

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

HOWARD-SUAMICO SCHOOL DISTRICT BOARD OF EDUCATION

and

HOWARD-SUAMICO EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

Case 101

No. 67304

MA-13827

(Inclement Weather Grievance)

Appearances:

Robert W. Burns, Attorney, Davis & Kuelthau, S.C., 318 South Washington Street, Suite 300, Green Bay, Wisconsin, 54301, appeared on behalf of the Howard-Suamico School District Board of Education.

Suzanne Dishaw Britz, UniServ Director, United Northwest Educators, 1136 North Military Avenue, Green Bay, Wisconsin, 54303, appeared on behalf of the Howard-Suamico Educational Support Personnel Association.

ARBITRATION AWARD

The Howard-Suamico School District Board of Education, herein the District, and the Howard-Suamico Educational Support Personnel Association, herein the Association, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance file by the Association concerning school year employees' access to certain paid leave benefits during days that school was closed or cancelled due to weather or emergency conditions. From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on February 19, 2008, in Green Bay, Wisconsin. A transcript was prepared. The parties filed briefs and reply briefs by June 30, 2008, and the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues. The Association states the issues as:

Did the District violate Article XXVI of the 2006-2007 collective bargaining agreement when it denied school-year employees the ability to use paid personal days for inclement weather days on February 5, 2007, and March 1, 2007? If so, what is the appropriate remedy?

The District states the issues as:

Did the District violate the Collective Bargaining Agreement when it continued to restrict access to Article XXVI, Emergency School Closings, to full-year employees as defined by Article II? If so, what is the appropriate remedy?

The Association's statement of the issues is selected as that which more closely reflects the record.

RELEVANT CONTRACT PROVISIONS

ARTICLE II DEFINITIONS

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- A. **FULL YEAR:** Full year employment shall be defined as employment regularly scheduled for all workdays of the year exclusive of paid holidays, vacation, and sick leave usage.
- B. **SCHOOL YEAR:** Regular employment is the work year defined as follows for each of the following employee groups:
 - 1. **Aides, Occupational Therapy Assistants and Food Service Workers:** The work year is defined as the student academic year. Non-student days that occur within the student academic year are non-workdays, except for designated paid holidays. Employees may also be required to work before the beginning of the student academic year and following the end of the student academic year.
 - 2. **School-year Secretaries and Job Coach.** The work year is defined as the teacher contract year. Employees may be required to work up to two (2) weeks before the beginning of the teacher contract year and up to two (2) weeks following the end of the teacher contract year. Days within the teacher contract year on which both students and teachers are absent are non-workdays, except for designated holidays. Days within the teacher contract year on which only teachers are present are workdays. However, the supervising administrator may designate such a day as a "non-workday" and in such cases, the employee need not report to work. "Non-workdays" are not to be recorded on time cards turned in by the employee.
 - 3. **School-year employees shall receive no compensation for non-workdays occurring within their defined work year, or for any days outside of their defined work year, unless the employee is required by their supervisor to work the day and the employee does actually work.**

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**ARTICLE V
WORKWEEK/WORKDAY**

- A. **WORKWEEK:** The normal workweek for all employees shall be Monday through Friday.
- B. **WORKDAY:** The typical and normal workday for all employees shall be between the hours of 6:30 a.m. and 5:00 p.m. These hours are subject to adjustment by the Employer on special occasions but will not become an every workday occurrence. The normal workday for full year and school year employees shall consist of no less than six (6) nor more that eight (8) hours. During the summer and on special occasions employees may be scheduled for more or less than eight (8) hours per day.

...

- F. **FLEX-TIME:** Employees may flex their work schedule only with the permission of their supervisor. The permission must be obtained prior to beginning to work the flexed schedule. The flexed work schedule must occur entirely within the same work week and must not result in the creation of overtime on a daily or weekly basis.

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**ARTICLE XIII
GRIEVANCE PROCEDURE**

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Step 4: ARBITRATION

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- E. Decision of the Arbitrator: A decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the Agreement in the area where the alleged breach occurred. The arbitrator shall not modify, add to, or delete from the express terms of this Agreement.

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**ARTICLE XVII
LEAVES**

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- B. **PERSONAL LEAVE/EMERGENCY LEAVE:** Employees are allowed a maximum of three (3) each emergency/personal days per year. Personal and emergency leave days are non-accumulative.

Personal days must be approved by your immediate supervisor and the Director on Human Resources at least twenty-four (24) hours in advance. In cases of emergency, the immediate supervisor should be contacted as soon as the employee is aware of the need to take emergency leave.

Part-time employees as defined in Article II are entitled to a maximum of one (1) each emergency/personal day per year. "Day" is to be defined as the equivalent of that employee's workday.

. . .

ARTICLE XXVI EMERGENCY SCHOOL CLOSINGS

In the event of inclement weather or emergency school closings, employees who have been approved by their supervisor not to report to work or are approved to leave work early may use vacation, personal leave, or accrued compensatory time to avoid loss of pay. The employee may also arrange with his/her supervisor to make up the time on an hour-for-hour basis provided the make up is consistent with the flex time language on the Agreement and occurs within the same week in which the time was lost. The time also may be taken without pay, without affecting available unpaid leave time.

The need to use leave for inclement weather should arise very infrequently and employees are expected to make a reasonable attempt to get to work and to work an entire shift.

The above shall not apply for the ½ hour of early release on days when students are dismissed early (pay will not be deducted).

BACKGROUND AND FACTS

Article XXVI of the 2006-2007 collective bargaining agreement, as set out above, is a change from its previous language in the 2003-2006 agreement which stated:

Employees who cannot get to work or have requested to leave work early because of inclement weather (blizzard, tornado, storm or emergency school closings) may use vacation time or arrange with his/her supervisor to make up the time on an hour-for-hour basis. The time may also be taken without pay.

The need to use leave for inclement weather should arise very infrequently and employees are expected to make a reasonable attempt to get to work and to work an entire shift.

The above shall not apply for the ½ hour of early release on days when students are dismissed early (pay will not be deducted).

This language had been in the agreement since at least the 1985-1987 master agreement.

The Association represents both full year and school year employees. All employees have a limited number of personal or emergency paid leave days available to them under the agreement. School year employees have not always taken all of their available personal leave days in any given year. Only full year employees of the District have vacation under the agreement, and only the full year employees have had access to the provision allowing them to use vacation time in the event of an inclement weather closing. School year employees did not have a paid leave option available for inclement weather school closings. There had been some school year secretarial employees who had been allowed to work on the hour-for-hour basis. School year employees work, and are paid for, the make up days added at the end of the school year by reason of inclement weather school closings. School year employees are not expected or required to work on inclement weather days.¹ Such days were not considered work days for those employees. Full year employees are expected to work on such days, and they are considered work days.

During the same bargaining of the 2006-2007 agreement that produced the above change in Article XXVI, the parties also bargained and changed the provisions of Article II B, as set forth above. The previous language stated

- C. SCHOOL YEAR: School year employment shall be defined as regular employment which shall be scheduled for aides and food service employees to coincide with the academic calendar. Secretaries may be required to work up to two weeks before the beginning of the school year and up to two weeks after the end of the school year. School year employees required to work during the summer shall be given at least a 24 hour notice except in emergencies. For purposes of this section, full-time shall be considered to include those who are regularly scheduled to work more than thirty (30) hours per week.

During negotiations of the 2006-2007 agreement the District initially proposed, among other things, a new flex time provision and compensatory time provisions, along with changes to the definitions in Article II B for various classifications of employees. The Association initially proposed, among other things, language that would add the use of any available paid leave time (vacation, sick, personal or emergency) to vacation days for unanticipated school closings under Article XXVI, or take the day without pay and not suffer a deduction from available unpaid leave time under Article XVII D. The Association later proposed changes in Article XXVI that only added the use of personal time and retained its proposal that time taken without pay would be without affecting available unpaid leave time. The District made a counter proposal for Article XXVI that did not include sick leave or emergency leave, but did include the use of personal leave, accrued compensatory time, the hour-for-hour provision to be consistent with the flex time language of the agreement, as well as the use of time without pay without affecting available unpaid leave time. The District's proposal is the same language that eventually was agreed to by both parties in mediation, included in a tentative agreement of February 1, 2007, and ultimately in the 2006-2007 agreement.

¹ Commonly referred to as "snow days".

During the negotiations and mediation process for the 2006-2007 agreement, neither party specifically stated to the other whether the changes in Article XXVI were intended or expected to apply to the school year employees or apply only to full year employees. The matter was not discussed. The Association, during bargaining, indicated to the District that the change was a no cost item. During the Association ratification process the Association members were told by their negotiators that the change now applied the provision for taking available paid leave to all employees, including school year employees. At the District Board discussions, the Board was told by its negotiators that the change was a no cost item and also that no new categories of benefits were created.

There were other changes agreed to in the 2006-2007 bargain, including the provision for flex time in Article V F, above, and compensatory time language in Article V E 3.

School was closed due to inclement weather on February 5, 2007 and March 1, 2007. One school year employee requested use of a personal leave day for the February 5th closing, which was approved by her immediate supervisor and the Human Resources Office. Several school year and part-time employees requested use of personal time leave for the March 1st closing, which were also approved by their supervisors and the Human Resources Office. On March 14th another school year employee inquired of the Human Resources Office as to the availability of personal leave for an inclement weather day and was informed she was able to use personal leave. The employee submitted a request on March 15th which was approved by her supervisor. The Human Resources Office then denied the request and also denied, retroactively, the previously granted requests made by school year and part-time employees. Other requests submitted that same day were denied either at the supervisory level of by the Human Resources Office. Thereafter, the Assistant Superintendent of Human Resources, James Freeman, and Association President, Debbie Meyers, discussed the interpretation of Article XXVI. Freeman had reinterpreted the provision in making the March 15th denials, indicating that he had initially overlooked the distinction between school year and full year employees.. Meyers initially agreed with Freeman's re-interpretation. However, shortly after contacting other Association officers she re-contacted Freeman and expressed disagreement with Freeman's re-interpretation. Several discussions and communications between the parties followed without resolving the issue. Thereafter, the Association filed a grievance over the matter which was denied by the District, eventually leading to this arbitration.

Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

Association

In summary, the Association argues that the contract language is clear and unambiguous and does not exclude school-year employees from eligibility under Article XXVI. There is no reason to resort to interpretation where the language is clear and unambiguous. The District violated this clear and unambiguous language when it began denying personal leave requests by school year and part-time employees for days school was closed due to inclement weather.

The clause states that all bargaining unit employees are eligible to substitute either paid or unpaid leave in the event of an emergency school closing. The absence of any restrictions as to eligible employee classifications supports the position that all bargaining unit members had the option. There has been a historical understanding between the parties that Article XXVI applied to all members that all employees could make up lost time. The District position would void vacation contract language and the practice. An honest reading of the language demonstrates no exclusion exists. The provision neither applies solely to 12-month employees, nor does it exclude school year and part-time employees. Under the District's re-interpretation not only do employees lose their historical ability to make up lost time or take the day unpaid, they lose the newly negotiated paid leave options.

The Association argues that bargaining history supports the Association's position. The Association's initial proposal would have expanded paid leave options to both full year and school year employees and sought to expand leave options from only vacation to any available paid leave time, preserving available leave without pay. The District's initial proposal would clarify the work year and add flex and compensatory time language. Association negotiators understood this to be clarification. The District's revised proposal added modifications to Article XXVI, which expanded the language to include its new compensatory time and flex time proposal, and included personal leave while preserving leave without pay. The District did not express any exclusion of school year employees from its revised Article XXVI proposal. The Association understood the language applied to all bargaining unit members. This proposal was accepted and agreed to by the parties during the mediation process. And the District language is in the collective bargaining agreement. Historically, all employees were covered by Article XXVI since 1985-87 and it was mutually understood that only 12-month employees were eligible for vacations. Association negotiators clearly understood the Association's initial proposal intended to expand paid and unpaid leave options for all bargaining unit members, and that the District's language applied to all employees consistent with historical application. The District never conveyed its intention to create a new exclusion of school year and part-time from Article XXVI provisions. Association negotiators understood the Article II revisions were a clarification of the beginning and ending of the school year employee work year. The District never verbalized any connection with emergency school closings. The District created the language. There are no restrictions as to employee eligibility for flex time and compensatory time under Article V. As the proponent for the revised language proposals, it was the District's duty to convey any intended exclusions to the proposed language, or any intended relationships between proposals. District negotiators did not. The lack of communication as to any other veiled meaning works against the District's position in this matter, citing arbitral authorities. It is incumbent upon the proponent of a contract provision to explain what is contemplated or to use language which does not leave the matter in doubt. If the District intended to exclude school year and part-time employees from access to emergency closing provisions, it was incumbent upon its negotiators to specify any such exclusions during negotiations, which they did not. This prohibits the District from now claiming any alleged exclusions exist. The Association interpretation provides the only consistent and plausible reading of the emergency school closing provision.

The Association also argues that the District clearly understood the intent and correct application of the newly negotiated language. Mr. Freeman's explanation to Human Resources staff, administrators and his approval of personal leave requests are unmistakable evidence that the District understood Article XXVI that school year and part-time employees were able to use personal leave for inclement weather closings, citing leave approval examples. Building administrators understood this, citing leave approvals. Leaves were not denied until after Mr. Freeman's re-interpretation of the language.

The Association further argues that language contained in other leave provisions is instructive in the interpretation of Article XXVI. The contract defines several types of leave, and where limitations exist as to eligibility for certain leave, the contract specifies the same. All members are eligible for paid holidays, sick leave, and personal and emergency days. Limitations on these leaves are based on employee classification in their provisions. Unlike these leave provisions, there is not the slightest inference in the emergency school closing language that school year and part-time employees are exempt from its provisions. The all-inclusive reference to employees means what it says, that all bargaining unit members are eligible under Article XXVI.

The Association argues that acceptance of the District's interpretation will lead to an absurd result. It would result in a contractual loss to school year employees. If a snow day is no longer considered a work day, then school year employees would no longer be allowed to make up the day as historically permitted by the clear contract language, such forfeiture was never contemplated by the parties. And the law abhors forfeiture, citing arbitral authority. Under the District interpretation, school year and part-time employees may use personal time for a partial snow day, but not a full day. If the day were delayed or school closed early, school year and part time employees would be able to substitute personal days because those days would be considered a work day. Under the District interpretation these would not be work days. This is an absurd result. It would require inserting language into the agreement in violation of Article XIII E.

The Association also argues that the arbitrator cannot add restrictions to the clear terms of the negotiated provisions. The emergency closing provision has been in the agreement since 1985-87 and untouched until 2006-2007. The all inclusive use of the word employee in Article XXVI has been unchanged since the initial contract in 1985-87. Sustaining the grievance will merely affirm the parties' agreement. Acceptance of the District position would require the arbitrator to ignore the clear contract language. Imposing restrictions as to employee classifications requires the arbitrator to go beyond his authority in violation of Article XIII E. The District seeks to circumvent the agreement by reading into the contract words that do not exist. The Arbitrator has no authority to do so, and should sustain the grievance.

In reply to the District arguments, the Association contends that the parties agreed to expand inclement weather provisions. There was never a hint or suggestion by the District during negotiations that it intended to exclude school year and part-time employees from

accessing personal leave or suggest the historical application would no longer apply and eliminate their ability to make up lost time due to closings. The parties did agree to expand paid leave options to all employees. The parties did not agree to exclude school year and part-time employees from that availability, or completely from Article XXVI. Adopting the District position would prohibit school year and part-time employees from accessing paid leave options under Article XXVI and eliminate them from being able to make up lost time in the event of a closing. The Association never intended such a result or agreed to such a concession. Mr. Freeman's approvals of the requests are clear admissions he accepted the Association interpretation. Association officers understood the proposed language changes included all employees. The Association would have responded to any other meaning. The District did not negotiate a change from what the language clearly states. What it did not achieve at the bargaining table it cannot read into the agreement.

The Association argues that the cost of a contractual provision is not a valid defense. The Association disagrees with the District claim that available personal leave is a new cost. Personal leave had historically been part of the benefit package and is not a new benefit. The ability to access compensatory time and flex time is not a new cost either. There is no cost with either. They are options to avoid forfeiture of salary in unanticipated school closings. The argument of the District that not all school year employees use all their personal leave is ridiculous. Personal leave has been a historical benefit to all employees. Cost is not a defense for not complying with an agreement, citing arbitral authorities.

The Association further contends that District-created documents not shared with the Association cannot be relied upon to support the District's position. The February 8, 2007 memo does not speak to changes in emergency school closing language or to restrictions to classifications or exclusions. It does state that new benefit categories were not created. This is consistent with testimony that school closing provisions were not considered a new category of leave. The District cannot now claim that the contract changes now somehow from a new benefit or type of leave. The District Exhibit 3 email is only evidence of what Mr. Freeman told administrators minutes after conversations with president Meyers, who was not copied and had no opportunity to rebut it. The Association was not present during Board deliberations during the grievance, and never got a copy of District Exhibit 4 before the arbitration hearing. It is not evidence of the parties' intent or understanding during negotiations. The fact that five principals approved personal leave requests is a strong indication that administrators had a clear understanding of the meaning of Article XXVI, which consistent understanding had to come from Mr. Freeman.

The Association argues that Hornick's testimony is irrelevant to the instant dispute and cannot be relied upon to decide the grievance. She is not part of the Human Relations Department. She was not a member of the District bargaining team and did not participate in the parties' discussions. Her testimony adds nothing to the intent and understanding of the parties to the new contract provisions.

District

In summary, the District argues that the changes to Article XVII did not expand the job classifications within the emergency school closing provision of the contract. After reviewing the bargaining proposals and mediation for the 2006-2007 agreement, and how the previous Article XXVI had been used, the District suggests that the Association admits that prior to the 2006-2007 agreement, only full year employees were eligible for the benefit under Article XXVI. The Association claims the District never pointed out during negotiations that it was excluding school year employees under Article XVII. The District did not have to affirmatively exclude them because those employees were never included in the first place. The District never interpreted the language as an attempt to expand the group. There is a change in the status quo under the Association's interpretation. Because the Association was the party looking to change the status quo as to school year employees, the proposal specifically referencing those employees should have come from the Association. Citing arbitral authority, there was no mutual understanding to expand the pool of employees eligible for that benefit. Non-full year employees are not employees for purposes of applying Article XXVI as they do not have work days in the context of Article XXVI. References to employee remained constant throughout all proposals during the negotiations. There was nothing said specifically by the Association which indicated school year employees were now going to be included in accessing leave benefits under the school closing provisions. That would have caught Mr. Freeman's attention as a change in the status quo. The District understood the Association's proposal was only to expand the options available for leaves on inclement weather days for those who already had it, i.e., full year staff. There was never an agreement to expand the categories to include school year employees. District Exhibit 2 corroborates that understanding. There was no new category of benefits for school year employees identified anywhere in the course of bargaining. The clear language of the contract and past practice supports the District position that both the previous and revised provision was intended by the parties to apply only to full year employees.

The District argues that the Association claimed its proposal was a no-cost item. The full year employees would be working one way or the other. The Association's current position is inconsistent with that which they represented at bargaining. There would be a cost for school year employees to have access to paid leave under Article XXVI. As Mr. Freeman testified, not all school year employees use all of their personal leave they have coming to them. In the make up order of snow days for students, we would not only pay the school year employee for the day under personal leave, but they're coming in and working that day as well and we'd have to pay them for that time worked. It could be an additional cost. And, the Association is asking us to pay people for time not worked. Because there would be a price tag associated with the Association's proposal, the District believes this further supports its position that school year employees were not to be included when the language under Article XXVI was changed. Because there was no cost to the proposal, there wouldn't have been any reason to draw the Board's attention to the proposal. The Association is attempting to expand a benefit without a quid pro quo.

The District contends if employees are not scheduled to work, they are not entitled to the school closing benefit. The arbitrator is to give meaning to all terms of the contract. Consistent reading of the agreement as a whole supports the contention there was no need to isolate employees under Article XXVI because non teacher and student days are not contractual work days for employees other than full year employees. Article II was changed to provide language, including, for full year: all workdays of the year. For school year: non-student days that occur within the student academic year are non-workdays; days within the teacher contract year on which both students and teachers are absent are non-workdays; school-year employees shall receive no compensation for non-workdays occurring within their defined work year; school-year employees . . . required to work non-workdays. The intent was to clarify the work year and work day for school year employees. Full year employees are expected to work year round except for holidays, vacation and sick leave. For school year employees there is nothing in Article II B to reference whether the days are scheduled or not. The qualifier is whether there are students present for B1 or where students and teachers are present for B2. Paragraph B3 was to make clear that if school year employees are not physically present, they do not get paid. This is consistent with Hornick's testimony and the admissions of Borkovec and Meyer for the Association. Because it is not their workday, there is no application of Article XXVI. The language does not require payment for a non-workday. The District did not agree to it, nor does the practice support it.

The District further argues that the method used to approve leave requests during the two inclement weather days that occurred in 2007 is not supportive of the practice that has been in place for many years. Mr. Freeman simply erred in his first review of the contract language when the absent forms came in for his approval. He did not remember the distinction in the contract between school year and full year employees. Freeman's mistake cannot be construed as a new practice, citing arbitral authority. Use of personal or emergency days are not available to school year employees based upon the contract language and, the new language did not change the way in which inclement weather situations have been handled in the past. It was a simple error that does not serve to repeal consistent application of Article XVII, especially when that was recognized by a lead member of the Association's bargaining team.

In reply to the Association arguments, the District contends the emergency school closing provision of the contract excludes school year employees due to their workday definition in Article II. The District believes Article XXVI is clear and argues those entitled to the leave benefits are full year employees who were exclusively permitted to those benefits in the past. The Association's arguments overlook the basic prerequisite to using leave: you must first have a workday. The Association ignores the clear language of Article II. An express exclusion in Article XXVI is not needed if, by virtue of Article II, only the full year employees have a workday to start with. Under Article II, inclement weather days are non-workdays for school year employees unless those employees are requested by their supervisor to come to work, because teachers and students are absent. There is no ambiguity in that language. Paragraph B3 is clear - if school year employees are not physically present, they do

not get paid. On March 1, 2007 neither students nor teachers attended school. The day is a non-workday for school year employees. There is no application of Article XXVI. To do so would be akin to teacher access to sick leave pay in July. The Association failed to reconcile the conflict between its interpretation of Article XXVI and Article II definitions. All contract provisions are to be given meaning. Sustaining the grievance would render workdays language of no significance. The District is not re-interpreting the language under Article XXVI; it is administering benefits to eligible staff. The first paragraph of Article XXVI has remained unchanged since 1985-86. In the 2006-2007 bargain the language did not include a catch-all phrase allowing each employee the right to the benefit of leave. Only full year employees were allowed to apply vacation under the previous language. Granting the Association position would impermissibly expand the definition of employees, which is not within the scope of the arbitrator's authority.

The District argues the revision of Article XXVI did not include expansion to school year employees. There was no mention during the exchange of the Association's initial proposal or during the negotiations in which the Association's alleged intent was revealed to the District. The District never interpreted the language as an attempt to expand the group. The proposed change to Article XXVI was only to expand the options available for leaves for those who already had it, i.e., full year staff. Getting paid for a day for which they did not previously get paid is a new benefit that would have been noted. There was no need for the District to convey anything with regard to the proposed language. The word employees in that section was never changed. There is no evidence of the Association raising the change in that context. The contract provision here does not say each or all employees. Article II defines who is an employee for purposes of application of the benefit. The definition and uniform practice supports the fact that only full year employees were subject to the benefits, not all employees, because the day is a workday for them. Association arbitral precedent is distinguished in that here the Association initially sought language changes, so the language should not be construed against the District as the drafter. As the proponent to the change it is the Association which should explain its desire, not the District.

The District argues a mistake does not detract from the consistent application of Article XXVI. Freeman admitted he made an honest mistake and failed to consult Article II. He then corrected himself. Such error cannot abolish the consistent application of Article XXVI. The Association president initially agreed with Freeman. The question is not whether Freeman or Meyer should be bound to their initial reaction, but which result is consistent with the contract as a whole.

The District further contends that the fact that other leave provisions call for specific reference to eligibility does not discount the fact that only full year employees are eligible to substitute leave benefits under Article XXVI. None are backed by clear and consistent practice. Had it been the intent to make personal leave available to all bargaining unit members for weather closings, it could have been added to the list of acceptable reasons for the use of personal leave in the personal leave language itself.

The District argues that the arbitrator will give meaning to all terms of the agreement if he denies the grievance. The District is not imposing new restrictions. The current restrictions have been in place since the inception of the agreement. Denying the grievance will not go beyond the arbitrator's authority, but will harmonize Article XXVI and Article II, which is consistent with the practice.

DISCUSSION

The issue in this case requires deciding if school year and part-time employees can access paid leave benefits under Article XXVI when school was closed for inclement weather on February 5, 2007 and March 1, 2007. That Article and others were revised from prior language in the 2006-2007 bargain. It now reads in pertinent part:

In the event of inclement weather or emergency school closings, employees who have been approved by their supervisor not to report to work or are approved to leave work early may use vacation, personal leave, or accrued compensatory time to avoid loss of pay. The employee may also arrange with his/her supervisor to make up the time on an hour-for-hour basis provided the make up is consistent with the flex time language on the Agreement and occurs within the same week in which the time was lost. The time also may be taken without pay, without affecting available unpaid leave time.

The parties agree that prior to the changes only full year employees could access the paid leave provisions in the Article because they were the only employees who had vacation, and vacation was the only paid leave benefit available under the previous language. It appears that some school year employees were able to make up hour-for-hour time under the previous language. There are no examples of any school year or part-time employees accessing paid leave. The Association contends that the new language expanded the availability of paid leave under Article XXVI to school year and part-time employees because they have personal time as a benefit under the agreement and that was the Association's intent during bargaining. The District contends that inclement weather days are not work days for school year or part-time employees under Article II so as to be available for personal leave and, as historically applied to only school year employees for paid leave, the parties understood during bargaining that the revised provision only applied to full year employees.

The Association argues that the language of Article XXVI is clear and unambiguous, and its plain meaning requires including all employees, both school year and full year, as employees who can access the benefit. The District argues that the language of both Article XXVI and Article II makes the agreement clear and unambiguous that only full year employees have access to paid leave in Article XXVI. Normally, if language in an agreement is clear and unambiguous it will be applied as written without resort to other interpretation, bargaining history or past practice. An agreement is ambiguous if plausible contentions may be

made for conflicting interpretations. Both parties make plausible contentions as to how Article XXVI is to be read. Reading the plain language of the Article, as the Association suggests, would suggest that school year and part-time employees can access Article XXVI paid leave benefits because they are all employees. Reading both Article XXVI and Article II together, as the District suggests, the agreement limits paid leave access to employees who have a work day which are not during the school year and part-time employees. In this respect, the language in Article XXVI is ambiguous and requires further interpretation to ascertain its meaning.

Past practice and bargaining history are used to help interpret ambiguous language. Here the language at issue, the changes to Article XXVI, is new. There could be no past practice established as to that language. The District has argued that there is a past practice in how the former language had been administered. However, both parties agree that only the full year employees had vacation and thus the ability to use paid leave under that provision. That is a simple and straight forward reading of the language. There is no record that either party recognized any other pattern of facts that would support a binding past practice as to the availability of paid leave under Article XXVI. While this application of the prior language may have some bearing on the District's understanding of the language in negotiations, as discussed below, there is no binding past practice established on this record that aides in interpreting the new Article XXVI.

The bargaining history does provide aide in interpreting the language. It is clear that previously only full year employees could use paid time off for inclement weather because they were the only employees who had vacation time available. In this respect the District had a reasonable understanding of what employees were being discussed when the matter of expanding available leave times was proposed. The Association argues that the District should have been more clear and should have specified that school year and part-time employees were not contemplated in the Districts' Article XXVI proposal, or were to be excluded from it. However, the idea of expanding the types of leave that had formerly only been available to full year employees under Article XXVI actually came from the Association initially. Inasmuch as the Association criticizes the District for not being specific as to whom the District's counter proposal applied to, the Association itself did not state at any time to the District who it intended the new language to apply to. If there is merit to the Association argument then it is the Association that failed to communicate its understanding that would alter who would have access to paid leave under the revised language.

Added to this is the uncontroversial testimony that the Association stated to the District during bargaining that its proposed change was a no cost item. But the expansion of the benefit to school year and part-time employees would be a cost item in those circumstances where such employees would not have otherwise taken available paid leave. They also have the ability to work on the make up days that are added at the end of the year. This would be payment twice for the same day - once as paid leave and once as actually worked. That is a cost item the way the Association interprets the language. It is not a cost item the way the District interprets the language. If this is not a cost item as represented during negotiations

then it cannot expand access of the paid leave benefits to employees other than those who already had access to paid leave in the form of vacation. The Association is correct that just because a provision in an agreement has a cost to it does not give the District a reason to not provide the benefit of the agreement. But that is not the point here. What is important here is not the fact that there is a cost to a benefit. What is important is that the Association stated this was a no cost item and that is what aids in assessing the bargaining history as to who the language would apply to. On the other hand, had a cost been associated with the proposal of the Association then some type of quid pro quo discussion could be expected, which was never discussed as the District points out.

While it is true that the document prepared by the District for Board discussion that was not shared with the Association would not itself be reliable proof of anything relevant, it is not inconsistent with the testimony that the Association stated at bargaining this was a no cost item. That is also consistent with the District understanding there would be no additional benefits involved. This is very much the same as the Association testimony that at its Association ratification meeting it was explained by Association negotiators that the benefit would now be available to school year and part-time employees, with the District representatives not being present.

Given the above, bargaining history favors the District's interpretation of the language and position on the issue.

An interpretation of the language also requires reading the agreement as a whole. In this respect provisions of Article II are helpful. Article II was also changed in the same bargain to clear up the start and end of the work year for various classifications of employees. It sets out a provision in Article II B.3 that states:

School-year employees shall receive no compensation for non-workdays occurring within their defined work year, or for any days outside of their defined work year, unless the employee is required by their supervisor to work the day and the employee does actually work.

Inclement weather days are not work days for school year and part-time employees. On those days either students, teachers or both are not present. Under Article II A and B, these are not work days for school year and part-time employees. As the District argues, the employees are not paid leave for days that are not work days to begin with. There is no work day for a paid leave to apply to for school year employees. This is different for school year employees, who are still expected to work on the inclement weather days. For them it is still a work day. And, the record does not present the question of a school year employee being required by their supervisor to work the day and the employee actually did work. Thus, Article II is consistent with the District reading of Article XXVI, and is inconsistent with the Association's interpretation. Interpretation of agreement language should be consistent among its provisions. This is whether or not the two provisions are otherwise linked or jointly negotiated.

Conversely, interpreting Article XXVI as the Association suggests would be to void Article II B3 of meaning. An arbitrator cannot add to, delete from or modify the language in this or any other agreement. And nothing is being added to Article XXVI. Who are the employees for that Article is being interpreted in light of other Articles in the agreement along with bargaining history.

Reading Articles XXVI and II together consistently and giving force and effect to all provisions of both Articles favors the District position.

As a further aide in interpreting the agreement and ascertaining the intent of the parties, the matter of what benefits apply to these various classifications of employees had been dealt with in other respects in the agreement. In Article XXVIII the parties agreed to certain health, dental, long-term & life insurance benefits. They state:

The Employer shall pay ninety-five percent (95%) of the family and ninety-five percent (95%) of the single monthly premium of a group health insurance plan on a twelve (12) month basis for all full year and school year full-time employees as defined in Article II . . .

This language demonstrates that if the parties intended a benefit to be available for both full year and school year employees they knew how to draft specific language reflecting that intent. For the health insurance provision they did so. In the matter of inclement weather in Article XXVI they did not do so, indicating that is not the intent behind Article XXVI. The clause in Article XXVI does not state, as the Association has argued, that all bargaining unit employees are eligible to substitute paid leave.

There is the matter of Freeman having originally approved the paid leave days and then re-interpreting the provision. His re-interpretation was also originally agreed to by Association President Meyers. These matters were both mistakes. Freeman admits he made a mistake and pointed out that he had not considered the difference between full year and school year employees when making the original approvals. Meyers also made a mistake in her original agreement with Freeman's re-interpretation before she conferred with other Association officials. The original approvals, moreover, do not represent a practice that has been unequivocal, clearly enunciated and acted upon, and readily ascertainable over a long period of time as a fixed and established practice accepted by both parties. They do not bind the District as past practice. If anything, they point out the ambiguity in the language of Article XXVI, rather than add interpretive meaning to the language. Freeman's mistake, and the short term misunderstanding of Meyers as to the Association position, do not change the agreement language or bargaining history.

The Association argues that an award in favor of the District would amount to a forfeiture of bargaining unit members' rights. However, this is not forfeiture. If school is closed for inclement weather there is the opportunity to still work make up days and be paid

for that work. And it is not forfeiture if there is no contract right to the benefit for inclement weather days in the first place. They did not have access to that benefit for those days before. The ability for the other bargaining unit members to use their personal leave times on other work days is not changed or taken from them. The facts of the case do not present an hour-for-hour situation and such a fact scenario is not being decided here.

School year employees do not work on inclement weather days. In view of the agreement as a whole and the bargaining history of the 2006-2007 changes, when school was closed for inclement weather on February 5, 2007 and March 1, 2007, they did not have a right under Article XXVI to access paid time off for those days. The District did not violate Article XXVI of the 2006-2007 collective bargaining agreement when it denied school year employees the ability to use paid personal days for inclement weather days on February 5, 2007 and March 1, 2007.

Accordingly, based upon the record and arguments of the parties, I issue the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 10th day of September, 2008.

Paul Gordon, Commissioner