

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MINOCQUA, HAZELHURST, LAKE TOMAHAWK
EDUCATION ASSOCIATION**

and

**JOINT SCHOOL DISTRICT NO. 1, TOWNS OF
MINOCQUA, HAZELHURST AND LAKE TOMAHAWK**

Case 57
No. 61462
MA-11945

Appearances:

Ms. Carol J. Nelson, Director, Northern Tier UniServ, 1901 W. River St., P.O. Box 1400, Rhinelander, WI 54501-1400, appearing on behalf of the Association.

Mr. Thomas N. Shorter, Attorney at Law, Quarles & Brady, Firststar Plaza, P.O. Box 2113, Madison, WI 53701-2113, appearing on behalf of the District.

ARBITRATION AWARD

The Association and District named above are parties to a 1999-2001 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to assign the unsigned arbitrator to hear and resolve a grievance over personal leave. A hearing was held on December 10, 2002, in Minocqua, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by March 3, 2003.

ISSUES

The parties did not stipulate on the framing of the issues. There are two issues presented:

1. Is the grievance timely?

2. Did the District violate the collective bargaining agreement when it denied the Grievants' request for three days of personal leave before the spring break holiday in 2002? If so, what is the appropriate remedy?

BACKGROUND

The grievance was filed on June 3, 2002, by Kenneth Schoville on behalf of himself and his wife Pamela Schoville, who are grieving the denial of personal leave for March 20, 21 and 22. They were denied the use of those personal days by the District on March 7, 2002. The collective bargaining agreement provides for personal leave but prohibits it preceding or following a holiday or vacation period, except as deemed appropriate by the administrator.

The Schovilles are both teachers in the District. Ken Schoville is the grievance chair for the Association. He moved to northern Wisconsin for recreational opportunities. He is a cross-country skier and has participated in the American Birkebeiner for many years. He also is the cross-country ski coach for the Lakeland High School District, located in Minocqua. There was an opportunity in March of 2002 for him and his wife to participate in the Norwegian Birkebeiner, which was a once in a lifetime opportunity for them.

The District uses a form for leave approvals and substitute teacher requests. It has a space for details, but the Grievants had not filled out that portion in the past when requesting personal leave. The Grievants asked for three personal days each, two of them to be paid, and one as an unpaid day. The Principal, Margaret Wolff, reviewed the requests. When Wolff receives a form for a leave request, she reviews it for the date, the length, the type of leave, the closeness to holidays, the availability of substitutes and how many other people have also asked for leave.

When Wolff checked the calendar, she noted that the days being requested were before the week long spring break. She consulted with James Kranpitz, the District Administrator. Wolff was not aware of anyone being granted a three-day personal leave prior to a holiday. Kranpitz reviewed the language of the labor contract. Both he and Wolff felt it would place undue interruption in the educational program for children since the combined absence would affect over a hundred children for each of the three days. Wolff felt that taking an extended vacation prior to holidays could compromise the integrity of the instruction program. A total of six substitute days would be needed. They both decided that the request should be denied. Wolff then wrote a memo on March 7, 2002, to the Grievants, stating that they could take Wednesday and Thursday off but not Friday.

Other teachers who have received personal leave prior to a holiday are Brian Sutton, Sandy Gehrke and Judy Hutter. Sutton received personal leave in 2001 for one day before Memorial Day. Gehrke was granted personal leave before Memorial Day break in 2002. Gehrke told Wolff that she needed to attend an event for her daughter at a school right in town.

Wolff told her that if the District could not get a substitute or someone called in sick, Gehrke would have to come in, and she agreed to that. Judy Hutter was granted personal leave for a day before Memorial Day of 2001 but later substituted a sick day for the personal day in order to be with her husband during surgery. Cathy Gelinas was granted two days of personal leave in April of 2001 right before a holiday (the Friday before Easter). Gelinas taught two periods only, so her two-day absence would mean that four class periods would be missed. A regular school day has about eight class periods.

Kranpitz acknowledged that the administration has used its discretion to grant personal leaves before a holiday. He was aware of the requests from Sutton and Gehrke, both for one day, and for Gelinas for two days. He believed that the District has never approved any request for more than one day prior to a holiday, except for Gelinas who got two days for four periods of absence. When Wolff showed Kranpitz the request from the Schovilles, he asked if there were any extenuating circumstances, and she was not aware of the reason for the leave request. Teachers are not required to provide a reason when requesting personal leave. The Grievants have received five days of leave three times in the past, but none of them were before or after a holiday.

The grievance procedure was changed from the prior contract and it now has a second step that requires the grievant to meet with the grievance committee which is to decide whether the grievance is to proceed or not.

Ken Schoville filed the grievance for himself and his wife, on behalf of the Association. The June 3, 2002 document states that the grievance is at Step 3. On June 7, Kranpitz sent a letter stating that he was returning the grievance because there was no indication what action was taken by the Association in Step 2, and there should be a signed statement by the committee stating it supported forwarding the grievance to Step 3. Schoville replied on June 18, 2002, stating that as grievance chair, he could verify that the committee met and approved the grievance to proceed to Step 3. He also noted that the Association, as well as the grievance committee and negotiating team, agreed that Step 2 notification does not require a written notice. Kranpitz responded on July 3, 2002, with the concern that the District was not in the position to take his assertion that all three groups felt that way without some documentation from each of those groups. He also expressed what he called an inherent conflict of interest in the grievance process where he was forwarding a grievance for he and his wife while he was the grievance chair. On July 11, 2002, Schoville moved the grievance to Step 4, and on July 29, 2002, Kranpitz notified Schoville that the Board would address the concerns on August 12, 2002. On August 13, 2002, the Board scheduled a meeting for September 9, 2002, to meet with the Grievants. On September 12, 2002, the Board president notified the Grievants that the grievance was being denied.

Schoville testified that the grievance committee met shortly after it learned that other staff members were being allowed to take a personal day prior to a holiday – in particular, Gehrke and Hutter. He believed the meeting took place sometime in May – probably between May 28 and June 3 – after Gehrke and Hutter had taken their personal leave days. The meeting was a combination of Step 1 and 2 in the collective bargaining agreement.

Schoville acknowledged that the denial was on March 7th, but since he did not know of anyone who had been granted leaves before holidays, he thought that his request could be denied. However, when he later learned that others were being granted personal days prior to the Memorial Day weekend and spring break, he believed he had a basis for a grievance. He and his wife had been granted personal leave in the past but not right before a holiday. While Step 2 in the labor contract has no time limit for the grievance committee to meet, determine the merits, and advance the grievance or drop it, Schoville believed that it was not completely open-ended but that they tried to stick to the usual 5 days for timelines. The grievance procedure had new language in the current contract – Step 2 was new.

THE PARTIES' POSITIONS

The Association

The Association maintains that the District has not interpreted and uniformly applied all rules and regulations of the collective bargaining agreement. It has on three occasions granted employees person leave days immediately preceding a holiday. It has granted Ken Schoville five-day leaves on three separate occasions. The denial of the request being grieved here was arbitrary and capricious. The Association asserts that the Schovilles are both teachers who have traveled previously and use their experiences within the classroom. Ken Schoville could use the experience of the Norwegian Birkebeiner with his extra-curricular assignment as the cross-country ski coach. The Association realized that the District was not applying the rules on the contract consistently when it found out that other staff who requested personal leave for such things as attending a grandchild's school program were granted leave even though it was right before a holiday.

The Association believes that it became apparent that the District's actions were targeting an individual who had been an advocate for members of the Association. Kranpitz referred to a conflict of interest in forwarding a grievance when the Grievant sat as the grievance chair. The Association argues that Schovilles' request was denied because he has been an active member of the Association. The District tried to block the grievance procedure.

The only reason that the District denied the leave requests was that they would extend the holiday. However, other people were granted leaves that extended their holidays. While the articulated reason given for the denial was that it would disrupt the educational process of the students, this arbitrary change in policy has the effect of denying a benefit to the Schovilles which they had previously enjoyed while giving it to others without a legitimate basis.

The Association submits that the District violated the rights of the Schovilles. Those rights were determined by the past practices of the District, which allowed staff to take leave immediately preceding or following a holiday or school vacation. The unilateral change in that philosophy and/or policy by Kranpitz is arbitrary. That arbitrariness led the Association to file a grievance on behalf of the Schovilles when they observed others taking leaves prior to a holiday on three separate occasions.

The District

The District first argues that the grievance is not arbitrable because the Association did not follow the proper procedure pursuant to Article 5 of the bargaining agreement. Step 1 of Article 5 requires employees to discuss the grievance with the Association within 5 school days of the matter giving rise to the grievance. The Schovilles were required to discuss the grievance with the Association within five days of March 7, 2002, the date their leave request was officially denied. Then the grievance was to be presented to the Association's grievance committee for evaluation of the merits as soon as possible after March 12, 2002. The grievance needed to be forwarded to Step 3 within 5 days of Step 2. The Schovilles missed the first deadline and Step 2 was handled improperly and in an untimely manner.

There is no dispute that the Schovilles failed to comply with Step 1 – the discussion with the Association did not take place until late May or early June, some two months after the grievance filing timeline expired. While Ken Schoville suggested at the hearing that he had no reason to grieve until he learned that others had received pre-holiday personal leave, the contractual time limit cannot be extended because the Grievants did not think of filing a grievance sooner. Potential grievants and the Association have a duty to investigate possible grievances within contractual time limits in order to protect both parties from stale claims.

Even if the Schovilles' interpretation of "occurrence giving rise to the grievance" is correct, Step 2 was handled improperly. Apparently, Steps 1 and 2 were combined, which violates the clear separation of the steps contemplated by Article 5. Ken Schoville's position as grievance committee chair created an inherent conflict of interest in the grievance process, as it allowed the Schovilles to process their grievance individually in violation of the grievance committee's purpose. While no deadline for Step 2 filing is stated in the contract, Step 2 was intended to speed up the procedure. Schoville had no written record of the Step 2 committee meeting and did not recall the exact date, but testified that it occurred toward the end of May. The grievance was not forwarded to Kranpitz until June 7, 2002. Thus, the five-day limit for moving the grievance from Step 2 to Step 3 had already expired when Kranpitz received the grievance. This violates the intent of the Step 2 filing deadlines. Moreover, there was no evidence of the necessary Association grievance committee approval.

The District contends that even if the grievance were arbitrable, the denial of the leave request was a proper exercise of the District's contractual discretion. Article 11 provides that no personal leave shall be granted either immediately before or after a District holiday unless the District exercises its discretion and determines the particular request is appropriate. While the Association argues that past practice supports the Schovilles' position, evidence of past practice is unnecessary where the contract provision at issue is clear and unambiguous. Even if Article 11 were ambiguous there is no binding past practice of the understood and accepted way of doing things over an extended period of time. Schoville was aware of only two teachers who received pre or post-holiday personal leave when he filed his grievance, only one of which occurred prior to his denial. Incidents occurring after the Schovilles' leave requests

cannot be considered past practice. Thus, there is just one pre-holiday leave request granted by the District, and one occurrence within a time period of two years cannot establish a past practice. No one was ever granted a three-day personal leave before or after a holiday.

Wolff and Kranpitz looked at the factors consistently used to evaluate leave requests – timing and length of leave, availability of substitutes, and impact on the educational process. The District determined that the leave requests were excessive and unduly disruptive to the educational process of more than 100 students per day of leave. It was deemed inappropriate and denied. The District's discretion under Article 11 was properly exercised.

In Reply, the Association

The Association responds to the timeliness issue by arguing that Ken Schoville, acting as the grievance chair, was not aware of all the evidence in which leaves have been granted in the past as well as after their denial of leave on March 7th. Once all the evidence was clear, Schoville filed the grievance in a timely manner. When the Association became knowledgeable of the fact that other individuals had received the opportunity to take leaves before a holiday, the Association proceeded with the grievance procedure. Grievances are not always discovered at the time they occur. Moreover, the District tried to interfere with the Association's right to process the grievance. Kranpitz testified that he received no documentation from the Association's committee. However, the language does not require any documentation nor does it indicate a time frame in which the committee shall meet.

While the District suggests that the reason the Schovilles were denied their request is due to the fact that they did not indicate on their leave forms what the leave was intended for, the Schovilles did not need to fill out the purpose of their leave on the form. The Association also notes that the District has raised the claim that if the Schovilles left, it would affect over 100 children for each of three days and required a total of six substitute teachers. On several other occasions, the Schovilles took such leaves.

In Reply, the District

The incidents cited by the Grievants are distinguishable from the Grievants' requests. Hutter's leave request was for sick leave. Gehrke received one day of personal leave before Memorial Day in 2002 but agreed to work if the District could not get a substitute. Both requests were made well after the Grievants' requests had been made and denied. Those post-denial requests cannot be considered part of the District's practice in March of 2002. Sutton's request is the only one before the Grievants' request, and his was for one day, not three days.

The District submits that it never tried to block the grievance, Kranpitz pointed out the conflict of interest in his response, and the grievance then moved through the procedural steps. There is no basis to claim that the District discriminated against Ken Schoville.

DISCUSSION

The threshold issue of arbitrability must be addressed first. The collective bargaining agreement states in Article 5:

A. Definition: A grievance is defined as a claim based upon the interpretation, meaning, or application of any of the provisions of this Agreement. Grievances shall be processed pursuant to the following procedure.

B. Procedure: It is understood that the time limits set forth in this Article shall be considered as substantive, and failure of the grievant to file and process the grievance within the time limits set forth in this Article shall be deemed a settlement and a waiver of the grievance. The number of days indicated at each level should be considered a maximum and every effort should be made to expedite the process.

Step 1: Any employee covered by this Agreement shall first discuss the grievance with MHLTEA, with the object of settling the matter informally, within five (5) school days of the occurrence giving rise to the grievance.

Step 2: If the grievance is not resolved through means of informal discussion, it shall be presented by the grievant to a committee established by the Association for this purpose. The committee shall determine the merit of the alleged grievance.

If no merit is found, the committee shall instruct the grievant to cease pursuit of the matter. If merit is found, the grievance shall advance to the next step.

Step 3: If the grievance is not resolved to the satisfaction of the employee in Step 2, then the grievance shall be reduced to writing and an appeal may be made to the Administrator by the employee and a representative of MHLTEA within five (5) school days of the discussion in Step 2. The Administrator shall respond, in writing, within five (5) school days of receipt of the written grievance. The written grievance shall contain the name of the Grievant, a statement of the grievance, the issue(s) involved, the relief sought, the date the incident or violation of the contract took place, the specific section(s) of the Agreement alleged to have been violated, the signature of the Grievant and the date.

...

The Grievants did not meet with the Association within five days of the denial of the leave request on March 7th, and thus failed to meet the requirements of Step 1 of the grievance procedure. The Association admits that it combined Step 1 and 2 and this meeting occurred in either late May or early June of 2002. There is nothing inherently wrong with combining steps of the grievance procedure, as long as the time lines are still being met. But combining the steps without meeting the first requirement of the five-day limit is a problem.

The question is: what is the “occurrence giving rise to the grievance” as the language of Article 5, Step 1 states? Obviously, the first “occurrence” would be the denial of the leave request, which occurred on March 7, 2002. One could also use a later date of March 20, 21, and 22 of 2002, the dates when the Schovilles wanted to use personal leave. The District could have changed its mind anytime between March 7th and March 20th, so it is technically possible to wait until the date of the actual leave time desired to claim that the “occurrence” for the purpose of the grievance started to run at that time.

However, neither of those “occurrences” would help the Grievants in this case, because the grievance was not filed until June 3rd, well outside the time limits of Step 1. The Grievants did not meet with the Association pursuant to Step 1 until late May or early June. The Association claims now that the “occurrence” is when the Grievants learned that others had been granted leaves before a holiday.

The problem with extending the word “occurrence” to the knowledge of others being granted leaves before holidays is that there would appear to be no time limit whatsoever on the need to file a timely grievance, under the Association’s position. The Association not only looks back approximately a year when Brian Sutton received a personal day before the Memorial Day holiday in 2001, but it also looks to the future past the spring break of 2002. It looks at people who were granted leaves in April and May of 2002, well after the Schovilles were denied their leave requests in March. Gehrke received personal leave before the Memorial Day holiday in 2002. Galinas also got two days of personal leave before a holiday in 2002 – the Friday before Easter in April – although as a part-timer, her leave hours would mean that four class periods would be missed, or about one-half day absence total. Schoville mentioned Hutter, but her leave was for sick leave and occurred the prior year.

The Association cannot claim that the Grievants lacked knowledge of Sutton’s leave before a holiday, since his leave occurred nearly a year before the Grievants’ request. The claim that the District granted leaves in the future after it denied the Grievants’ requests for leave cannot be considered to be the occurrence giving rise to the grievance. There would be no cut off time under such a claim. For example, if the Grievants were denied leave time before the spring break in 2002, and the District were to grant a similar request before the spring break in 2003, would the Association maintain that a grievance could be filed a year later?

Accordingly, I find that the future conduct of the District cannot be held to be the “occurrence giving rise to the grievance” under Step 1 of Article 5. The occurrence was the denial of leave on March 7th. If the question of the later dates of March 20, 21 and 22 were before me as the possible dates of the occurrence, I would extend that much time to the occurrence giving rise to the grievance, since the decision of the District could always be reversed up until that time. However, the two-month period following the denial and actual time of leave requested is too long a period to extend the meaning of the phrase “occurrence giving rise to the grievance.” The Grievants knew or should have known of the prior incident involving Sutton, and their grievance time had to start running in March. A party cannot develop a better theory late in the day – or year – to contend that it then has a claim. Moreover, it would be unlikely that any arbitrator could consider something that happened in the future to be part of any past practice.

AWARD

The grievance is untimely and is denied.

Dated at Elkhorn, Wisconsin, this 18th day of April, 2003.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator