

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**SECRETARIAL/CLERICAL EMPLOYEES'  
LOCAL 1750, AFSCME, AFL-CIO**

and

**SHEBOYGAN AREA SCHOOL DISTRICT**

Case 127

No. 67857

MA-14038

(Leigh Robert Grievance)

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**Appearances:**

**Mr. Samuel Gieryn**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 187 Maple Drive, Plymouth, Wisconsin 53073, on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Paul C. Hemmer**, 605 North 8<sup>th</sup> Street, Suite 610, Sheboygan, Wisconsin 53081, on behalf of the District.

**ARBITRATION AWARD**

Secretarial/Clerical Employees' Local 1750, AFSCME, AFL-CIO (herein the Union) and the Sheboygan Area School District (herein the District) have been parties to a collective bargaining relationship for many years. At the time of the events chronicled herein there was a collective bargaining agreement in effect covering the period from July 1, 2006 through June 30, 2011. On March 19, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of the collective bargaining agreement in the District's refusal to authorize two days of paid personal leave for Leigh Robert for the purpose of her marriage. The undersigned was appointed to hear the dispute and a hearing was conducted on May 13, 2008. The proceedings were not transcribed. The parties filed briefs by June 27, 2008 and reply briefs by July 29, 2008, whereupon the record was closed.

**ISSUES**

The parties were unable to agree to a statement of the issues. The Union would frame the issues as follows:

Did the Employer violate Article VIII, Section A, subparagraph 1, of the collective bargaining agreement when it denied two days of personal leave to the Grievant?

If so, what is the appropriate remedy?

The District would frame the issues as follows:

Did the Employer violate Article 8, Section A, subparagraph 1, of the collective bargaining agreement when it denied two days of personal leave to the Grievant for a marriage not recognized in the State of Wisconsin?

If so, what is the appropriate remedy?

The Arbitrator adopts the statement of the issues proposed by the Union.

### **PERTINENT CONTRACT LANGUAGE**

#### **ARTICLE VIII – ABSENCES AND LEAVES**

- A. Personal and Emergency Leaves – (The total number of days for such leaves shall not exceed ten (10) days in any one (1) calendar year.)

The secretary's appropriate administrator may grant personal and emergency leaves on absence with compensation.

1. Marriage of the staff member or of a member of the immediate family. The immediate family includes children, stepchildren, grandchildren, parents, brothers, and sisters. The leave shall not exceed two (2) days.

...

13. A duplicate form for all personal leave requests will include a section, which will indicate why a request has been denied and the reason.

### **OTHER RELEVANT PROVISIONS**

#### **ARTICLE XV – HOLIDAYS**

All secretaries shall earn through their service their regular compensation for all the following legal holidays or part thereof:

...

E. Floating Holiday

Secretaries scheduled to work more than ten (10) months per year shall receive a floating holiday. A request for a floating holiday shall be given to the employee's immediate administrator two (2) weeks prior to the requested holiday. The holiday will be granted subject to the employee's immediate administrator's approval. To be eligible for the initial floating holiday, the employee must have been hired prior to February 1.

**ARTICLE XVI – VACATIONS**

Employees qualify for vacation according to the following schedule:

...

D. After seven (7) calendar years, the secretary shall be entitled to fifteen (15) days vacation.

**BACKGROUND**

In this case, the Union and District have been in a collective bargaining relationship since 1971. Since at least 1985, there has been language in the contract providing for paid personal leave, at the discretion of the employer, for the marriage of a staff member or a member of a staff member's immediate family. The practice that has developed regarding this policy is that requests for leave are made to an employee's immediate supervisor, who signs the request and then forwards it to the Human Resources Department. The supervisor may indicate whether the request is approved or denied, but frequently they are signed without a recommendation. The Human Resources Director has final approval over all leave requests. Prior to the events at issue herein, the District has routinely approved such requests without inquiring into, or challenging, the circumstances underlying them.

Leigh Robert, the Grievant herein, has been employed full-time by the District since 1998 and currently has a 2/3 position as a Financial Secretary for the Recreation Department and a 1/3 position as a Secretary at Jefferson Elementary School. Since 1995, and thus pre-dating her employment with the District, Ms. Robert has been in a domestic partnership relationship with Judy Stock. In late 2007, the Grievant and Ms. Stock decided to get married. At all times pertinent hereto, same-gender marriages have not been permitted in Wisconsin or recognized as valid under Wisconsin law. As a result, they decided to have the marriage performed in Sault Ste. Marie, Ontario, Canada, where same-gender marriages are legal, on March 6, 2008. An announcement of their forthcoming nuptials was published in the Sheboygan newspaper on January 13, 2008.

On January 23, 2008, in conformance with the contract, the Grievant submitted a written leave request to her supervisor, Steve Scharrer, seeking two days' paid leave on March 6 and 7, 2008 for her marriage. Sharrer signed the request without indicating whether it was approved or denied and forwarded it on to the District's Human Resources Coordinator, Kelly Cvetan. On January 28, Ms. Cvetan sent a memo to the Grievant, stating as follows:

“Leigh, I am in receipt of your request for two days of leave of absence with compensation on March 6 and 7, 2008 for your marriage. At this time the State of Wisconsin does not and will not recognize your marriage. For this reason we are denying your request. We encourage you to use your vacation and/or floating holiday.”

On January 31, 2008, the Grievant filed a grievance over the denial of her personal leave request. The grievance was denied and was advanced through the contractual procedure, being denied at each step. Meanwhile, the Grievant and Ms. Stock applied for and obtained a marriage license from the Province of Ontario and the two went through a marriage ceremony at Sault Ste. Marie on March 6, officiated by their pastor. Ultimately, the Grievant used vacation days for paid leave at the time of her marriage ceremony and the Union filed a request for arbitration of her grievance, leading to the hearing herein.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The Union asserts that the District may not unilaterally define the term “marriage” to mean only those legally recognized in Wisconsin. The parties could have used that language in the contract had they so chosen, but did not. Instead, the arbitrator should give the term its ordinary and commonly accepted meaning. The record shows that the District has never in the past denied a leave request based on the legality of the marriage, nor has it sought verification of the legality of a marriage before granting a leave request. Kelly Cvetan testified that she reviewed and denied the Grievant's leave request because the marriage was not legal in Wisconsin. Jayne Hoffmann testified, however, that she previously sought and obtained paid leave to attend her daughter's marriage ceremony in Mexico even though she told her supervisor the marriage was not legal.

The legality of the marriage in Wisconsin is irrelevant. Entitlement to paid leave is based on going through a marriage ceremony, not the fact of being married. The question is whether the Grievant got “married” as that term is generally understood. Arbitrators often resort to definitions from reliable dictionaries to resolve such questions. The *Merriam-Webster Collegiate Dictionary, 11<sup>th</sup> Ed.* includes the following definition for “marriage”:

**1 a (2):** the state of being united to a person of the same sex in a relationship like that of a traditional marriage < same-sex marriage >

The Grievant went to Canada for the purpose of uniting with her partner in a consensual, contractual relationship recognized by the law of that jurisdiction. There is also a growing number of foreign countries and U.S. states that recognize the legality of same-gender marriages. This growing recognition is evidence that same-gender marriages fall within the commonly accepted definition of the term.

It is not appropriate to rely on the application of external law to define “marriage.” Rather, he should confine himself to the meaning of the term adopted by the parties in their agreement and hold them to it. Reference to external law is only appropriate where the parties have referenced it in their agreement, which they have not done here. This is especially so where, as here, the law in this area is in a state of flux.

To deny the benefit under these circumstances is a form of *de facto* discrimination based on sexual orientation. The evidence shows the District never inquired into the legality of a marriage when addressing leave requests in the past. Legality only became an issue when it was based on the sexual orientation of the employee. The job posting for the Grievant’s position stated that the District does not discriminate based on sexual orientation, yet that is exactly what happened here in the administration of contract benefits.

To decide in the District’s favor would lead to a harsh, unfair and absurd result because it would deny the Grievant a benefit available to all heterosexual employees at the time of their marriage. Because she is now legally married in the view of many other states and countries, she cannot avail herself of this benefit in the future without committing bigamy. This case should not be decided according to shifting political winds, but upon the facts that the Grievant obtained a legal marriage license and went through a legal and formal marriage ceremony, and thus satisfied the contractual requirements to obtain paid leave benefits for the event.

### **The District**

The District takes the position that in order to take advantage of the marriage leave benefit in the contract, an employee must, in fact, be married and that the Grievant was not married on March 6, 2008, as that term is to be interpreted for purposes of the contract. In bargaining the current contract, the parties addressed the issue of extending leave benefits to cover caring for significant others. Ultimately, the issue was dropped because Wisconsin has not adopted a definition for the term “significant other.” Ostensibly, this issue was raised because of the Grievant’s domestic partnership relationship. Removal of the issue is, in effect, an admission that significant others are not covered by the definitions in the contract. By extension, it may be inferred that personal leave is not available for an employee going to a foreign jurisdiction to marry a significant other where that marriage is not valid in Wisconsin. Having failed to obtain its preferred language in negotiations, the Union should not be able to do so through arbitration.

In determining the meaning of the term “marriage,” it is appropriate to refer to the law of the State of Wisconsin. Marriage is not an industrial term or workplace occurrence or event,

nor is it regulated by Sec. 111.70, Stats. It is a creature of state law and is regulated by the state, thus the arbitrator must apply the meaning to the term that is accepted under state law. This is additionally so because collective bargaining is also regulated by statute and so the parties' contract may not contravene the laws of the State of Wisconsin. Thus, there are many instances where arbitrators have deferred to state law in determining the meaning of terms in contracts (citations omitted). In fact, in this case, by deferring the "significant other" issue in bargaining due to a lack of an official definition, the parties acknowledged that state law is a legitimate authority for determining the meaning of contract terms..

The Grievant's marriage is not valid or recognized in Wisconsin. Wisconsin courts have long held that a ceremony alone is insufficient to render a marriage valid without societal recognition as manifested by the law of the state. The statutory and common law of Wisconsin make it clear that the state does not recognize the validity of same-sex marriages. Further, in November 2006, the electors of the state passed an amendment to the state constitution defining marriage as being between a man and a woman and rejecting the legality of other relationships purporting to be similar to or conferring the same status as marriage. Also, Sec. 765.04(1), Stats. provides that a marriage in another jurisdiction that would not be valid in Wisconsin shall be void for all purposes in this state. Therefore, by going to Canada in order to be married in a manner not permitted in Wisconsin the Grievant violated Sec. 765.04(1) and the arbitrator has no jurisdiction to extend the definition of marriage in contravention of the Wisconsin constitution and statutory law. The contract language must be harmonized with state law and the only way to do so is by applying the definition of marriage that is adopted in state law. The Union cannot be permitted to add words to the contract to give the term the meaning it prefers.

The Union has asserted an employment discrimination claim based on sexual orientation. Unlike many contracts, however, this one contains no prohibition to discrimination based on sexual orientation. The arbitrator's jurisdiction is limited to contract interpretation. Since these parties have not included language addressing discrimination, the arbitrator here has no jurisdiction to decide this claim. Notwithstanding this argument, however, the District further maintains that no discrimination occurred in this case. This is a case of first impression and there is no history of the District having ever dealt with employees in similar circumstances differently. Testimony was introduced from other witnesses who had been given paid leave to attend weddings of children in other countries. In each instance, however, there was no evidence that these marriages were in any way invalid under Wisconsin law. The Grievant's marriage clearly does not comply with the requirement of Wisconsin law, therefore, these other instances are not instructive as to the Grievant's case. The Grievant may have had the benefit of Canadian law and society while she was in Canada, but those benefits and entitlements did not follow when she returned to the United States. A transitory marriage in another country has no effect here.

It should also be noted that the Grievant was not denied paid leave when she had her wedding ceremony. She was encouraged to use other paid leave, such as vacation or a floating holiday, and did so. She was not entitled to paid leave for a "marriage," however, and her

request was denied. This is a deliberate attempt to confront the District to create rights that are not in the contract and the grievance should be denied.

### **Union Reply**

The record shows that a “marriage,” as that term is commonly understood, took place between the Grievant and her partner on March 6, 2008. The marriage was valid in the place where it took place and is recognized in several other countries and states. It is thus irrelevant for purposes of contract interpretation that Wisconsin does not recognize the marriage as valid. There is no evidence that the parties intended any other meaning for marriage than the commonly understood one. It is a stretch for the District to argue that withdrawing a proposal to have the term “significant other” added to the family leave provision was a concession that marriages not considered valid in Wisconsin do not fit into the contractual framework for personal leave. It is not the same as if the Union had proposed language to expand the definition of marriage and then withdrawn it. Further, in a consensus bargaining process, issues and options are merged and cannot be attributed to one party or another.

There is no evidence that the parties ever intended to be bound by Wisconsin law as to the definition of marriage. Again, the fact that the parties discussed possibly adopting a statutory definition of “significant other” in the future does not establish their acceptance of a statutory definition of “marriage.” Likewise, the use of the word “spouse” in other parts of the contract cannot be construed to mean that the parties were relying on statutory definitions of the terms. It may be in the future the Union will assert that the Grievant has a “spouse” for purposes of receiving contract benefits, but that is not the issue here. There is also arbitral authority that arbitrators cannot rely on external law in interpreting terms in contracts, but rather must go by the parties’ intent. CITY OF LA CROSSE, Case 287, No. 54407, MA-9670 (Nielsen, 8/15/97). Parties do not usually refer to statutes when they are drafting contract language and if they intend to adopt a statutory definition they will say so. Further, statutes often use more than one meaning for a term, further complicating the issue. It is also not necessary to harmonize the contract with state law. There is nothing illegal under Wisconsin law about the parties choosing to treat the Grievant’s ceremony as a marriage for purposes of receiving contractual benefits. Here, the employer agreed to pay the as a condition of the contract, regardless of whether the marriage was enforceable in state court. Meaning is derived from the intent of the parties, not state law. Thus, cases cited by the District to the effect that the marriage is not legal are irrelevant. The Grievant considers her marriage to be valid. She has done all she can to solemnize it. Further, this is not a forum to challenge the legal validity of a marriage, but a private tribunal charged with determining privately negotiated contract rights. Thus, the question for the arbitrator is not whether the marriage is valid, but whether the parties intended to confer a benefit under these circumstances.

It is the District’s burden to show that “marriage” means something beyond its commonly accepted definition. The dictionary shows that marriage includes same-sex unions and is not dependent upon the gender of the parties. The employer desires a narrower, more legalistic definition that is tied to the validity of a marriage in a specific jurisdiction. It is the

District's burden to show that the parties intended this definition over the more commonly accepted one. Further, the arbitrator is able to address the discrimination claim in that the District already admitted it approved marriage leave for an employee, Jayne Hoffman, where the marriage was admitted to have been illegal. Further, the District admitted it has never in the past inquired into the validity of a marriage before approving the leave. It only did so in the Grievant's case, permitting the arbitrator to conclude she was treated differently than other similarly situated heterosexual employees. The arbitrator is also permitted to consider that the posting for the Grievant's position clearly stated that the District does not discriminate based on sexual orientation. Finally, the District's argument that other leave was available to the Grievant is meritless. She was entitled to this benefit based on her marriage and cannot be denied it simply because she had other leave options available.

### **District Reply**

This is a case of first impression. The District has never previously had occasion to deny the benefit due to invalidity of a marriage, nor has it made inquiry into the validity of a marriage because it has never before had a basis for making such an inquiry. It has approved marriages in Mexico because there was no suggestion that they were not valid. Here, the Grievant published an announcement in the local newspaper, which was brought to the attention of the administration, making an investigation unnecessary. Regardless of its validity elsewhere, the marriage is not valid in Wisconsin, under the laws of which this contract was formed and is administered.

It is not necessary for the arbitrator to go beyond the common meaning of the term "marriage" to decide this case. The commonly accepted meaning, recognized for centuries, is that marriage is a legally recognized relationship between a man and a woman. The concept of same-sex marriages is highly controversial and is by no means commonly accepted. Further, there is no evidence the marriage attended by Jane Hoffman in Mexico was illegal or that the administration had notice to that effect. The testimony suggests, to the contrary, that the marriage was legal under Wisconsin law.

The essence of marriage is societal recognition. There is no evidence that these parties intended this benefit to be available to any employee, regardless of whether their marriage was legitimate. Rather, given the age of the provision, it is likely that when it was negotiated the parties expected that only valid marriages would qualify. Dictionary definitions are not necessarily helpful because they give every possible definition of a term, but marriage is a legal concept and its meaning must conform to prescribed law. Wisconsin law does not recognize the concept of same-sex marriage. The legal definition is entirely relevant here because the contract benefit is available to married persons and may be denied to those who are not. The Grievant and her partner are under no legally enforceable obligations to each other under Wisconsin law and the contract under which the term marriage is here used exist solely on the basis of Wisconsin law. Further, contrary to the Union's assertion, CITY OF LA CROSSE, Case 287, No. 54407, MA-9670 (Nielsen, 8/15/97), supports the proposition that where a term is ambiguous, a definition that comports with external law will be favored over one that does



not. The District agrees with the Union that subjecting contract terms to different interpretations based on changing political climates creates instability, but the District maintains that in this case it is the Union, not the District, that is doing so. The law of Wisconsin is clear and the arbitrator is legally bound to apply it.

The provision in question was added to the contract prior to 1984. There is no evidence that the parties at the time intended to recognize a same-sex marriage conducted in a foreign country as legally recognized same-sex marriages were unknown at the time. There is also no basis for the Union's discrimination claim. Other employees have been denied various forms of leave because they did not qualify for it. The Grievant is no different. The District has never before granted leave for a marriage it knew to be invalid, nor has it been asked to do so, so there is no basis for a claim of disparate treatment. She was denied the leave because she was not qualified for it, not due to her sexual orientation. If the Grievant enters into a marriage recognized in Wisconsin she will qualify for the benefit. To interpret the term "marriage" as the Union suggests will create an unstable labor management relationship between the parties and, therefore, the grievance should be denied.

### DISCUSSION

The pertinent facts in this matter are not seriously disputed. For over twenty years, the parties have had language in their collective bargaining agreement providing for two days of paid leave for a bargaining unit member in the event of his or her marriage or the marriage of a member of his or her immediate family. Leigh Robert, the Grievant in this matter, planned to wed her same-gendered partner of many years in early 2008. The couple planned for the marriage ceremony to take place in Sault Sainte Marie, Ontario, because Canada recognizes same-gendered marriages as legal, and obtained an official Canadian marriage license. Ms. Robert made no secret of the matter and even published a wedding announcement in the local newspaper. When she requested two days of paid leave for her marriage, per the contract, the County Human Resources Director, Kelly Cvetan, denied the request on the basis that the marriage was not valid under Wisconsin law and, therefore, did not qualify for the benefit. The purpose of the arbitration, therefore, is to obtain a determination as to whether, under all the facts and circumstances, Ms. Robert was or was not entitled to the marriage leave benefit.

The operative contract language in Article VIII. Section A, states:

"The secretary's appropriate administrator may grant personal and emergency leaves of absence with compensation.

1. Marriage of the staff member or of a member of the immediate family. The immediate family includes children, stepchildren, grandchildren, parents, brothers, and sisters. The leave shall not exceed two (2) days."

The parties have diametrically opposed views as to how the term "marriage" as it is used in this context is to be defined. The contract itself provides no guidance. The Union takes

the view that the term should be given its commonly accepted meaning, which, it maintains, includes the ceremony entered into by Ms. Robert and her partner in Ontario. In support of its position, the Union points out that definitions contained in dictionaries may be used by the arbitrator to interpret ambiguous terms where the parties have not done so. It then cites various dictionary definitions of marriage which either make no reference to the genders of the parties, or, at least in one instance, include same-sex partners. The Union maintains that it is the public ceremony that solemnizes the coming together of two people in wedlock that characterizes marriage, not the respective genders of the parties. It points out that Ms. Robert chose a forum for the ceremony where same-sex marriage is legal, went through the formalities of obtaining a marriage license and had the ceremony performed by a member of the clergy who was legally empowered to do so. It further notes that same-sex marriage has been legalized in not only Canada, but also in some other foreign countries, as well as in some U. S. states and is thus gaining more widespread recognition and acceptability. It is the Union's position that Ms. Robert did all she could to enter into a valid marriage as that term is commonly understood and that, under the contract she should have been provided the same two days of paid leave to celebrate it that would have been granted to an employee entering into a heterosexual marriage.

The District argues for a definition of marriage that is consistent with the meaning ascribed to the term under Wisconsin law on the basis that the collective bargaining agreement between the parties is itself a creature of state law, authorized under Sec. 111.70, Stats., and that the terms contained therein should be defined in accordance with the legal meaning applied to them by the legislature. Specifically, the District points out that Sec. 765.001(2), Stats. defines a marriage as being a relationship between a "husband and a wife," implying male and female genders, and that Sec. 765.04(1) declares void any marriage by a Wisconsin citizen in another state or country where that marriage would not be legal in Wisconsin. It further points out that in 2006 the state adopted by referendum an amendment to Article XIII, Section 1 of the Wisconsin Constitution which states:

"Section 13. Only a marriage between one man and one woman shall be valid or recognized as a marriage in the state. A legal status identical or substantially similar to marriage for unmarried individuals shall not be valid or recognized in this state."

It further cites a long line of Wisconsin court decisions which have held that same-sex relationships are not entitled to the same status as marriage for purposes such as child visitation, extension of benefits, adoption of children, or coverage under family health insurance plans. It is the District's view, therefore, that Ms. Robert's marriage, while recognized in Canada and some other U. S. states, has no validity under Wisconsin law and that since a same-sex marriage has no legal standing in Wisconsin, it cannot entitle her to qualify for the paid marriage leave benefit provided in the contract.

In my view, the arbitrator's function is fundamentally to interpret the collective bargaining agreement and apply it to the circumstances which resulted in the grievance. When interpreting terms within a contract, therefore, the arbitrator cannot necessarily be bound to

objective rules of construction, such as reliance on dictionary definitions or statutory formulations. Rather, the arbitrator's task is to determine, where possible, the parties' intent in putting particular language into a contract and to apply it accordingly. In that regard these rules, and others, are tools to aid the arbitrator in interpreting the contract, rather than immutable principles that dictate particular outcomes. Thus, when considering competing interpretations of a word or phrase an arbitrator may rely on a dictionary to determine the common meaning of a term, or may rely on a legal definition where an issue of law is raised, but ultimately the goal is to give the contract terms the meaning the parties' intended or, where a specific intention cannot be determined, provide the meaning that is most reasonable under all the facts and circumstances.

Turning to the particulars of this case, I first note that the language of Article VIII, Section A states that:

“The secretary's appropriate administrator may grant personal and emergency leaves of absence with compensation.” (emphasis added)

This language is permissive and suggests that the decision to grant or deny leave under the listed circumstances is discretionary with the District. In addition to marriages, this list includes such things as graduations, religious holidays (other than Good Friday, Christmas Eve and Christmas Day, which are specified holidays in the contract), court appearances, illnesses of family members and funerals. The request form used by the District makes it clear that there is an approval process and that the granting of paid leave is not automatic upon request. There is no evidence of a paid leave request having previously been denied, or even made, under these circumstances, but District Exhibit #6 lists fifty-two instances going back to April 2003 where the District has denied paid leave requests arising under Article VIII for various reasons. I note, as well, that the vast majority of the denials were based on management's determination that the requested leaves were not covered by Article VIII. In many cases however, the bases for the requests seem at least facially to come within the parameters of Article VIII, such as ill mothers-in-law and fathers-in-law, graduations of siblings and children and required court appearances. Yet, so far as the record indicates, only the denial of Ms. Robert's request was grieved. This suggests to me that the District has recognized authority to review leave requests on a case by case basis and has discretion to determine, based on its interpretation of the contract language, whether the request is appropriate.

The issue, therefore, is not what the appropriate definition of the term “marriage” is, but whether the District abused its discretion in making the determination it did. An analysis based upon a claimed abuse of discretion addresses the reasonableness of the challenged action or decision, rather than a balancing of the merits of the respective parties' positions. In this case therefore, the issue is not whether the Union's position is more reasonable than the District's, or whether I would have arrived at the same result, but whether the District's determination was rationally arrived at, and was not arbitrary, capricious, or discriminatory. If the District had a rational basis for its action, therefore, it must be upheld.

At the outset of this analysis, I take issue with the District's proposition that the word "marriage" must be given the meaning ascribed to it under Wisconsin's marital statutes. In my view, parties negotiating a contract have discretion to use terms as they choose and may give them particular meanings that are unique to their situations, even if those meanings would not be generally accepted elsewhere. Thus, in this case, the parties have the latitude to define marriage for the purposes of extending benefits under their agreement as they choose, even to include same-sex unions, despite the statutory requirements for a legally recognized marriage. In the same way, they could mutually agree to extend benefits to domestic partners, even though domestic partners do not have any special status under the law. Under these circumstances, there is no sanctity conferred on the statutory definition that precludes the parties from deviating from it. By the same token, parties are likewise at liberty to adopt definitions that are far less all-encompassing than what would be contained in a dictionary, the purpose of which is to provide all the recognized uses of a particular word without passing on their general acceptability. Here, it is clear that the parties never specifically addressed whether the term "marriage" as it is used in the contract encompasses same gender unions. In addressing Ms. Robert's request, the District applied a definition that excluded same-gender unions, no matter where or how they are formalized, and the question before me is whether its determination was so irrational as to constitute an abuse of discretion. I find that it was not.

Here, the relevant language was added to the contract at least as far back as 1985. There is no bargaining history evidence that would suggest that the parties ever discussed the meaning of the word marriage or agreed to attribute to it any particular definition beyond what was commonly understood to constitute marriage at the time the language was adopted. At that time, marriage was generally understood to be an event reserved to heterosexual couples. Same gender marriages were largely unknown and were not recognized at the time as valid in any U.S. state or Canada. In the absence of any evidence to the contrary, therefore, it is reasonable to conclude that when this language was added the parties never contemplated that a ceremony solemnizing a relationship between same-gendered partners would qualify. There is no evidence that the issue of changing or expanding the definition of marriage has been raised in negotiations at any time since the language was added. Also, since that time, Wisconsin has not seen fit to legalize same-gender marriages, but has actually gone in the opposite direction. In November 2006, it declared by constitutional amendment that only marriages between one man and one woman are valid and even refused to legitimize civil partnerships resembling marriages between unmarried persons. Given the bargaining history and legal environment, therefore, it is difficult to conclude that the District' determination was irrational.

Beyond that, however, approval of the request could conceivably have resulted in potential additional costs to the District beyond the two days of requested paid leave. The contract provides for the availability of family health insurance benefits where an employee has a spouse and also provides for paid personal and emergency leave for employees based upon the illness of a spouse or in-laws. Expanding the definition of marriage, therefore, could potentially expose the District to significant additional costs beyond just the two days' leave provided for the event. While these benefits were not requested, inasmuch as the marriage had not yet taken place, the potential for these additional costs in the future based on an expansion

of the definition of marriage was a valid concern and, again, provides support for a finding that the District's determination had a reasonable basis. I find, therefore, that the District's decision to deny Ms. Robert's leave request based on the fact that her marriage is not legally recognized in Wisconsin was a rational exercise of its authority and was not an abuse of discretion.

This, however, does not end the inquiry, because the Union also raises arguments based on alleged disparate treatment, and discrimination based upon sexual orientation. As to the disparate treatment claim, the Union contends that in the past the District has not inquired into the validity of marriages in handling paid leave requests and has, in at least one instance, approved leave for a marriage it had reason to believe was invalid. By inquiring into the circumstances of Ms. Robert's marriage and denying her request when it was determined the marriage was not valid in Wisconsin, the District allegedly treated Ms. Robert differently than similarly situated employees to her detriment. This argument suggests that, whether or not the resulting marriage would be valid under the contract, the leave should have been granted because it has been granted to others under like circumstances. I disagree. The evidence indicates that in a few instances employees requested, and were granted, paid leave to attend marriages of their children in foreign countries. It is conceded that the District did not investigate to determine whether those marriages were legal under Wisconsin law, and perhaps did not care because they involved marriages of employees' children rather than the employees themselves, but took it on faith that the requests were legitimate. Here, there was no investigation either. Ms. Robert openly announced her intention to wed her partner by placing a notice in the local newspaper and Ms. Cvetan was aware of it at the time the request was made. This was not a case of the District conducting an investigation into one case in order to find a basis for denying the request when it did not do so in others, but one where Ms. Robert announced her intentions openly before the fact, thereby putting the District on notice of the situation. Thus, the District did not treat her differently than other similarly situated employees in that regard.

In the case of the allegedly invalid marriage, Jayne Hoffman, an Administrative Secretary, testified that she previously requested paid leave to attend her daughter's wedding in Cozumel, Mexico. She testified that she told the supervisor that the marriage was not legal and that the couple would later have a second civil ceremony in the United States. The supervisor signed the request form without indicating whether it was approved or denied and forwarded it to the Human Resources Department. Ms. Hoffman's request was granted without any inquiry. On cross examination, however, Ms. Hoffman was vague as to what exactly she told her supervisor about the circumstances of the marriage and was unable to indicate any circumstances that would have invalidated the marriage in Wisconsin. Further, it is unknown what, if anything, was shared with the Human Resources Director about this conversation, so it is unknown what, if any, difference this knowledge would have made with respect to the request's approval. In Ms. Robert's case, the supervisor also did not indicate whether the request was approved or denied. What is different in this case, however, is that Ms. Cvetan was clearly aware of the circumstances of the marriage from the newspaper announcement and, thus, was fully aware of the issues it raised. The facts of the Hoffman request are distinct from

Ms. Robert's situation, therefore, and I cannot on that basis state that she was treated disparately.

The argument regarding discrimination is based upon the fact that the job announcement for the position Ms. Robert holds states, as follows:

"The Sheboygan Area School District does not discriminate on the basis of age, handicap, marital or parental status, national origin, pregnancy, race, religion, sex, or sexual orientation."

The Union contends that the District has never in the past made legality of a proposed marriage a precondition for the granting of a leave request and only did so here because Ms. Robert was marrying another woman. The Union argues, therefore, that the District's denial of Ms. Robert's request was based on her sexual orientation. This argument, again, appears to go to the issue of disparate treatment, rather than the proper definition of marriage and the Union uses the District's handling of the Hoffman case as the basis for its argument that Ms. Robert was singled out for different treatment solely due to her sexual orientation. I have, however, already determined that the Hoffman case is distinguishable on its facts. In addressing this argument, I also find instructive Ms. Cvetan's written denial of the leave request, which states:

"Leigh, I am in receipt of your request for two days of leave of absence with compensation on March 6 and 7, 2008 for your marriage. At this time the State of Wisconsin does not and will not recognize your marriage. For this reason we are denying your request. We encourage you to use your vacation and/or floating holiday."

Ms. Cvetan makes it clear that the District's decision was based upon the current state of the law in Wisconsin regarding what constitutes a marriage. There is no question that the 2006 amendment to the Wisconsin Constitution restricts the institution of marriage in this state to persons of opposing genders and, thus, precludes same sex couples from becoming legally married and enjoying the entitlements accompanying that status. It is clear, therefore, that in Wisconsin a prohibition against the marriage of same sex couples is not considered discrimination based upon sexual orientation, or is, at least, a form of discrimination which the state is prepared to endorse. It is difficult to conclude, therefore, that the District, operating within that legal framework, can be considered to have discriminated against Ms. Robert by not granting to her a benefit inhering to a form of relationship not available to her in the contract or under the law. Beyond that, however, Ms. Cvetan's response does not raise sexual orientation as the disqualifying factor, but the validity of Ms. Robert's marriage. There are numerous reasons why a particular person might not be permitted to marry under Wisconsin law quite apart from the gender of the parties, including age, competence, or being party to an existing marriage. There is no evidence that the District, being confronted with a similar request from an employee under any such disability, and with clear knowledge of the disability, ever has granted, or would grant, such a request. I find, therefore, that the District's decision to deny Ms. Robert's request based on the invalidity of her marriage under Wisconsin law was not a form of discrimination based upon her sexual orientation.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby enter the following

**AWARD**

The Employer did not violate Article VIII, Section A, subparagraph 1, of the collective bargaining agreement when it denied two days of personal leave to the Grievant. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 18th day of September, 2008

John R. Emery /s/

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John R. Emery, Arbitrator

JRE/gjc

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