BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CLINTONVILLE SCHOOL DISTRICT

and

CLINTONVILLE EDUCATION ASSOCATION

Case 45
No. 61809
MA-12073

(Summer Sick Leave Grievance)

Appearances:

Mr. David A. Campshure, UniServ Director, United Northeast Educators, 1136 North Military Avenue, Green Bay, WI 54303-4414, on behalf of the Association.

Mr. Robert W. Burns, Davis & Kuelthau, S.C., 200 South Washington Street, Suite 401, P.O. Box 1534, Green Bay, WI 54305-1534, on behalf of the District.

ARBITRATION AWARD

Pursuant to a joint agreement and the terms of the 1999-2001 labor agreement between Clintonville Board of Education (District) and Clintonville Education Association (Association), the parties jointly requested that Sharon A. Gallagher be appointed as impartial arbitrator to hear and resolve a dispute between them regarding whether teachers absent during summer school should be allowed to use contractual sick leave therefor. Hearing was scheduled and conducted on September 22, 2003, at Clintonville, Wisconsin. A stenographic transcript of the proceedings was made and received by the Arbitrator on October 14, 2003. The parties agreed to exchange their briefs directly with each other, a copy to the Arbitrator, post-marked November 10, 2003. The parties reserved the right to file reply briefs and they did so by December 26, 2004, whereupon the record herein was closed.

ISSUES

The parties were unable to stipulate to an issue or issues for determination in this case. However, the parties stipulated that the Arbitrator could frame the issues based upon the relevant evidence and argument presented as well as the parties' suggested issues. The Union suggested the following issues for determination:

> Did the District violate the collective bargaining agreement when it deducted pay rather than accumulated paid time off for teachers who were absent during the 2002-03 summer school sessions? If so, what is the appropriate remedy?

The District suggested the following issues for determination:

> Is the subject matter of summer school outside the jurisdiction of the collective bargaining agreement? If not, did the District violate the collective bargaining agreement by paying summer school teachers for actual days worked? If so, what is the appropriate remedy?

Based on the relevant evidence and argument as well as the above-quoted suggested issues, I find that the District's initial issue must first be determined but that the Association's substantive issue should then be determined in this case.

RELEVANT CONTRACT PROVISIONS

ARTICLE VII – COMPENSATION

7.1 Salary Schedule
The Salary Schedule for 1999-00 is ATTACHED as APPENDIX "A". The 2000-01 Salary Schedule will be attached to APPENDIX "A" as soon as possible.

7.2 Extracurricular Salary Schedule
The Extracurricular Salary Schedule is ATTACHED as APPENDIX "B." The extracurricular pay schedule is based on percentage of BA level based on experience in the extracurricular activity.

7.3 Extended Contracts
Teachers offered extended contracts (contracts in addition to the 188-day contract), shall receive the following compensation:

A. 100% of prorated daily salary if working with students

B. 75% of prorated daily salary if not working with students

C. Band directors, when leading a marching band for a Memorial Day parade and/or Christmas parade, shall be compensated as provided in 7.3A; however, each are limited to a maximum of five (5) hours.

. . .

7.5 Special Compensation

This schedule is to be considered as a minimum and is not construed as preventing the Superintendent of Schools from recommending, and the Board of Education from granting, additional compensation over and above the amounts provided in the schedule. Information regarding the qualifications necessary to receive special compensation shall be made available to all teachers.

. . .

ARTICLE X – LEAVES OF ABSENCE

10.1 Sick Leave

A. No deduction will be made from the salary of any member for absence due to personal illness, providing such absence does not deplete sick leave, which is credited at the beginning of each school year as per "B."

B. This benefit shall be cumulative and such portion of the ten (10) as has not been used may accumulate up to a total of ninety (90) days, inclusive of allowance for the current year in which used. These days may be used for illness or disability of the teacher. Illness is defined as being an unhealthy condition of the body or mind.

. . .

E. Full deductions will be made from the salary of any teacher for absence in excess of the periods named in 10.1-A. Deductions from pay will be made for either quarter, half or full days on the basis of 1/752, 1/376, or 1/188.

. . .

10.2 Emergency Leave

A. No deduction will be made from the salary of any teacher for absence due to the death of a member of his or her immediate family; a maximum of three (3) days may be allowed for the death and funeral of the following relatives: spouse, father, mother, father-in-law, mother-in-law, brother, sister, brother-in-law, sister-in-law, son, daughter, or grandchild.

B. A maximum of two (2) days may be allowed for attending the funeral of a grandmother or grandfather.

C. Emergency leave for illness in the immediate family shall be allowed in case of critical illness, in case of a sudden call for suspected critical condition, in the necessity of taking a member to the hospital, or in making of arrangements for care due to sudden illness. This provision is limited to five (5) days annually. Other days may be used from sick days.

D. Funeral leave of up to two days per occurrence for attendance at funerals deemed necessary by the individual that are not otherwise listed in the contract will be deducted from the employee's accumulated sick leave.

. . .

ARTICLE XXII – TERM OF AGREEMENT

22.1 Agreement Application
This Agreement shall supersede any rules, regulations or practices of the Board, which shall be contrary to or inconsistent with its terms.

22.2 Teacher Contracts
A. The individual teacher contract is a vital part of this Agreement (Appendix D.)

B. The extracurricular contract is a vital part of this Agreement (Appendix E).

22.3 Complete Agreement
This Agreement represents the full and complete agreement as a result of negotiations between the parties. It is agreed that any matters relating to the current contract terms, whether or not referred to in this Agreement, shall not be open for negotiations except as the parties may specifically agree thereto.

22.4 Binding Agreement
This Agreement shall be binding on both parties.

22.5 Period of Agreement
This Agreement shall become effective on JULY 1, 1999, and shall continue in effect through JUNE 30, 2001.

. . .

BACKGROUND

It is undisputed that the District has issued separate contracts for teachers who work during summer school and who perform work on extended contracts beyond the 188 day contractual school year. Under the labor agreement, each teacher's pay for summer school is based on a per diem rate figured as 1/188 of the teacher's annual salary. For extended contracts, the District pays 75% of the teacher's per diem rate (1/188) if no contact with students is involved. Non-district teachers/individuals have been hired and have signed summer school contracts for many years. These non-unit teachers have received no fringe benefits, they do not pay union dues and to date, they have not received seniority credit for the time worked during summer schools. 1/

1/ The District has argued that teachers should receive credit for summer school work if they performed the summer school work prior to their hire as regular District Teachers, for purposes of breaking a tie in seniority in a layoff situation. The parties have not agreed to place this approach into the collective bargaining agreement to date.

Each year, the District sends out letters in February to those who have taught summer school in the prior year, asking if they wish to submit course offerings for the next summer school. The District also puts memos in each District teacher's school mailbox asking them for any summer school class proposals. The District then takes these proposals, puts them in a book and distributes the books to students to see what courses the students will register for. The students' choices determine the course offerings in summer school; if at least 15 students choose a course, the District will offer it and issue a summer school contract to the teacher involved. 2/ The District then checks each teacher's certification to make sure they would be eligible to teach the summer school offering they have suggested and which the students have selected.

2/ One exception to the 15 student rule is for remedial classes needed by students; these classes are offered from time to time, without regard to the number of students selecting them.

Elementary Principal Strauman who has been employed by the District since 1997 and who has run the District's summer school since the year 2000, stated that the District has never paid or applied contractual leave to teachers during summer school. If a summer school course is shortened, the teacher involved receives less pay therefor; if the course is not taught, the teacher receives no pay therefor; if a teacher fails to teach a day, he/she is not paid therefor and the District does not request any reason for a summer school teacher's absence. When a labor agreement is settled, summer school rates are adjusted and paid to reflect the bargained

for increases in the salary schedule (and therefore per diem rates). During the summer, summer school teachers are paid separately for their work, on four days during the summer. Extended contracts are also paid by separate checks during the non-school year. During the 1998 summer school, seven summer school teachers were absent and none of them was paid for hours they did not work due to their absences.

Prior to 2002, the District had printed the following language in all individual summer school teacher contracts:

> EMPLOYMENT: The teacher is employed subject to such rules and regulations as have been, or may be hereafter, adopted by the Board of Education, and subject to the supervision and control of the Superintendent of Schools. This contract is applicable to Wisconsin Statutes and the Master Agreement.
>
> COMPENSATION: The above named teacher is to be paid according to the terms of the Master Agreement and will be placed at the appropriate position on the salary schedule as determined by the Superintendent of Schools.

The issue of teacher use of accrued sick leave arose during the 2000 and 2001 summer schools. The parties settled those issues by entering into written agreements after grievances were filed. According to the settlements (Union Exh. 4 and 5), Karen Rogers had been ill and Kathy Block had served on juror duty during the 2000 summer school. During the 2001 summer school, Karen Rogers and Chris Dittman had been absent for undisclosed reasons. In each case, the teachers involved were reimbursed for the time they had been absent without pay during the relevant summer school. Significantly, the District objected to the admission of Union Exhibits 4 and 5 because both settlement agreements contained language stating that the agreement should not set a precedent, as follows:

2000 Settlement Agreement:

> The parties further agree that the issue of payment for missed summer school contract days (see attachment) will be addressed during the 2001-2003 negotiations.
>
> This side letter (i.e., resolution of these situations) does not establish a practice nor shall it be cited as precedent by either party in any interest or grievance arbitration proceedings, or in any other disputes between the parties.

. . .

2001 Settlement Agreement:

> The parties further agree that the issue of payment for missed summer school contract days will be addressed during the 2001-2003 negotiations and this resolution shall not be considered the status quo.
>
> This Memorandum of Understanding (i.e., resolution of these situations) does not establish a policy or practice nor shall it be cited as precedent by either party in any interest or grievance arbitration proceedings, or in any other disputes between the parties.

. . .

The Union argued that it was offering these settlement agreements herein, only for the fact that the issue of the use of accrued sick leave during summer school has arisen before the instant case. The District argued for their exclusion. 3/

3/ I will deal with this issue in the Discussion section.

FACTS

For the 2002 summer school contract, the District changed the language (quoted above) contained in the individual summer school teacher contracts to read as follows:

> EMPLOYMENT: The teacher is employed subject to such rules and regulations as have been, or may be hereafter, adopted by the Board of Education, and subject to the supervision and control of the Superintendent of Schools.
>
> COMPENSATION: The above named teacher is to be paid for actual days worked on a per diem basis calculated from the teacher's placement on the salary schedule for the prior academic year.

On June 18, 2002, the Union formally objected to the change of language contained in the individual summer school teacher contracts by writing a letter to the District. 4/ The Association asserted in its letter, as follows:

. . .

> Summer school contracts continue to be subject to the parties' Master Agreement and State Statutes, despite the District's deletion of the statement to

that effect. In addition, the parties have not negotiated any changes regarding the manner in which teachers working summer school are to be compensated.

The CEA believes the changes to the Summer School 2002 Contract were made by the District in an effort to avoid possible payment of sick leave or other paid time off to any teacher contracted for 2002 summer school. As you are well aware, the parties settled grievances over that very issue in each of the last two years, on non-precedential grounds, by paying teachers who used sick leave during summer school. The District's changes to the language of the 2002 summer school contracts for [sic] does not automatically resolve that dispute for this or future years.

The Master Agreement is applicable to summer school contracts. Therefore, and the CEA fully intends to grieve any instances in which teachers under 2002 summer school contracts are denied sick leave or any other contractual paid time off.

. . .

4/ The Union did not file a grievance on this point.

During the 2002 summer school, four teachers were absent due to funeral and emergency reasons and their summer school pay was docked for the time they did not work. Three of these employees were named in the grievance filed on September 6, 2002: Karen Rogers, Amy Sieber, Jill Spiegelhoff. 5/ During its investigation of the instant grievance, the Union requested information regarding teacher absences during the 2002 and 2003 summer school sessions. The District responded *inter alia*, that Tere Masiarchin had been absent during the 2003 summer school for two days [redacted]. The parties agreed herein to add Ms. Masiarchin and Mr. Pugh to the instant grievance for purposes of a remedy.

5/ The Association was unaware that another employee, David Pugh, had also been absent two hours on July 9th during the 2002 summer school and that he had not been paid therefor at the time the Association filed the grievance.

The labor agreements in the District run from July 1 in odd numbered years through June 30th of the next odd number year (a two-year period) now required by Wisconsin state law. The parties negotiated a collective bargaining agreement for 1999-01. However, in

2001-03 no labor agreement was executed between the parties because the District imposed a QEO. Therefore, in 2001-03 the Union only received salary schedules for the pertinent years and the language items from the 1999-01 labor agreement continued in full force and effect. In 2002 and 2003, all teachers involved in the instant grievance signed individual summer school contracts which contained the language quoted above regarding "actual days worked."

POSITIONS OF THE PARTIES

The District

The District argued that summer school contracts are outside the jurisdiction of the collective bargaining agreement and that therefore, the Arbitrator has no power to issue an award in this case. In this regard, the District noted that individual teacher contracts specifically state the number of days a teacher is to provide services and the wages to be paid therefor; that summer school contracts are signed by teachers who teach summer school but these contracts are not referred to in the collective bargaining agreement; the only connection between summer school contracts and the collective bargaining agreement is the manner in which employees are paid for summer school work. Therefore, the leave provisions of Article XXII do not apply. Therefore, the District urged that as the contract specifically states that the Arbitrator must base his/her decision on the interpretations/applications of specific terms of the Agreement and cannot add to or modify the contract language, the Arbitrator in this case cannot rule on the Union's grievance.

Even if the Arbitrator finds that she has jurisdiction in this case, the District urged that the grievance can be disposed of by reference to the express terms of the summer school contracts. In this regard, the District noted that employees are to be paid for "actual days worked" pursuant to the summer contracts they signed which are the basis of this case. As the Association did not grieve the change in the summer school contract language, the District urged the Arbitrator to dismiss the grievance.

Contrary to the Association's arguments, summer school contracts and extended contracts are not one in the same. The District noted that the Association argued that teachers on extended contracts are paid a daily rate based on the teacher's annual salary and that teachers under summer school contracts are paid in the same fashion. Therefore, the Association argued that the District must pay sick leave as it does during the 188-day contract of individual teachers for both extended contracts and summer school contracts. However, the District noted extended contracts are used in special situations such as for early childhood or special education students and at-risk students as well as for curriculum development. Superintendent O'Toole stated that extended contracts and summer school contracts are treated differently and identified and handled differently. Therefore, the District urged that the Association's argument on this point should be disregarded.

The collective bargaining agreement does not call for sick leave use during the summer. On this point, the District urged that although the contract states that no deduction from the salary of any member shall be made for illness and that deductions if made shall be "from the salary" of any teacher, these references in Section 10.1 of the labor agreement require a conclusion that sick leave is to be provided only across the 188-day school year of teachers for which the receive a salary. If sick leave is depleted and the teacher is sick for one day while teaching summer school, the District has not filled the teaching slot for that day, it has merely canceled the day and not paid the teacher for that day of summer school. The District noted that it hires District teachers as well as those outside the District to teach summer school and that it has never paid outside teachers any sick leave benefit for summer school absences. Were the Arbitrator to conclude in favor of the Association in this case, then the District notes it would have the service of teachers for a 12-month period, making summer school included in the "salary" of each teacher. If this were the case, the District noted that it would have been overpaying and under-employing teachers for many years.

The District urged that contractual sick leave is not based upon 12 months. On this point, the District urged that the sick leave provision is specific to salary and is not a 12-month benefit. Section 7.4 of the labor agreement says when additional pay for "summer work" will be paid; there is no language in the labor agreement that allows teachers to spread sick leave accumulation and use over the summer months. Just because the collective bargaining agreement covers two 12-month periods does not mean that sick leave can be accessed across the entire 12 months when no work days under the collective bargaining agreement are being performed.

The District has not paid teachers who are absent while teaching summer school in the past. The District noted that in 1998 (District Exhibit 1), the District did not pay teachers who were ill or in need of emergency leave during summer school; that both Summer School Administrator Strauman and Superintendent O'Toole testified that if teachers do not work during summer school they have not been paid for those days prior to 2000, 2001 and 2002; and that no leaves were applied to any absences of teachers during summer school in the past.

Finally, the District urged that the Arbitrator's upholding the grievance would create a new and unbudgeted benefit for summer school, which was never negotiated between the parties. In this regard, the District asserted that if the District were to have to pay employees for their absences during summer school, they would also have to provide a substitute which would increase summer school costs for the day the teacher was absent. Therefore, the extension of sick leave and emergency leave to summer school would extend a benefit to teachers not provided for in the labor agreement and not negotiated between the parties.

The Association

The Association argued that summer school is within the jurisdiction of the labor agreement. On this point, the Association noted that Article I states that the Association is the exclusive bargaining representative for "all contracted teaching employees." As employees

sign summer school contracts, the Association represents them for that purpose. Article VII, Section 7.3, addresses extended contracts and states that they are contracts in addition to the individual 188-day contract. Bargaining unit employees who teach summer school sign contracts which are in additional to their individual 188-day contracts. Therefore, summer school contracts are extended contracts for work in excess of the 188-day period. The Association noted that teachers are paid 100% of the pro-rated daily rate for summer school. The fact that these summer school contracts, signed by bargaining unit members, are called "summer school contracts" and not extended contracts is irrelevant in these circumstances.

The language of the summer school contracts for 2001 and earlier referred directly to the Master Agreement. There, the summer school contracts stated as follows: "this contract is subject to applicable Wisconsin Statutes and the Master Agreement." "The above named teachers is to be paid according to the terms of the Master Agreement and will be placed at the appropriate position on the salary schedule as determined by the Superintendent of schools." The above-quoted language specifically refers to the Master Agreement and tied summer school contracts for 2001 and earlier thereto.

However, in 2002, the District changed the language of summer school contracts to refer to "actual days worked" and to remove references to the Master Agreement. This change does not mean that summer school contracts are outside the jurisdiction of the collective bargaining agreement as the rates to be paid for summer school work are specifically stated to be adjusted at the completion of negotiations for 2002-03. As the Association objected to the change in the 2002 summer school contract language, and it had filed grievances in 2000 and 2001 protesting the District's failure to pay for leaves of teachers during summer school, the Association urged that the language of the 2002 summer school contract is not determinative of this case.

No deduction should be made from wages if employees have accrued paid time off for their use in summer school. The Association noted that there is no contract prohibition or limitation on a teacher's use of accrued sick leave or emergency leave. In addition, the collective bargaining agreements between the parties have been in full force and effect for their continuous terms (1999-2001 and 2001-2003). The Association noted that teachers are covered for health and dental insurance purposes continuously across the contract term, not simply during the 188-day period. In addition, the Association observed that Section 20.1 requires that teachers who terminate their employment between July 1 and the beginning of the school year, pay liquidated damages, making the 188-day contract period irrelevant.

The Association noted also that sick days are credited at the beginning of "each school year" and can accumulate up to 90 days "inclusive of allowance for the current year in which used." The contract, therefore, uses the terms year, school year, contract year and current year in various ways. Notably, the school year is used regarding the salary schedule changes (Section 6.1c), the number of paychecks chosen by a teacher (Section 7.4a), personal leave (Section 10.3c) and leaves of absence (Section 10.6a) as well as layoff notices (Section 11.1j

and k). The parties use "contract year" when discussing extracurricular duties in Section 9.2 and they use "calendar year" when specifying when teachers will be notified of changes in their assignment. In addition, Section 10.1f, refers to the "fiscal year" when additions are to be made to the sick leave bank of employees. However, no language in the collective bargaining agreement limits the use of sick leave or emergency leave to the 188-day period nor does it prohibit the use of same during summer school contracts or extended contracts.

In these circumstances, the Association urged the Arbitrator to sustain the grievance, find that the District had violated the labor agreement by its refusal to pay accrued benefits to teachers absent during summer schools in 2002 and 2003, order that affected employees be made whole and that the Arbitrator retain jurisdiction regarding the remedy.

Reply Briefs

The District

The District argued that summer school contracts are outside the jurisdiction of the Master Agreement. The language contained in the summer school contracts, as well as a lack of specificity in the labor agreement indicate that while other individual contracts are covered by the labor agreement, summer school contracts are not. In addition, although the Association has claimed that extended contracts are the same as summer school contracts, this is inconsistent with past practice and the record evidence. The evidence showed that summer school contracts have been treated differently from extended contracts: Article VII specifically refers to extended contracts but makes no reference to summer school contracts.

References in the Master Agreement to "one's position on the salary schedule" for purposes of compensation and references in the summer school contracts used for 2001 and earlier as being "subject to the Wisconsin Statutes and the Master Agreement" do not automatically mean that all of the Master Agreement benefits are to be incorporated into summer school contracts. The District noted that the Association failed to grieve the District's changes to the 2002 summer school contracts. In any event, the District noted that its changes to the 2002 and 2003 summer school contracts merely reflected the true past practice of the parties in paying teachers under summer school contract. This action was taken pursuant to Article II – Management Rights, in which the District has the specific right to control programs not covered by the Master Agreement. The reference in Article I to "all contracted teaching employees" is insufficient to require that summer school contracts incorporate accumulated benefits to bargaining unit teachers during summer school.

Teachers choosing to teach summer school cannot access their sick leave bank to cover leave during summer school, as the summer school contract states that teachers are to be paid for "actual days worked" based upon the teacher's placement on the salary schedule. The Association argued that language in the Master Agreement that "no deduction from salary will

be made while employees have accrued sick leave or emergency leave available," does not require a different conclusion. The term "from the salary" refers back to the 188 contract days in which a teacher has a salary without regard to any summer school compensation. Sick leave language is tied directly to the 188-day salary for teachers. Therefore, the District argued that the Association is comparing apples to oranges by its argument that insurance benefits relate to the salary and the leave provisions of the contract. Although the Association has pointed to the use of the term "contract year," "school year" and "year" as used in the labor agreement, these arguments are not persuasive as the sick leave language has been specified in the contract for some time. As there is no past practice or contract language or other evidence of record to support a conclusion that the use of accrued sick leave must be across the 365-day calendar year for bargaining unit teachers, the District urged that the grievance be denied and dismissed in its entirety.

The Association

The Association urged that summer school is covered by the collective bargaining agreement. The fact that a summer school contract is not attached to the Master Agreement does not mean that it is not a part thereof. In this regard, the Association noted that summer school contracts fit the definition of an extended contract "a contract in addition to the individual 188-day contract" contained in Section 7.3. In addition, the Association noted that the title of contracts should be irrelevant and that the pay, 100% of the pro-rated daily rate, is the same for extended contracts as well as summer school contracts for unit members. Furthermore, Section 1.1 of the labor agreement states that "all contracted teaching employees" are covered by the labor agreement. Therefore, as teachers sign a summer school contract, they are represented by the Association and they are covered by the Master Agreement regarding that summer school contract.

The Association urged that the wording of the summer school contract is not dispositive of the issues herein. The Association noted that it objected to changes made in the summer school contract form in 2002, stating that it would grieve future violations. If the District were allowed to unilaterally change the summer school contract language, the Association urged that the District could revise extracurricular or even 188-day contract wording to avoid grievances in the future. This would certainly violate Section 111.70 of the Wisconsin Statutes.

The labor agreement does not limit the use of sick leave or emergency leave to the 188-day individual contract term. The Association noted that the definition of "salary" is the compensation at the a fixed rate paid periodically for services rendered, not an hourly rate, citing Black's Law Dictionary. Teachers who teach under summer school contracts are also paid a "salary" and Sections 10.1 and 10.2 do not exclude summer school or extended contracts from the concept of "salary." As bargaining unit members have accumulated leaves under the Master Agreement, the fact that the District hires non-bargaining unit teachers to teach in summer school should have no effect on unit member rights.

The Association argued that there is no existing past practice regarding the use of sick leave or emergency leave during summer school. The Association noted that none of the elements of a binding past practice are present here, as the Association grieved, the issue of the use of accrued leaves in years 2000, 2001 and has now placed the same issue before the Arbitrator regarding summer schools which occurred in the years 2002 and 2003. The fact that grievances in the years 2000 and 2001 were settled has no effect upon this argument.

Furthermore, the Association noted that sick leave and emergency leave are bargained for benefits which were negotiated between the parties. Therefore, the costs were well known to the parties when they entered into their agreement regarding these benefits and as no contract provision restricts the use of paid leave to the period of the 188-day contract terms, the District's argument that a ruling in favor of the Association would create an unfunded benefit is simply illogical and it should carry little, if any, weight. In all of the circumstances, the Association urged that the grievance be sustained in its entirety and affected employees be made whole.

DISCUSSION

Several facts significant to the resolution of this dispute must be analyzed before the dispute can be determined. First, a sample teacher individual contract is attached as Appendix D to the labor agreement and a sample extracurricular contract is attached to the labor agreement Appendix E. Article XXII, Section 22.2, also specifically refers to individual teacher contracts and to extracurricular contracts as "a vital part of this Agreement." It is significant that no reference is made in the parties' labor agreement to summer school or to summer school contracts.

In addition, Article VII, defines contractual compensation at Section 7.1, where it states that the "salary schedule" for each of the two covered years of contract (1999-2000 and 2000-2001) are to be attached to the labor agreement as Appendix A. All salary rates are listed for teachers in Appendix A. Section 7.2 refers to the "Extracurricular Salary Schedule" which is attached as Appendix B and is to be "based on percentage of BA level based on experience in the extracurricular activity." All extra curricular rates (percentages of salary) are listed in Appendix B.

The Association has argued that the summer school contracts are extended contracts and that both must be administered in the same fashion. On this point, I note that the only reference to extended contracts in the labor agreement is in Section 7.3 and that, historically, a sample copy of an extended contract has never been attached to the parties' labor agreements. Section 7.3 also states that extended contracts are those "offered" to teachers and Section 7.3 defines "Extended Contracts" as "contracts in addition to the 188-day contract" and compensated at "100% of prorated daily salary if working with students" and compensated at "75% of prorated daily salary if not working with students." There is no reference in Article VII to summer school contracts and a sample summer school contract has never been attached to the Master Agreement.

In my view, the language of Article VII, Section 7.3, is very broad, defining an extended contract as any contract "in addition to the 188-day contract." As teachers are paid 100% of their prorated daily salary for summer school classes and summer school is held outside the 188-day teacher work year, summer school contracts are extended contracts under the broad language of the labor agreement. The fact that the District entitles summer school contracts as such and does not call them extended contracts, does not require a different conclusion. 6/ Based upon the above, I believe that summer school contracts are a type of extended contract which are within the jurisdiction of the labor agreement pursuant to 7.3 and that I have jurisdiction to determine the merits of this case.

6/ I note that the District has issued contracts entitled extended school contracts which have either referenced a specific year in the title or they have not referenced a specific year (District Exhibit 2 and 3). Summer school contracts have always referenced the specific year involved in the titles thereof. Extracurricular service contracts have never referenced a specific year in the titles of those contracts.

Regarding the substantive issue herein, I note that historically, the parties' contracts have specifically included school year calendars showing the number and placement of student days, contract days, holidays, in-service days, recess days, parent-teacher conference days and one make-up (snow day) each year. The inclusion of these calendars and the listing of 188 contract days which teachers are expected to teach in order to receive the salary included in Appendix A, strongly supports a conclusion that the term "salary" is tied to the 188 days of the school year.

In addition, the 1999-2001 contract contains two Memoranda of Understanding regarding "In-House Teacher Trainers" and "Fringe Benefit Deduction on Leave Without Pay." The trainer memorandum makes clear that teachers who work and/or prepare outside the regular 188 contract days and the regular eight-hour contracted school day, shall be paid additional monies as trainers. The memorandum regarding leave without pay states that such leaves up to four days "may be granted" "during the school year" and require "salary deductions from wages and items tied to salary such as FICA and WRS." These memoranda tend to support a conclusion that if the parties had intended to apply accrued sick leave and emergency leave to summer school contract periods, they would have done so expressly in a memorandum of understanding.

Furthermore, the language of Article X, Section 10.1A, states that "no deduction will be made from the salary of any member for absence due to personal illness. . . ." The reference in Section 10.1A to salary can only be understood in reference to Section 7.1 and Appendix A: salary is the compensation teachers can expect to receive for the 188 contract days that they work pursuant to their individual teacher contracts and the school year calendars attached to the labor agreement. The fact that Section 7.3 refers to the "prorated daily salary," also supports a conclusion that salary must be based upon the 188 contract days teachers are paid for in Appendix A.

The Association has argued that there are no contractual limits or prohibitions regarding teacher use of accrued sick and emergency leave and that, therefore, teachers should be allowed to use such leave during summer school. If the Association's argument were taken to its logical extension, teachers who are not working during summer school could potentially call in sick while on summer recess and receive pay therefor from their accrued sick leave. Clearly, neither party to this contract intended such a result.

The District has pointed to several instances in the past (prior to the year 2000) where it refused to allow teachers to use accrued leave in order to be paid for absences while teachers were working under extended contracts or in summer school. None of these instances was grieved. The District offered District Exhibit 1, which indicated that during the 1998 summer school, Jana Burg, Karen Rogers, Chris Dittman, Sue Whippermann, Roxy Jungwirth, David Lemmenes and Paul Skarda all were absent during the 1998 summer school and were not allowed to take any accrued leave. Rather, their pay was docked for that summer session for the period of their absence. Furthermore, the District noted that non-district teachers who work summer school do not earn sick leave; when these teachers are ill, their pay is docked. In addition, the District noted that its witnesses Strauman and O'Toole testified that if teachers do not work during summer school, they have not been paid for those days both prior to 2000 and as well as in 2000, 2001 and 2002. The fact that the parties settled two grievances, without precedent, regarding absences from summer school in the years 2000 and 2001, should not be held against either party as those settlements were specifically stated not to set a precedent between the parties. In addition, there is no evidence that the parties ever agreed on the intent and/or applicability of Sections 10.1 and 10.2 to summer school contracts. In all of these circumstances, the District urged that a past practice had arisen whereby teachers who were absent in summer school, whether it be due to illness or an emergency, were not paid on the days of their absence. 7/

7/ The District also argued that if it had to pay teachers for their absences during summer school, the District would also have to provide a substitute teacher on those days. I disagree. There appears to be no contractual requirement that a substitute be engaged during summer school for an absent teacher. Therefore, this argument has not been considered herein.

The above-described District arguments regarding past practice, in Arbitrator's view, do not prove a true past practice but they do tend to support the District's arguments in this case. Although it is clear that the Association has grieved the District's refusal to grant sick leave and emergency leave to District teachers employed during summer school in 2000 and 2001, it failed to do so when similar situations occurred prior to the year 2000. In addition, the fact that the District does not pay non-district teachers who work during summer school for their absences and has simply traditionally docked their pay, is strong evidence in favor of the District's arguments herein. Thus, although it does not appear that a true past practice has arisen regarding the District's refusal to pay teachers for their absences during summer school, the evidence described above does tend to support the District, not the Association in this case.

The Association has pointed to the use of various terms across the contract, such as contract year, school year, year, fiscal year, current year and calendar year. However, these usages across the contract, in my view, do not detract from the specific language contained in Sections 10.1 and 10.2, which refer to deductions "from the salary" of the teacher for sick leave and emergency leave.

In all of the circumstances of this case and in light of the fact that the issue regarding the District's change of the language contained in the 2002 summer school contract is not before me, I issue the following

AWARD

The District did not violate the collective bargaining agreement when it deducted pay rather than accumulated paid time off for teachers who were absent during the 2002-2003 summer school sessions. Therefore, the grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 11th day of March, 2004.

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

SAG/anl
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