BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DENMARK SCHOOL DISTRICT

and

DENMARK EDUCATIONAL SUPPORT PERSONNEL

Case 10
No. 62909
MA-12446

(Piontek Grievance)

Appearances:

Mr. David Brooks Kundin, Executive Director, Bayland Teachers United, 1136 North Military Avenue, Green Bay, WI 54303, appearing on behalf of Denmark Educational Support Personnel and Grievant Pat Piontek.

Godfrey & Kahn, S.C., by **Attorney John Haase**, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, WI 54307-3067, appearing on behalf of the District.

ARBITRATION AWARD

Denmark School District (District) and Denmark Educational Support Personnel (Union) jointly requested that the Wisconsin Employment Relations Commission designate Sharon A. Gallagher to act as Arbitrator to hear and resolve a dispute between them regarding whether Pat Piontek should have received sick leave, vacation and personal leave while she was on disability and Workers Compensation due to various injuries she suffered between October, 2001, and June, 2003. A hearing in the matter was scheduled and held at Denmark, Wisconsin, on February 16, 2004. A stenographic transcript of the proceedings was made and received by the Arbitrator on February 27, 2004. The parties agreed to exchange their briefs directly with each other, a copy to the Arbitrator, postmarked March 29, 2004. The parties also agreed that two weeks after their receipt of the initial briefs, on April 12, 2004, they would file reply briefs, if any. The Arbitrator received the parties' reply briefs on April 13, 2004, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the issues for the Arbitrator's resolution herein. However, the parties stipulated that the Arbitrator could frame the issues based upon the relevant evidence and argument in this case as well as the parties' suggested issues. The Union's suggested issues were as follows:

> Should the grievance be sustained? If so, what is the appropriate remedy?

The District suggested the following issues:

> 1. Did the Grievant earn vacation benefits during the period October 11, 2001, through October 10, 2002, when she worked only 224 hours?
>
> 2. Did the Grievant earn sick leave and personal leave benefits during the periods July 1, 2001, through June 30, 2002, when she worked 240 hours and July 1, 2002, through June 30, 2003, when she worked 252 hours?

Based upon the relevant evidence and argument in this case, the Arbitrator has selected the Union's suggested issues, but will address the factual points raised in the District's issues within the body of the Award.

RELEVANT CONTRACT PROVISIONS

ARTICLE XVIII – EMPLOYMENT STATUS

> Section 18.01: All newly hired employees shall be on probation for a period of one hundred eighty (180) working days from the initial date of their employment, during which period such newly hired employees may be disciplined or discharged without proper or just cause at the sole discretion of the Employer without recourse to the grievance procedure hereinafter provided. Upon successful completion of the probationary period, an employee may be suspended or discharged for a just cause.
>
> Section 18.02: A regular full-time full calendar year employee is any employee who works 1820 hours or more per year.
>
> Section 18.03: A regular full-time school year employee is an employee who works more than 1260 hours per school year but less than 1820 hours per school year.

Section 18.04: A regular part-time full calendar year employee is an employee who works less than 1820 hours per school year, but more than 540 hours per year.

Section 18.05: A regular part-time school year employee is any employee who works more than 540 hours per school year but less than 1260 hours per school year.

Section 18.06: Any employee who works less than 540 hours per year shall not be eligible for fringe benefits unless specifically provided for in this Agreement.

XIX – VACATIONS

Section 19.01: Employees shall be notified of their total number of vacation days on an annual basis. Vacations shall be pre-approved by the immediate supervisor and/or Principal.

Section 19.02: Vacation days shall be granted to 12-month employees in accordance with the following schedule:

1 year of employment	1 week of vacation	(5 days)
2 years of employment	2 weeks of vacation	(10 days)
10 years of employment	3 weeks of vacation	(15 days)
15 years of employment	4 weeks of vacation	(20 days) – Effective 1999-2000

(Note: The District's non-union vacation policy is in effect for the 1998-99 school year.)

Section 19.03: Up to one week vacation may be carried over from year to year.

Section 19.04: At the termination of employment, compensation for any unused vacation days will be equal to the daily salary per accumulated day at the time of the employee's termination and will be remitted on the final paycheck.

XX – PAID HOLIDAYS

Section 20.01: All employees are entitled to paid holidays which fall within the employee's work year. Employees will be compensated for paid holidays at their normal daily rate.

Section 20.02: If a holiday falls on a Saturday or a Sunday, it will be celebrated and paid as though it had occurred on a Friday or a Monday unless otherwise agreed to by the parties; unless school is in session on such Friday or Monday, in which case employees will receive an additional day of pay at their normal daily rate. If a holiday(s) falls within a vacation period of the employee, the employee will be paid for the holiday(s) and the holiday will not be counted as used vacation time.

Section 20.03: The following holidays will be paid holidays:
July 4 (12-month employees)
Labor Day
Thanksgiving Day
Day after Thanksgiving Day
Christmas Eve Day (12-month employees) – Effective 1999-2000
Christmas Day
New Year's Day
Good Friday
Memorial Day
One-half day off for New Years Day (12 month employees).
Substitutions may be made for other religious holidays upon agreement among the employer, employee, and union.

Section 20.04: No employee shall be required to work on paid holidays. Employees whose services are requested by the District and who volunteer to accept such assignment, shall be paid at two times their normal hourly rate for all hours worked and shall be paid a minimum of two (2) hours.

. . .

XXIV – LEAVE CONDITIONS

Section 24.01: Sick Leave: 10 days will be granted annually for persons employed 9-10 months, cumulative to 100 days. 11 days will be granted annually for person employed 11 months, cumulative to 110 days. 12 days will be granted annually for persons employed 12 months, cumulative to 120 days. A sick day is defined as an amount equal to the number of hours an employee normally works per day.

Section 24.02: Emergency Leave: - Deaths: Emergency leave may be used in the event of a death in the immediate family. For purposes of this Article members of the immediate family will consist of the following:

Category I	1. Husband	Category II	1. Father
	2. Wife		2. Mother
	3. Child		3. Step-father
	4. Step-child		4. Step-mother
			5. Brother
			6. Sister
			7. Mother-in-law
			8. Father-in-law

Category III
1. Brother-in-law (brother of one's present spouse)
2. Sister-in-law (sister of one's present spouse)
3. Grandfather-in-law

4. Grandmother-in-law
5. Aunt
6. Uncle
7. Former Spouse
8. Grandmother
9. Grandfather
10. Grandchildren
11. Niece or Nephew
12. First Cousin
13. Friend
14. In the event of the death of a retired employee of the school district, the most appropriate building principal may select a staff member to attend the funeral as a representative of the school district.

Allowable days off for death of:

Category I persons - - - - - - - -	up to 5 days
Category II persons - - - - - - - -	up to 3 days
Category III persons - - - - - - - -	up to 1 day (if attending funeral)

Under Category III, Friend, such leave is to be limited to one day per year with pay and no more than 10% (rounded to the nearest whole number) of each building's staff shall be allowed off on a day with requests filled on a first-come, first-served, basis.

Requests for time off to serve as a pall bearer shall be honored, but such time off will be counted against other emergency days allowed.

Time off for deaths of family members not listed, or for the death of close friends beyond the above limitation shall also be considered but, when allowed, will be without pay. Days mentioned above are on a per occurrence basis. However, simultaneous deaths shall be considered one occurrence.

Section 24.03: Emergency Leave – Critical Illness: An employee may use up to four (4) accumulated sick days per year for the following purposes: four (4) days to care for sick children in the immediate family; two (2) days to care for other critically ill persons in Categories I and II; two (2) days to be with spouse while giving birth. No more than four (4) accumulated sick days can be used for these purposes in a given school year, except as allowed by law.

Section 24.04: Personal Leave: One (1) day of leave with pay per year shall be available to each employee as personal leave. Notice of intent to use a personal leave day shall be filed with the building principal at least five (5) school days in advance, when possible. Said personal day will be deducted from accumulated sick leave. A personal leave day shall be defined as an amount equal to the number of hours an employee normally works per day.

Personal leave days may not be used during the first five school days or the last five school days of each semester without the building principals' approval. No more than 10% (rounded to the nearest whole number) of each building's staff will be allowed off on a given day. Requests will be honored on a first-come, first-served basis.

Employees who do not use any sick days in a given school year will accumulate one (1) additional personal day for use in the next school year. Said days do not have to be earned in consecutive years in order to accumulate. Any unused personal days may be carried into future years. Five (5) personal days including the one for the current year will be the maximum accumulation.

. . .

XXV – HEALTH AND MEDICAL INSURANCE

Section 25.01: For purposes of this Article, full-time is defined as eight (8) hours per day.

Section 25.02: Effective 1998-99 (June, July, August, 1999), the District will contribute one-half the summer insurance cost for eligible 9-month employees. Effective 1999-2000, the District will pay summer insurance at the same level paid during the school year for eligible 9-month employees.

Section 25.03: Health Insurance: The District shall provide group health coverage through the WEA Insurance Trust. Such plan includes Long-Term Care. The plan shall be agreed upon by the Door/Kewaunee WEAIT Consortium, with the withdrawal from the consortium allowable only if mutually agreed upon by the Board and the Denmark Association of Support Personnel.

The District will pay 92% of the monthly premium toward the purchase of a family or single health plan for all full-time employees who choose to participate in the group health plan. Employees who work 50% time but less than full-time are eligible to receive premium payments on a pro-rata basis.

Section 25.04: Dental Insurance: The District shall provide group dental insurance through the WEA Insurance Trust. The plan shall be that agreed to by Door/Kewaunee WEAIT Consortium, with the withdrawal from the consortium allowable only if mutually agreed upon by the Board and the Denmark Association of Support Personnel.

The District will pay 92% of the monthly premium toward the purchase of a family or single dental insurance plan, for all full-time employees who choose to participate in the group dental plan. Employees who work 50% time but less than full-time are eligible to receive premium payments on a pro-rata basis.

. . .

FACTS

Grievant, Pat Piontek (Piontek), was hired by the District on October 11, 2000, as a 12-month full-time custodian. According to her medical records (Assoc. Exh. 2, page2), Piontek began having pain and stiffness in her left shoulder in April of 2001, which she and her doctor (whom she saw at this time) related to "overuse at work." (Assoc. Exh. 2 and Tr. 45) On or about May 10, 2001, Piontek was ordered off work by her doctor due to her work-related shoulder injury (Dist. Exh. 1. page 3). On May 24, 2001, Piontek became eligible for Workers Compensation (WC) benefits and she began receiving same on May 25, 2001 (Dist. Exh. 1 and Assoc. Exh. 2). At this time, Piontek received 2.5 hours of WC benefits and she worked 5.5 hours at the District. Thereafter, from May 29 through June 6, 2001, Piontek received 8 hours pay in the form of WC benefits.

From June 7 through June 15, 2001, Piontek returned to work at the District to see if she could tolerate her duties during the summer school break. As Piontek's shoulder was not significantly better and she was still in great pain, she went out on WC again based on her doctor's diagnosis, from June 18 through December 10, 2001. On July 15, 2001, Piontek became eligible to receive LTD benefits and apparently at this time, the LTD carrier (WEAIT) waived health insurance premiums for her so that neither she nor the District had to pay such premiums for her.

On July 25, 2001, Piontek had surgery on her left shoulder (Assoc. Exh. 2). Piontek went through extensive physical therapy after her surgery. On December 11, 2001, Piontek returned to work full-time and she continued to work full-time until January 3, 2002, when she began receiving partial WC benefits for 2.5 hours per day.

On January 23, 2002, Piontek fractured her right wrist in an accident at home. Piontek's medical records showed that her left shoulder continued to trouble her and that the shoulder had not healed from the time of her surgery. 1/ Piontek continued in physical therapy for her shoulder but it did not improve. Piontek's doctor concluded that she would have to have a second surgery on her left shoulder and this was performed on November 4, 2002. Piontek again went through extensive physical therapy on her shoulder and she was released to return to work full time on May 10, 2003. Piontek has continued to work full-time as a 12-month custodian for the District without incident to date.

1/ Piontek stated that if she had not broken her wrist on January, 2002, she would not have been able to work due to the continuing pain in her shoulder.

On of about July 25, 2003, the Association filed a grievance on behalf of Piontek because the District had denied Piontek vacation, sick leave and personal leave for the period she had not worked for the District while she was receiving WC and LTD benefits following her shoulder and wrist injuries (Assoc. Exh. 3). The District's position on this issue was stated by Superintendent Meles in his September 3, 2003 letter, as follows:

. . .

My response to this request is based upon the bargaining agreement; paragraph 18.06, which states that "employees who work less than 540 hours per year shall not be eligible for fringe benefits' [sic] unless specifically provided for in this agreement." Vacation time accrues to our twelve month employees annually based upon each individual's date of hire. During the period of October 11, 2001, and October 10, 2002, Ms. Piontek worked a total of 224 hours, not qualifying her for such benefit.

Personal and sick leave accrues annually between July 1 and June 30. During the 2000-01 fiscal year she worked a sufficient number of hours to qualify her for such benefit. However, during the 2001-02 fiscal year, she received payment for 240 hours. Based on the number of hours worked, Ms. Piontek does not qualify for such benefits in that year. She did not work a sufficient number of hours during the 2002-03 fiscal year to qualify as well.

Based upon the description provided, the request to have Ms. Piontek receive vacation, sick and personal leave during the time she was receiving workmen's compensation and disability payments is denied.

. . .

The District also enclosed the following summaries of Piontek's leave and vacation usage from her date of hire in its September 3rd letter, as follows:

. . .

Sick Leave and Personal Leave Summary

10-11-00 — 6-30-01	8.5 Sick days granted 1 Personal day granted
7-1-01 — 6-30-02	(240 hours) No sick or personal days
7-1-02 — 6-30-03	(252 hours) No sick or personal days

. . .

Vacation Summary

10-11-00 — 10-10-01	Received 5 days 10-11-01

10-11-01 — 10-10-02	Did not qualify
10-11-02 — 10-10-03	Will receive 10 days 10-11-03

The Association disputed the District's treatment of Piontek and processed the grievance to arbitration herein.

It is undisputed that Piontek has remained an employee of the District from her date of hire onward and that her employment was never severed. The District has a past practice of pro-rating the sick leave and vacation of 12-month employees based on their date of hire. The District also has a practice of allowing employees who are hired into 12-month permanent positions to use their sick leave before they have completed the minimum 540 hours to be eligible for "fringe benefits" (Article XVIII, Section 18.06). This is so because the District expects these employees will complete 12 months of work. It has never happened that a District employee has used sick leave and quit or been terminated from their employment before completing 540 hours of District work. Only 12-month employees receive vacation under Article XIX. So, for example, District aides who work 1260 hours or more but less than 1820 hours per year do not receive vacation. The record herein showed that Piontek received holiday pay for all days that would have fallen in the 12-month period she would have worked but for her injuries.

District Superintendent Meles stated herein that he believed that the term "fringe benefits" as used in the labor contract means holidays, insurance, vacation and sick leave. Piontek stated herein that she believed that as a full-time (12-month) employee of the District, she earned the sick leave, personal leave and vacation denied her by the District because she was injured on the job. The parties have never had a case involving the issues before me.

POSITIONS OF THE PARTIES

The District

The District argued that Piontek was not entitled to vacation during the time she was off on Workers Compensation and disability because she did not work enough hours as required by Article 18 of the labor agreement. In this regard, the District noted that Article 18 defines employees based upon the number of hours they "work" and it specifically states that only "12- month employees" — that is employees who work 12 months of the year for the District — "shall be granted" vacation. In addition, Section 18.06 provides that "any employee who works less than five hundred forty hours per year shall not be eligible for fringe benefits unless specifically provided for in this Agreement." The District noted that there is no contractual provision which states that employees out on disability or Workers Compensation are eligible for fringe benefits, which the District defined as a benefit that is given in addition to an employee's wages/salary.

In the District's view, Article 18 makes clear that Piontek was not entitled to vacation, a fringe benefit, in 2001-02 as she worked just over 200 hours. The District pointed out that full-time and part-time school year employees who work many more hours than 200 per year, do not receive vacation, as they work less than the required 1,820 hours necessary to qualify for vacation. Were the Arbitrator to grant Piontek vacation, this would work an injustice on District school year employees and lead to absurd results.

Furthermore, the District asserted that vacation is "a period of time devoted to pleasure, rest or relaxation especially one with pay granted to an employee." Here, Piontek received pay from disability and/or Workers Compensation for not working during the period from October, 2001 through October, 2002, such that if she were to receive paid vacation during that period, she would receive more compensation than if she had actually worked.

Finally, the District argued that taken to its logical extreme, the Association's argument would require the District to pay many fringe benefits to employees who were injured on the job but who are unable to perform any work for years because these employees remained technically employed while recovering from their injuries. This result, the District urged, would be absurd and is another reason to deny the grievance.

Regarding the Association's requests that Piontek receive sick leave and personal leave, the District noted that Article 24 bases the amount of sick leave available to employees upon the number of months the employee is "employed" and defines a sick day as "an amount equal to the number of hours an employee normally works per day." Article 24 also states that one day of paid leave "shall be available to each employee as personal leave." In these circumstances, as the quantity of sick days is contractually linked to the hours an employee actually works and because the District has prorated sick days for new employees, it argued that Piontek should, at most, be granted sick days based upon the 240 hours she worked from July 1, 2001 through June 30, 2002 and based upon the 252 hours she worked from July1, 2002 through June 30, 2003, or 1.58 and 1.66 sick days respectively.

The Association

The Association argued that Piontek was entitled to all fringe benefits during the period of her disability (from May, 2001 to May, 2003) because she was originally hired by the District as a 12-month employee and her status as such never changed during the period of her disability. The Association noted that the District paid Piontek for certain holidays that were not paid by Workers Compensation and that she was eligible and/or received health insurance during the entire time she was out on Workers Compensation/disability.

The Association asserted that the District's argument that Section 18.06 absolutely disqualified Piontek from receiving any vacation, sick leave and personal leave, first raised in Superintendent Meles' letter of September 3, 2003, was raised too late for consideration. The

Association pointed out that Superintendent Meles stated herein that in his view, fringe benefits include health and dental insurance, and paid time off such as holidays, sick leave, vacation and personal leave; and that Piontek could not accrue vacation and other paid leaves while she was on paid leave no matter what type of leave she was using. The Association queried, if Piontek was not eligible for fringe benefits, why had the District given her health insurance, holidays and granted her sick leave (when she tried to return to work in 2002)?

Except in Piontek's case, the District has never required employees to work 540 number of hours before they are allowed them to use their contractual fringe benefits. Rather, Meles admitted that the District has always granted employee benefits based upon the number of hours an employee is scheduled or expected to work in one year. The Association argued that the labor agreement does not expressly require employees to work a certain number of hours if they are out on paid leave before they are eligible for fringe benefits. Put another way, the contract does not state that employees who are receiving Workers Compensation or disability may not accrue vacation and other paid leaves. In these circumstances, the Arbitrator should not read such an exclusion of benefits into the agreement. Here, the parties clearly did not consider or intend such an exclusion of benefits.

Therefore, the Association urged that the language of Sections 19.02 and 24.01 and the conditions contained therein are the only provisions of the contract that should be interpreted and applied in this case. As neither Section excludes the accrual of paid leaves when an employee is receiving Workers Compensation and/or disability, such an exclusion should not be implied. The Association requested that the grievance be sustained, that 10 days of vacation be credited to Piontek for the period October, 2001, through October, 2002, and that she be credited with 24 sick days (2 of which she can use as personal days) for the period July 1, 2001, through June 30, 2003.

Reply Briefs

The District

The District argued that Piontek's status as a 12-month employee during her extended absence from work does not entitle her to fringe benefits. In this regard, the District noted that although Piontek remained an employee of the District, she was not actually a full-time calendar employee while she was on leave. The District urged that the use of the term "full-time" in Section 19.02, 2/ "explicitly indicates that one must be actively working a certain number of hours to earn vacation pay." Therefore, because Piontek did not work 1,820 or more hours she was not entitled to vacation pay during the relevant period.

2/ There is no reference in Section 19.02 or in any part of Article XIX to the term "full-time."

Piontek's receipt of holiday pay does not prove that she is entitled to vacation pay. On this point, the District observed that Section 20.01 uses the broad term "all employees" while Sections 19.02 does not. The fact that Piontek was covered by health insurance while she was out on WC/LTD also does not justify her receipt of vacation pay for the period of her absence. In this regard, the District noted that the labor agreement requires the District to pay health premiums for employees based upon the number of hours each employee works and that Piontek's health premiums were paid by the LTD carrier, not by the District. As Piontek did not work the required number of hours to be eligible for paid health premiums, the District was not obligated to pay such premiums for her during her absence.

In addition, the evidence failed to show that the District paid sick leave benefits for Piontek during the week of June 7 through 15, 2001, when she tried to return to her regular duties after her first surgery. The District noted that Superintendent Meles could not recall if sick leave had been granted to Piontek during this week and no time cards or other District records were placed in the record to prove the Association's assertion on this point. At most, the District argued that Piontek should receive 3.24 sick days, as it had asserted in its initial brief, based upon the hours she actually worked during the relevant period.

The District's practice of granting sick days to full-time employees before they have worked the required 540 hours does mean the grievance has merit, in the District's view. The District argued that it is reasonable for it to grant full-time employees sick leave when needed as otherwise new employees would have to wait until their 67th day of employment before they could use a sick day.

Finally, the District urged that the Association misapplied the doctrine, "Expressio Unius, Est Exclusio Alterius" in its initial brief. Because Section 18.06 uses the phrase "unless specifically provided in this Agreement," employees must work at least 540 hours to qualify for fringe benefits. As Articles XIX and XXIV state no exceptions to Section 18.06, for employees who are on WC or LTD leaves, even employees on such leaves must work 540 hours to be eligible for fringe benefits. Thus, the "Exclusio" doctrine is not applicable to this case. The District therefore urged the Arbitrator to deny and dismiss the grievance in its entirety.

The Association

The Association argued that the Grievant's status as a 12-month employee did not change when she went out on Workers Compensation and/or long term disability (WC/LTD); that the best evidence that Piontek was always considered a 12-month employee of the District is her work record since May 25, 2001, placed in this record as District Exhibit 1. This assertion is supported by the fact that Piontek received all paid holidays while she was out on WC/LTD (just as all other 12-month employees did during that period). Thus, the Association urged that there is no logical basis for treating Piontek as a 12-month employee for holiday pay

entitlement but not for vacation pay entitlement. Furthermore, the District's past practice of allowing employees hired to work more than 540 hours in a year to use sick leave before actually having worked the required 540 hours necessary for sick leave eligibility also supports the Association's interpretation of the language of the labor agreement.

Therefore, the Association asked the Arbitrator to disregard Superintendent Mele's opinion that Piontek was not entitled to sick leave and vacation accrual while she was on WC/LTD because that opinion is contrary to the terms of the labor agreement and to District past practice. So long as Piontek was considered a 12-month employee by the District (which she consistently was during her absence) the grievance must be sustained and Piontek made whole.

DISCUSSION

Articles XX and XXIV, though broad in scope, contain clear and unambiguous language. Article XX, Section 20.01, provides that "all employees are entitled to paid holidays which fall within the employee's work year." This language makes no distinction between employee classifications as contained in Article XVIII. Rather, it clearly states that so long as an individual is considered a District "employee," he/she must be paid for the holidays listed in Section 20.03 which fall within the individual employee's normal work year. I note that there is no contractual requirement that employees work the day before or the day after the holiday in order to receive holiday pay, as is sometimes the case in labor agreements. In this case, Piontek was consistently treated as a District employee during her extended absence from work. Therefore, as a District employee, Piontek was properly paid for all listed holidays which fell within her normal work year during the period of her absence.

In addition, Article XXIV, Section 24.04, states broadly that one day of leave with pay "shall be available to each employee as personal leave" provided the employee has accumulated sick leave from which such personal leave must be deducted. Thus, the contract provides one day of personal leave per year to all employees who have sufficient accumulated sick leave, regardless of their Article XVIII classification. Hence, if Piontek had had accumulated sick leave to use during the period of her extended absence, she could have used one day each year as personal leave. 3/

3/ The language of Sections 24.04 and 20.01 is so broad as to provide exceptions to the strict prohibition of Section 18.06. Thus, I find that Sections 24.04 and 20.01 contain fringe benefits that are "specifically provided for" in the labor agreement to which all employees are entitled. Of course, if an employee has no accumulated sick leave, h/she may not take the one day of personal leave per annum provided for in Section 24.04.

The Association has argued that the District's payment of holiday pay to Piontek during her extended absence requires a conclusion that the District must pay Piontek vacation and sick leave during the period of her absence. I disagree. As noted above, the language of Article XX - Paid Holidays, is extremely broad, using the term "all employees" without making any distinction within the unit employee group. In contrast, Article XIX expressly limits vacation to "12-month employees" and Article XXIV grants 12 days of sick leave only to "persons employed 12 months." The only contractual definition which would cover 12-month employees or persons employed 12 months is found in Article XVIII. Sections 18.02 and 18.04 clearly link "full calendar year" employee status to the number of hours an employee "works" per year. It is significant that these Sections do not refer to the number of hours an employee normally works or the number of hours the employee is regularly scheduled or contracted to work.

Black's Law Dictionary (6th Edition, 1990) at page 525, defines "employed" as follows:

> Performing work under an employer-employee relationship. Term signifies both the act of doing a thing and the being under contract or orders to do it. . . .

Black's, SUPRA, at page 1605 also defines "work" as follows:

> To exert one's self for a purpose; to put forth effort for the attainment of an object; to be engaged in the performance of a task, duty, or the like. . . . "Work" or "employ" for purposes of determining employee's right to compensation means physical and mental exertion controlled or required by employer and pursued necessarily and primarily for benefit of employer and business . . .

The above definitions (not unlike those contained in English language dictionaries) 4/ strongly support a conclusion that by using the terms "works" and "employed" in Articles XVIII, XIX and XXIV, the parties intended to grant sick leave and vacation benefits only to eligible, actively working unit employees.

4/ The Random House Dictionary of the English Language, (College Edition, 1968) at pages 434 and 1516.

Article XXIV, Section 24.01, requires that a person be "employed" 12 months in order to be eligible for contractual sick leave. As demonstrated by the definition quoted above, the verb "employed" requires more than status — it also requires action, the performance of work. And the use of the term "12 months" must refer to Section 18.02 and 18.04 to be understood. Thus, Section 24.01 makes clear, reading the contract as a whole, that all full calendar (part-

time and full-time) employees who are employed 12 months are entitled to receive 12 days of sick leave annually, each sick day to be equal to the number of hours the employee "normally works per day."

The Association has argued that because the District consistently treated Piontek as an employee and because she was never separated from her employment as a 12-month District employee during her extended absence, she must be considered "employed" during her absence pursuant to Section 24.01 and therefore entitled to sick leave. If Section 18.06 were not included in this labor agreement, this argument would likely have been persuasive on this point. However, Section 18.06 provides that unless there is specific contractual language to the contrary, "any employee" who "works less than 540 hours per year" shall not be eligible for " fringe benefits."

Clearly, sick leave has traditionally been considered a fringe benefit in labor relations. I note that there is no specific language to contradict Section 18.06 and that the definitions of employees contained in Sections 18.02 and 18.04 also require "full calendar" (12-month) employees to work a certain number of hours per year. Therefore, the term "employed" as it is used in this labor agreement must mean both the status of being employed by the District and the act of working for the District during each calendar year. On this point, it is also significant that the contract contains no provision or language which addresses the treatment of employees who become eligible for Workers Compensation or LTD. The silence of the agreement in this area further supports a conclusion that all District employees are subject to the requirement that they must work at least 540 hours per year to receive fringe benefits, pursuant to Section 18.06.

In regard to Article XIX, Section 19.02, I note that the contract states that only "12-month employees" shall be granted vacation benefits. Again, in order to identify who is eligible for vacation benefits, one must look at the definitions contained in Article XVIII, Sections 18.02 and 18.04 define "full calendar" (12-month) employees and require that such employees work a certain number of hours per year to fit into these definitions. Although there is no language in Section 19.02 requiring employees to be "employed" as is true in Section 24.01, as the language in Section 19.02 does not exempt employees otherwise eligible for vacation from the restriction contained in Section 18.06, I find that because of the specific terms of this contract, Piontek was not entitled to vacation benefits during the period of her extended absence as she did not work more than 540 hours per year.

The Association has argued that the District's past practice of allowing newly hired employees to access their sick leave before they have worked at least 540 hours, as required by Section 18.06, supports its contentions in this case. I disagree. The District's flexibility on this point does not violate the labor agreement *per se*. Given the silence of the agreement on the issue of the use of sick leave during the probationary period and the fact that no evidence was presented herein to show that any new employee granted access to sick leave in the past prior to having worked 540 hours has failed to complete 540 hours of work thereafter, the record fails to support the Association's assertions on this point.

The Association has also argued that Superintendent Meles waited too long to assert the Section 18.06 defense in this case. However, the grievance was filed at an informal meeting between Meles and the Association on July 25, 2003, and Meles' September 3, 2003 letter was the District's Step 2 response to the grievance. There was no contention by either party herein that the grievance had not been timely filed or processed by the other party. Thus, Meles' September 3rd response was the District's first response to the Association's claims and therein Meles timely raised the District's Section 18.06 defense.

The Association contended that Piontek was allowed to use sick leave during June 7 through June 15, 2001, when she tried to return to work prior to going out on WC/LTD and prior to her first surgery. Neither District Exhibit #1 nor any other document on this record or testimony herein supports this assertion.

The Association asserted that because the District paid Piontek's health insurance during the period of her absence this supports the Association's case. First, the evidence was insufficient to show how long after her first inquiry the District paid Piontek's health insurance premiums. However, the evidence herein showed that at some point the LTD carrier either took over paying Piontek's health insurance premiums or that the health carrier (the same as the LTD carrier) waived the premiums for Piontek. Thus, this evidence is insufficient to support the Association's arguments in this case.

Although neither party submitted evidence/argument thereon, it is likely that the Workers Compensation law required the District to continue to consider Piontek an employee unless and until she was found disabled and unable to return to work; and the District's maintenance of Piontek in the status of a 12-month employee during her extended absence was likely also necessary so that she could continue to receive LTD benefits. But given the specific contract language before me regarding vacation and sick leave entitlement Piontek's status as a District employee during her extended absence cannot be bootstrapped into eligibility for vacation and sick leave. I, therefore, issue the following

AWARD

The grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 7th day of May, 2004.

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

SAG/anl
6673.doc