BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORTHWEST UNITED EDUCATORS FOR THE ASSOCIATE STAFF

and

LADYSMITH SCHOOL DISTRICT

Case 39
No. 70110
MA–14864

Appearances:

William J. Nelson, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868.

Dr. Chris Poradish, District Administrator, Ladysmith School District, 1700 Edgewood Avenue East, Ladysmith, Wisconsin 54848.

ARBITRATION AWARD

Pursuant to the terms of the collective bargaining agreement (CBA) between Ladysmith School District (the District) and Northwest United Educators (the Union),[1] the parties selected me from a panel of arbitrators created by the Wisconsin Employment Relations Commission (the Commission) to hear and resolve a dispute between them. The dispute involves the interpretation and application of the CBA regarding the Grievant's loss of benefits after the District changed her position from a twelve-month Secretary to a nine-month Special Education Aide and three-month Secretary.

I arbitrated the grievance on November 10, 2010, at the District office in Ladysmith, Wisconsin. There is no stenographic or other transcript of the proceedings. The parties initially declined to file post-hearing briefs; however, I requested post-

[1] The CBA at issue is entitled, "Master Contract Between Ladysmith-Hawkins School District and Northwest United Educators for the Associate Staff Contract Years 2008-09 & 2009-10".

hearing submissions regarding the issue of remedy, the last of which was received on March 8, 2011.

ISSUES

The parties stipulated to the following statement of the issues:[2]

1. Is the Grievant a nine-month or a twelve-month employee within the meaning of the collective bargaining agreement?

2. Is the Grievant entitled to the same benefits afforded a nine-month employee, a twelve-month employee, or other?[3]

3. What, if any, remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS

Contract provisions germane to this dispute state in relevant part:

ARTICLE VI – VACATIONS AND HOLIDAYS

A. All twelve-month employees are entitled to paid vacations under the following schedule:

. . .

3. After completion of ten (10) years of service four (4) weeks.

. . .

[2] The parties stipulated to the first two issues in writing prior to the arbitration. Other than the omission of the Grievant's name, my statement of the first two issues mirrors the written version to which the parties agreed. The parties stipulated to, and offered argument on, the third issue in post-hearing submissions.

[3] The Union's "Request to Initiate Grievance Arbitration" filed with the Commission identifies the nature of the grievance as follows: "Contesting loss of vacation benefit for 12-month secretary transferred to a 9-month aide, 3-month secretary position." At arbitration, however, the parties expressed their mutual desire to expand the scope of the controversy to include consideration of benefits other than vacation to which the Grievant is entitled in her 9-month aide/3-month secretary position. The parties identified these other benefits as holidays, sick leave, and health.

B. The following holidays will be fully-paid holidays (pay that is normally paid for the employee's normal workday) with the employee not working during such days:

1. For calendar-year employees the holidays are Labor Day, Thanksgiving Day, the day after Thanksgiving, Christmas Eve, Christmas, New Year's Eve (1/2 day), New Year's Day, Good Friday, 4^{th} of July, and Memorial Day.

2. For school-year employees the holidays are Labor Day, Thanksgiving, day after Thanksgiving, Christmas Day, Good Friday, and Memorial Day.

. . .

ARTICLE 13 – LEAVES

A. Sick Leave: For school-year employees, sick leave will be earned at the rate of 10 days per year, cumulative to 75 days. Twelve (12) month employees shall earn twelve (12) sick leave days per year. Employees who are not eligible for LTD insurance will have sick leave cumulative to 120 days. . . .

. . .

ARTICLE 17 – INSURANCE AND RETIREMENT

. . .

B. Health Insurance – The Board will pay for a health and dental plan for those working 7½ hours a day or more (180 days a year or more); the Board will pay a prorated share of the full premium for those working less than 7½ hours a day; the prorated share will be based on the hours per day worked between 3 and 7½ compared to a 7½ hour day. No premium will be paid for those employees working less than three (3) hours per day.

. . .

BACKGROUND

The Grievant began her employment with the Ladysmith School District (the District) as a nine-month (or school-year) Aide. She received successive promotions to a nine-month secretarial (or clerical) position and a twelve-month (or calendar-year) secretarial position.[4] In correspondence addressed to the Grievant dated May 27, 2008, then District Administrator Mario Friedel notified her that due to performance-related concerns, her position as a calendar-year secretary would be changed to "the position of 'Aide for Handicapped' beginning with the 2008-2009 academic year." The May 27th letter further explains:

> It is anticipated that you will retain the same number of daily work hours as an aide to the handicapped as you have now in your job as High School Attendance Secretary. However, you will be paid at the "Aide for Handicapped" rate instead of "Clerical" rate as per the Master Agreement for Associate Staff. I am also offering you a full-time position working in the high school office over the summer months as a secretary in which you will be compensated at the regular Clerical rate for those hours. You will also be compensated at Clerical rate for your vacation time which I recommend the majority of which you use during the school year. In this way you will have ample time to complete your secretarial tasks during the summer. Your seniority as an aide will commence from the time period upon which you were initially hired by the District as an aide, not as a secretary.

Consistent with her new employment arrangement described above, the Grievant worked full-time as a secretary during the summers of 2008, 2009, and 2010, and as an aide during the school years beginning with, and following, the 2008-2009 school year. However, beginning in 2010, and as of the date of the arbitration, she temporarily had replaced a secretary on sick leave. As of the date of the arbitration, the Grievant had been continuously employed full-time by the District for over ten years in the following positions, in chronological succession: 1) a twelve-month secretary; 2) a nine-month Aide/three-month secretary; and 3) a nine-month secretary in place of an employee

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[4] The terms, "twelve-month employees", "calendar-year employees", and "school-year employees" appear in Article VI of the CBA. During the arbitration, the parties also referred to "nine-month employees", although this term does not appear in Article VI. The parties dispute whether the Grievant has been a twelve-month employee within the meaning of the CBA from the time her position changed from that of a twelve-month secretary to that of a 3-month secretary /nine-month aide. They do not, however, dispute that the terms "twelve-month employees" and "calendar-year employees" are synonymous, as are the terms "school-year employees" and "nine-month employees".

taking sick leave during the school year, combined with her three-month secretarial position during the summer.[5]

In correspondence to the Grievant dated January 9, 2009, then Director of Special Education, Kurt Lindau, stated in relevant part:

> Thank you for the excellent effort you have put forth as a CWD aide at the Ladysmith Middle School. You now have a unique position as a twelve month employee that is assigned as a nine month CWD aide and a three month Secretary. Nine month CWD aides do not accrue vacation time but twelve month secretaries do. You will continue to accrue vacation but it will be prorated to the percent of time you are assigned as a twelve month secretary. Your vacation anniversary date is February 24. For the year February 24, 2008 – February 23, 2009 it will be 50% or two weeks vacation as you have worked as a twelve month secretary for sixth months during the prior year. For the upcoming year February 24, 2009 – February 23, 2010 it will be 25% or one week vacation as you will work three months as a twelve month secretary.

. . .

In a memo dated November 9, 2009, the Grievant wrote in pertinent part:

> I had been informed by Kurt that I would now only have one week vacation as I work only 3 months as a clerical employee. I had told Kurt that Mario had told me that I would keep my 4 weeks vacation. Kurt said that . . . my current job position was something new and again that I was only working clerical for 3 months so I would be given one week vacation starting with my next seniority date. I did not agree with Kurt that I should only have one week.

[5] Although precise dates of the Grievant's employment by the District in these various positions were not identified during the Arbitration, the Grievant did testify that she has had no breaks in her employment and has considered herself to be a twelve-month employee for fifteen years. Her testimony to that effect begs the question of whether she has been a twelve-month (or calendar-year) employee *within the meaning of the CBA* from the time her position changed from that of a twelve-month secretary to that of a 3-month secretary/nine-month aide. Nevertheless, no testimony was offered to rebut her claim that she has been continuously employed by the District, and has worked the entire calendar year, for the past fifteen years.

> As time came for negations [sic][6] was coming up, I decided to look over the contract. As I read it I realized that the contract stated "any twelve month employee" (not twelve month clerical) would receive 4 weeks vacation for 10 years of completed employment. I hadn't been thinking 12 month employee but 12 month clerical and because the contract states any 12 month employee I should still have 4 weeks.
>
> I feel I should be given 3 weeks vacation pay at the aide wages and 1 week vacation at the clerical wages.

. . .

In correspondence to Dr. Chris Poradish dated March 31, 2010, the Executive Director of Northwest United Educators, William Nelson, stated in pertinent part:

> In January of this year,[7] [the Grievant] received a letter from Kurt Lindau in regard to her position as a twelve-month employee assigned as a nine-month CWD aide and three-month secretary.
>
> We want to clarify what has been described to me as a "done deal" by Toby Paone in cooperation with Mario Friedel, that she would retain her four weeks vacation.
>
> > Three (3) weeks to be paid at her aide rate and
> > One (1) week at her clerical rate.
>
> I was led to believe that a written agreement would be forthcoming confirming that her vacation would accrue in this way.
>
> Please respond as I would like to put this file away as completed.

. . .

[6] Based on the Grievant's reference in this sentence to "the contract", her hearing testimony, and the similarity in spelling of the words "negations" and "negotiations", I interpret the word "negations" to be a misspelled reference to negotiations related to the CBA.

[7] I interpret Mr. Nelson's reference to "January of this year" to be in error. The content and context of Mr. Nelson's letter suggests that he meant to refer to the letter dated January 9, 2009 (not 2010), from Kurt Lindau to the Grievant.

Prior to the District's receipt of the grievance at issue, new management personnel was hired, including individuals to fill the positions formerly held by Mario Friedel and Toby Paone.[8]

Additional facts are set forth below where appropriate.

ANALYSIS

"Arbitrators have the authority to use principles of contract law in resolving disputes under collective bargaining agreements." MADISON TEACHERS INC. V. MADISON METROPOLITAN SCHOOL DIST., 2004 WI App 54, ¶ 17, 271 Wis. 2D 697, 711, 678 N.W.2D 311, 318. Indeed, "in the context of construing terms of a collective bargaining agreement, arbitrators have utilized rules, standards, and principles borrowed from the jurisprudence developed by courts to resolve disputes over the meaning of terms in contracts." *Id.*, 2004 WI App 54, ¶ 15, 271 Wis. 2D at 710, 678 N.W.2D at 317, *citing* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 431 (Alan Miles Ruben ed., 6th ed. 2003). *See also* WISCONSIN LAW ENFORCEMENT ASS'N, LOCAL 1 V. STATE, DEPT. OF TRANSP., 2010 WI App 27, ¶ 16, 323 Wis. 2D 444, 455-456, 780 N.W.2D 170, 176 (same). Applying principles of contract law helps to resolve the three issues identified above.

I. FIRST ISSUE: WHETHER THE GRIEVANT IS A NINE-MONTH OR TWELVE-MONTH EMPLOYEE, WITHIN THE MEANING OF THE CBA

The first issue to which the parties stipulated is whether the Grievant, in her position as a nine-month aide/three-month secretary, is a nine-month or twelve-month employee within the meaning of the CBA.

A. Relevant Contract Principles

The Wisconsin Court of Appeals has observed, "[i]t is our duty to construe the [collective bargaining] agreement as it stands giving effect to the plain meaning of the language used." FOX V. GENERAL TEL. CO. OF WISCONSIN, 85 Wis. 2D 698, 700-701, 271 N.W.2D 161, 163 (Ct. App. 1978). Moreover,

> [w]e interpret the language "consistent with what a reasonable person would understand the words to mean under the circumstances." *Id.*

[8] Niether Mr. Friedel nor Mr. Paone testified at hearing.

> "**Where the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms.**" GORTON V. HOSTAK, HENZL & BICHLER, S.C.*,* 217 Wis. 2D 493, 506, 577 N.W.2D 617 (1998). When the contract language is ambiguous, however . . . evidence extrinsic to the contract itself may be used to determine the parties' intent . . . ." SEITZINGER*,* 270 Wis. 2D 1, ¶ 22, 676 N.W.2D 426.

MARYLAND ARMS LTD. PARTNERSHIP V. CONNELL, 2010 WI 64, ¶ 22, 326 Wis. 2D 300, 311, 786 N.W.2D 15, 20-21 (ellipses and bold emphasis supplied). "Contract language is considered ambiguous if it is susceptible to more than one reasonable interpretation." KERNZ V. J.L. FRENCH CORP., 2003 WI App 140, ¶ 16, 266 Wis. 2D 124, 137, 667 N.W.2D 751, 757, *quoting* DANBECK*,* 245 Wis. 2D 186, ¶ 10, 629 N.W.2D 150.

B. Application of Relevant Contract Principles

I find that the terms, "twelve-month employees", "calendar-year employees", and "school-year employees" – terms used to determine the number of vacation days and holidays to which employees are entitled – are unambiguous as used in Article VI of the CBA. Though undefined, the plain meaning of these terms is clear; they simply refer to the duration during a given year that an employee works, irrespective of that employee's position. *See* UNITED STATES FIRE INS. CO. V. ACE BAKING CO., 164 Wis. 2D 499, 503, 476 N.W.2D 280 (Ct. App. 1991) (noting that a contractual term is not ambiguous merely because it is not defined in the contract.)

Whether the Grievant's unique position with the District as a nine-month aide/ three-month secretary is cast as a single, hybrid position or two positions, she did not cease to be an employee of the District simply because her duties and responsibilities differed during the calendar year and summer.[9] The common definition of employee lends further support to this readily apparent conclusion. "Terms used in contracts are to be given their plain or ordinary meaning, and it is appropriate to use the meaning set forth in a recognized dictionary." WATERS V. WATERS, 2007 WI App 40, 300 Wis. 2D 224, 229, 730 N.W.2D 655, 658, *citing* JUST V. LAND RECLAMATION, LTD.*,* 155 Wis. 2D 737, 745, 456 N.W.2D 570 (1990). *See also* WILDIN V. AMERICAN FAMILY MUT. INS. CO., 2001 WI App 293, ¶ 9, 249 Wis. 2D 477, 484, 638 N.W.2D 87, 90 (noting that "ordinary meaning may be established by reference to a recognized dictionary".)

[9] Various correspondence introduced as evidence refer to the Grievant's position in both the singular and the plural.

Webster's online dictionary defines employee as "one employed by another usually for wages or salary and in a position below the executive level".[10] Although the Grievant's secretarial position was hybridized to that of an aide/secretary, she continued to be employed by the District during all twelve months for wages in a position (or positions) below the executive level. The hybrid nature of her position (or, alternatively, her dual positions) following the change in her employment did not diminish the total duration of her employment with the District during a given year. Under the new arrangement, she was to continue to work for twelve months (or the calendar year), less any time off to which she was entitled. Accordingly, in her capacity as a nine-month aide/three-month secretary, the Grievant is a twelve-month or calendar-year employee within the meaning of the CBA.

II. SECOND ISSUE: WHETHER THE GRIEVANT IS ENTITLED TO THE SAME BENEFITS AFFORDED A NINE-MONTH EMPLOYEE, A TWELVE-MONTH EMPLOYEE, OR OTHER.

That the Grievant is "a twelve-month" or "calendar-year" employee within the meaning of the CBA might suggest at first blush that she is entitled to all benefits afforded such employees. Examining relevant language in the CBA regarding each *kind* of benefit, however, exacts more refined conclusions. I thus consider each kind of benefit that the parties identified at hearing: holidays, vacation, sick leave, and health, respectively.

A. Holidays

Article VI, Section B of the CBA entitles employees of the District to certain "fully-paid holidays (pay that is normally paid for the employee's normal workday) with the employee not working during such days." Subsections 1 and 2 of Article VI, Section B, distinguish between the holidays to which "calendar-year employees" and "school year employees", respectively, are entitled. Thus, as a calendar-year employee, the Grievant is entitled to all paid holidays expressly provided to such employees in Subsection 1:

> For calendar-year employees the holidays are Labor Day, Thanksgiving Day, the day after Thanksgiving, Christmas Eve, Christmas, New Year's Eve (1/2 day), New Year's Day, Good Friday, 4th of July,

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[10] <u>*Merriam-Webster Online Dictionary*</u> (visited August 8, 2011) <http://www.merriam-webster.com/dictionary/employee>.

and Memorial Day.

The express enumeration of fully paid holidays afforded to calendar-year employees, however, begs the question of the hourly rate(s) at which these holidays must be paid to the Grievant, whose nine-month and three-month positions (or sets of duties) are compensated at different hourly rates.[11] The contract language in Article 6, Section B, clarifies that "fully-paid" holidays means "pay that is normally paid for the employee's normal workday . . . with the employee not working during such days." The plain meaning of this contractual language requires that the Grievant be compensated at the clerical hourly pay rate for those holidays occurring on days that she would have worked as a clerical (secretary), and at the special education aide hourly rate for those holidays occurring on days that she would have worked as a special education aide.[12] The Grievant testified at hearing that former District Administrator Mario Friedel had promised her, and she has actually received, compensation at the clerical pay rate for all holidays since the change in her position to a nine-month aide/three-month clerical. Nonetheless, based on purported discussions with Mr. Friedel, School District Superintendent Dr. Chris Poradish opines that this arrangement was inadvertent and disputes that the District ever agreed to it. Moreover, Mr. Friedel, who had been involved in the decision to change the Grievant's position, was not present at the arbitration to clarify the District's understanding of holiday and vacation pay rates. Given the clarity of the contractual language discussed above and the absence of any strong proof that the parties mutually agreed to modify it, the plain meaning of the contractual language here should control. *See* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 249 (Alan Miles Ruben ed., 2008 Supplement) (noting reluctance of arbitrators to consider evidence of past practice that contradicts otherwise clear contractual language, and citing awards.)

B. Vacation

The vacation benefits to which the Grievant is entitled as a nine-month aide and three-month secretary loosely parallel her holiday benefits: she is entitled to all vacation days expressly provided to twelve-month employees, with some paid at the aide rate and the remainder paid at the clerical rate. More specifically, Article VI, Section A, Subsection 3, provides that all twelve-month employees who have completed ten years of service are entitled to four weeks of vacation. As noted above, the Grievant has

[11] Article 18 of the CBA sets forth hourly wage rates for various classifications of employees, including Special Education Aides and Clericals (or Secretaries).

[12] I also note that as long as the Grievant fills in during the school year for the secretary temporarily on sick leave and continues to work as a three-month clerical during the summer, she is entitled to all benefits afforded to clericals, including the clerical rate of pay for holidays and vacations.

completed over ten years of service working during the entire calendar year and is a twelve-month employee within the meaning of the CBA; therefore, she is entitled to four weeks of paid vacation.

However, the rate at which these vacation days are to be paid to the Grievant is less clear. While the CBA expressly clarifies the holiday pay rate as "pay that is normally paid for the employee's normal workday . . . ", it does not specify the rate of pay for vacation days. Notwithstanding this contractual silence, I conclude that as a nine-month aide/three-month clerical, the Grievant is entitled to three weeks of vacation per year at the hourly rate for special education aides and one week of vacation per year at the hourly rate for clericals. I conclude as much despite the compensation of all of the Grievant's vacation days at the clerical rate after the change in her position. I base my conclusion on 1) the application of principles of contractual interpretation; and 2) extra-contractual evidence of the Grievant's and her Union representative's acceptance of this arrangement.

1. Application of Principles of Contractual Interpretation

"The general rule as to construction of contracts is that the meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole." TEMPELIS V. AETNA CAS. AND SUR. CO., 169 Wis. 2D 1, 9, 485 N.W.2D 217, 220 (1992), *citing* ROSPLOCH V. ALUMATIC CORP. OF AMERICA, 77 Wis. 2D 76, 81, 251 N.W.2D 838 (1977). "All clauses and provisions of the contract should, if possible, be so construed as to harmonize with one another . . ." 17A *Am. Jur. 2d Contracts* § 376 (2011) (footnotes omitted). "(W)here one construction would make a contract unusual and extraordinary while another (construction) equally consistent with the language used would make the contract reasonable, just, and fair, the latter must prevail." CAPITAL INVESTMENTS, INC. V. WHITEHALL PACKING CO., INC., 91 Wis. 2D 178, 193, 280 N.W.2D 254, 260 - 261 (1979), *quoting* BANK OF CASHTON V. LACROSSE COUNTY SCANDINAVIAN TOWN MUT. INS. CO., 216 Wis. 513, 257 N.W. 451 (1934).

Applying these principles herein, I conclude that compensating the Grievant at the clerical rate for all four weeks of vacation, even though she works nine of twelve months as a special education aide at a lower rate of pay, would be not be "reasonable, just, and fair". Nor would such a reading of the contract "harmonize" with the pay rate for holidays specified in Article 6, Section B. More specifically, paying the Grievant the clerical wage rate for all vacation days logically would confer on her a windfall equivalent to the difference between the clerical and aide rates for three of her four allotted vacation weeks, assuming she works nine out of twelve months as an aide.

Interpreting the CBA to entitle the Grievant to a windfall that other twelve-month employees compensated at a single rate of pay do not receive would be "unusual and extraordinary", not "reasonable, just, and fair".

Notably, there is no contractual term related to paid vacations comparable to the definition of a "fully-paid holiday" as "pay that is normally paid for the employee's normal workday . . ." In consequence, there is no express contractual language that invariably sets the Grievant's pay on a given vacation day as the amount "normally paid", had she worked on that day. However, holidays are distinguishable from vacation days; while the former are pre-determined, the latter are selected. Thus, if the Grievant's vacation pay were calculated in a manner similar to holiday pay, her freedom to choose vacation days would appear to permit scheduling all of them during her summer work as a three-month secretary to receive a clerical-wage-rate windfall for three out of four weeks of vacation. Under a more reasonable and fair construction, if the Grievant were to work ¾ of the year as an aide, then ¾ of her total vacation days (three of the four weeks) would be compensated at the lower wage rate for aides. This contractual interpretation regarding vacation pay harmonizes with the spirit of the provision defining a "fully-paid holiday", because it allocates the Grievant's two wage rates for vacations in direct proportion to the wage rates paid for the type of work she actually performs and thereby precludes a windfall.

2. Extra-Contractual Evidence of the Grievant's and Her Union Representative's Agreement to Allocate the Grievant's Two Wage Rates for Vacations in Direct Proportion to the Wage Rates Paid for the Type of Work She Actually Performs

Though reasonable, this contractual interpretation would not apply if a subsequent modification to the CBA were to compel a different construction. As the Wisconsin Supreme Court has observed:

> Justice Traynor in HOTLE V. MILLER, 51 Cal.2D 541, 334 P.2D 849 (1959), relying upon Corbin *Contracts*, and Williston, *Contracts*, stated that any contract can be discharged or modified by the subsequent agreement of the parties. He reasoned that parties, by entering into a contract, do not contract away their power to contract in the future, because it is the law, not private agreements, which determines the essential elements of a valid contract.

LAKESHORE COMMERCIAL FINANCE CORP. V. DROBAC, 107 WIS. 2D 445, 458, 319 N.W.2D 839, 845 (1982).

Nevertheless, I do not find that the greater weight of the credible evidence ultimately supports a modification of the CBA to compensate the Grievant at the clerical rate for all vacation days. As noted, the Grievant testified that Mario Friedel had promised her, and she has actually received, compensation at the clerical wage rate for all holidays since the change in her position to a nine-month aide/three-month clerical. The record is less clear whether the Grievant maintains that Friedel promised her the clerical wage rate for all vacation days. In any event, Dr. Poradish disputed that the District ever agreed to any such arrangement, and he maintains that the District's compensation of the Grievant's holidays at the clerical rate since the change in her position constitutes inadvertent overpayment. More significantly, to the extent that inconsistent testimony of the Grievant and Dr. Poradish creates any fact disputes, I rely on documentary evidence proferred by both parties as joint exhibits and my reading of the CBA to resolve any such disputes. In a narrative dated November 9, 2009, the Grievant wrote in relevant part, "I feel I should be given 3 weeks vacation pay at the aide wages and 1 week vacation at the clerical wages." Subsequently, in a letter to Dr. Poradish dated March 31, 2010, the Union's Executive Director, William Nelson, confirmed this arrangement:

> We want to clarify what has been described to me as a "done deal" by Toby Paone in cooperation with Mario Friedel, that she would retain her four weeks vacation.
>
> > Three (3) weeks to be paid at her aide rate and
> > One (1) week at her clerical rate.

The Grievant's and Union Representative's written confirmations of an agreement effectively to allocate the Grievant's two wage rates for vacations in direct proportion to the wage rates paid for the type of work she actually performs mirror what I view as the most reasonable construction of the contract as a whole.

C. Sick Leave

My analysis of the number of, and wage rate for, the vacation days to which the Grievant is entitled under the CBA applies with equal force to the relevant provision on sick leave accrual:

> <u>ARTICLE 13 – LEAVES</u>
>
> A. <u>Sick Leave:</u> For school-year employees, sick leave will be earned at the rate of 10 days per year, cumulative to 75 days. **Twelve**

> **(12) month employees shall earn twelve (12) sick leave days per year.** Employees who are not eligible for LTD insurance will have sick leave cumulative to 120 days. . . .

(Bold emphasis added.)

Having determined that as a nine-month secretary/three-month aide, the Grievant is a twelve-month employee within the meaning of the CBA, I also conclude that she "shall earn twelve (12) sick leave days per year." These sick-leave days are earned at the secretary and aide wage rates, allocated in direct proportion to the wage rates paid for the type of work she actually performs during a given year. Accordingly, if the Grievant were to work nine months as an aide and three months as a secretary, she would earn nine days of sick leave at the aide rate and three days at the secretary rate.

D. Health

Although the parties at arbitration requested that this Award also clarify health benefits, they offered sparse testimony on the subject. Moreover, the evidence proferred at hearing focused primarily on the distinction between school-year and calendar-year (or twelve-month) employees, and on the ramifications of that distinction regarding paid holidays and vacations. By contrast, the CBA provisions addressing health insurance are based on different temporal distinctions: whether the employee works at least 7½ hours per day and at least 180 days per year:

. . .

ARTICLE 17 – INSURANCE AND RETIREMENT

. . .

> B. Health Insurance – The Board will pay for a health and dental plan for those working 7½ hours a day or more (180 days a year or more); the Board will pay a prorated share of the full premium for those working less than 7½ hours a day; the prorated share will be based on the hours per day worked between 3 and 7½ compared to a 7½ hour day. No premium will be paid for those employees working less than three (3) hours per day.

. . .

Accordingly, I merely conclude that the terms of this provision must be applied when determining the percentages of premium the Grievant and Board must pay, irrespective of whether, at any given time, the Grievant works as an aide or a secretary.

E. School District's Arguments

I have considered, but am ultimately unpersuaded by, the District's various arguments that the Grievant is not a twelve-month employee within the meaning of the CBA, and, accordingly, should be entitled only to her currently pro-rated single week of vacation.

The District argues, for example, that it changed the Grievant's position from a secretary to a nine-month aide/three-month secretary possibly in lieu of terminating her, and that her current position and benefits are therefore more than fair. Yet even assuming *arguendo* that the District charitably spared the Grievant termination and that it therefore believes it has treated her more than fairly, the District's equitable argument does not supplant the relevance and application of the principles of contract interpretation, as set forth above. In a related vein, the District argues, "[i]t seems quite unreasonable to assume she is entitled to 12 month benefits for the period of time she is not doing a 12 month job . . . ."[13] The plain and unambiguous meaning of the contract language, however, allocates benefits based on whether the Grievant is a twelve-month **employee**, not whether she does a twelve-month **job**. *See* ROSPLOCK V. ROSPLOCK, 217 Wis. 2D 22, 31, 577 N.W.2D 32, 37 (Ct. App. 1998) (noting that "a court may not rewrite a clear and unambiguous contract".)

The District also points out that the Grievant's pro-rated vacation arrangement remained unchallenged for over a year, and that it was only challenged when changes in management occurred. However, the District did not challenge the timeliness of the grievance, and the Grievant explains the delay in her memo dated November 9, 2009:

> I had been informed by Kurt that I would now only have one week vacation as I work only 3 months as a clerical employee. I had told Kurt that Mario had told me that I would keep my 4 weeks vacation. Kurt said that . . . my current job position was something new and again that I was only working clerical for 3 months so I would be given one week

[13] This and other arguments that the District offered at hearing are contained in Joint Exhibit 3, under the heading, "Key Points".

> vacation starting with my next seniority date. I did not agree with Kurt that I should only have one week.
>
> As time came for [negotiations] was coming up, I decided to look over the contract. As I read it I realized that the contract stated "any twelve month employee" (not twelve month clerical) would receive 4 weeks vacation for 10 years of completed employment. I hadn't been thinking 12 month employee but 12 month clerical and because the contract states any 12 month employee I should still have 4 weeks.

In addition, the timing of the grievance and the motives or reasons underlying that timing, ultimately do not control my analysis of the proper interpretation and application of the CBA.

To like effect, the District's feared consequence of awarding the Grievant vacation days for her work as an aide – namely, that "one could logically conclude her aide colleagues should be entitled to the same benefit"[14] – must yield to a proper interpretation and application of contractual principles. And, even if considered, this alleged consequence is unpersuasive. As Director of Special Education Kurt Lindau correctly stated in his letter to the Grievant dated January 9, 2009, "You now have a *unique* position as a twelve month employee that is assigned as a nine month CWD aide and a three month Secretary." (Emphasis added.) Because the Grievant's position is unique and other aides are nine-month, not twelve-month, employees, the precedent feared by the District does not exist.

Finally, in addition to its fear of creating an unwanted, future precedent, the District alleges past precedent to support its position: "[i]n the 1980's, a 9 month employee who worked as a cook was allowed to work additional summer hours as a custodian and received no additional benefits (other than hourly wages.)"[15] This hearsay evidence of an isolated incident that allegedly occurred decades ago and that involved either an unrepresented employee or an employee represented under a different CBA, the terms of which are wholly unknown, does not alter my analysis and conclusions. First, such evidence is insufficient to establish a past practice. *See* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 607-608 (Alan Miles Ruben ed., 6th ed. 2003) ("When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required.") And even if I were

[14] Joint Ex. 3 at 1.

[15] *Id.*

to find a past practice regarding vacation days, the principles of contractual interpretation would control under the circumstances of this case.

III. THIRD ISSUE: THE APPROPRIATE REMEDY

Based on the foregoing analysis, I conclude that the District violated the CBA and that the Grievant is therefore entitled to all benefits wrongfully denied and consistent with this Award, including the restoration of any and all wrongfully denied vacation days and sick-leave as a twelve-month employee. I am thus ordering the parties to attempt to determine and stipulate to the appropriate remedy, consistent with this Award. Moreover, I am retaining jurisdiction in this matter for sixty (60) days, in the event that the parties cannot reach an agreement on the appropriate remedy.

Dated at Madison, Wisconsin, this 26th day of August, 2011.

John C. Carlson /s/
John C. Carlson, Arbitrator

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