BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN RAPIDS SCHOOL DISTRICT

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 95, AFL-CIO

Case 56
No. 60279
MA-11569

(Sick Leave Allocation/Health Insurance Contributions Grievances)

Appearances:

Shneidman, Hawks & Ehlke, S.C., by **Attorney Bruce F. Ehlke,** 217 South Hamilton, P.O. Box 2155, Madison, WI 53701-2155, appearing on behalf of OPEIU, Local 95.

Ruder Ware, by **Attorney Jeffrey T. Jones**, 500 Third Street, P.O. Box 8050, Wausau, WI 54402-8050, appearing on behalf of the District.

ARBITRATION AWARD

The Board of Education of the Wisconsin Rapids Public Schools (hereafter District) and Office and Professional Employees International Union, AFL-CIO, Local 95 (hereafter Union), are parties to a collective bargaining agreement coving the years 1998-2001, which provides for final and binding arbitration of grievances. Pursuant to a joint request of the parties to the Wisconsin Employment Relations Commission, Sharon A. Gallagher, was requested to hear and decide two disputes between the parties regarding the District's method of calculating sick leave entitlement and health insurance contributions for bargaining unit employees. The hearing was originally scheduled for November 28, 2001, but was postponed to January 15, 2002, and continued on February 28, 2002. A stenographic transcript of the proceedings was made and received by the undersigned on March 5, 2002. The parties submitted initial and reply briefs, the last of which was received on May 22, 2002, whereupon the record herein was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties were unable to stipulate to an issue or issues before the Arbitrator. The Union suggested the following issues:

> 1. Did the Employer breach the collective bargaining agreement when, in calculating the employees' actual hours of normally scheduled work per day for purposes of sick leave, it averaged the employees' hours using a five-day work week regardless of the actual work week of the employee? If so, what is the appropriate remedy?
>
> 2. Did the Employer breach the collective bargaining agreement when, in calculating whether the employees work six or more hours per day for purposes of health insurance, it averaged the employees' hours using a five-day work week regardless of the actual work week of the employees? If so, what is the appropriate remedy?

The District suggested the following issues for determination:

> Did the School District violate the collective bargaining agreement by the method it used to compute the School District's health insurance contribution toward the cost of the employees' health coverage and sick leave accrual? If so, what is the appropriate remedy?

The parties stipulated that the Arbitrator could frame the issues in this case based upon the suggested issues of the parties as well as the relevant evidence and argument in the case. Based upon a consideration of the parties' issues and the relevant evidence and argument in this case, the undersigned finds that the District's issue reasonably states the controversy between the parties and it shall be determined herein.

RELEVANT CONTRACT PROVISIONS

ARTICLE II

DEFINITIONS OF EMPLOYEES

Section 201 – Regular Full-time

Employees in this category shall include those employees who are assigned to a position on a full-time basis (seven or more hours per day) for the full calendar year.

Section 202 – Regular Part-time

Employees in this category shall include those employees who are assigned to a position for less than a full schedule of hours (less than seven (7) hours per day) for the full calendar year.

Section 203 – School Year Full-time

Employees in this category shall include those employees who are assigned to a position on a full-time basis (six (6) hours or more per day), for a duration that ranges from approximately thirty-six (36) to forty-five (45) weeks of work per academic year.

Section 204 – School Year Part-time

Employees in this category shall include those employees who are assigned to a position for less than the full schedule of hours (less than six (6) hours per day) for a duration that ranges from approximately thirty-six (36) to forty-five (45) weeks of work per academic year.

Section 205 – Temporary

A temporary employee is defined as a non-bargaining unit employee who is hired for a period of not more than ninety (90) days unless by joint agreement between the Board and the union.
The Board shall notify the union whenever temporary employees are hired.
The Board agrees that no temporary employees will be utilized to eliminate any bargaining unit jobs.

ARTICLE III

MANAGEMENT RIGHTS

Section 301 – General

Except as otherwise specifically provided in this Agreement, the Board retains all rights and functions of management and administration that it has by law and the exercise of any such rights or functions shall not be subject to the grievance procedure.

Section 302 – Management Rights

Without limiting the generality of the foregoing Section 301, the Board's prerogatives shall include:

302.1 – The management and operation of the school and the direction and arrangement of all the working forces in the system, including the right to hire, suspend, discharge, discipline or transfer employees.

302.2 – The right to relieve employees from duty for poor or unacceptable work for other legitimate reasons.

302.3 – The right to determine location of the schools and other facilities of the school system, including the right to establish new facilities and to relocate or close old facilities.

302.4 – The determination of the layout and the equipment to be used and the right to plan, direct and control school activities.

302.5 – The determination of the management, supervisory or administrative organization of each school or facility in the system and the selection of employees for promotion to supervisory, management or administrative positions.

302.6 – The determination of the size of the working force, the allocation and assignment of work to employees, the determination of policies affecting the selection of employees, the establishment of quality standards, and the judgement of employee performance.

302.7 – The maintenance of discipline and control and use of the Board's property and facilities.

302.8 – The determination of safety, health and property protection measures where legal responsibility of the Board or other governmental unit is involved.

302.9 – The right to enforce the rules and regulations now in effect to establish new rules and regulations from time to time not in conflict with the Agreement.

ARTICLE V

WORKWEEK, WORKDAY AND DUTIES

Section 501

501.1 – Work Year – All employees who are not employed on a twelve month basis, who have not been discharged or laid off, shall be employed the subsequent school year; however, it is understood that employees may be subject to layoff at any time.

501.2 – Workweek – The Board reserves the right to identify the workweek for each of the employee groups. The length of the workweek may vary with the positions.

. . .

ARTICLE VII

LEAVES

Section 701

A sick leave day for the purposes of this contract is hereby defined as being equivalent to the employee's actual hours of normally scheduled work per day excluding overtime. Sick leave shall be credited to the employee upon completion of the individual's initial day of work in each school year. This section includes new employees.

701.1 – Regular, full-time, twelve-month employees working seven (7) hours or more per day shall accrue twelve (12) days of sick leave per year worked, cumulative to one hundred-twenty (120) days.

Regular part-time, twelve-month employees working more than three (3) hours per day but less than seven (7) hours per day shall accrue twelve (12) days of sick leave per year worked, cumulative to eighty (80) days.

Full-time, school-year employees working six (6) or more hours per day shall accrue ten (10) days of sick leave per year worked, cumulative to one hundred (100) days.

Part-time, school-year employees working more than three (3) but less than six (6) hours per day shall accrue ten (10) days of sick leave per year worked, cumulative to fifty (50) days.

Part-time school-year employees working three (3) hours or less per day shall accrue five (5) days of sick leave per year worked, cumulative to twenty-five (25) days.

701.2 – It is understood that sick leave will be paid for scheduled hours of work time lost by reason of illness or injury of the employee himself. Up to two (2) days of sick leave can be used per employee per year for the care of an ill minor child(ren).

. . .

ARTICLE VIII

HOLIDAYS AND VACATIONS

Section 801 – Holidays

801.1 – Regular full-time, twelve-month employees shall be eligible for ten (10 paid holidays.

… .

When a holiday falls on an employee's regularly scheduled work day, or on a non-scheduled day, their normal daily average for the week will be paid as Holiday pay.

802.2 – Regular, full-time, school-year; regular part-time, school-year employees working more than three (3) hours per day and regular part-time, twelve-month employees working more than three (3) hours per day and less than seven (7) hours shall be eligible for six (6) paid holidays. These holidays include: Labor Day, Thanksgiving Day, Christmas Day, New Year's Day, Good Friday and Memorial Day. When a Holiday falls on an employee's regularly scheduled work day, or on a non-scheduled day, their normal daily average for the week will be paid as Holiday pay.

ARTICLE X

INSURANCE

Section 1001 – Health Insurance

The Board agrees to pay toward a health insurance plan adopted by the Board as follows:

For regular, full-time, full-year employees working seven (7) hours per day the Board will pay 97% per month toward the single health plan premium, 85% per month toward the family health plan premium, with the employee paying the balance of the cost of such coverage.

For regular, part-time, full-year employees working less than seven (7) hours but more than three (3) hours per day the Board will pay 75% per month toward the single health plan premium, 64% per month toward the family health plan premium, with the employee paying the balance of the cost of such coverage.

For regular, full-time, school-year employees working six (6) or more hours per day the Board will pay 97% per month toward the single health plan premium, 85% per month toward the family health plan premium, with the employee paying the balance of the cost of such coverage.

For regular, part-time, school-year employees working less than six (6) but more than three (3) hours per day the Board will pay 75% per month toward the single health plan premium, 64% per month toward the family health plan premium, with the employee paying the balance of the cost of such coverage.

BACKGROUND

The Union organized the bargaining unit in 1980. The parties' first contract covered the years 1981-82. At this time, all unit employees worked a set number of hours per day, five days per week. Therefore, there was no discussion between the parties at negotiations over the first contract regarding prorating benefits for employees working less than five days per week. Rather, the labor agreement was negotiated to include references to the number of hours of work "per day" of employees as a basis for benefits eligibility and accrual, without any definition therein of the phrase "per day." Both Sue Akey and Shirley Frank were on the Union's bargaining team which negotiated the parties' first contract. Akey was also Unit Chair from 1993-97. 1/ Shirley Frank was Unit Chair from 1980 through 1992-93.

1/ The local union unit chair is the functional equivalent of a local union president.

In approximately 1982-83, Akey was employed as a special education aide. She and six to eight other special education aides were then threatened with the loss of work hours such that they were to go from working five days per week, the same number of hours per day, to a four-day work week. At this time, Akey met with her department head as well as Human Resources Director Wasson; Akey agreed with management that the total number of hours worked per week should be divided by five days in the work week in order to find the number of "hours per day" for special education aides' entitlement to sick leave and health insurance. No grievance was filed by the Union regarding this matter.

Union witness Shirley Frank stated that in the mid-1980s, the District needed to cut special education aides' hours, so that they would work less than five days per week. At this time, Frank, Union Representative Steve Hartmann and HR Director Wasson met and resolved this difficulty by the District's offering special education aides extra hours of work in the library. By this resolution, special education aides could work up to two or three days per week in the library, for a total of five days of work per week with "enough hours in each day or in – in the average of their days, so they came up over 6 (hours per day)" so that these aides could thereby "continue with their benefits" (Tr. 78). Frank stated herein that this is how she learned that the District had been calculating benefits for unit employees by using the number of hours worked in a week and dividing by five days per week to get an average of hours. Frank also stated that "it was agreed upon to average hours" for unit employees at this time (Tr. 86-87). 2/

2/ Frank was unaware of Akey's arrangement with management in 1982-83. It is unclear whether Akey's 1982-83 situation was in fact the same incident Frank described as having occurred in the mid-1980s. It does not appear so to this Arbitrator.

In approximately 1987, the School District created Early Childhood Aide positions, to work four days per week. At this time, Akey was a union official and was aware that the District averaged early childhood aide employees' work hours for eligibility for health insurance and sick leave benefits — dividing their hours worked per week by five days per week as the District had done in the past (Tr. 153-155; 179-180). The Union did not challenge the District's averaging method at this time. Akey stated that she shared information regarding early childhood aide hours being averaged with members of the Union's bargaining committee, including Elaine Fisa and Helen Zimmerman. 3/ (Tr. 202)

3/ Neither Fisa nor Zimmerman was called as a witness herein.

In the early 1990s, two unit employees, VanAsten and Ziegler, desired to share one job. At this time, VanAsten and Ziegler agreed to share a position which worked seven hours per day, five days per week. Frank stated she was aware that as part of the job-share agreement, the District averaged the hours of VanAsten and Zielgler in figuring health insurance and fringe benefits. Frank also stated herein that she knew that the District used the same calculation method for VanAsten and Ziegler it had used with special education aides in the mid-1980s. The Union did not object to the treatment of VanAsten and Ziegler, neither of whom received full benefits or full health insurance during their job-share. (Tr. 81, 91-92, 157-159, 168, 186)

In the early 1990s, unit employee Sue Breese approached Union official Sue Akey about Breese's fringe benefits. At this time, Breese worked less than five days per week and her hours were averaged to determine her benefit levels. Akey advised Breese to seek more hours of work if she wanted greater benefits (Tr. 159-162, 180-182 and Tr. Vol. 2, 15). Akey stated that she spoke to Unit Chair Shirley Frank 4/ and to Union Business Agent Sam Froiland and advised them of her conversation with Breese. 5/

4/ Frank does not recall this conversation.

5/ Neither Breese nor Froiland was called as a witness herein.

The Union Business Agent for the years 1993-98 was Gary Nuber. Akey told Nuber during preparations for contract negotiations in either 1993 or 1995 about the District's method of averaging employee work hours for purposes of determining benefit levels. (Tr. 162-163, 183 and Tr. Vol. 2, 15-16, 23, 30) 6/

6/ Nuber stated herein that he did not recall having such a conversation or conversations with Akey but that such could have occurred (Tr. Vol. 2, 5-6, 9-11). Therefore, I have credited Akey on this point.

Akey also stated that each year, she and Nuber examined fringe benefits of employees when employees were reclassed by the District (typically, one-third of all unit positions reclassed each year) (Tr. Vol. 2, 15-16, 30). Finally, Akey stated that she transmitted all of her union documents to Maureen Hodgeson when she (Akey) left the Unit Chair position. Maureen Hodgeson was Unit Chair after Akey was defeated in an election in January, 1998. Hodgeson did not testify herein and none of the union documents Akey referred to was placed in the record. Akey stated that the documents she transmitted included documents showing when employees were hired and transferred, which often listed their work hours as "day average" (Tr. 164-166, 190-192).

By letter dated July 6, 1998, District Superintendent Ryerson explained the District's position concerning a grievance field by Sue Breese concerning her allegation she was entitled to personal leave, as follows:

. . .

> On Monday, June 29, 1998, at 7:30 a.m. a meeting was held in my office to hear a grievance at Step 2 of the grievance procedure as per Section 1205 of the Collective Bargaining Agreement. Present were Wayne Pankratz, Susan Breese, and me.

. . .

> I have reviewed the information you presented to me during our meeting. I have also reviewed the nature of the grievance as filed on the June 5, 1998 form.
>
> Prior to the 1994-95 school year, Sue Breese worked 7 hours per day, 4 days per week. At that time, personal leave time was not available to her. Beginning with the 1994-95 school year and continuing through the 1995-96 school year, the hours of Sue Breese were increased by 3 hours per week. Due to that increase and due to the fact that the grievant thus worked on an average more than 6 hours per day, personal time was made available to Sue Breese and such time was approved and utilized.
>
> Beginning with the 1996-97 school year, the hours again returned to 7 hours per day, 4 days per weeks. [sic] Consistent with past practice and contract language, personal leave was not made available at that time. It is our practice that personal leave not be made available to a person who works less than 6 hours per day as per the negotiated agreement. The Human Resources Director correctly applied the contract language in denying the grievance request for May 8, 1998. Therefore, the grievance is denied.

. . .

As a result of its investigation of Breese's personal leave grievance, the District discovered that Breese had underpaid her portion of health insurance premiums by more than $2,000 due to the fact that the District failed to recognize the decrease in her hours from 31 hours per week (4 days, 7 hours per day and one day, 3 hours) to 28 hours per week (4 days, 7 hours per day) effective the 1996-97 school year. The District thereafter insisted that Breese reimburse the District for health insurance premium payments it overpaid for Breese, the difference between 97% and 85% District paid premiums for that year. Ultimately, the parties were able to resolve Breese's insurance premium underpayment by her agreement to re-pay the District in accord with the following settlement agreement executed December 23, 1998:

. . .

> The Parties to the Collective Bargaining Agreement namely the Wisconsin Rapids School District "Employer" and the Office and Professional Employees International Union Local 95 "Union" in addition to Ms. Sue Breese a member of the Union, enter into the following Agreement as a full, complete and final resolution of an insurance re-payment. This situation developed over at least a two (2) year period, wherein Ms. Breese's hours of work dropped, yet the District maintained the same level of insurance contribution on her behalf as if her hours were the same. This Agreement has been reached based upon

discussions between the Union, School Administration Officials and Ms. Breese. The Parties agree that this is a non-precedent setting resolution with respect to re-payment of monies owed to the Employer and that the following conditions shall apply:

A) The total amount overpaid during the aforementioned two (2) year period by the District on behalf of Ms. Breese was $2482.46.

B) Ms. Breese will re-pay to the District 75% or $1861.65 over a three (3) year period commencing in January, 1999, with the final payment to be made December, 2001.

C) During the three (3) year re-payment period, Ms. Breese will have equal deductions made from her paychecks and will not have double deductions made during the paycheck immediately preceding her summer breaks.

D) In the event Ms. Breese severs her employment with the Employer she agrees to pay the total outstanding amount within thirty (30) days.

E) Ms. Breese will have the aforementioned insurance re-payment deductions made prior to taxable deductions.

. . .

The Board's Minutes of its July 22, 1998 closed session described, *inter alia*, the parties' agreement to changes in Section 801 for the effective labor agreement, as follows:

. . .

Section 801.1 would change the holiday pay to the normal scheduled hours if the holiday fell on a regular work day, or to the employee's normal daily average if the holiday fell on a non-scheduled day. Mr. Pankratz noted that with the current system, employees would lose pay if the previous week happened to have fewer hours due to things such as early release or a snow day.

Section 801.2 would be the same language for employees that work less than 7 hours per day.

Section 801.5 would change the language so that employees would receive holiday pay if they were on a approved unpaid leave or Workers' Compensation the day before and after the holiday.

. . .

Two District witnesses (Bailey and Heinz) stated that the District had, since at least the early 1990s, averaged unit employees hours for purposes of determining eligibility for health insurance, sick leave and holiday. Bailey and Heinz have regularly counseled new employees at the time of hire regarding their hours and benefits and they have answered questions from time to time posed by employees and managers regarding health insurance and benefits of unit employees. This evidence was corroborated by District Managers Kauth and Jorgenson.

The District also submitted voluminous documents which showed that between the years 1993 and 2001, 23 employees who worked less than five days per week, had their health insurance and fringe benefits averaged based on dividing their total regular work hours by a five-day work week. Bailey also stated that she has computed fringe benefits using the District's averaging method since she began employment in 1992 and that she was advised to do so by her predecessor who had worked for the District for 30 years prior thereto.

Union witness Mary Weaver stated herein that she has been Unit Chair from June, 2001, forward and that she has been on the union bargaining team since 1994-95. Weaver stated that she became aware that the District was employing employees less than five days per week when the case of Karen Hiti, an outside hire, arose in 1999. Weaver stated that after Hiti was hired and the Union failed to prevail on its posting grievance regarding her position, the District cut Hiti's work days to four days per week and then began averaging her fringe benefits by dividing by five days in the week. (District Exhibit 1E)

District Exhibit 1A showed that from 1993 through the school year 1995, employees Ziegler and VanAsten shared a job in which they worked 7 to 7 ½ hours per day but each received only 3.75 hours of holiday time and sick leave accrual. District Exhibits 1C showed that in August, 2000, for Cindy Milkey and Sue Reinke, the District routed a copy of their employment documents showing salary changes as well as their "average hours per day" to the "clerical union representative." In District Exhibit 1C, Tamara Rippier was shown to have worked 5.6 hours per day in the years 1995-1997. 7/ Also in District Exhibit 1E, the "clerical union representative" was copied on a November, 1999 employment document for Bonnie Grundman showing her hours and benefits. This was also true of a District Exhibit 1E document concerning Karen Hiti dated December, 1999. District Exhibit 1F and 1G, also contained documents which were given to the "clerical union representative" concerning employees Linda Dougherty and Christina Johnston in the years 2000 and 2001. Also, District Exhibit 1B showed that hours were averaged according to the District's calculation formula for the period 1993-2000. Finally, it is undisputed that every year, unit employees receive a copy of a document which lists their hours and benefits. No grievances have been filed regarding the averaging method the District has used in arriving at fringe benefits for employees working less than five days per week.

7/ No District employees were then or are now assigned to work 5.6 hours per day. This must have been the average of Rippier's hours.

On May 1, 2001, the Union filed the instant grievances regarding the District's alleged improper calculation of sick leave and health insurance benefits. The parties processed the grievances up to the arbitration step and then jointly requested that the WERC assign the undersigned to hear and resolve the cases.

POSITIONS OF THE PARTIES

The District

The District argued that applying relevant contract interpretation principles to the terms of the collective bargaining agreement would require a conclusion that no contract violations have occurred in these cases. In this regard, the District noted that the evidence herein showed that Akey's hours had been cut in 1982-83 and that her benefits were averaged; that early childhood aides in the special education department had their work days cut to less than five days per week in approximately 1987 and that their fringe benefits would have been averaged using the District's calculation method had the District and Union not agreed to a resolution thereof; and that 23 employees whose documents were placed in the record had had their benefits averaged using the District's calculation method from the early 1990s through 2001. This evidence demonstrated that the District has had a past practice of averaging employee hours by totaling the number of hours worked per week and dividing by five days in the week, to equal the number of average daily hours of employees for purposes of benefits eligibility and accrual.

As the language of Section 701.1 and 1001 is ambiguous, this past practice, which has been consistently applied since at least the early 1980s, should be used by the Arbitrator to "fill in the blanks" of the contract, which fails to define the phrase "per day" in specific terms. In addition, other record evidence supports a conclusion that the District has provided the Union with various documents over time regarding job reclasses, job descriptions, hours, fringe benefits of new hires and of employees whose job positions have changed. The District pointed out that all of its witnesses affirmed that the District has explained to all newly hired employees how their benefits will be averaged if they work less than six hours per day, five days per week. The District noted that the Union submitted no evidence to contradict its consistent application of this averaging method to unit employees. In addition, the District observed that Union Official Akey specifically stated that she told Union Business Agent Gary Nuber either in 1993 or 1995 about the District's method of averaging work hours. Nuber was unable to specifically deny herein that he had had any such conversation with Akey.

The District urged that the Arbitrator should construe the terms of the collective bargaining agreement in order to avoid absurd results or an unwarranted windfall to the Union that is not based on specific contract language. Here, if the Union prevails in this case, an employee who works one six-hour day per week could receive the highest District contribution to health insurance under the contract, essentially the same benefits that an employee who works five days per week, six hours per day is entitled to. The District urged that this result would be patently unfair and one that the parties never intended.

In addition, an employee working four hours per day, five days per week would receive less sick leave and health insurance (based on four hours) even though the four-hour employee was working fourteen hours more per week than the employee who worked one day per week, six hours per day. In all of these circumstances, the District urged that no contract violation had occurred and that the relevant contract provisions of Section 701.1 and 1001 contain a gap which must be filled in with the practice of averaging work hours which the parties have found to be an acceptable method of computing the employees benefits over many years. Therefore, the District urged that the grievances be denied and dismissed in their entirety.

The Union

The Union argued that the Sue Akey was the only Union Offical who was aware of the averaging method employed by the District and that she never discussed what she knew with the various Union representatives in charge of the labor agreement. Indeed, the Union urged that it learned of the District's averaging method when it was processing the case of Sue Breese in the year 2000, an unrelated grievance. Akey also failed to reveal what she knew regarding the District's averaging procedures during the processing of the instant grievances.

The Union argued that the contract language clearing and unequivocally requires that the District pay any employee who works six hours in a day, the full amount of sick leave and the highest amount of health insurance premiums. In addition, the Union noted that the District reserved the right to identify the work week for each employee group under the contract, as well as reserving the right to vary the length of the work week for various positions (Section 501.2 of the labor agreement). Thus, the District has retained control of employee work hours. The Union also noted that although most employees normally work five days per week in the unit, some work six days per week 8/ and others work only four days per week. As the contract differentiates school year full-time from school year part-time only on the basis of hours worked "per day" not hours worked per week, the Union urged that its grievances must be sustained.

8/ No evidence was placed into the record to support this assertion.

The Union argued that the rule, *expressio unius est exclusio alterius* should apply here. Here, the parties knew how to express the method of averaging as demonstrated by their agreement to average hours in the most recent labor agreement, Section 801.2 – Holidays. The Union urged that the phrase "normal daily average for the week" showed that the parties could express averaging when they chose to do so.

Even if the contract language at issue herein is determined to be ambiguous, the Union argued that it should be given a construction that is reasonable and equitable. Here, equity would support a conclusion that the District violated the contract by application of its averaging calculation to sick leave and health insurance. Although the Union admitted that it was aware that averaging was being done in the mid-1980s when aides were reduced below six hours per day, "it was agreed that the affected employees, who were assigned to work a five-day work week, would have their hours per day averaged, by dividing the total hours that they worked each week, by the number of days that they were assigned to work." (Union Initial Brief, page 9) However, this agreement was reached to protect employees and not to reduce their benefits. In this regard, the Union urged that the Union noted that since the mid-1980s, the District has many times stated to the Union that it wished to interpret the labor agreement in order to help employees, not to hurt them.

In the instant case, the Union contended that as the contract violations affect only five or six employees (working four days per week, seven hours per day) the Arbitrator should make these employees whole and the District should be ordered in the future to cease and desist from failing to properly calculate and pay health insurance and sick leave benefits to employees.

Reply Briefs

The District

The District argued that no contract violation has occurred in this case and that a valid past practice has arisen over many years which must be used to fill in the gaps in Sections 701.1 and 1001. The District noted that the primary goal of arbitration is to give effect to the parties' intent without doing violence to the general spirit of the express language of the agreement. As the past practice proved by the District was not at variance with any written provisions of the Agreement, had been long-standing and had not been changed during negotiations, the past practice should now have attained the status of a contract right. In addition, the parties have acted consistently under the practice over a long period of time and the Union has failed to repudiate it or in any other way limit the practice through negotiations or grievance filing. Thus, the Union's failure to object to the District's use of the calculation method should provide the mutuality or acquiescence sufficient for the practice to become a part of the contract.

The District noted that in approximately 1990, Sue Breese complained to Akey who then told either Frank or Froiland about Breese's questions regarding the averaging of her benefits, demonstrating full Union prior knowledge of the practice. Thus, the District noted that the Union's claim that it was unaware of the averaging practice is contrary to the evidence. Here, Akey stated that she also revealed the averaging practice to Union Committee members Fisa and Zimmerman, and that she told Nuber about the practice on several occasions,

including prior to bargaining in 1993 or 1995, as well as during discussions of employee reclasses over the period of years that Akey was Unit Chairman. Akey further stated that she handed over to her successor Union Chairs, Maureen Hodgeson and Barb Shannon, her Unit Chair documentation, which showed averaging had been on-going at the District. The District noted that the Union failed to ask Nuber about the job reclassifications and failed to put Hodgeson, Breese, Froiland, Hartmann or any other supportive witnesses on the stand. Therefore, in the District's view, Akey's statements stood unrefuted and undisputed on this record and must be credited.

The District noted that the Union knew and agreed, or at least acquiesced in the application of the calculation method for almost 20 years and that the settlement of the Sue Breese health insurance and sick leave accrual grievance in or about 1996-97, showed that Union Representative Pankratz knew or should have known about the practice: Pankratz should have known that Breese would not have had to pay a higher amount of health insurance premiums had her daily hours simply been credited in full and not averaged.

The Union's arguments that other parts of the contract support its theories are without merit. In this regard, the District noted that the parties' recent change in the 1998-2001 labor agreement to average daily hours for purposes of holiday pay entitlement cannot be used as an example of the parties' understanding how to average work hours, as it is undisputed that there were no employees working less than five days per week when the initial labor agreement was entered into. The holiday pay language change occurred long after the initial contract was agreed upon.

In regard to Section 501.2, the District urged that the determination of the work week for employees does not relate to averaging or to the computation of fringe benefits. Sections 201, 203 and 204, which contain the phrase "per day" do not address fringe benefit entitlement or calculation. Therefore, to adopt the Union's view would result in an absurd scenario as described in the District's initial brief and it urged the Arbitrator to deny both grievances.

The Union

The Union argued that there was no mutually agreed upon, well-established past practice proven by the District in this case. In this regard, the Union noted that the District failed to prove that the Union was aware and knowingly acquiesced in the benefits calculation past practice. Here, the Union urged that it did not know or understand and never tacitly agreed to the past practice.

The Union argued that the District's documents, on their face, revealed nothing about how the employer calculated the hours that employees worked *vis a vis* their fringe benefits. In addition, the facts of this case showed that District representatives did not discuss the basis

of their calculations with any union representatives until the instant grievances arose. Thus, only Sue Akey knew of the employer's calculation "practice" and Akey never discussed her knowledge with employees or with union representatives. Finally, the Union argued that Akey was not a reliable witness, that she had been voted out of office and that it was probable that her recollection was "colored by her recent, unsuccessful election experience."

Giving affect to the plain meaning of the language contained in the agreement does not result in any absurdity. Here, the employer controls and identifies the length of the work week for all employees and therefore the assignment of an employee or employees to one six-hour day is under the District's complete control. In addition, it would not be absurd to treat the five or six employees actually affected by this case (who work four days per week, seven hours per day during the school year) as regular full-time employees for purposes of sick leave and health insurance.

The collective bargaining agreement, in the Union's view, does not provide for the District's past practice of differentiating regular full-time employees and school year full-time employees from part-time employees. In this regard, the Union noted that that contract only differentiates employees by hours worked per day. The Union then reiterated arguments contained in its initial brief regarding the recent holiday pay provision averaging, the length of the work week and the variation of the work week contained in the labor agreement and its argument that the District has tried to interpret the contract to help employees, all as support for its argument that both grievances should be sustained in their entirety and affected employees should be made whole.

DISCUSSION

Certain facts in this case are not disputed. For example, there is no dispute between the parties that in the early 1980s when the initial contract was reached between the parties, all employees worked a set number of hours per day, five days per week and that during initial contract negotiations, the parties never discussed what level of benefits employees working less than five days per week might be eligible for. It is also clear that the parties failed to define the phrase "hours per day" and that the contract does not otherwise define this term nor does it define the work week. Thus, it appears from this record that the parties never considered the appropriate level of benefits, if any, for employees who worked less than five days per week for the District.

It is axiomatic in labor arbitration that unless the contract clearly addresses an issue, past practice can be used to fill in an ambiguity contained in the language of the agreement. In this case, absent a clear definition of "hours per day" 9/ or of the work week and given the fact that the parties never discussed how benefits would be computed for employees working less than five days per week when they entered into the initial agreement, the relevant contract

language is certainly ambiguous. Therefore, evidence of past practice and bargaining history becomes relevant to fill in the ambiguities contained in Articles 701 and 1001.

9/ The use of the phrase "per day" strongly implies that the parties expected employees to work more than one day to be eligible for benefits. Had the parties intended otherwise, they would have simply placed a number of hours in the contract for benefits eligibility and accrual without using the phrase "per day" after that number.

A great deal of evidence was proffered by the District that since the early 1980s the Union was aware of the District's practice of calculating an average number of daily work hours for employees by adding their hours worked across the period of one week and dividing the total hours by five days. However, the Union argued that it was unaware of the District's calculation "practice." An analysis of the evidence regarding the alleged practice indicates that the practice did in fact exist and was consistently applied across a period of approximately 20 years, but that the Union only became aware of the practice in approximately the mid-1980s, when special education aides work hours were cut dramatically by the District.

As Shirley Frank testified, these special education aides had their daily hours of work cut below six hours per day and their work days were cut below five at this time. The Union Business Agent, Steve Hartmann and then-Unit Chair Shirley Frank as well as Human Resources Director Wasson (who later became Superintendent of the District), negotiated a resolution of the matter by allowing the affected special education aides to pick up a couple of days of work per week in the elementary school library. As Ms. Frank stated herein,

> . . . we could average out their work week, which was a 5-day work week and they would come up with over six hours a day continued with their 5-day work week. They had enough hours in each day, or – in the average of their days, so that they came up over 6. They continued with their benefits." (Tr. 77-78)

Frank also stated that at this time, when the District and the Union agreed to allow special education aides to work extra hours in the elementary school library, "it was agreed upon to average" employee work hours across a five-day work week in order to determine whether they had at least six hours of work per day for purposes of eligibility to health insurance and other benefits. (Tr. 87). Ms. Frank stated that prior to this time, she had been under the impression that all unit employees worked five days per week.

Frank stated that it was during the early 1990s (Tr. 80-1), that she again became aware that the District was calculating hours worked per day by adding all hours worked by the employee in a five-day work week and dividing by five days, when VanAsten and Ziegler

discussed the job-share with the Union Business Agent 10/ and they decided together that they needed to know how the employees were going to divide up or decide upon benefits with the job-share. At this time, the District informed Frank and the Union Business Agent that they were calculating VanAsten and Ziegler's benefits by adding their hours worked each day and dividing them by a total of five days in the work week, the same method that had been used in the mid-1980s with the special education aides.

10/ The Union Business Agent in the early 1990s may have been Gary Nuber (1993-1999) or Sam Froiland or Chris Bishofberger. Only Nuber testified herein.

A great deal of controversy surrounded Sue Akey's testimony in this case. The Union argued that Akey was either an unreliable witness because she had been ousted from her Unit Chair position in 1998 as a result of an internal Union election, or that she was simply mistaken in her assertions in this case. I disagree. The record evidence showed that Akey testified without contradiction by any Union witness or the documentary evidence regarding the Union's awareness of the District's calculations past practice. I find that the situation that Akey described as having occurred in 1982-83, when six to eight special education aides, including herself, were threatened with the loss of hours was not known to the Union by Akey's own account. However, Shirley Frank admitted that she was aware of a situation which occurred in the mid-1980s when the District needed to cut special education aide hours; and that Frank, Union Agent Hartmann and HR Director Wasson entered into a resolution of the situation whereby the District allowed special education aides to pick up extra work hours in the elementary library on additional days of the week when they were not otherwise working at least six hours per day, in order avoid losing their benefits was known to the Union. This evidence also showed that the Union was aware of the District's calculation method.

Akey also stated that in approximately 1987, when the School District hired early childhood aide employees to work less than five days per week, the subject of the average daily hours of these employees arose again. Akey stated that she spoke to at least two members of the Union's bargaining committee, Elaine Fisa and Helen Zimmerman, about the fact that the District was going to average early childhood aide employees' daily work hours in order to arrive at their benefits eligibility. This evidence remained uncontradicted.

In the early 1990s, employees VanAsten and Ziegler chose to share a job at the District. Both Akey and Frank were aware of this arrangement, and Frank stated that the District used the same calculation method for VanAsten and Ziegler that it had used with the special education aides in the mid-1980s. Neither VanAsten nor Ziegler received full benefits or full health insurance during their job share, and the Union did not object to the District's treatment of these employees. This District also submitted documents to support its assertions

regarding this job share.

Also, in the early 1990s, unit employee Sue Breese approached Akey regarding her fringe benefits. Akey stated that at this time, Breese worked less than five days per week and her hours were being averaged by the District to determine her benefit levels. Akey advised her to seek more work hours from the District. Akey stated with assurance and without contradiction, that she spoke to Union Business Agent Froiland about this situation. 11/

11/ Akey also asserted that she spoke to Unit Chair Shirley Frank regarding this situation, but Frank could not recall their conversation having occurred. I have credited Akey.

Finally, Akey stated that she spoke to Union Agent Nuber several times regarding the District's benefits calculation practice. Akey stated firmly that she told Nuber about the District's calculation practice in either 1993 or 1995, prior to the beginning of labor negations for a new contract; that she also discussed the District's benefits calculation practice with Nuber when employees were reclassed annually by the District and she went over reclass documents each year with Nuber.

Nuber testified herein but had no recollection of any particular conversations with Akey on the issue of averaging hours, although Nuber agreed such conversations could have taken place (Tr. Vol.2, 5-6). As Nuber did not clearly deny having had conversations with Akey regarding the issue of averaging and because Akey's testimony was corroborated on several different points by other witnesses as well as by documentation placed in the record, I must credit Akey in light of her certainly on these points.

Additional evidence of record, both testimonial and documentary, also tends to support the District's arguments herein. In this regard, I note that Debra Bailey, Payroll Manager for the District, and Cindy Heinz, who is employed in the benefits area by the District, both stated that the District regularly and consistently counsels new employees at the time of their hire that their hours are being averaged to determine their benefit levels and that Bailey and Heinz have personally answered questions from time to time, either posed by new employees or by current employees and managers, regarding hours averaging *visa vis* health insurance and other benefits of unit employees. 12/ The District also offered documents to show that at least 23 employees who worked less than five days per week had their health insurance and fringe benefits averaged based on dividing the total number of regular work hours of these employees by five days per week, between the years 1993-2001. Several of these documents indicated that the "clerical union representative" had been sent copies of these documents and at least two documents (District Exhibit 1C, Milkey and Reinke, August, 2000) indicated that employees had received salary change information with their hours of work listed as "average hours per day."

12/ This evidence was corroborated by managers Kauth and Jorgenson.

In addition, current Unit Chair Mary Weaver stated herein that she became aware, in approximately 1999, that the District was employing employees less than five days per week when a new outside hire, Karen Hiti, received a full-time (30 hours per week) job from the District instead of a senior unit member who had posted for the position. After Hiti was hired and the Union's grievance failed regarding the rights of the senior unit employee, the District cut Hiti's hours to four days per week, seven hours per day, and her benefits were cut along with that, based upon the application of the District's averaging method to Hiti's case. Significantly, across these many years, the Union failed to object to or file a grievance regarding the District's calculation method.

In addition, circumstances arose in 1998 regarding Sue Breese's benefits which indicated that Breese had underpaid her health insurance premium portion when her hours of work fell from 31 hours per week in 1994-96 to 28 hours per week effective the 1996-97 school year. Following the decrease in Breese's hours, the District failed to recalculate Breese's health insurance premium payments at 85% District paid. Rather, the District continued to erroneously pay Breese's premiums at 97%.

At this time, Breese had a question regarding her personal leave, which also had been erroneously maintained at a higher level following the decease in her hours. The District sent the Union a letter dated July 6, 1998 which clearly stated that District had been averaging Breese's hours since at least 1994. In this letter, the District indicated that because Breese's hours increased in 1996-97 (to 31 hours per week), that Breese "worked on an average more than 6 hours per day" and that she was therefore entitled to personal leave; and that "consistent with past practice and contract language, personal leave was not made available" when Breese's hours were cut in 1996-97 (to 28 hours per week). The letter also stated, "it is our practice that personal leave not be made available to a person who works less than 6 hours per day as per the negotiated agreement." At the very least in light of this July 6th letter, the Union should have sought further information regarding the content and meaning of the District's July 6, 1998 letter.

It is also significant, that the Union entered into a December 23, 1998 settlement agreement whereby Breese agreed to repay insurance premium payments she should have made after her hours were cut by the District in 1996-97. This settlement agreement stated:

> . . . This situation developed over at least a two (2) year period, wherein Ms. Breese's hours of work dropped, yet the District maintained the same level of insurance contribution on her behalf as if her hours were the same. . . .

Again, further questions should have occurred to Union representatives regarding the basis upon which Breese was expected to and agreed to repay over $1,800 to the District in insurance premiums, given the fact that had Breese's daily hours been credited to her (without averaging), Breese would not have owed the District any repayment.

The Union has argued that its case is supported by the fact that the parties amended Section 801 of the agreement in the effective agreement, indicating that the parties knew or should have known how to express averaging of work hours for unit employees. As this change in the contract occurred in 1998, long after the initial agreement, the Union's argument on this point is diminished substantially. In addition, I note that the parties never attempted to change the language contained in Articles 701 or 1001 and that there was no direct evidence that the parties ever discussed the District's calculation past practice during labor negotiations for the current agreement, 1998-2001. 13/

13/ The only evidence that there were any discussions regarding averaging during negotiations for the 1998-2001 labor agreement was a statement by current Union Agent Wayne Pankratz that it was possible that there had been discussions during negotiations regarding the averaging of work hours for fringe benefit eligibility and that the Union proposed to change the holiday pay provision for the 1998-2001 contract. This evidence was not conclusive.

The Union asserted that the District's reservation of a right to identify the work week for unit employees and the right to vary the length of the work week for various positions as well as the District's statements that it intended to administer the contract for the benefit not deterrent of employees, should support a conclusion on behalf of the Union in these cases. In this regard, I note that the Union failed to draw any connection between these contract provisions and the parties' original contractual intent or the development of the calculation past practice in this case. Therefore, I find this evidence lacks demonstrated weight and relevance to this case.

The District argued that it would be patently absurd for the Arbitrator to construe the phrase "hours per day" such that an employee who works one six to seven hour day per week will receive the same amount of District-paid health insurance premiums and sick leave and holiday credit as an employee who works six hours per day, five days per week. In addition, the District urged that the employee who works one six to seven hour day, would receive greater benefits than an employee who works five hours per day, five days per week. The District's arguments in this area are persuasive. Although the Union pointed out that approximately five or six employees who work four days per week, seven hours per day would be involved in receiving a remedy in these cases, this assertion does not detract from the District's argument that a ruling in favor of the Union would create absurd results.

Finally, I note that Akey asserted without contradiction that she transferred her Unit Chair files to Maureen Hodgeson and/or Barb Shannon after she left her Unit Chair position. Neither Shannon nor Hodgeson testified herein, requiring the inference to be drawn that Akey accurately stated the facts on this point as well.

In all of the circumstances of this case, I find that this District proved a past practice which appropriately fills in the blanks in Sections 701 and 1001. As no contract violation has occurred in these cases, I issue the following

AWARD

The District did not violate the collective bargaining agreement by the method it used to compute the School District's health insurance contribution toward the cost of the employees' health coverage and sick leave accrual. Therefore, both grievances are denied and dismissed in their entirety.

Dated at Oshkosh, Wisconsin, this 19th day of August, 2002.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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