BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ALGOMA EDUCATION ASSOCIATON

and

ALGOMA SCHOOL DISTRICT

Case 22
No. 60800
MA-11727

Appearances:

Mr. David B. Kundin, Executive Director, Bayland UniServ, appearing on behalf of the Association.

Mr. Robert W. Burns, Attorney at Law, Davis & Kuelthau, S.C., appearing on behalf of the District.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2001-2003 collective bargaining agreement that provides for arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear and resolve a grievance over emergency leave. A hearing was held on May 6, 2002, in Algoma, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by August 5, 2002.

ISSUE

This issue is:

> Did the District violate Article VI, B of the collective bargaining agreement when it denied the Grievant emergency leave on October 1, 2001? If so, what is the appropriate remedy?

CONTRACT LANGUAGE

The relevant language is found in Article VI, Leave Provisions, under Section B:

7. Emergency leave may be used in the event of serious illness or death in the immediate family. This absence is limited to ten (10) days per year except as provided by the FMLA or WFMLA. The immediate family is interpreted to include: mother, father, sister, brother, husband, wife, child, mother-in-law, father-in-law, sister-in-law, brother-in-law, grandfather, grandmother, or other relative who is a member of the teacher's household.

8. Other emergency leave shall be used only in situations of urgency for the purpose of conducting those affairs, which are impossible to transact after school hours or during weekends. These days will be counted as part of the ten (10) days of sick or emergency leave.

. . .

12. Emergency Leave Criteria:

1.) Is the health and or welfare of the teacher or the immediate family in peril?
2.) Can the essential function or responsibility be performed outside the school day?

Note: It is highly recommended that if someone else in the family can perform the individual or essential family function or responsibility that they do so.

Examples (not an inclusive list)

Emergency Doctor Visit (emergency room visit, express care visit, or Specialist that can't be schedule outside school hours.)
Fire, Tornado, Flood Damage, Storm Damage
Legal – non criminal
Catastrophic Event
Car Accident
Other Emergencies – when the above two (2) criterion are satisfied.

Examples of not Emergency leave (not an inclusive list)

Scheduled Doctor visits that could be scheduled outside of the school day or during vacation

Weddings and other such celebrations
Graduations, Anniversaries, Birthdays
Legal – (personal) – criminal
Divorce
Purchasing Car or Recreation Vehicle
Funeral Other than Immediate Family
Veterinarian Visits
Closing on a House
Receiving Recognition or Awards outside of the school.

BACKGROUND

William Reynolds started teaching in the District in August of 2001. Before he started for this District, he worked in Superior, Wisconsin, which is about a six-hour drive from Algoma. Reynolds had an interview for a teaching position with the Superintendent, Dr. Mark Smits, on August 21, 2002. He attended new teacher orientation meetings on August 22-24 and stayed at a hotel. When school started on August 28, Reynolds' wife and children stayed with friends in DePere while he stayed at a campground on the peninsula. The family later also stayed at the campground and then stayed with some teachers in Algoma. Reynolds sold his home in Superior and closed on it on September 25, 2001. The family had found a duplex to rent in DePere but it was not available until October 1, 2001, a Monday.

Reynolds hoped to move in the Sunday before October 1st, because the landlord said that the existing tenant would be out by that weekend. Reynolds showed up that Sunday, September 30th, with a U-Haul and his family's belongings, but the duplex unit was not available and he could not move in until Monday, October 1st. The family stayed at a hotel on Sunday night. Reynolds' parents had driven from Superior to DePere to help with the moving. They stayed to help on Monday and then drove back to Superior. Reynolds testified that his wife would not be able to lift the heavier furniture, and his children are too young to be of any help. He said it took about six hours to get his larger things out of the U-Haul and another three weekends to get the rest of the boxes. Reynolds used Monday to move and returned to work on Tuesday.

Reynolds filled out a form before October 1st, asking for emergency leave. He testified that he was being proactive, knowing that he might not be able to move in on Sunday, September 30th. The District denied the request for emergency leave but allowed Reynolds a personal day on October 1st. He was not paid for the day since teachers have to work a number of years before getting paid personal leave.

Smits was the chief negotiator for the Board in the last round of contract negotiations. He noted that the number of days for sick leave can be tapped in through the Family and Medical Leave Act, and there was a concern that this was unfunded. To reduce the cost of

substitutes, the Board looked at lowering the number of days that could be accumulated. They talked about emergency leave versus sick day and personal days and looked at potential savings. Under the prior labor contract, there were ten sick days and five emergency leave days. The current contract combined sick or emergency leave to ten days, with two days for personal illness. Smits was also concerned about administrating emergency leave, and the parties talked about emergency leave criteria. He also asked for a better definition of personal leave and wanted examples, but the examples went into the non-emergency leave list and the Association did not want anything changes on personal leave. He drew up the lists for emergency leave and it was modified a bit before being mutually agreeable.

The current contract lists two questions under #12, Emergency Leave Criteria (see language above) and Smits looks at both those items in order for someone to qualify for emergency leave. He defines emergency as something beyond one's control. The criteria were placed, in Smits view, so that people would not use such leave for their convenience. In looking at the two-prong tests in Reynolds' case, he did not believe the health or welfare of the teacher or immediate family was in peril. He also thought that the activity could be performed outside of the school day. Thus, Smits thought that the issue was a matter of Reynolds' convenience and not an emergency.

Thomas Flood has been with the District for 29 years and been involved in contract negotiations since 1977. He was at the table for the 2001-2003 contract. Flood acknowledged that the emergency leave provisions were changed and there were circumstances where someone would have received emergency leave under the 1999-2001 contract but would not get it under the current contract. Both parties agree that the emergency leave was tightened up. However, Flood did not agree that the emergency leave was tightened up in exchange for more money in the salary schedule. Flood stated that the Board felt people were using emergency leave for doctor visits and weddings, and the parties agreed that would be an improper use of emergency leave.

THE PARTIES' POSITIONS

The Association

The Association asserts that Reynolds is entitled to emergency leave for October 1, 2001. The first list in the examples contains several specific situations plus a catchall of other emergencies that would occur when both criteria are met. Smits testified that all use of emergency leave must meet both criteria, but that is not what the language says. The two questions are stated but the list of examples is not inclusive, which would mean that there could be situations where emergency leave is justified even if both criteria are not met. Sub-paragraph 12 does not state that every situation falling under emergency leave must meet both criteria.

Moreover, the Association states that the specific examples indicate that Reynolds' situation is closer in comparison to examples of emergency leave than the examples of non-emergency leave, because each example of emergency leave contains an element of surprise or inability to predict the event that would occur, while each example of non-emergency leave lacks that element of surprise. Reynolds had repeated assurances from his landlord that he would be able to move in on Sunday, September 30, 2001, and he relied on those assurances. An emergency situation sprang up when he arrived ready to move in and was only then told he could not move in until Monday, October 1, 2001. Clearly, Reynolds was surprised and at that point in time, it became an emergency. The Association asks – what is the difference between flood damage or storm damage being an emergency, or having to incur unexpected expenses to stay in hotels, when the Reynolds' family was unexpectedly without a place to live on the night of September 30, 2001? The welfare of the family was at stake, if only for one night. It was in peril because they had no place to live. If they did not move their furniture into the house on Monday, they would lose the assistance of Reynolds' father. Nothing in the contract sets any monetary amount that must be expended before emergency leave kicks in. However, Smits decided that Reynolds could have paid others to help move or could have stayed in a hotel until the following week. The fact that Reynolds' parents were there to provide essential assistance to moving makes this an essential function that could not be performed outside the school day. The welfare of the Reynolds' family was in peril, even if the peril was a financial peril.

The Association argues that the parole evidence rule prohibits the introduction of extrinsic evidence to interpret sub-paragraph 12 which is clear and unambiguous on its face. Smits offered his uncorroborated testimony to some invisible deal that resulted in a trade off of improved salary for tightening up of emergency leave. His testimony is in conflict with that of Flood's. Any and all deals must be reflected in the plain and unambiguous language of the contract.

The District

The District submits that Article VI is clear and unambiguous and that Reynolds did not qualify for emergency leave. The contract states the two criteria for leave to be applied to all requests for emergency leave including those under paragraph 8 of Article VI. There was mutual intent on the part of the parties to provide more definition in paragraph 12 to paragraph 8, according to the testimony of Flood and Smits.

The Grievant's situation had more in common with the examples not qualifying as emergency leave than it did with examples qualifying as emergency leave. Where there is no showing of a mutual understanding of the parties as to the meaning of a particular term, arbitrators often look to the usual and common definition of that term as defined in a reliable dictionary. The term "emergency" is defined by the American Heritage Dictionary, 3rd Edition, as a serious situation or occurrence that happens unexpectedly and demands

immediate action, or a condition or urgent need for action or assistance. There was nothing unexpected about the Grievant not being able to move into the duplex on September 30th, as he knew well before he arrived that he might not be able to move on that date. That's why he submitted a request for emergency leave form before October 1st, because he knew it was a possibility that he could not move his household into the duplex on the weekend.

The District states that the whole process of relocating was completely within the Grievant's control. He had several options, as he acknowledged on cross-examination. He could have split the move up between more than one night. It was his choice to rely on his father and his availability or lack of it. There was nothing serious about the situation. The Grievant's children did not have to sleep outdoors that evening. The only consequence of not being able to move in on September 30th was that the Grievant and his family had the expense of staying in a hotel that night. Expense is not one of the criteria considered in determining whether leave qualifies as emergency leave. The Grievant's situation did not demand immediate action. He could have stayed additional nights in a hotel, stayed with friends or other teachers as he had done in the previous month, or hired someone else to move his belongings into the duplex. He could also have moved his belongings into the duplex later that week or even the next weekend.

Another arbitrator defined an emergency within the context of labor arbitration terminology as an unexpected or unforeseen occurrence which leaves no time for deliberation or demands prompt action. That definition is also not satisfied by the facts in this record.

The District argues that the situation must satisfy the two criteria in Article VI, and the first one requires that the reason for leave must put the Grievant or his immediate family in peril. Peril is defined as imminent danger, exposure to risk of harm or loss, something that endangers or involves risk, or to expose to danger or the chance of injury, imperil. The Grievant's explanation for satisfying the first criteria states that his family had no place to live until the apartment was available. In no manner does his explanation show that he or his family was in imminent danger. According to his own testimony, staying in a hotel for one more night was merely an inconvenience and additional expense. The Grievant did not satisfy the second criteria, and admitted that he had other alternatives such as splitting up the chores over two nights.

The Grievant's situation had more in common with the examples of non-emergency situations, such as weddings, graduations, anniversaries, etc. Closing on a home is listed as a reason not qualifying as emergency leave. The Grievant's situation is more similar to this example than any other, as the final step in closing on a home is taking possession. Taking possession of a leased property is not a qualifying reason for emergency leave. The Grievant showed up one day before he was legally entitled to take possession – that's a situation entirely within his own control and did not constitute an emergency.

The District contends that the Association is attempting to gain through grievance arbitration that which it gave up during negotiations. The Association agreed to reduce the qualifying reasons for emergency leave in exchange for the Board placing more money on the salary schedule. The end result of negotiations was a reduction in the number of leave days and a tightening of the qualifying reasons for emergency leave. Now the Association is trying to loosen this language. It is well established that a union cannot obtain through grievance arbitration that which it gave up through negotiations.

In Reply, the Association

The Association argues that the District seeks to have it both ways – it agrees that the language in Article VI is clear and unambiguous yet it seeks to use parol evidence in the form of Smits' testimony on what happened to prove its case. Even if Smits' testimony is taken into consideration, nothing in his testimony suggests that the tightening of emergency leave would keep Reynolds from qualifying for emergency leave on October 1st. Moreover, the Association contends that while the District accuses the Association of trying to get back what it gave away at the table, that is just not the case. The Association does not seek to change the language but have it applied because both prongs of the test require such a result. The situation on September 30th put the health or welfare of the Reynolds' family in peril, and the essential functions of moving into his new home could not be performed outside the school day.

The Association notes that the District selectively chooses from two different definitions or emergency, ignoring the one that is more applicable to this situation. The landlord's refusal to allow Reynolds to move in on Sunday after Reynolds relied on the landlord's assurances constituted a condition of urgent need for action or assistance that required him to take Monday off to make the move work. It was a serious situation, based on the financial bind Reynolds was in with this move, it was unexpected and demanded immediate action as well. Also, to be in "peril" means exposure to the risk of harm or loss. There were significant financial consequences which meet the definition of loss that are ignored by the District.

Later on, the District relies on an arbitrator's definition of emergency – when there is an unexpected or unforeseen occurrence which leaves no time for deliberation or demands prompt action. That is what Reynolds did. He had a truck full of furniture with the only help available to him needing to get back to Superior on Monday. He had no time for deliberation and the situation demanded prompt action.

In Reply, the District

The District claims that the Association misstated important facts in its initial brief, such as there was an emergency because the landlord had broken "his promise" that the property would be available on Sunday. There is no evidence that the landlord promised to

have the property ready, it was merely a possibility. There is also no evidence that the landlord gave "repeated assurances" that the property would be available early. At most, the landlord said the property might be available. The situation may have been disappointing and inconvenient for the Grievant, but that does not make it an emergency. There is no support in the record that the situation was an emergency because the Grievant's family had no place to sleep that night, as the family stayed in a hotel.

While the Association contends that an employee can qualify for emergency leave by satisfying one of the criteria in Article VI, it is wrong. The last line of examples provides for "Other Emergencies – when the above two (2) criterion are satisfied." That provision establishes that both criteria must be met. Smits had it right.

The District objects to the Association's claim that incurring flood damage and storm damage are examples most similar to the Grievant's situation. The Association's contention is flawed because it focuses not on the unexpectedness of the event, but rather on the consequences of the event. An event is an emergency because the event itself is serious and unexpected. The fact that the Grievant could not move until Monday was not unexpected, nor was the consequent expense of staying in a hotel the previous evening unanticipated.

The Association opened the door to consideration of bargaining history, which is relevant and instructive as to the intent of the parties. Flood testified that the Association perceived the proposal modifying leave provisions to free up money for the salary schedule, and he agreed that the emergency leave language was tightened.

DISCUSSION

There is some ambiguity in the contract language, because paragraph #8 states: "Other emergency leave shall be used only in situations of urgency for the purpose of conducting those affairs, which are impossible to transact after school hours or during weekends." This matches the second question under paragraph #12 for the emergency leave criteria, but does not mention that the health and or welfare of the teacher or the immediate family must be in peril. Therefore, it is somewhat unclear whether one must meet both questions under #12 to qualify for emergency leave. The District asserts that the criteria in paragraph #12 give more definition to paragraph #8. Also, the last item called "Other Emergencies – when the above two (2) criterion are satisfied" lends support to the District's position that both questions need to be satisfied to qualify for emergency leave.

The bargaining history is clear on one point – the parties agreed to tighten up the emergency leave language, and there were situations in the past where emergency leave was granted but would no longer be granted under the new language. Whatever the *quid pro quo*, the language now states what it states. The question of whether a teacher must meet both

criteria in paragraph #12 may be cleared up in a future bargain, as it is unnecessary to address it at all in this grievance. Reynolds would not meet either of the criterion, let alone both. First of all, Reynolds does not fall within the language of paragraph #8, which states:

> 8. Other emergency leave shall be used only in situations of urgency for the purpose of conducting those affairs, which are impossible to transact after school hours or during weekends. These days will be counted as part of the ten (10) days of sick or emergency leave.

There was nothing impossible about transacting the business of moving furniture after school hours or during weekends. It was only inconvenient for him – really for his father – to move furniture after school hours because his father wanted to drive back to Superior on Monday. In fact, the only reason that Reynolds could not move his belongings after school hours was because of his father's schedule or need to get back to Superior. The contract language, however, controls this situation, not personal choices. The contract calls for situations of urgency, to conduct affairs impossible to transact after school hours or during weekends for emergency leave. This case does not fit this language and emergency leave may be denied for this reason.

> The emergency leave criteria under paragraph #12 to ask:
>
> 1.) Is the health and or welfare of the teacher or the immediate family in peril?
> 2.) Can the essential function or responsibility be performed outside the school day?
>
> **Note: It is highly recommended that if someone else in the family can perform the individual or essential family function or responsibility that they do so.**

The second question has already been answered. The answer to the first question is that there is no evidence on the record that the health or welfare of Reynolds or his family were in peril on Monday, October 1, 2001, the day that he requested emergency leave. The Association argues that the circumstances brought him to financial peril, but there is no evidence on the record to show that is so. Another night in a hotel may be expensive, but it is hardly the kind of peril imagined by the parties in fashioning emergency leave language.

The examples of emergency leave show that the parties contemplated the traditional definitions of emergency. The District uses the American Heritage Dictionary, 3rd Edition, which says: "a serious situation or occurrence that happens unexpectedly and demands immediate action; a condition of urgent need for action or assistance." Arbitrator Seifer in

LENNOX INDUSTRIES, INC., 70 LA 417, 419, stated that emergency has been defined as "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action." The parties' list uses some of those elements:

> Emergency Doctor Visit (emergency room visit, express care visit, or Specialist that can't be schedule outside school hours.)
> Fire, Tornado, Flood Damage, Storm Damage
> Legal – non criminal
> Catastrophic Event
> Car Accident
> Other Emergencies – when the above two (2) criterion are satisfied.

The very fact that Reynolds could apply for emergency leave a few days in advance of October 1, 2001, takes the emergency nature out of the request. There was nothing sudden, unexpected or serious that needed urgent action or immediate attention. The set of circumstances dealt to Reynolds by the prior tenant not moving early and delaying Reynolds' move into the duplex was expected to one extent, because the lease did not start until October 1st and there was no certainty that the duplex would be empty when Reynolds arrived. He knew that in advance. There was no need for immediate action – in fact, there was nothing much he could do at all but to wait. The extra expense of staying in a hotel on Sunday night does not amount to an emergency.

The District is correct in stating that the situation is closer to the list of examples that are not emergencies:

> Scheduled Doctor visits that could be scheduled outside of the school day or during vacation
> Weddings and other such celebrations
> Graduations, Anniversaries, Birthdays
> Legal – (personal) – criminal
> Divorce
> Purchasing Car or Recreation Vehicle
> Funeral Other than Immediate Family
> Veterinarian Visits
> Closing on a House
> Receiving Recognition or Awards outside of the school.

Certainly, closing on a house can be time consuming and inconvenient and expensive. So can many of the other examples on the list of non-emergencies. The list includes examples where people can make some plans. The moving situation was planned in advance. It did not go as well as hoped by Reynolds, his family, his father, etc., but it was not an emergency situation.

In conclusion, I find that the District did not violate the collective bargaining agreement when it denied emergency leave to Reynolds for October 1, 2001.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin, this 21st day of August, 2002.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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