BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WEST CENTRAL EDUCATION ASSOCIATION –
NEW RICHMOND TEACHER ASSISTANT/AIDE UNIT

and

NEW RICHMOND SCHOOL DISTRICT

Case 49
No. 59896
MA-11449

(Sandi Skramstad Funeral Leave Grievance)

Appearances:

Mr. Brett J. Pickerign, Executive Director, West Central Education Association, 105 21st Street North, Menomonie, Wisconsin 54751, appearing for the Association.

Mr. James A. Wold, District Administrator, School District of New Richmond, 701 East Eleventh Street, New Richmond, Wisconsin 54017, appearing for the District.

ARBITRATION AWARD

The Association and the District are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Association and the District jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned as Arbitrator to resolve a dispute as set forth below. By letter dated July 5, 2001, the Commission appointed the undersigned as Arbitrator. Hearing on the matter was held on August 22, 2001, at the School District Office, New Richmond, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on September 28, 2001.

After considering the entire record, I issue the following decision and Award.

STIPULATED ISSUES

1. Did the New Richmond School District violate the collective bargaining agreement in only allowing Sandi Skramstad one day of funeral leave to attend the funeral of her father-in-law in New Richmond, Wisconsin?

2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND

On November 15, 2000, Sandi Skramstad, hereinafter the "Grievant," called the District and informed them that she would not be in due to the death of her father-in-law. The Grievant spent the following days preparing for the funeral services and grieving with her family. She attended a visitation on Friday, November 17, 2000. The funeral service was held in New Richmond on Saturday, November 18, 2000.

The Grievant returned to work the following week. She was unsure as to the number of funeral days that she was entitled to take under the contract. She asked the Principal of her building and was ultimately referred to Human Resources Director Brian Johnston. Johnston informed the Grievant that she would be eligible for one day of funeral leave since the funeral was in town. Johston also informed her that three days were available if travel was involved in attending the funeral. The Grievant then requested one day of funeral leave, based upon Johnston's recommendation.

Thereafter, the Grievant consulted the collective bargaining agreement and saw that the contract stated that "not more than three days" could be taken. She also talked with other employees. She found no one who had only received one day off for a funeral in New Richmond. She also heard from a number of people who had received three days off for a funeral in New Richmond.

She next asked her union steward, Barb Gharrity, about this provision of the contract. Gharrity stated that it was her belief that the Grievant should have been eligible to take all three days as funeral leave days.

The Grievant then wrote a letter to Johnston dated December 9, 2000 stating that it was her belief that she was entitled to take three days under the collective bargaining agreement. She added that she did not see where the contract limited her to only one day of leave because the funeral was held in town.

Johnston replied by letter dated January 2, 2001, stating that "the contract allows you up to three days to attend the funeral using funeral leave. As you stated, you needed time to grieve and I do not doubt your sincerity." Johnston added that the agreement "is designed to make sure you have enough time to get to the funeral and back for work. Additional personal or sick days may be used if you are distraught and cannot return to work."

West Central Education Association Executive Director James H. Begalke then wrote a letter dated January 3, 2001, to Johnston asking whether the District was applying the same standard to all the employee groups in the District with similar funeral leave language.

Johnston responded by letter on February 1, 2001, stating in relevant part:

> It is the boards (sic) belief that based upon the language in the contracts for the various groups, the language allows individuals the time to attend a funeral but does not include extra time to grieve. The reason three days are given is to account for travel time if longer distances are involved. This language is only for the funeral day and does not count reasonable grieving time for which sick days exist. This is always a tough one for supervisors to deal with as when time is needed it is a very emotional time for the subordinate.
>
> I believe I did mention to you that the custodians currently get 3 days in any case because of a maintenance of standards clause in the contract, however, the board has repudiated this practice. As a result, the custodians are negotiating a change in the language of their contract. Also, the Food Service staff receive 3 paid days for the death of the immediate family.
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> . . .

Johnston also discussed the matter with the principals to see if they had applied any form of uniform standard in granting funeral leave. The principals did not follow a uniform standard but approved funeral leave for a variety of different reasons. Johnston attempted without success to find consensus with the principals as to how funeral leave would be granted. He then left it up to the building principals as to how they would apply the funeral leave provision.

Johnston subsequently spoke with West Central Education Association Executive Director Brett J. Pickerign and informed him that there was no consensus on how to treat everyone regarding the use of funeral leave.

Thereafter, by letter dated February 28, 2001, Sandi Skramstad filed a grievance over the District's failure to credit her with the appropriate amount of funeral leave. In said grievance, she stated that other bargaining units had the same language in their contract and were allowed to take up to three days for funeral regardless "of if they are in or out of town." She added: "I feel that the administration violated the collective bargaining agreement when it created a new standard for deciding when an employee is eligible to take three funeral leave days." She concluded: "As a result of the District's actions, I was forced to take two sick days to mourn." For a remedy, she requested "that the District credit me 2 days of sick leave that I was incorrectly charged to attend the funeral of my father-in-law."

By letter dated March 6, 2001, Dr. Jim Wold, District Administrator, responded that he interpreted "the phrase 'to attend the funeral' to mean the time necessary for one's physical presence at the funeral service." He stated: "Whether the funeral is 'in town' or 'out of town' is only significant in determining the time required attending to the funeral." He added: "For the grieving process that we know is often associated with the death of a close relative, other types of leave are available depending on the employee group and the contract." He therefore denied the grievance.

The Association then appealed to the Board on behalf of the Grievant with a level three grievance on March 9, 2001. The Board denied the grievance on April 11, 2001. The Association then filed for Arbitration in a letter to the Wisconsin Employment Relations Commission on April 23, 2001.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 1 – MANAGEMENT RIGHTS CLAUSE

> The Board's right to operate and manage the school system is recognized, including the determination and direction of the teacher assistant/aide work force, the planning, direction and control of school activities, the assigning of workloads, and the determination of methods and procedures to be used. The Board's obligation and right to maintain an effective school system is recognized, including the right to create, revise, and eliminate positions, to establish and require the observance of reasonable rules and regulations, to select and terminate staff, and to discipline and discharge staff for cause.

. . .

ARTICLE 12 – ABSENCES

A. Sick leave shall be granted as follows: Twelve (12) days per year accumulative to one hundred twenty (120) days. Employees hired after July 1, 1993, shall receive ten (10) sick leave days annually to a maximum accumulation of one hundred twenty (120) days. This may be used for personal illness or immediate family illness. Prior approval of the superintendent is required in cases of family illness in order that sick leave may be obtained. The immediate family shall be considered a spouse, son or daughter. Employees who have accumulated one hundred and twenty (120) days shall be paid $25.00 per day for each unused sick day remaining at the end of each year. No employees shall be paid for more than twelve (12) such days in any one year. Payment shall be made before June 30.

Pregnancy shall be treated as any other illness or disability; however, a doctor's written statement is required certifying the time it is necessary for the employee to be away from her duties.

Retiring employees shall be paid $25.00 per day for unused sick leave if they have accumulated a minimum of one hundred (100) days after twenty (20) years of service in the district or at age fifty (50).

B. Employees shall be allowed one (1) day per year for emergency leave or to conduct personal business. After ten (10) years of experience employees shall be allowed two (2) days per year for emergency leave or to conduct personal business. This leave is cumulative to ten (10) days and shall be charged against an employee's days of accumulated sick leave. In cases involving two (2) or more days of leave or leave immediately before or after a scheduled vacation, the employee shall secure prior written authorization from the Superintendent.

C. In the case of death of any member of the immediate family, a leave of not more than three (3) days shall be granted to an individual employee to attend the funeral. The immediate family shall be considered a spouse, a son, daughter, mother, father, sister, brother, grandparent, mother-in-law, father-in-law, grandchild, or other relative living with the employee. Such leave is not considered sick leave nor is it cumulative. All other funerals are covered under Article 12(B).

POSITIONS OF THE PARTIES

Association's Position

The Association makes the following principal arguments in support of its position.

The District, by granting the Grievant only one day of funeral leave and requiring her to take two sick leave days to cover for the time she took off to grieve and make funeral arrangements, has violated the clear and unambiguous language of Article 12, Section C.

The District's interpretation of the single phrase "to attend the funeral" leads to harsh, absurd and nonsensical results. For example, the Association asks why does the aforesaid contract provision refer to three days of leave if no one would ever take those days since few, if any, funeral ceremonies last three days. The Association points out that even the District agrees that the phrase "to attend the funeral" must be given a broader meaning than mere "physical presence at the funeral service" since it admits that transportation time to and from the funeral should be counted under the funeral leave provision. (The language in the contract contains no language giving the District the right to grant funeral days based upon the distance of the employee from the funeral.) The Association notes that under the District's interpretation the phrase does not include such actions as calling relatives, prayer, visitation, attending the wake, meeting with the funeral director, mourning or any other action often taken subsequent to a loved one's demise. The Association adds that if one accepts the definition offered by the District, the Grievant would not have qualified for any funeral leave since in her case all the applicable activities took place on a Saturday. Finally, the Association points out that under the District's interpretation an employee who lost a relative from out of town, whom they had never met, would always have more time to grieve than an employee who suffered the death of a close relative that resided with the employee.

It is the duty of the Arbitrator to ascertain the intent of the parties at the time they drafted the agreement. The Association's interpretation of the phrase "to attend the funeral" is broader than the District's and incorporates other activities one may undertake for the purpose of preparing for and attending the funeral as noted above. This is the interpretation the bargaining parties originally agreed to and that has been historically honored by the District in enforcing identical language in the other collective bargaining agreements with other employees.

The District's interpretation of the aforesaid phrase is an attempt to carve out a contractual power that was never intended by either bargaining party. In addition, "the fact that they have only recently thought of the interpretation and applied it to the funeral leave provision justifies a rejection of it." Even if the District's action is "taken as a managerial

right to amend a work rule it alters a condition of employment in a contract and must first be bargained." MINERAL POINT SCHOOL DISTRICT, Case 22, No. 56389, MA-10259 (Hahn, 9/98).

The District first began to seek a way to limit funeral leave days during the last round of negotiations with the custodial unit. This has not been the subject of negotiation or discussed at the bargaining table with the Teacher Assistant/Aide Unit. The District has three other bargaining units that have identical language in their labor contracts regarding funeral leave and a non-organized unit that has different language. All units have been allowed to take three days funeral leave regardless of the location of the funeral. It is not logical to assume that the District would negotiate identical language with all the groups if it intended to apply a different standard to one of the units. The District should not be allowed to gain through grievance arbitration this new restriction on use of funeral leave when it has openly acknowledged that it must gain it through bargaining with its custodial unit.

It is unfair that the District applies different standards to different employees when a benefit is articulated in the collective bargaining agreement in identical language. The fact that teachers, secretaries and teacher assistant/aides are all represented by WCEA, the same bargaining agent, should be further evidence that identical language should be interpreted in the same manner. The District has not attempted to apply this new restriction against the teachers and acknowledges that they can only change it through bargaining with the custodians. It appears even more unfair when the one group of employees that is not organized has not given up its right to take three days of funeral leave even though the District has the right to unilaterally change their benefit. This suggests anti-Union animus. All units with identical language must be treated the same.

Based on the foregoing, the Association asks the Arbitrator to sustain the grievance and to rule that the District violated Article 12, Section C, of the agreement when it granted the Grievant only one day of funeral leave when she was absent for three days to attend the funeral of her father-in-law. The Association also requests that the Arbitrator order the District to credit the Grievant the two sick leave days that she was improperly charged to attend her father-in-law's funeral.

District's Position

The District first argues that its action was consistent with the clear and unambiguous language of the contract. In support thereof, the District points out that Article 12, Section C of the agreement states that in the case of the death of an immediate family member "a leave of not more than three (3) days will be granted to attend the funeral."

The District maintains that the phrase "not more than three days" clearly puts forward three considerations for granting leave. One, said language provides no "automatic" leave of three days to attend an immediate family member's funeral. Two, the language restricts the District from granting more than three days to attend a funeral of a member of the immediate family. (Emphasis in the original). Three, the aforesaid clear language requires the use of a reasonable standard of judgment, in this case location of the funeral ceremony, to determine the amount of time required for a unit employee to attend the funeral.

The District also points out that the agreement specifically states that funeral leave will be granted "to attend the funeral." The District states that it has consistently interpreted this phrase to mean one's physical presence at a "funeral", that is the ceremony for a dead person before burial or cremation. In the case of a funeral in New Richmond, the District believes that it acted reasonably in granting one day to attend that ceremony.

The District notes that the Grievant stated at hearing that she needed the full three days for the "funeral and grieving and the amount of work she had to do for the family." The District points out that the agreement addresses the possible need for employee time off due to emotional distress or other activities related to the death of a close relative. In particular, the District states the agreement provides "emergency leave" in Article 12, Section B and, in the case of emotional distress, "sick days" in Section A of the same Article for such purposes. The District concludes that the Grievant had sick days available to her to use for the above mentioned reasons.

The District next argues that its decision was consistent with its management rights and was not arbitrary and capricious.

In support thereof, the District points out that Article 1 of the agreement reserves for the School Board the right to require the observance of reasonable rules and regulations, as well as the Board's obligation and right to maintain an effective school system.

The District reiterates that it is acting reasonably by using the criteria of travel distance to determine how much leave time is needed "to attend the funeral" for an immediate family member. The District adds that because other leaves are available in the contract to address grieving or preparation issues related to a family death raised by the Grievant, it was not punitive or arbitrary in applying the travel distance standard and limiting the time allowed to that reasonably required to attend the funeral.

Finally, the District argues that there is no past practice between the parties with respect to the disputed language. In this regard, the District points out that the case at hand is one of first impression between the District and the Teacher Assistant/Aide bargaining unit. The District also claims that examples of past practice referenced to the Teacher Unit at the

hearing are irrelevant and non-binding since the teachers are not a party to the disputed agreement.

For the reasons set forth above, as well as the record evidence, the District requests that the Arbitrator dismiss the grievance in its entirety.

DISCUSSION

At issue is whether the New Richmond School District violated the collective bargaining agreement by only allowing Sandi Skramstad one day of funeral leave to attend the funeral of her father-in-law in New Richmond, Wisconsin.

The Association argues that the District violated the agreement by its action while the District takes the opposite position.

The Association first maintains that the clear language of Article 12, Section C provides that any employee who suffers the loss of an immediate family member and takes time off to attend the funeral shall be granted funeral leave for the days missed not to exceed three days. The Association opines that the District violated the clear language of the aforesaid contractual provision when it granted only one day of funeral leave and required the Grievant to use two sick leave days to cover for the time she took off to grieve and make funeral arrangements.

The first sentence of Article 12, Section C, poses the interpretive issue, and cannot be considered clear and unambiguous since both parties have made plausible, but conflicting, arguments regarding its interpretation. The ambiguity flows from the references to "not more than three (3) days" and to the phrase "to attend the funeral." Read together, the references limit the funeral leave benefit to three days, as pointed out by the parties, but do not specify the scope of the limitations, or who determines them. The three-day cap may imply the District must approve funeral leave requests, or that the three days are taken at the employee's discretion. The Association believes that the Grievant has an unrestricted right to three days of funeral leave to make funeral arrangements, to attend the funeral and to grieve. Under the District's view, the Grievant has a restricted right consisting of, at most, two days for travel to and from the funeral, and one day for the funeral itself. Furthermore, the reference to funeral attendance limits the purpose for which the leave may be taken. The reference cannot be considered clear, however, for it is undisputed that employees in other bargaining units with the same or identical contract language have been granted three days of funeral leave where the funeral required virtually no travel at all.

Past practice and bargaining history are appropriate guides to resolve contractual ambiguity.

The Association argues that it is a practice in other bargaining units represented by the Association and with identical contract language to grant three days of funeral leave upon request regardless of where the funeral is located. However, the practice in other bargaining units is not binding in this unit unless there is a showing that the parties have mutually considered this bargaining unit to be linked to the other District bargaining units represented by the Association, so that a practice that developed under a provision in the contract covering one unit was mutually understood to apply to all of the units with the same or similar language. BROWN COUNTY (SHELTER CARE), Case 568, No. 52478, MA-8989 (Shaw, 4/96). There has been no such showing in this case. In addition, the record is undisputed that no relevant past practice exists that would serve as a guide in interpreting this language within the collective bargaining agreement for the Teacher Assistant/Aide Unit. (Emphasis added). Therefore, the record does not support a finding that there is a binding past practice under the agreement covering this bargaining unit providing that an employee is to be granted funeral leave upon request regardless of where the funeral is located.

The Association also argues that the District's interpretation of the disputed contractual provision is an attempt to carve out a contractual power that was never intended by either bargaining party. However, the Association never introduced any persuasive evidence of bargaining history that supports this argument. Nor did the Association offer any evidence of bargaining history that would support its interpretation of the disputed contract language. Therefore, the Arbitrator also rejects this argument of the Association.

The Association cites a number of rules of contract interpretation to support its interpretation of the disputed contract language. Over the years, arbitrators have looked to the principles of contract interpretation for guidance in interpreting collective bargaining agreements. However, the principles of contract interpretation serve only as guides and should not be used as rigid or undeviating rules to be followed as methodically as though labor relations were an exact science. *Labor and Employment Arbitration, Volume 1*, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 9, "Contract Interpretation and Respect for Prior Proceedings", by Jay E. Grenig, s. 9.01[1], 9-3 and 9-4 (1998).

Cases involving funeral leave provisions have turned upon the precise wording of the funeral leave or "bereavement" pay clauses, and arbitrators appear to be inclined toward strict construction of such clauses. Elkouri and Elkouri, *How Arbitration Works*, (BNA, 5th Ed., 1997), p. 1040.

In the absence of past practice or bargaining history to the contrary, the Arbitrator finds that the Grievant's request for three days of funeral leave unpersuasively reads the limitations stated in the first sentence of Article 12, Section C out of existence. The grievance seeks an automatic entitlement to three days of funeral leave. This is inconsistent with the express

reference to "not more than three (3) days". More significantly, this reads the reference to "to attend the funeral" out of existence since there is no question the Grievant attended the funeral on one day only. WAUSHARA COUNTY, Case 42, No. 47317, MA-7230 (McLaughlin, 7/92).

The District's application of Article 12, Section C is more compatible with the contract language. The provision provides that in case of death of any member of the immediate family, a leave of not more than three (3) days shall be granted to an individual employee to attend the funeral. (Emphasis added). The provision does not state that an employee shall be granted three (3) days to attend the funeral. (Emphasis added). The words "not more than" imply a certain amount of discretion on the part of the District in granting funeral leave. To deny the District this discretion effectively eliminates the express limitation that funeral leave is granted an employee "to attend the funeral" in "the case of death of any member of the immediate family." WAUSHARA COUNTY, *supra*.

In the instant case, the Association points out that there are no words in the agreement that state management has the discretion of awarding funeral leave based on the amount of travel involved. However, where the contract specifically states that a certain number of days of paid leave will be allowed to attend the funeral of a member of the employee's immediate family, arbitrators have held that leave provision includes attendance at the funeral and necessary travel time but does not contemplate absences to aid bereaved relatives or to attend to the estate. (Emphasis added). Elkouri and Elkouri, supra.

The Association also points out that under the District's interpretation of the disputed contract language the phrase "to attend the funeral" leaves out many important functions such as preparation for the funeral and grieving. The Association adds that the District's interpretation can sometimes lead to absurd results. However, as noted above, arbitrators strictly construe funeral leave provisions. Typically, funeral leave is distinguished from bereavement leave by being tied to attendance at the funeral of the deceased; bereavement leave is usually somewhat broader in its scope. *Labor and Employment Arbitration*, *Volume 2*, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 30, "Leaves of Absence", by Andria S. Knapp, s. 30.05, 30-26 (2001).

The Association further argues that even if the District's actions were taken as a managerial right to amend a work rule it alters a condition of employment in a contract and must first be bargained. MINERAL POINT SCHOOL DISTRICT, *supra*. The Association points out that in MINERAL POINT SCHOOL DISTRICT the Employer was prevented from unilaterally altering the definition of emergency leave where it conflicted with the contract.

In MINERAL POINT SCHOOL DISTRICT Arbitrator Paul A. Hahn found that the District violated the collective bargaining agreement when it denied emergency leave to three employees. In said case, the agreement stated that in the event of a serious illness involving a

member of the immediate family an employee would be allowed up to three (3) days leave per year with pay. The agreement defined serious illness as "confinement, personal care or hospitalization." The Superintendent, however, issued a memorandum to staff setting forth guidelines that dealt with emergency leave. He defined emergency as "an unexpected happening or condition calling for prompt action." He further defined emergency to depend on the "immediacy" of the situation. When the Superintendent denied a request for emergency leave under the aforesaid guidelines, the Association filed a grievance.

Arbitrator Hahn found the Association's arguments persuasive based on clear contract language and past practice. In particular, Arbitrator Hahn found that, except in one instance, the District granted emergency leave based on the employee's decision to request it. Arbitrator Hahn also found that the agreement clearly defined "emergency", and that the District's guidelines conflicted with those contract terms. Based on the foregoing, Arbitrator Hahn concluded that the District violated the agreement when it denied emergency leave to the aforesaid employees based on guidelines which conflicted with both clear contract language and past practice.

In the instant case, there is no clear contract language, unlike MINERAL POINT, which supports the Association's position. Nor is there any past practice upon which the Association can rely in support of its contention that the Grievant should have been granted three days of funeral leave. Unlike MINERAL POINT, the District herein did not refuse to grant funeral leave in violation of the contract. In addition, the District's action in denying the Grievant two days of funeral leave for the reasons stated do not affect a condition of employment in the contract (when funeral leave can be used) and, therefore, there is no duty to bargain.

Finally, the Association argues that the Grievant had a right to take funeral leave for the visitation. Article 12, Section C provides leave "to attend the funeral." However, as noted above, this contractual phrase is ambiguous. Nor does past practice or bargaining history shed light on its meaning. Funeral is defined as "the ceremonies held in connection with the burial or cremation of the dead." *The American Heritage Dictionary of the English Language, New College Edition*, (10th Ed. 1981) p. 539. Visitation certainly is such a ceremony. The Grievant attended a visitation on Friday, November 17, 2000, prior to the funeral on Saturday. However, there is no evidence in the record that she attended this visitation during work hours. Where the language used is "pay for time lost" or "paid leave of absence" while attending the funeral of a family member, arbitrators generally have denied such pay when the employee was already on vacation or otherwise not scheduled to work. Elkouri and Elkouri, supra, p. 1041 and cases cited therein. Exceptions occur only where the contract language is less specific than the aforementioned contract language (which is similar to the language of Article 12, Section C) or where there is a conflicting practice. CITY OF MANITOWOC (WASTEWATER TREATMENT PLANT), Case 122, No. 53142, MA-9250 (Honeyman, 5/96). In the instant case, there is no conflicting practice. Therefore, the Arbitrator likewise rejects this argument of the Association.

The District points out that Article 1 of the parties' collective bargaining agreement reserves for the School Board the right to require the observance of reasonable rules and regulations, as well as the Board's obligation and right to maintain an effective school system. The District argues that it acted reasonably by using the criteria of travel distance to determine how much time is needed "to attend the funeral" for an immediate family member. Based on the foregoing, and the entire record, the Arbitrator agrees.

Based on all of the above, and absent any persuasive evidence or argument to the contrary, the Arbitrator finds that the answer to the issue as framed by the parties is NO, the New Richmond School District did not violate the collective bargaining agreement in only allowing Sandi Skramstad one day of funeral leave to attend the funeral of her father-in-law in New Richmond, Wisconsin.

In reaching the above conclusion, the Arbitrator has addressed the major arguments of the parties. All other arguments, although not specifically discussed above, have been considered in reaching the Arbitrator's decision.

Based on all of the foregoing, and the entire record, it is my

AWARD

That the grievance filed in the instant matter is denied and the matter is dismissed.

Dated at Madison, Wisconsin this 14th day of November, 2001.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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