BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DURAND SCHOOL DISTRICT

and

WEST CENTRAL EDUCATION ASSOCIATION

Case 43
No. 64762
MA-13004

(Davidson Grievance)

Appearances:

Mr. Fred Andrist, Executive Director, West Central Education Association, 105 21st Street North, Menomonie, Wisconsin 54751, appearing on behalf of the Union.

Wisconsin Education Association Council, by **Attorney Priscilla Ruth MacDougall**, 33 Nob Hill Drive, Madison, Wisconsin 53708, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, SC, by **Attorney Stephen L. Weld**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030

ARBITRATION AWARD

The West Central Education Association, hereinafter referred to as the Union or the Association, and the Durand School District, hereinafter referred to as the Employer or the District, are parties to a collective bargaining agreement (Agreement) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the non-renewal of the teaching contract of Vickie Davidson, hereinafter referred to as Grievant or Davidson, for the 2005-2006 school year. Arbitrator David Shaw was initially appointed by the Commission as the Arbitrator. Upon Arbitrator Shaw's retirement, the undersigned was appointed as the Arbitrator and held a hearing into the matter in Durand, Wisconsin, on May 19, 2006, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed. The parties filed post-hearing briefs by August 1, 2006, and reply briefs were received by August 14, 2006, marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following decision and Award.

ISSUES

The parties did not stipulate to a statement of the issues. The union frames the issue as follows:

> Did the District violate the Master Agreement, specifically Article II, Section A, part 3 by terminating Ms. Davidson given the fact that she was accessing the LTD benefit?

I frame the issues as follows:

1. Did the Agreement require the District to stay non-renewal proceedings during the two year period under the Long Term Disability benefit?

2. If not, did the District have just cause not to renew the Grievant's 2005-2006 teaching contract?

3. If the answer to number 1 is yes, what is the appropriate remedy?

4. If the answer to number 1 is no, and the answer to number 2 is no, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE II - BOARD FUNCTIONS

A. The Board of Education, on its own behalf, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules, and regulations to establish the framework of school policies and projects including, but without limitation because of enumeration, the right:

. . . 3. To employ and re-employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and conditions of employment, or their dismissal or demotion, their promotion and their work assignment. However, no employee covered by this agreement shall be discharged without just cause, and no employee after serving three (3) years in the District shall be non-renewed or disciplined without just cause.

. . .

ARTICLE VII - COMPENSATION

A. Appendix A containing the salary schedule is hereby made a part of this Agreement.

Appendix A, (C)(3):

Long Term Disability Insurance - The Board of Education will offer a long term disability insurance plan that provides 90% of covered salary after a 90 calendar day qualifying period.

B. Early Retirement

Early retirement benefits shall be available to employees who resign from their regular, full-time duties at ages fifty-seven (57) to sixty-five (65).

. . .

ARTICLE X - ABSENCES

A. Sick Leave:

1. Ten days per year for 1st 3 years of service; 15 days per year for balance of service cumulative to 120 days. Sick leave for summer school teachers shall be 2 half days for half day teachers and 2 full days for full day teachers. Unused sick leave will be added to the teachers (sic) cumulative days but not to exceed 120 days. Once you accumulate 120 sick days, the board agrees to compensate you at the end of the year, $20 per day for up to 5 days if you use 5 or fewer sick days that year. . .

B. Military Leave: . . .

C. Emergency Leave:

1. Two days emergency leave at full pay will be allowed each school year. Such leave will not be cumulative and shall be granted only at the discretion Superintendent. The following will serve as a guide in granting suck leave:

a. Funerals: . . .
b. Weddings: . . .
c. Births: . . .

2. Absences Not Covered:

a. Teachers will not be excused to participate in a remunerative activity.

b. Any other reasons not covered by the Board's policies and not approved by the Superintendent...

D. Administrative Leave:

1. One administrative leave day may be granted at the discretion of the Superintendent of Schools.

E. Personal Leave:

1. One personal leave day will be granted by the Superintendent of Schools. Seven calendar days notice is required and this leave is not cumulative.

F. Catastrophic Leave:

1. Additional leave not to exceed 15 days per year may be granted by the Superintendent of Schools for reasons of immediate family emergencies. Such leave will be subtracted from accumulated sick leave.

G. Maternity Leave: . . .

H. Educational Leave: . . .

BACKGROUND

Vickie Davidson, the grievant in this case, has been a full time teacher in the Durand School District for over fifteen years. All agree that her past teaching performance was exemplary and that she was an asset to the District until the 2000-2001 school year. Sometime prior to, or during, the 2000-2001 school year she became ill, suffering from clinical depression. This unfortunate condition caused her to miss a great deal of work during the 2000-2001, 2001-2002, 2002-2003 and 2003-2004 school years, so much so that she exhausted all of her paid leave in each of those school years. In each of those years the District agreed to place her on unpaid leave with the hope that she would be able to get well and return to work as before.

The Grievant did not recover though, and during the 2004-2005 school year the administration began to consider its options. Things came to a head on February 25, 2005

when the District gave her notice that the administration was considering a recommendation to the Board of Education that her contract not be renewed. According to the notice this potential recommendation was premised upon her "Physical inability to perform the essential functions of a teacher." (Quoting Union Exhibit 4, letter dated 2/25/05 to Vickie Davidson from Bonnie Flahaven, Director of Pupil Services and Interim Co-Superintendent.) The notice was delivered to, and accepted by, Mr. Fred Andrist, the Union's Executive Director, on behalf of the Grievant. In addition to the above, the notice explained her right to a private conference pursuant to Ch. 118.22 Wisconsin Statutes and referenced a prior conversation with Mr. Andrist which, according to the notice, the District construed to be a request for a non-renewal hearing, a waiver of the statutory March 15 deadline, and, finally, an agreement that the deadline be extended to May 1, 2005. The notice sets forth the District's understanding that the extension was agreed to for the purpose of obtaining "additional medical information . .regarding your physical ability to return for the 2005-2006 school year." (Quoting from Union Exhibit 4)

On May 4, 2005, the Board of Education held a hearing for the purpose of considering the renewal/non-renewal of the Grievant. The Grievant and the Union's Executive Director, Mr. Andrist, attended the hearing. The unanimous decision of the Board was to non-renew Ms. Davidson's contract and she was so notified. This grievance followed in a timely manner.

POSITIONS OF THE PARTIES

The Union

While the Union agrees that Ms. Davidson has missed a lot of work over the years leading up to the events giving rise to this grievance it asserts that no one advised her to begin the process of applying for long term disability. Had someone done so, and had she accessed LTD benefits earlier than she did, the Union believes the District would not have "put the non-renewal into play." Mr. Andrist believed that once the LTD benefit was "activated" then the non-renewal effort would stop because he thought that the two year LTD period would "stay" that effort. In effect he believed the LTD benefit created a two year "window" during which period the District would be prevented from taking any action relating to non-renewal and that the Grievant would retain her position regardless of her ability to return to work or to perform the functions of a teacher in the Durand School District. Essentially, says the Union, the LTD benefit is nothing more or less than a two year period during which the insurance company pays the Grievant's salary instead of the Employer. It asserts that the LTD benefit "was negotiated so that at a time in a person's life where they need to concentrate on recovering from a serious illness, neither the District nor the individual have to worry about income or job protection." The Union asserts that LTD is intended to give the employee an opportunity to recover from his/her illness without worrying about his or her employment status.

According to the Union Ms. Davidson "clearly fits into the scenario of a distinct possibility of not coming back" to work, but it says that neither the Union nor Ms. Davidson ever claimed she was not coming back. It points to Union Exhibit 5, the Long Term Disability

Claim Form as evidence that she could possibly return to work. Exhibit 5 contains the Grievant's attending physician's note saying that he expects a full recovery and that he anticipates she will return to work full time on April 11, 2005. The Union contends that "The LTD benefit was working exactly the way it was intended except the District chose to go after Ms. Davidson for non-renewal."

The Union argues the real reason the District terminated (non-renewed) the Grievant has nothing to do with her poor attendance record and potential inability to ever return to work but rather was based upon the District's desire to prevent the Grievant from qualifying for early retirement benefits. Under the terms of the early retirement program Ms. Davidson would have reached the early retirement age of fifty-seven during the two year LTD period and, if she were at that time a full-time employee, would have been able to take advantage of early retirement. This event, according to the Union's argument, would have been costly to the District and it wished to avoid this cost. By not renewing her, it did so. The Union argues that the testimony of the various Board members reveals a "concerted effort to hide the real reason" behind the non-renewal by virtue of their "poor or selective" memories. The Union supports this theory by reference to Board member Richardson's recollection of the discussion the Board had concerning the potential cost of retirement benefits and "about not hearing the Union say Ms. Davidson would not come back." It also points to co-Superintendent Flahaven's testimony to the effect that "the Board did come to the realization that by not non-renewing Ms. Davidson they would be committing the District to the potential of her accessing the retirement benefit." (The Union's capsulized phraseology.) The Union says Mr. Andrist's notes, taken at the non-renewal hearing, clearly indicate that the discussion was about access to retirement benefits and not about attendance. (Union Exhibit 7)

The Union takes the position that Ms. Davidson's non-renewal fails to meet the standards of just cause thus violating Article II, A (3). While it acknowledges that a poor attendance record "probably" constitutes grounds for discharge, it says that anytime an employee is on LTD "the argument that attendance is just cause for termination must be mitigated." If not, anyone on LTD would risk termination due to poor attendance. It argues that if the Arbitrator were to allow the District to prevail in this case the District would be free to terminate any LTD employee. Further, the Union says that the District would be "forced to terminate everyone accessing these types of benefits that take the employee out of the classroom" so as "not to be arbitrary and capricious."

The Union maintains that by reason of the District's treatment of another teacher, Greg Fay, it has created a situation where fairness and equity dictate that it should "do the same for Ms. Davidson." In May of 2001 Mr. Fay was placed on a paid leave of absence due to illness for the 2000-2001 school year. In the 2001-2002 school year he remained unable to return to work and was placed on an unpaid leave of absence with a view toward reviewing his situation in the spring of 2002. The District continued to pay for his health insurance during this period of time. He was unable to work for a period of over two years. In the face of Mr. Fay's non-renewal the Union attempted to reach a separation agreement but was not successful in that effort. At that point Mr. Fay had three options: return to work; resign and hope that he could

qualify for permanent disability; or non-renewal. Ultimately his contract was not renewed and he subsequently qualified for permanent disability. Mr. Fay's early retirement potential was nonexistent due to his young age. The Union asserts that in the instant case the Grievant should be given a fourth option - early retirement. If her contract is renewed for the 2005-2006 school year she will become eligible for early retirement upon turning fifty-seven during the two year LTD period. In order for this to occur though, the District would have to exercise its discretion in a fair and equitable manner and renew her contract for the 2005-2006 school year. The Union argues that this treatment would be consistent with the treatment received by Mr. Fay and that principles of fairness and equity should be observed in this case. The Union points out that in Mr. Fay's case the District paid for his family health insurance costs whereas in the Grievant's case it would only have to pay for the cost of her single health insurance premium which is less than half the cost. The Union asserts that the District should maintain the same standard of protected employment during the LTD period for the Grievant that it maintained for Mr. Fay and that "The whole retirement piece should not even enter into consideration or the proceedings."

In sum, the Union believes that the real reason the District failed to renew the Grievant's contract was to avoid having to pay her retirement health insurance. Such a basis for non-renewal should not be allowed to support just cause for termination and, if allowed, would result in the termination of every employee who attempted to access benefits such as Long Term Disability. Further, it believes that the District should allow the Grievant the opportunity to "go through this LTD window" as a full time employee so she can ultimately qualify for early retirement and receive the benefits which attend that status.

As a remedy the Union asks this Arbitrator to instruct the District "that to terminate an employee for accessing benefits such as LTD and to use the person's attendance record as an excuse does not meet the standard of just cause for termination." She should be reinstated as an employee and allowed to remain on LTD and, at the end of the LTD two-year period she should be allowed "to make the appropriate decision based on her particular set of circumstances: return to work; resign and hopefully qualify for permanent disability; be terminated and hopefully qualify for permanent disability; or retire.

The District

The District asserts that arbitral authority and common sense dictate that an employee's inability to perform any job duties constitutes just cause for termination. It cites the case of CITY OF MENASHA, MA-7361 (1999) as standing for the proposition that in order to establish just cause for discharge the Employer is required to establish three elements: that the Grievant is unable to work at the time of her discharge; that the Employer has no reasonable expectation that she can return to work; and that the discharge does not undermine other agreement provisions. It argues that the same standard should be applied to the present case and, if applied, fully supports the District's actions in not renewing the Grievant.

The District notes that the Union does not dispute that the Grievant was not able to work from January, 2005, to the present and that all of the evidence suggests that the Grievant's intent was not to return to work but to retire after exhausting her two years of Long Term Disability. Additionally, it says that the failure to renew Ms. Davidson's contract for the 2005-2006 school year does not undermine any other Agreement provisions. All of these things together fit within the Menasha standard and formulate the basis for just cause termination.

The Agreement does not require the District to stay non-renewal proceedings during the pendency of LTD benefits. As such whether an employee is receiving LTD benefits, or is eligible for them, is irrelevant to the question of whether just cause exists for the employee's non-renewal. The only requirement of the Agreement is that the District provide LTD benefits to its employees and it has done so in the Grievant's case. Since LTD benefits are not tied to employment status, a supposition confirmed by District's Exhibit 19, and because the Agreement does not explicitly or implicitly require the District to hold an employee's position while on LTD, holding that position for the employee is discretionary with the District. If the District has reason to believe that the employee will return within a reasonable period of time it may choose to hold the position, but when an employee indicates that a return to work is not viable it may choose to non-renew. The District says that such a non-renewal does not adversely affect the LTD benefit since it is not tied to employment status, and the District has no obligation, contractually or otherwise, to stay the non-renewal action until the benefit is exhausted.

The District affirmatively states that its motivation for not renewing the Grievant was her inability to perform any of the duties required by her teaching position, not, as the Union alleges, its desire to prevent her from acquiring the health insurance benefits associated with early retirement. If Ms. Davidson had continued to come to work there would have been no non-renewal and she would have been eligible for early retirement at age 57 pursuant to the terms of the Agreement. Since the District has no obligation to stay non-renewal proceedings during the pendency of LTD, the timing of the non-renewal is irrelevant. The District's obligation is not modified simply because of the age of the Grievant. Regardless of the timing it has to have just cause to non-renew and once just cause exists it becomes the District's option to proceed with non-renewal or to stay it. The District supposes that if the Union were to prevail and the Arbitrator were to stay non-renewal until LTD benefits were exhausted, this would effectively reduce the early retirement age from 57 to 55 years, a result clearly not intended by the parties.

In response to the Union's anticipated assertion that the District had created a binding past practice by virtue of the treatment of Mr. Fay in the past, the District points out that Mr. Fay had always indicated his intent to return to work, unlike the Grievant who gave every indication that she did not. And, like the Grievant's case, when it became apparent that Mr. Fay would not be able to return to work his contract was not renewed. The District draws one parallel with the Fay case and the present one. Just as Ms. Davidson did during the school years 2000-2001, 2001-2002, 2002-2003, and 2003-2004, Mr. Fay gave every indication that

he could and would return to work. The cases part ways, however, because Ms. Davidson, following her last day of work on January 7, 2005, never gave the District any indication that she intended to return. On the contrary, she indicated that she intended to retire. The District considers this distinction to be important because, under those circumstances, it would be irrational to place her on unpaid leave with no expectation that she would ever return to work. The Union has pointed out that Mr. Fay's case is different than the present one because the Grievant would have been eligible for early retirement benefits before the end of the LTD benefit, whereas Mr. Fay would not have been, and hence the Grievant's case, if she were allowed to hold her position until she became eligible for early retirement, would have been more costly for the District. In response, the District queries how this alleged motive, even assuming it was the sole basis for the District's actions, could negate the existence of just cause or contravene the Agreement.

As for the binding nature of any alleged past practice, the District asserts that no such practice has been established under these facts. One incident does not satisfy the requirement that a binding past practice be readily ascertainable over a reasonable period of time and accepted by both parties.

The District also argues that because the representatives of the Union stalled the progress of the hearing in this case, over the District's objection, it should be reimbursed for the costs of the Grievant's health insurance premiums paid by the District during the roughly five months delay from the December 14, 2005 initially scheduled hearing until the actual hearing date of May 19, 2006, and it asks the Arbitrator to so find.

In sum the District asks the Arbitrator to find just cause for the non-renewal of the Grievant and to make the determination that no binding past practice exists with regard to the prior Fay termination proceeding, and finally, it seeks reimbursement of the expenses it incurred providing health insurance premiums on behalf of the Grievant during the period from December 14, 2005 to May 19, 2006.

The Union's Reply

The District is overstating the case when it alleges that Davidson "never gave them an indication that she planned on returning to work" and that it's reliance on communications from the Union in that regard are misplaced. In support of this, it points to the February 17, 2005 (Union Exhibit 5) document which says that a physician expected a full recovery. It finds the District's position "disheartening" because it did not rely on medical evidence to support it's contention that Ms. Davidson would not return to work but, rather, upon the Union's supposed representations. The Union points out that Mr. Andrist is not a medical authority and that his comments in the record regarding any indications seeming to suggest that the Grievant could not return to work were actually nothing more than references to advice he had given her relative to the paperwork necessary for permanent disability. It says that nothing in the record affirmatively indicates that the Grievant was not planning to return to work.

If the Grievant did not intend to return to work, asks the Union, then why would she bother to go on unpaid leave? She was historically a hard worker and a conscientious employee and so her record of absences should suggest that she expected to return. Conversely, the District paints her as a conniver who carefully staged a way to get a free ride.

Regarding the District's allegations that the non-renewal hearing was postponed to give the Grievant time to recover or to identify a time when she could return to work, the Union says that the real reason was to give her time to qualify for LTD "so that the hearing would not be necessary." Ms. Davidson was not asked to give the District a time when she could return to work so the District has failed to prove that she or her doctor "ever indicated that she would not be able to come back to work."

The Union repeats its belief/allegation that the District's actions were motivated by the desire to save retirement benefits rather than the Grievant's poor work record or inability to return to work. It questions the veracity of the Board members regarding their memories of the context of the non-renewal hearing.

The Union argues that the Agreement requires it to hold an employee's position during the LTD two year period. Otherwise, it asks, why have LTD benefits if "one can be terminated when accessing it". The Union states "that the Master Agreement and the LTD benefit give them (presumably the Union) the contractual right to stay a non-renewal until such time as the LTD benefit ends."

The District also overstates the importance of the ERD determination of no probable cause and urges the to Arbitrator ignore this piece of the puzzle.

The Union does not suggest a past practice because of the Fay termination which preceded the current case.

Finally, the Union asserts that any delay in scheduling the hearing in this matter should not result in the refund of any money previously paid to, or on behalf of, the Grievant.

The District's Reply

The only reference to "long term disability" in the Agreement appears in Appendix A, Section C(3) which requires the District to pay for LTD insurance, which the District has done.

Article X specifically addresses absences and leaves and sets forth the types of leave available under the terms of the contract. LTD is not included in that list. Hence, the Agreement does not require that the District provide "leave" for teachers who are physically unable to perform. The granting of such leave under these circumstances is discretionary with the District and, in a situation like the present one, where the employee expresses no interest in

returning to work, why, asks the District, would it have any interest in granting such leave. The Union's attempt to equate LTD with negotiated leave benefits must consequently fail.

The District reiterates its assertion that Ms. Davidson's contract was not renewed due to the fact that she was unable to work and did not intend to return to work. She was, and is, unable to return to work. This fact supports just cause not to renew her teaching contract.

DISCUSSION

Job Protection During Long-Term Disability

The Union has asserted that the Agreement requires the District to protect an employee's position during the two year LTD period and, further, that it (the Union) has a contractual right to stay a non-renewal action during this same period by virtue of "the Master Agreement and the LTD benefit." If the Union is correct this grievance must be resolved in favor of the Union and no further inquiry into the issue of just cause is required. The Agreement and the record evidence in this case do not support the Union's conclusion, however.

The Union relies primarily upon Article II, Section A, part 3 as providing the contractual requirement that the District hold the Grievant's position open during the two year LTD period. That provision is the clause entitled "Board Functions" and is essentially a management rights clause. It contains the requirement for just cause as a basis for discharge, and, by implication, for non-renewal. According to the Union this portion of the Agreement was breached due to the failure of the District to establish just cause for non-renewal. The Union is correct in its assertion that this clause places the burden upon the District to establish just cause for non-renewal. The Union is incorrect in its assertion that it creates a duty upon the District to safe-guard Ms. Davidson's position during the LTD period or that it grants the Union a “right to stay” any non-renewal action pending the LTD period. Nothing in this language can be construed to explicitly or implicitly create the duties the Union seeks regarding job security during the LTD period.

The Union's assertion that the LTD benefit "was negotiated so that at a time in a person's life where they need to concentrate on recovering from a serious illness" . . . and "neither the District nor the individual have to worry about income or job protection" is not supported by the evidence. What the evidence does show is that while Mr. Andrist and Mr. Schneider, the Union's lead negotiator, may have both been under the impression that the two year LTD period would halt any non-renewal action, neither witness could locate any contractual authority to support their impressions nor did they provide any evidence that such a benefit was negotiated into the Agreement:

Tr. Page 108, Line 5, et seq.:

Mr. Schneider's testimony:

A. It's my understanding that once they're on long-term disability, that their job or position is held for a certain number of years, two years the benefit is. At that point, they either come back or they don't.

Cross-Examination:

Q. Dave, you just testified that your understanding is that there's some kind of disability leave in the contract, if they go on long-term disability, they get long-term disability benefits. Can you point that out in the contract?

. . .

A. Just got to find the page that it's on here. On page 14 underneath Section C, group insurance, where it says long-term disability insurance, board of education will offer a long-term disability insurance plan that provides an annual percent of a covered salary after a 90-day qualifying period.

Q. All right. But your testimony was that there's a leave that you go on when you receive benefits. In fact, long-term disability doesn't have anything to do with your employment status, does it?

A. It's been my understanding that it does, so.

. . .

Q. I guess I'm looking at your reference here to long-term disability benefits on page 14. Doesn't say anything about disability leave, does it?

A. Not there, no.

Q. Article X deals with absences, the reference to sick leave, military leave, emergency leave, administrative leave, personal leave, catastrophic leave, maternity leave, educational leave. Do you see disability leave listed there?

A. Not in that regard. I'd look under sick leave where it has part B there, medical certification, talks about five days or more may be required to furnish a certificate, board may require a second medical opinion at the board's choosing, so on. Then it talks about return to duty.

. . .

Q. Now, referring to the contract here, there is no disability leave, is there? Article VII? Article X. I'm sorry.

Mr. Andrist: I would say the document speaks for itself.

. . .

Mr. Weld: No further questions.

Mr. Schneider offered no testimony relevant to the issue of bargaining the contract or to the intent of the parties in that regard. Mr. Andrist's testimony also fails to shed any light on the bargaining intent of the parties as it relates to the LTD benefit. And, like Mr. Schneider, Mr. Andrist testified about his understanding of the LTD benefit and the fact that he felt it had a leave component built into it but could not point to any contractual foundation which might support that understanding. The record is otherwise void on the topic of bargaining history.

The Union's case rests on the assumption/presumption that the two year period envisioned by the Long-Term Disability plan is tantamount to "leave". It is not. The term “leave” has been defined thus:

> "Ordinarily, in industrial relations parlance, 'leave,' when 'granted,' connotes absence from work without the imposition of penalties that might otherwise be suffered for failing to report . . . when scheduled for work." PUBLISHERS' ASS'N OF NEW YORK CITY, 32 LA 513, 515 (Seitz, 1959)

> A leave of absence "perpetuates the employment relationship during the absence of an employee while relieving that employee of the responsibility to be present and to perform." CITY OF SUNRISE, FLA., 94 LA 80, 85 (Richard, 1990)

Of course the granting or denying of leave is the prerogative of the employer unless otherwise restricted by the agreement. There is no automatic entitlement to a leave of absence. Such a privilege exists, if at all, by virtue of the terms of the agreement or, under the proper circumstances, past practice. The Agreement here, under Article X entitled "Absences", specifically enumerates those situations where leave may be available. Some, like Maternity Leave, provide for the automatic granting of leave upon the presentation of medical certification that a teacher is not able to perform his/her normal teaching duties due to pregnancy, while others are granted only at the discretion of the Employer. Article X does not include Long-Term Disability and when the parties set forth specific items in their agreements the inference is that they intend to exclude those items which are not listed. This is the rule of *expressio unius est exclusio alterius* meaning 'the expression of one thing is the exclusion of another.' Here, Long-Term Disability, because it is not included in the list of 'leaves' available under Article X, is excluded.

The only other reference to Long-Term Disability in the Contract appears under Article VII - Compensation. Appendix A, (C)(3) of that Article requires that the District offer LTD insurance to its employees. It does not, however, provide for, nor does it implicitly

create, a duty upon the District to extend 'leave' to employees under the LTD insurance plan. Likewise, the LTD insurance plan itself does not so provide. Union Exhibit 6 is the WEA Trust's Long Term Disability Plan. A careful review of this 45 page document reveals that the references to 'leave' or 'leave of absence' relate to the provision of coverage for those persons on leave at the inception of the LTD policy; the provision of coverage for persons during an Employer-approved leave of absence; the integration of the payment of benefits with any sick leave pay the employee may receive; and the exclusion of benefits during military leave for active duty or for training. The insurance plan does not provide for the retention of an individual's position during the two year period of disability envisioned by the plan. This conclusion is confirmed by District Exhibit 19, a letter from the WEA Trust to Jerry Walters of the District dated March 31, 2006 stating that the LTD insurance policy contains no provision addressing "what an employer must do with an employee's job" during the LTD benefit period. In short, the LTD plan is an indemnity insurance policy designed to replace a portion of the income a covered employee loses due to her inability to work because of a physical or mental impairment. It does not provide a job protection guarantee nor does it provide for a leave of absence.

Having concluded that the written Agreement does not confer a right to a leave of absence under the LTD benefit, nor does it provide the Union with a right to stay non-renewal proceedings during the LTD two year period, the question remains whether a past practice might create that right. The Union, although its argument dances around the past practice theory with the reference to the Fay case, has stated that it does not advance that theory here. Instead it seeks a "measure of fairness and equity" when it suggests that the District renew the Grievant's contract for the 2005-2006 school year thus allowing her to take advantage of retirement benefits. If I were to adopt the Union's request in this regard I would, in effect, be re-writing the Agreement to add a provision requiring a mandatory leave of absence for all employees who qualify for the LTD benefit. This, I believe, is the Union's desired result, and this I cannot do. The modification of the Agreement to embrace such a leave of absence may only be accomplished through the collective bargaining process by agreement of the parties. The Union is free to attempt to achieve this result at the bargaining table but may not accomplish it via the grievance process.

Just Cause

The record supports the fact that the Grievant, due to her illness, was unable to work full time during school years 2000-2001; 2001-2002; 2002-2003; and 2003-2004. In each of those years she exhausted all of her contractual leave and was granted unpaid leave by the District in hopes that she would be able to return to full time teaching. In the 2004-2005 school year she was able to work, at least some of the time, until January 7, 2005 at which point she became completely unable to return. She was once more placed on unpaid leave, again in hopes that she could eventually return to work.

In February, 2005, she was given notice that the District was considering her non-renewal due to her inability to perform her work assignments.(See Union Exhibit 4) On

April 20, 2005, Mr. Andrist sent a letter to Ms. Flahaven regarding the Grievant. It is found in the record as District Exhibit 6 and is set forth in its entirety here:

> Dear Bonnie:
>
> Vickie and I have just received confirmation that she has qualified for and is now officially on Long Term Disability. ***As you are aware, she has up to two years to either get back on her feet or transition into permanent disability. Vickie tells me that she intends to use the time to concentrate on the latter***. (Emphasis mine)
>
> Consequently, we do not see a need to proceed with the nonrenewal (sic) process and would request that the hearing not be scheduled. It is the Union's position that the District should allow the LTD to serve its intended purpose.
>
> Additionally, as we discussed during the March 8 bargaining session, the change to the Point of Service and the accompanying Waiver of Premium will not effect (sic) Vickie's situation because of it existing prior to the changeover. It is our understanding that the District intends to pay her single insurances through August of 2005. If we are in error in this, please so advise.
>
> Finally, Vickie and I would welcome the opportunity to sit down and discuss with you how this transition will unfold so that we all have a common understanding of the direction we are going. If you are so inclined, please contact me to arrange a time that is convenient to all.
>
> Sincerely,
>
> WEST CENTRAL EDUCATION ASSOCIATION
>
> (Signed)
>
> Fred Andrist
> Executive Director

In May, 2005 the District Board held a non-renewal hearing following which the Board voted not to renew her teaching contract for the school year 2005-2006. Each member of the Board was subpoenaed by the Union and each testified at the hearing. The evidence suggests that the Andrist letter (above) was given to the Board during its deliberations. In each instance the witnesses testified that the Board unanimously voted not to renew Ms. Davidson's contract based solely upon her inability to perform the duties of her job as a teacher in the District, or words to that effect.

The Union tenaciously argues that the real reason the District non-renewed the Grievant was based upon its desire to save the costs of her "accessing retirement health insurance" and that her inability to perform her work responsibilities had no bearing on the decision. During the examination of the Board member witnesses Mr. Andrist tried, and then tried again, to pull from the witnesses some semblance of testimony which might support that theory. While a couple of the witnesses did recall a limited discussion of the costs associated with retirement benefits and all expressed some concern over the rising costs of retirement health care, none testified that the reason for her non-renewal had anything to do with those costs. The primary concern of the board members was the service to the students and the realization that Ms. Davidson could not continue to fill the bill. The Arbitrator found each of the Board member witnesses to be quite credible. The only record evidence which may in any way support the Union's theory comes from the testimony of Mr. Andrist and from Mr. Schneider, the lead negotiator, and only relates to their impressions, beliefs and suspicions.

The Union's arguments notwithstanding, the fact remains that the Union does not dispute that the Grievant's work record was dismal and that she was not able to return to work after January 7, 2005. This admission, in addition to the Andrist letter quoted above, lead the District to the conclusion that Ms. Davidson did not plan to return to school because of her permanent disability. While the Union says that this conclusion is unwarranted and that it never indicated that the Grievant could not return, I disagree. I believe the District's conclusion is not only warranted but virtually inescapable. The Union points to its Exhibit 5, the Long Term Disability Claim Form as evidence that the Grievant could conceivably return to work at some point. This Exhibit contains the patient's prognosis and the notation by her physician (psychiatrist) that he expected a full recovery. In response to the entry "Date you expect a return to work" the doctor replies "4/11/05 Full-time." Hence, according to her prognosis, she was to have been able to return 'full-time' on April 11, 2005, but the Andrist letter advising the District that she intends to concentrate on the transition to permanent disability is dated April 20, 2005, nine days after her doctor expected her return to work. Also, Ms. Davidson herself testified that she could not return on April 11, 2005 and the totality of her testimony convinces me that she would be unable to return to teaching even now. If the District had relied upon the medical prognosis it received on April 11, it had every right to ignore that prognosis when it received the Andrist letter on April 20.

Management's right to terminate employees whose physical condition renders them unable or unfit to perform their job has been repeatedly affirmed as has been the termination of employees because of mental unfitness (psychiatric problems or mental illness) for work. (See Elkouri & Elkouri, 6th Ed., 2003 at 814) And:

At some point the employer must be able to terminate the services of an employee who is unable to work more than part time, for whatever reason. Efficiency and the ability to compete can hardly be maintained if employees cannot be depended upon to report for work with reasonable regularity. Other arbitrators have so found, and this Arbitrator has upheld termination in several appropriate cases involving frequent and extended absences due to illness. (CLEVELAND TRENCHER CO., 48 LA 615, 618 (Teple, 1967))

In the instant case the record reflects that the District made every effort to stand by and give the Grievant a reasonable opportunity to recover. In my view, perhaps more than a reasonable opportunity. For more than four years prior to her non-renewal Ms. Davidson's attendance record suffered because of her illness and the District continued to grant additional unpaid leave in hopes that she could recover and return to work. Unfortunately her illness did not improve and the District reasonably concluded that her condition was permanent. The record indicates that the District was concerned about servicing the students and realized that in order to do so it would be necessary to non-renew the Grievant and find someone else who could do the job. Faced with these facts the District acted reasonably and prudently in proceeding with the non-renewal process and did so based firmly upon just cause and in accordance with the Menasha standard, which I embrace, set forth above.

The Union argues that the District failed to consider medical evidence when making the decision not to renew Ms. Davidson's contract. It did not have to. The Grievant's attendance record coupled with the reasonable inference that she would not return to work was justification enough. The Union says that Ms. Davidson's work record, evaluations and hearing testimony indicate that she is "a hard working, conscientious employee who has been stricken with a disease." This is true. Everyone agrees that prior to her illness she was a good employee and the District's representatives have expressed sadness over the fact that her illness has prevented her from performing her duties in recent years. This does not, however, create a duty upon the District to continue to renew the Grievant's contract forever in hopes that she will be able to return, or to continue to renew her contract until such time as she becomes eligible for retirement. The business of the school must be allowed to function efficiently and the District's decision to non-renew Ms. Davidson furthered this goal.

The Union accuses the District of overstating the importance of an ERD initial determination of 'no probable cause.' (See District Exhibit 17) I have given no weight to this determination.

Finally, the District has argued that because of the delay in the scheduling of this matter and the fact that it has continued to pay the insurance premiums on behalf of the Grievant during this period of time it should be reimbursed by the Union for such payments. Delays are often incurred in scheduling these matters. In addition, Ms. MacDougall's husband died during this period which arguably resulted in some delay. The District's request for reimbursement of health insurance payments on behalf of the Grievant prior to the date of this decision is denied.

In light of the above, it is my

AWARD

1. The District was not required to stay non-renewal proceedings during the two year period under the Long Term Disability benefit.

2. The District had just cause not to renew the Grievant's 2005-2006 teaching contract.

The grievance is denied.

Dated at Wausau, Wisconsin, this 30th day of August, 2006.

Steve Morrison /s/
Steve Morrison, Arbitrator

SM/gjc
7034