BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
NORTH FOND DU LAC SCHOOL DISTRICT	Case 17 No. 45701 MA-6713
and	
NORTH FOND DU LAC EDUCATION ASSOCIATION	

Appearances:

Lathrop and Clark, by Mr. Michael J. Julka, 122 West Washington Avenue, P.O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of the District.

Mr. Gary L. Miller, UniServ Director, Winnebagoland UniServ, P.O. Box 1195, Fond du Lac, Wisconsin 54936-1195, appearing on behalf of the Union.

ARBITRATION AWARD

North Fond du Lac School District, hereinafter referred to as the District, and North Fond du Lac Education Association, hereinafter referred to as the Union, are parties to a collective bargaining agreement, effective July 1, 1989 through June 30, 1991, which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the denial of sick leave. Hearing on the matter was held in North Fond du Lac, Wisconsin on October 29, 1991. Post-hearing written arguments and reply briefs were received by the undersigned by January 8, 1992. Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

ISSUE

> "Has the District violated Article X, Section A of the 1989-91 Collective Bargaining Agreement by denying sick leave to the grievant for the period of March 22 through March 28, 1991, a period of five (5) days?"
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> If so, the parties have stipulated to a remedy providing that the District make the grievant whole for the loss of five (5) contract days: by payment of wages in the amount of $860.35, with such wages being treated as taxable salary subject to withholding, social security, Wisconsin Retirement System, etc., with the grievant's sick leave account be reduced by five days, and with the grievant's personnel file be purged of any reference to the denial of his sick leave request.

PERTINENT CONTRACT PROVISIONS

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ARTICLE X SICK LEAVE, SABBATICALS, ABSENCES

A. Sick Leave

1. Ten (10) days sick leave shall be available at the beginning of each school year for every teacher. Unused sick leave shall be cumulative to one hundred twenty (120) days. Sick leave is to be used only for personal illness, disability, or periods of medical confinement of the employee. The Administrator may require a certificate of an M.D. at District expense for suspected abuse of sick leave. The minimum sick leave that may be taken is one-half (1/2) day.

BACKGROUND

At the commencement of the hearing in the above referenced matter the parties agreed to the following facts:

1. James Goeckerman is and has been employed by the District for twenty-one (21) years.
2. Goeckerman suffers from a very serious case of psoriasis.
3. Goeckerman took five (5) days of leave without pay after his request for sick leave was denied.
4. Goeckerman was docked five (5) days of pay by the District.
5. Donald W. Kellogg, District Administrator for four (4) years, has a total of twenty-six (26) years of employment with the District.
6. Robert Loberger, Association President, has been employed by the District a total of nineteen (19) years.

The record demonstrates James Goeckerman, hereinafter referred to as the grievant, first became afflicted with psoriasis in 1985. Dr. James E. Schuster has been the grievant's dermatologist and has described the grievant's psoriasis as more severe than average. The grievant's doctor has treated the grievant with various modalities including cortisone products, cancer drugs and light therapy including PUVA, an ultraviolet ray treatment. At the hearing the grievant testified that over the winter months the treatment he receives does not arrest his psoriasis in a substantial manner. He develops major patches of the skin disease in his cranial, facial and pubic hair, on most of his joints (knees, elbows, between his toes, etc.), on his legs and back, and in very sensitive and personal areas of his body. Towards the end of winter he has received as many as sixty (60) cortisone shots.

The grievant's doctor has advised him the most safest and effective treatment is direct sunlight. In 1988 the grievant began taking trips to areas of the United States where sunlight is in great abundance. The grievant took these trips during the District's spring break. However, during this same time

frame the grievant was divorced and granted custody of his children. Now during spring break the children spend a portion of time with the grievant and a portion of the time with his ex-spouse. During the 1989-90 school year the grievant requested eight (8) sick days to go to Florida to get direct sunlight treatment. The grievant's doctor submitted the following statement to the District on December 26, 1989: "Jim has a stubborn case of psoriasis and is currently on potent medication for treatment (mettistruate) sunlight is beneficial.". The District Administrator, Donald W. Kellogg, informed the grievant he needed more information. The grievant than submitted the following doctor's statement dated February 26, 1990: "Sunlight is beneficial for psoriasis, I recommend it as a form of treatment.". Thereafter Kellogg granted the sick leave request. However, at the hearing Kellogg testified he informed the grievant this was a one time only approval. Kellogg also testified that although he was not satisfied with the doctor's substantiation of the need for sick leave the written statement provided a minimum reason for the trip. Kellogg also testified that factor's such as the grievant's recent divorce, his being relieved as basketball coach and recent disagreements between the grievant and his immediate supervisor where taken into consideration by him when he approved the request.

On February 1, 1991 the grievant requested five (5) days of sick leave from March 22 through March 28, 1991. Kellogg requested additional information from the grievant's doctor. On February 13, 1991 the grievant's doctor sent the following letter to the District:

February 13, 1991

> Dear Sir:
>
> James Goeckerman has been treated by myself since 1985 for a severe form of psoriasis. He has been treated with numerous modalities including cortisone products, cancer drugs and light therapy including PUVA. Psoriasis is a fairly common illness, experienced by approximately 1 in 50 individuals. Jim's psoriasis tends to be more severe than would be considered average. Currently he is being treated with light therapy and topical cortisone drugs.
>
> For most persons with Psoriasis, sunlight is quite beneficial and usually safer than other modalities. I have recommended that Jim take advantage of normal sunlight as much as possible when his psoriasis is flaring. When this is not possible, he can receive artificial sunlight treatments in our light treatment facility.
>
> If I can answer any additional questions with regard to James Goeckerman, feel free to contact me.
>
> Sincerely,
>
> James E. Schuster, M.D. /s/
> James E. Schuster, M.D.

Thereafter Kellogg denied the sick leave request. The sick leave denial was grieved and processed to arbitration in accordance with the parties grievance procedure.

UNION'S POSITION

The Union contends the grievant requested sick leave for a personal illness. This was so the grievant could obtain the safest treatment modality, direct sunlight, for his psoriasis. The Union acknowledges the grievant went to Orlando, Florida for this treatment, however, the Union argues the location did not alter the grievant's intended purpose of seeking direct sunlight therapy over a number of days. The Union points out the grievant went to Orlando, Florida in 1988 and to Biloxi, Mississippi in 1989 over spring break. In 1990 he went to Orlando, Florida using eight (8) days of approved sick leave. The Union contends the grievant did not in 1991 use the five (5) sick leave days he requested as vacation days but used them as treatment days for his very serious case of psoriasis. The Union stresses that the grievant choose the Orlando location because of its high probability of full sunlight days.

The Union also points out the grievant presented honest testimony concerning dates he and his two (2) sons visited attractions in the Orlando area. In 1988 he visited attractions on three (3) days. In 1990 he visited attractions on two days, a Saturday and a Sunday. In 1991 he did not visit any attractions. The Union asserts the grievant's testimony that his intentions of taking sick leave days for direct sunlight therapy in Florida in 1990 and 1991 is exactly what he did and to infer otherwise is incorrect and must not be allowed.

The Union also argues that the fact the grievant took his two (2) sons on the 1990 and 1991 trips does not prove these were vacation trips. The Union stresses the grievant is a single parent who has custodial responsibilities for his children for most of the year.

The Union also contends the use of sick leave days to treat psoriasis with direct sunlight does not constitute abuse under the terms of Article X, Section A, Paragraph 1. The Union argues the District's contention that the grievant abused the use of sick leave is not substantiated by any evidence. Further, if the District believed the grievant abused sick leave in 1990 the time to raise that issue was in 1990, not at the arbitration hearing in 1991. Here the Union points out Kellogg knew of the grievant's destination in 1990 prior to the grievant's leaving for Florida. The Union contends that had the grievant lied about his intended use for the sick leave or his destination Kellogg would be justified in questioning such use and requiring medical verification for the leave. The Union concludes no lying occurred to support any claim of abuse.

The Union further points out that when Kellogg requested additional medical information the grievant supplied it. The Union does not dispute Kellogg's right to ask for additional medical information. The Union does dispute the raising of the sick leave abuse issue when it was not raised in 1990 and in 1991. The Union concludes there is no evidence to support a claim that sick leave abuse has occurred in this case.

The Union also argues that the District cannot exclude psoriasis direct sunlight treatment from the provisions of Article X, Section A. The Union asserts standards raised by the District: 1.) Sick leave days are only to be used when an employe cannot work, and 2.) Sick leave was not intended to cover absences such as the grievant's, are not specifically referenced in the collective bargaining agreement nor included in the parties' bargaining history. The Union points out sick leave can be used for doctor appointments. Further, that in addition to the category of "personal illness" are the categories of "disability" and "periods of medical confinement". The Union

also asserts that the parties have never agreed to a list of specific sick leave exclusions such as psoriasis treatment. The Union concludes psoriasis treatment is a legitimate usage of sick leave.

The Union does acknowledge that sick leave cannot be abused by an employe. However, the Union asserts misuse or abuse has not been demonstrated in the instant matter. The Union also argues it is the District's burden to prove that the type of treatment sought by the grievant is excluded under Article X, Section A.

The Union also contends the District's approval in 1990 for sick leave use by the grievant for psoriasis treatment is determinative in the instant matter and best reflects the parties past practice. The Union points out the District requested additional information prior to approving the request. That information was provided by the grievant. The Union contends no conditions were placed on the sick leave approval. The Union argues any thoughts, rights or reservations the District may have had were never communicated to the grievant or to the Union. The Union argues the 1990 request is parallel to the instant matter except that the grievant requested only five (5) days in 1991. The Union does acknowledge that the 1990 case was the first of its type of request. However, the Union concludes such a single incident establishes a practice and should be dispositive in the instant matter.

The Union would have the undersigned sustain the grievance.

DISTRICT'S POSITION

The District does not dispute the grievant's psoriasis nor the magnitude of it. The District does question the propriety of the use of sick leave under the circumstances in the instant matter. The District points out it is obligated to pay wages and benefits associated with a sick leave absence it asserts is totally unsubstantiated by medical specificity and by testimony which makes clear the absence was planned taking into account family considerations as to where to go, the days to be absent and the duration of the absence. The District contends paid sick leave under these circumstances is unwarranted under the existing collective bargaining agreement. The District also points out the burden of proof herein is on the Union to demonstrate the grievant had valid reasons which entitle him to paid sick leave.

The District points out the grievant's doctor did not proscribe one week in the Florida sunshine. The District does acknowledge that the language of Article X, Section A, is broad and stresses that the granting of sick leave is the prerogative of management provided the action taken is neither unreasonable or discriminatory. The District also argues that sick leave is not an absolute right but a privilege conditioned upon the employe's qualifying for the benefit. The District points out the grievant's doctor did recommend that the grievant take advantage of normal sunlight as much as possible, the doctor did not require exposure to sunlight in Florida as therapy for the grievant's skin condition. The District contends it was the grievant who elected to take sick leave to go to Florida, determined the number of days to take, and the duration of the absence. The District also argues it has the right to request additional medical verification when a request is made in February for sick leave to be taken in the last week of March. The District contends it made such a request and the grievant's failure to provide such medical verification and the Union's failure to provide it during the grievance process is ample justification for the denial of sick leave in the instant matter.

The District also asserts there is evidence in the record which suggests the grievant treated the leave in Florida as a vacation instead of therapy for his skin condition. The District argues the record clearly demonstrates the

grievant scheduled the trips to maximize family member participation. The District points out the grievant's children accompanied him on all four trips to Florida and Mississippi and the grievant's parents met him in Orlando, Florida in 1990. The grievant also acknowledged openly that complications arising out of joint custody agreement concerning his children with his wife precluded him from scheduling his trip during the District's spring vacation. The District concludes the 1991 trip to Florida was a matter of convenience and family vacation rather than an actual prescribed sick leave therapy.

The District also asserts that even if one assumes that the prescribed therapy for the grievant required a trip to Orlando, Florida, the scheduling of sick days/school days is totally unreasonable under the circumstances and warrants the denial of sick leave benefits. The District stresses the grievant's first obligation to the District is to be present on the job. The District argues there is no justification for the grievant to be in Florida on the five (5) immediate work days to a vacation and then not using the entire vacation for such treatment. Here the District points out the grievant's doctor did not prescribe any particular number of days for sun therapy in the prior three (3) years. Nor did the grievant have any guarantee the sun would shine on the days he chose for his trips rather than the days of scheduled spring vacation. The District argues the grievant's best approach would have been to stay in Fond du Lac, Wisconsin, under the treatment of his doctor.

The District also asserts that authorization of sick leave in this matter would have the effect of opening Pandora's box with respect to sick leave usage. The District argues such a result would allow an employe to self proscribe locations for therapy and the durations for therapy.

The District contends it took a businesslike approach in dealing with the grievant and was not arbitrary or capricious in denying the grievant's request. 1/ The District asserts it requested specific verification from the grievant's doctor that the grievant required sick leave time off to go to Florida and for the doctor to specify the dates and duration of such a leave. The District argues it was only when the grievant failed to provide specific information that Kellogg denied the sick leave request.

The District also contends there is not a past practice that can be construed to entitle the grievant to paid sick leave for his trip to Florida. The District argues that although it granted the grievant's request in 1990, no practice was established because the collective bargaining agreement is clear and unambiguous. The District argues the agreement establishes procedures for granting sick leave in instances where abuse is suspected. The District points to Article X, Section A, ..."The Administrator may require a certificate of an M.D. at District expense for suspected abuse of sick leave.", and asserts it requested medical certification and only when it was dissatisfied with the doctor's certification that the sick leave request was denied. The District argues it followed the procedure set forth in the collective bargaining

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1/ The District attached to its brief a letter which was not introduced as an exhibit at the hearing in the instant matter to support arguments that it had attempted substantiation and verification of the grievant's sick leave request prior to denying the request. The Union in its reply brief objected to the introduction of evidence it had neither seen nor had the opportunity to cross-examine and requested it be rejected as containing any supportive value. The undersigned has sustained the Union's objection and has rejected any supportive proof value the document may have contained.

agreement and even though it granted the 1990 sick leave request the District did not modify the sick leave policy of the agreement. The District also asserts the granting of sick leave in 1990 did not establish a practice that was unequivocal, clearly enunciated and readily ascertainable over a reasonable period of time. The District concludes that the fact that Kellogg testified that in 1990 that he "let it go this time" did not establish any mutuality and thus no binding past practice is established.

In its reply brief the District argues that lying or dishonesty need not be present for abuse of sick leave to occur. The District does not contend the grievant lied or was dishonest. The District does contend it can deny sick leave when it has concluded the treatment is self-prescribed, when the treatment is at a self-prescribed location and when the treatment is for a self-prescribed duration. The District argues the scheduling of the sick leave request itself raised concern by the District Administrator. Consequently, Kellogg requested the grievant to produce medical certification that he needed to go to Florida for sunlight treatment. The District again concludes that when the grievant failed to produce the proper certification it properly denied the sick leave request. The District also argues that there is no burden on it to demonstrate that any particular medical treatment falls inside or outside the terms of the collective bargaining agreement. In the instant matter under the instant circumstances the District determined that granting the grievant's request would constitute sick leave abuse and therefore it properly denied it. The District further contends that the granting of sick leave in 1990 did not convey a message that the approval was unconditional on future request and thus establish a binding past practice.

The District would have the undersigned deny the grievance.

DISCUSSION

Article X, Section A, Paragraph 1, of the parties' collective bargaining agreement provides that an employe may use sick leave for personal illness, disability, or periods of medical confinement. The District does not dispute the grievant has a severe case of psoriasis. The District does dispute the grievant's request to go to Florida to receive direct sunlight treatment for his skin disorder. There is no evidence in the record which would lead to the conclusion that psoriasis is not a personal illness. There is evidence in the record, the grievant's doctor's recommendation, that the grievant receive whenever possible direct sunlight therapy whenever the grievant's psoriasis is flaring. At the hearing in the instant matter the grievant testified that prior to obtaining direct sunlight therapy for his psoriasis he was receiving as many as sixty (60) cortisone injections in one (1) doctor visit for treatment of his psoriasis. The grievant also testified that when he made his request for sick leave his psoriasis was flaring and that this generally happened because he was unable to get direct sunlight treatment during Wisconsin's winter months. The grievant further testified that direct sunlight therapy is the safest form of treatment he can receive for treatment of his skin disorder. There is no evidence in the record to dispute the grievant's testimony.

The undersigned notes here that the parties' have not defined "personal illness" in their collective bargaining agreement. Nor was any bargaining history presented at the hearing which would demonstrate that the parties ever discussed what was and what was not an "illness". Webster's New World Dictionary of the American Language, (1978), defines "illness" as a noun meaning the "...condition of being ill,", and it defines "ill" as an adjective meaning "...not healthy, normal, or well; sick,". The undersigned concludes that the grievant's skin disorder is a "personal illness" and that he can use sick leave for the treatment of his skin disorder. The undersigned finds such

a conclusion is supported by the record. The grievant did receive an approved eight (8) day sick leave request in 1990 and the District has approved the use of sick leave for the grievant to attend doctor's appointments for the treatment of his psoriasis.

The District has raised arguments that it, in effect, can police the use of sick leave to prevent any abuse. These arguments have merit except that in so doing the District cannot ignore the provisions of Article X, Section A, Paragraph 1. This provision specifically provides that if the District's Administrator suspects an employe is abusing sick leave the Administrator can require a medical certificate from a doctor at the District's expense. Herein the grievant provided a letter from his doctor which recommended that the grievant receive direct sunlight therapy whenever possible as a treatment for his skin disorder. The District does not dispute direct sunlight therapy is a treatment for psoriasis but does dispute the timing, duration and location for the therapy. The undersigned notes here the District did not raise such questions in 1990 when the grievant requested an even longer period of time. However, the undersigned finds the District has the right to raise such questions to prevent the abuse of sick leave. Such questions, in order to comply with the provisions of Article X, Section A, Paragraph 1, must be answered by a doctor. Herein, the grievant's doctor's letter specifically stated that if there where any additional questions concerning the grievant the District could contact him. There is no evidence the District attempted to contact the grievant's doctor concerning any questions the District may have had about the grievant. There is no evidence in the record that would demonstrate that the District has the medical expertise to conclude the timing, duration or location of the grievant's therapy was unnecessary or that there were alternatives the grievant could have obtained. The parties' agreement clearly requires medical certification in cases of suspected abuse. Thus, if the District was not satisfied with the grievant's doctor statement of February 13, 1991 because it had concerns over the timing, duration or location of the therapy the grievant desired, prior to denying the sick leave, the District is required by the collective bargaining agreement to direct the grievant at District expense to get a medical certificate. The undersigned concludes the parties' collective bargaining agreement clearly acknowledges that the District does not have the medical expertise to make such a determination on its own.

The District has argued the grievant self prescribed the timing, duration and location of his sunlight therapy. However, the grievant's doctor clearly recommended direct sunlight therapy. Absent any evidence to the contrary the undersigned cannot conclude the grievant's desire to receive such therapy is an abuse of sick leave, whether the timing, duration and location is determined by the grievant or approved by a doctor. The District has the right to ask the grievant to seek a certificate from a doctor, however, if it suspects abuse it has the right to direct the grievant to obtain a certificate. Herein, in effect, the District suspected abuse because of concerns over the timing, duration and location of the sunlight therapy and denied the grievant's sick leave request. However, the District itself does not have the medical expertise to conclude the grievant's timing, duration and location of sunlight therapy is an abuse of sick leave. The grievant's acknowledgement that he took his children with him to Florida or that his parents met him in Florida does not demonstrate the grievant did not receive direct sunlight therapy while he was on sick leave in 1990 or that he would abuse sick leave in 1991. While it may be more economical for the District to have the grievant seek such therapy on his own time there is no requirement in the parties' collective bargaining agreement that requires employes to attempt to obtain therapy on off duty time before employes can use sick leave. Absent such a specific requirement in the collective bargaining agreement the undersigned finds the District cannot unilaterally impose such a requirement on the use of sick leave. Particularly in the instant matter where it approved the grievant's request in 1990.

Therefore, based upon the above and foregoing and the evidence, testimony and arguments presented, the undersigned concludes the District violated Article X, Section A, Paragraph 1, when it denied the grievant's sick leave request. The District is directed to make the grievant whole. The grievance is sustained.

AWARD

The District violated Article X, Section A, when it denied the grievant's sick leave request for March 22, 1991 through March 28, 1991. The District is directed to make the grievant whole in accordance with the parties' agreed upon remedy.

Dated at Madison, Wisconsin this 3rd day of April, 1992.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator