BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**NORTHWEST UNITED EDUCATORS**

and

**SCHOOL DISTRICT OF CLEAR LAKE**

Case 27
No. 66923
MA-13684

**Appearances:**

**Toby W. Paone,** UniServ Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appeared on behalf of the Union.

**James M. Ward,** Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appeared on behalf of the School District.

## ARBITRATION AWARD

On April 24, 2007, Northwest United Educators ("NUE") filed with the Wisconsin Employment Relations Commission a Request to Initiate Grievance Arbitration. That filing requested that the Commission designate a commissioner or staff member to serve as sole arbitrator of a grievance alleging that the School District of Clear Lake ("District") had violated the 2003-2005 collective bargaining agreement ("Agreement") between NUE and the District by denying a request by Grievant Barbara Stohr to take personal leave under a certain provision of the Agreement. The undersigned was so designated. Prior to hearing, the parties stipulated to certain facts and exhibits. A telephonic hearing was held on August 24, 2007, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. At the parties' discretion, no stenographic transcript of the proceeding was made. NUE and the District each submitted a post-hearing brief, the last of which was received by the undersigned on September 17, 2007, whereupon the record was closed.

Now, having considered the record as a whole, the Arbitrator makes and issues the following award.

## ISSUE

The parties have stipulated that the following issue should be determined herein:

Did the District violate Article XIII, Section C of the Agreement when it denied "category one" personal leave to the Grievant, Barbara Stohr, for the purpose of babysitting her granddaughter? If so, what is the appropriate remedy?

## BACKGROUND

Setting forth two categories of personal leave, Article XIII, Section C of the Agreement between NUE and the District states the following:

C. Personal Leave

1. Each employee may be granted to a maximum of three (3) days with compensation, to take care of important matters of a personal nature. Final approval of personal leave compensation will be at the discretion of the administration and any personal leave days with compensation will also be deducted from accumulated sick leave. The basis for granting approval will depend upon the fact that the personal business, which requires the teacher's attendance, could only be conducted during regular school hours.

2. In addition, one day of short-term leave may be taken each year at the discretion of the teacher. This day may accumulate to a maximum of five (5) days that can be used consecutively. One week's notice must be given to the building principal. The current per diem substitute pay rate plus $5.00 per short-term leave day shall be paid to the District and the day may not be taken on inservice days or on days of parent-teacher conferences. No more than a total of ten percent of the staff of a building may use personal leave or short term leave on the same day.

The "category-one" leave set forth in the first paragraph of Article XIII, Section C entitles an employee to full compensation for up to an annual maximum of three days of personal leave. The "category-two" leave set forth in the second paragraph of Article XIII, Section C also entitles an employee to full compensation, but requires that the employee reimburse the District at the current, per diem rate for a substitute teacher, plus $5.00.

Barbara Stohr is an elementary teacher employed by the District. In February of 2007, Ms. Stohr submitted a form requesting two days of category-one leave. Ms. Stohr's leave

request was denied by District Administrator Mark Heyerdahl, on the basis that the purpose of the leave had not been adequately described. In response, Ms. Stohr clarified that she intended to take the leave to care for her granddaughter. Because the regular, day-time care provider for Ms. Stohr's granddaughter was scheduled to be out of town, Ms. Stohr's daughter was seeking someone to provide replacement care for a period of time, and Ms. Stohr and the child's other grandmother had each agreed to provide coverage for certain days.

After learning that Ms. Stohr intended to use the personal days to care for her granddaughter, District Administrator Heyerdahl again rejected Ms. Stohr's category-one leave request. Ms. Stohr was told by elementary school Principal Bradley Ayer that Administrator Heyerdahl had rejected the leave request because the matter was "not personal". As an alternative, Ms. Stohr took category-two leave and paid the District a total of $180.00 to cover the cost of hiring a substitute.

Ms. Stohr grieved the denial of her request for category-one personal leave. Pursuant to the grievance process set forth in the Agreement, she submitted her grievance at the first step to Principal Ayer. Principal Ayer denied the grievance, indicating that he could not conclude that the request had been improperly denied because decisions as to how personal leave requests are categorized are made by the District Administrator. At the second step of the grievance process, District Administrator Heyerdahl stated the District's position with regard to Ms. Stohr's grievance as follows:

> Article XIII, Section C – Personal Leave, of the Master Contract between the School District of Clear Lake and the Northwest United Educators specifically states, "Final approval of personal leave compensation will be at the discretion of the administration". The administration decided that the activity fit better under short-term leave.
>
> The basis for granting approval will depend upon the fact that the personal business, which requires the teacher's attendance, could only be conducted during regular school hours. Family – babysitting for daughter may well be a desirable and enjoyable activity, but it clearly is not personal business that can only be conducted during regular school hours.

The District Board subsequently concurred, at the third step of the grievance process, with Administrator Heyerdahl's interpretation of the contract language.

Article XIII, Section C has been in existence at least since the inception of the 1997-1999 collective bargaining agreement between NUE and the District. While NUE and the District both have sought, at the bargaining table, to revise that provision, neither party has been successful.

Although Article XIII, Section C predated Administrator Heyerdahl's tenure with the District, Administrator Heyerdahl did not discuss the interpretation or application of that

provision with the previous District Administrator. That being the case, Administrator Heyerdahl has relied exclusively on his own interpretation in applying the provision.

In the past, Administrator Heyerdahl has granted category-one leave in situations where teachers have requested such leave to care for their own children. He also has granted category-one leave in a situation where a teacher requested the leave to be able to attend a state basketball tournament in which her daughters were playing. In other situations in which District teachers have not had children participating in the state basketball tournament, their requests to use category-one leave to attend that event were denied. Administrator Heyerdahl also has denied a category-one leave request from a District teacher who wanted to participate in a softball tournament.

## DISCUSSION

As the District correctly points out, an important discretionary component lies at the heart of the category-one leave provision set forth in Article XIII, Section C. The statement that "[f]inal approval of personal leave compensation will be at the discretion of the administration...." is one that clearly affords the District some level of independence in determining whether a leave request qualifies for category-one leave. This conclusion is reinforced by the contrasting language that appears in the second paragraph of Article XIII, Section C, which states that category-two leave is to be taken "at the discretion of the teacher".

The caselaw generally establishes, however, that such discretion is not unfettered. It has been recognized frequently that, with any act of managerial discretion affecting the benefits and privileges of employees, the employer has an implied obligation to act in good faith and not in an arbitrary, capricious or discriminatory manner. ID.; WILLIAMS PIPE LINE CO., 70 LA 664 (Barnhart, 1978); YALE UNIVERSITY, 53 LA 482 (Sandler, 1969); DENVER PUBLISHING COMPANY, 52 LA 552 (Gorsuch, 1969); GULF OIL CORP., 36 LA 1353 (Merrill, 1961); REICHHOLD CHEMICALS, INC., 73 LA 636 (Hon, 1979); COLSON COMPANY, 54 LA 896 (Roberts, 1970). This imperative has been analyzed by arbitrators with a variety of conceptually overlapping descriptives. An employer's judgments must be deliberate and reasoned, WILLIAMS PIPE LINE CO., ID., and not based on whim, ID.; HUDSON PULP & PAPER COMPANY, ID. An employer must use informed discretion, YALE UNIVERSITY, ID., based on all the facts of a particular situation in light of the purpose for which the power exists and must not act in an off-handed manner or without regard to the competing considerations involved. WILLIAMS PIPE LINE CO., ID. A mere difference of viewpoint, however, on the part of the union or arbitrator as to the wisdom or fairness of an employer's decision is wholly insufficient to set it aside. HUDSON PULP & PAPER CO., ID. It is not necessary for an employer to be correct, if it can point to any reasonable basis for making its decision. ID.

The District argues that, in addition to the discretionary component, paragraph one of Article XIII, Section C sets out two specific criteria under which requests for category-one leave must be evaluated. According to the District, the Agreement between the District and NUE allows for category-one leave only in situations where the underlying business, first,

"requires the teacher's attendance" and, second, can "only be conducted during regular school hours".[1] The arguments made by NUE, on the other hand, offered very little guidance as to how the provision at issue should be read. That being the case, I have deferred to the analytical structure proposed by the District. Using these criteria, however, I have concluded that the District abused its discretion when it denied Ms. Stohr's category-one leave request.

Considering the first element, I agree with the District's position that Ms. Stohr was not strictly required to babysit for her granddaughter. For various reasons, it seems unlikely that Ms. Stohr was her daughter's *only* fall-back option for babysitting, and NUE did not meet its burden to establish that she was. Nevertheless, I find that this fact did not justify the District's decision to deny Ms. Stohr's category-one leave request. The record in this case indicates that, in the past, Administrator Heyerdahl has been lax in the application of the required attendance element. Although Administrator Heyerdahl testified that he views category-one leave to be preserved for instances in which a teacher would have to attend a house closing, court date, or some other legal meeting, in practice he has approved category-one leave in instances that do not qualify as one of these types of compulsory events. Instances of approved category-one leave presented by the District include occasions upon which teachers have babysat for their own children and an occasion upon which a teacher was allowed to take category-one leave to watch her daughters participate in a state basketball tournament. In reference to the basketball tournament, the District acknowledged that it is doubtful that the required attendance element was met. As the District acknowledged in its brief, Administrator Heyerdahl has been "expansive" in his interpretation of the required attendance element.

Mr. Heyerdahl's handling of the specific leave request at issue here underscores the apparent insignificance of the required attendance element. Though Mr. Heyerdahl's first reported basis for rejecting the leave request – because it was "not personal" – may have been somewhat vague, it is at least fair to conclude that he was not stating that the request was being denied on the basis of the required attendance element. Later, at the second step of the grievance process, Administrator Heyerdahl indicated that the request had been rejected because babysitting "clearly is not personal business that can only be conducted during regular school hours". Here again the explanation for the denial of Ms. Stohr's category-one leave request did not account for whether the event had required Ms. Stohr's attendance. Although Administrator Heyerdahl included the required attendance element in his assessment of the request at hearing, testifying that it had been denied because he "didn't feel that the babysitting for the granddaughter required Barb's attendance and that it could only be conducted under

[1] The first sentence of Article XIII, Section C states that "[e]ach employee may be granted to a maximum of three (3) days with compensation, to take care of important matters of a personal nature." Perhaps relying on this sentence, Administrator Heyerdahl initially told Principal Ayer that Ms. Stohr's leave request was being denied because it was "not personal". Principal Ayer then conveyed this reasoning to Ms. Stohr, on a second-hand basis. The two-pronged test proposed by the District, in its brief, however, does not incorporate this "personal nature" element. Moreover, at the hearing, the District did not put any evidence on the record as to what Adminstrator Heyerdahl might have meant when he denied Ms. Stohr's leave request for being "not personal". For these reasons, I have not evaluated this case with that element in mind.

school hours", I find the narrower rationale provided contemporaneously with the denial to be a more reliable indication of the criteria he most likely took into account.

I do not disagree with the District's assertion that it should be able to use its contractually secured discretion to draw a line in the sand when deciding whether it will consider attendance to be "required". Further, I do not believe it would be arbitrary for the District to draw that line between children and grandchildren. What I find arbitrary here is the District's effort to apply the required attendance element in this case, when Administrator Heyerdahl did not apply that element in the past. As noted above, the District has acknowledged that Administrator Heyerdahl apparently did not apply the required attendance element in the case of the mother who wanted to attend the basketball tournament. In its brief, the District acknowledged, with regard to the basketball tournament, that "it could be argued that the necessary 'required attendance' element is dubious at best" and that the second element, regarding whether the tournament directly conflicted with school hours, was the one that "effectively governed" Administrator Heyerdahl's decision to grant category-one leave in that instance. It is the on-again, off-again employment of the required attendance element, rather than any discretionary interpretation of that element, that has led to my conclusion that the District abused its discretion when it supposedly used the required attendance element as a basis for its denial of Ms. Stohr's category-one leave request.

Consistent with his past actions, Administrator Heyerdahl seemed to evaluate Ms. Stohr's category-one leave request by focusing primarily on the second element of whether the underlying activity could only be conducted during regular school hours. As quoted above, Administrator Heyerdahl indicated at the second step of the grievance process that "babysitting for daughter may well be a desirable and enjoyable activity, but it clearly is not personal business that can only be conducted during regular school hours". I find that there was no reasonable basis on which to draw this conclusion. Ms. Stohr had been enlisted to fill what was a specific, child-care gap. Regardless of one's view of the relative importance of the activity, it is at least clear that she could not have accommodated the request at just any time. This fact makes the District's argument – namely, that Ms. Stohr could volunteer to babysit for her grandchild any time – simply irrelevant. Ms. Stohr's admission at hearing that she sees her granddaughter often and has many opportunities to babysit for her does not change the fact that it was during particular daytime hours on certain weekdays in February of 2007 when she had been specifically asked to do so. This dynamic is similar to that faced by the mother of the basketball players. Although she presumably had enjoyed the opportunity to watch her daughters play in many games, most of which would have occurred outside of regular school hours, the District recognized that she could only watch them play in the state tournament game during school hours, and it granted her category-one leave to do so.

The outcome of this case is not one that turns on a mere difference of viewpoint as to the fairness or wisdom of the District's decision. My view of the record is that the District behaved in an arbitrary and capricious fashion when it denied Ms. Stohr's request for category-one leave. If Administrator Heyerdahl was basing his denial on the failure to meet the required

attendance element as the District now claims, he was relying on a standard that was not even applied to the request related to the basketball tournament. Further, the record provides no reasonable basis for Administrator Heyerdahl's conclusion that the business underlying Ms. Stohr's request could have been conducted outside of school hours. Any consideration of the facts related to Ms. Stohr's particular situation would have revealed that just the opposite was true.

Based on the foregoing and the record as a whole, the undersigned enters the following

## AWARD

The grievance is sustained. The District is directed to reimburse Ms. Stohr for the amount lost due to the District's violation of the Agreement.

Dated at Madison, Wisconsin, this 30th day of July, 2008.

Danielle L. Carne /s/
Danielle L. Carne, Arbitrator

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