involves five days of non-compensated personal leave and, thus, as the Association argues, falls squarely within the "past practice."

Relying upon the testimony of Association Representative Hynnek and the March 23, 2000 Consensus Bargaining Session Minutes, the Association argues that the Board is obligated

to continue the practice on non-compensated personal leave until such time as the Board discusses the change in consensus bargaining and the change is agreed to at the bargaining table. However, neither piece of evidence supports this argument.

Hynnek's testimony demonstrates that, during the negotiations that lead to the 1999-01 agreement, the District and the Association discussed post service medical benefits. Hynnek recalls that, during these discussions, the Association expressed concern that the post service medical benefits were provided for in the Board Policy and not in the agreement. Hynnek further recalls that, as a result of these discussions, she understood that the District had to bargain any changes in the post service medical benefits at the table.

The "Minutes" of the March 23, 2000 session, which have been approved by both parties, contains the following:

> The topic of post service medical benefits was discussed. Due to the fact that this topic was brought forward for discussion, Mr. Bielarczyk stated the session minutes must reflect (1) it is the intent of the Board of Education to uphold the terms of the current post service medical benefits agreement and the current agreement will not change, and (2) the Board of Education had a chance to alter the current post service medical benefits agreement and did not. Therefore, the Board of Education must maintain the current post service medical benefits agreement through the 1999-2001 collective bargaining agreement.
>
> . . .
>
> It shall be stated in the session minutes that the Board of Education intends to maintain the post service medical benefits as specified in Board Policy 6.2 for the duration of the 1999-2001 collective bargaining agreement.

Hynnek's testimony and the relevant "Minutes" demonstrate that the agreement reached by the parties regarding a duty to maintain benefits that were provided in Board Policy, but not in the agreement, involved only the maintenance of post service medical benefits. As the District argues, this evidence does not demonstrate that the District made any assurances with respect to the continuation of any other Board policy, including the policy on non-compensated leaves.

The Association also argues that, when the District Administrator met with MDEA representatives in November of 2000, she agreed that the practice must continue. The record, however, does not demonstrate such an agreement.

At hearing, the District Administrator denied that she had agreed that she must approve requests for non-compensated leave requests. Her testimony is consistent with statements made in the MDEA President's letter of November 9, 2000, which expressly recognize that the agreement reached in the meeting was limited to the approval of requests of three named individuals. At hearing, the MDEA President expanded on this agreement by stating that the District Administrator agreed to permit the three named individuals to take the non-compensated leave that they had requested for the 2000-01 school year. This testimony is consistent with the evidence that, the day after the meeting, the District Administrator denied Hendee's first request for leave for the 2001-02 school year, without apparent objection from Hendee, who was present at the meeting, or any Association representative.

At hearing, the MDEA President also stated that the District Administrator agreed with the Association's position that non-compensated leave was part of the collective bargaining agreement and, if changed, should be changed at the bargaining table. This testimony, however, is inconsistent with statements he made in his letter of November 9, 2000, to wit:

> As you know from our discussions, the MDEA takes the position that non-compensated leave is a part of the current Agreement, as a past practice under specific provisions of the Agreement, including, but not limited to, the Article on absences. Thus, the only way that this practice can be changed is through the collective bargaining process. We also understand that you may have a different perspective on this issue. . . .

As the Association argues, in denying Hendee's second request for non-compensated leave for the 2001-02 school year, District Administrator Alexander acknowledged that there was a past practice of granting non-compensated vacation days. However, the evidence fails to establish that she agreed to approve all non-compensated leave requests, or that she agreed to continue the past practice until such time as the parties bargained a change in the practice. Indeed, it is not evident that this District Administrator made any agreement other than to approve the non-compensated leave requests of Cherie Miller, Tom Hendee, and Karen Jensen for time-off during the 2000-01 school year.

In summary, the record demonstrates that, at the time that the parties entered into their 1999-01 collective bargaining agreement, there existed a clear, consistent and mutually understood past practice. The record, however, does not demonstrate that District representatives made any assurance that the practice would not be changed without bargaining such change with the Association. Absent such an assurance or contract language requiring the maintenance of the past practice, it is generally recognized that the District has the right to unilaterally repudiate the past practice upon the expiration of the collective bargaining agreement. As the District argues, the District Administrator's "Memo" of March 29, 2001 repudiates the past practice, effective upon expiration of the collective bargaining agreement.

Relying upon Elkouri, the Association argues that the undersigned should use the past practice to "fill in the gaps" of ambiguous language contained in Article IX. Thus, the Association argues, the past practice must be maintained as a part of Article IX and cannot be unilaterally repudiated by the District. As a review of the relevant section of Elkouri establishes, "gap-filling" is used when the applicable contract language is general, rather than specific. (See Elkouri & Elkouri, *How Arbitration Works*, (5th ed., 1997) at 654.)

Article IX provides two optional leave formats, i.e., Option One and Option Two. Option One provides sick leave, emergency leave, urgent personal leave, funeral leave, maternity leave, and jury duty. Option Two, which has not been selected by a teacher since 1994, provides sick leave, funeral leave, maternity leave, jury duty and paid personal leave.

Neither Option provides for non-compensated personal leave. Each option, however, expressly recognizes the existence of unpaid maternity leave. Paragraph 3 of Section 9.3, implicitly recognizes the existence of non-compensated funeral leave.

The leave of absence provisions of Article IX are extensive and specific. Thus, the "gap-filling" principle advanced by the Association is not applicable.

Notwithstanding the Association's argument to the contrary, there is no ambiguity with respect to the discretion of the District Administrator under Emergency and Urgent Personal Leave because the contract specifically states that such "leave shall be with pay." The absence of any reference to non-compensated personal leave in Article IX does not raise an ambiguity with respect to the provision of such leave. Rather, it demonstrates that the parties did not intend Article IX to provide non-compensated personal leave.

Such a conclusion is further supported by the language of Section 10.3, which states "This Agreement reached as a result of collective bargaining represents the full and complete agreement between the parties and supersedes all previous agreements between the parties." Notwithstanding the Association's arguments to the contrary, the past practice on non-compensated personal leave is not embodied in Article IX of the parties' collective bargaining agreement.

Section 10.3 of the collective bargaining agreement also contains the following language:

> All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control provided, however, that the MDEA shall be notified in advance of any changes having a substantial impact on the bargaining unit, given the reason for such change, and provided an opportunity to discuss the matter.

The District, contrary to the Association, argues that this provision provides the District with the express right to discontinue the past practice on non-compensated leave.

Non-compensated personal leave is a term and condition of employment that is not covered by the agreement. To be sure, only a small number of teachers have used non-compensated personal leave. However, it is a significant benefit that is available to all bargaining unit members. Thus, the District's decision to discontinue the past practice of granting non-compensated personal leave requests involves a change that has a substantial impact on the bargaining unit. Under Section 10.3, the District may discontinue the past practice on non-compensated leave only if the District notifies the MDEA in advance of the change in the past practice, gives the reason for such change and provides the MDEA with an opportunity to discuss the matter. The Association, contrary to the District, argues that these requirements were not met.

First, the Association argues that the District has not complied with Section 10.3 because the District has not bargained a "change" with the Association. The undersigned notes, however, that Section 10.3 makes no reference to bargaining. Rather, it only requires the District to provide an opportunity to "discuss" the change. A requirement to discuss is not a requirement to bargain. Nor is the requirement to discuss a requirement to reach any agreement.

In summary, the plain language of Section 10.3 does not impose upon the District a requirement to bargain with the Association over a "change" in the past practice on non-compensated leave. Nor does it require the District to obtain the agreement of the Association prior to implementing such a "change." Nor does the other record evidence demonstrate that the parties mutually intended Section 10.3 to be given a construction other than that which is reflected in its plain language.

Secondly, the Association asserts that discussions on the matter did not take place. The plain language of Section 10.3, however, does not require that discussions actually take place. Rather, it only requires that the District provide the Association with an opportunity to discuss the matter.

The District Administrator's March 29, 2001 "Memo" includes the following:

Request:	*A non-compensated five-day personal leave for November 26-30, 2001*
Support for the request:	*This is a past practice that Mr. Hendee and the MDEA are asking to have continue.*

> Response: This request is being denied. It is a past practice, which we no longer wish to continue. Under Section 10.3 of the collective bargaining agreement, we are notifying the MDEA that starting July 1, 2001, we will not be granting noncompensated personnel leave. This practice denies Markesan students the opportunity to study directly with their teacher and is, therefore, not a practice that should be continued. The education association will be given an opportunity to discuss this matter.

By stating that the "Association will be given an opportunity to discuss the matter," the District Administrator gave notice to the Association that the District was willing to discuss the matter. Such notice was also provided in the Board of Education's Step Four Response to the grievance, which states, inter alia:

> . . . Indeed, Ms. Alexander's letter to you dated March 29, 2001 states the reason for discontinuing this practice and invited you to discuss this matter. The District remains willing to discuss this issue with you.

The Association received the March 29th "Memo" on March 29, 2001, which is three months before the date on which the District was to discontinue the practice. The Association received the Board's Fourth Step response no later than May 1, 2001.

In summary, the Section 10.3 "change" that is the subject of this dispute is the District's discontinuation of the past practice on non-compensated personal leave. The District Administrator's "Memo," as well as the Board's Fourth Step grievance response, establishes that, several months prior to the effective date of this "change," the District notified the Association of the "change"; stated a reason for the "change"; and confirmed its willingness to discuss the "change." The record provides no reasonable basis to conclude that the statements indicating a willingness to discuss the "change" were made in bad faith. By indicating that it was willing to discuss the change, the District provided the Association with "an opportunity to discuss the matter." As the District argues, it has complied with the notification requirements of Section 10.3.

As a review of the Step Four Response to the grievance discloses, the District's Board of Education had knowledge of the District Administrator's "Memo" of March 29, 2001 and confirmed that this memo involved the exercise of the District's Section 10.3 rights to discontinue any non-compensated leave practice. Accordingly, the undersigned is satisfied that, in issuing the "Memo" of March 29, 2001, the District Administrator acted on behalf of the Board of Education. Thus, notwithstanding the Association's suggestions to the contrary, the Section 10.3 "change" was subject to the Board's "direction and control."

Given the fact that Board policy expressly provides the "superintendent" with discretion to grant or deny non-compensated absences of short duration, there is no merit to the Association's argument that the past practice is written in the Board Policy. It may be true, as the Association argues, that "formal" action is required to discontinue a Board policy. The undersigned notes, however, that neither the District Administrator's "Memo" of March 29th, nor the Board's Fourth Step grievance response, discontinued the Board policy on non-compensated leave. Rather, the District discontinued a "past practice" on non-compensated leave pursuant to Section 10.3. Section 10.3 does not require "formal action" by the Board to discontinue the "past practice."

Given its compliance with Section 10.3, the District has the contractual right to discontinue the past practice on non-compensated personal leave, effective July 1, 2001. While the parties may discuss this discontinuation at the bargaining table, the District's right to discontinue the practice is not contingent upon such discussions taking place at the bargaining table. Nor is the District's right to discontinue the practice contingent upon the parties reaching an agreement on a discontinuation of, or change in, the practice. The reason being that the District bargained the right to discontinue the past practice when the parties previously agreed to the language of Section 10.3.

In its brief, the District argues that Board Policy II, K, 2(a) remains in effect. As the Association argues, this argument appears to be inconsistent with the March 29th "Memo" which indicates that, effective July 1, 2001, "we will not be granting noncompensated personnel (sic) leave." Given the fact that this statement was made within the context of the District Administrator's discussion of "past practice," the undersigned is not persuaded that the District Administrator was stating that she would exercise the discretion granted to her under the Board Policy by denying all short duration non-compensated absences.

The reason for the District's decision to discontinue the past practice under Section 10.3 was that it denies Markesan students the opportunity to study with their teachers. Hendee's request for non-compensated leave was, in fact, a vacation request. A decision that the District's interest is better served by having a teacher in the classroom, rather than on vacation, is not arbitrary, capricious or discriminatory. Thus, the District Administrator did not abuse her discretion under the Board policy when she denied Hendee's request for non-compensated leave.

Conclusion

At the time that the parties entered into their 1999-01 collective bargaining agreement, the parties had a clear, consistent and mutually understood past practice on non-compensated leave requests. During the term of the parties' 1999-01 collective bargaining agreement, the District discontinued this practice effective July 1, 2001. Section 10.3 of the parties' collective

bargaining agreement provides the District with the authority to discontinue this practice effective July 1, 2001. Thus, as of July 1, 2001, the past practice was no longer in effect and was no longer binding upon either party.

Hendee's right to take non-compensated leave is governed by the contractual rights that are in effect at the time of the leave. At the time of hearing, the parties were in consensus bargaining on a successor agreement. It may be that the successor agreement will provide Hendee with a right to take the non-compensated leave that he is seeking. However, for the reasons discussed above, such a right is not provided by Article IX of the 1999-01 collective bargaining agreement, or any practice that is binding upon the parties.

Neither the grievance documents, nor the statements of the issue presented by the parties at hearing, reference Sec. 111.70, Stats., or present any claim that the District has acted in a manner that violates MERA. The District, in its brief, avers that the Association has not alleged that the District has violated Sec. 111.70, Stats. The Association, in its brief, acknowledges that it has not alleged a violation of Sec. 111.70, Stats. Accordingly, the undersigned has not addressed any argument regarding the District's statutory duty to bargain, including the District's statutory duty to maintain the status quo on mandatory subjects of bargaining during a contract hiatus period.

Based upon the above, and the record as a whole, the undersigned issues the following:

AWARD

1. The District did not violate Article IX of the collective bargaining agreement, or any binding past practice, when it denied Tom Hendee's request for non-compensated leave for November 26-30, 2001.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 1st day of November, 2001.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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