

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SOUTHERN DOOR COUNTY SCHOOL DISTRICT

and

SOUTHERN DOOR EDUCATION ASSOCIATION

Case 24
No. 47241
MA-7208

Appearances:

Wisconsin Association of School Boards, Inc., Post Office Box 160, Winneconne, WI 54986 by Mr. William Bracken, Director, Employee Relations, appearing on behalf of the Southern Door County School District.

Bayland, WEA, NEA, 1136 North Military Avenue, Green Bay, WI 54303 by Mr. Dennis Muehl, Executive Director, appearing on behalf of the Southern Door Education Association.

ARBITRATION AWARD

The Southern Door County School District and the Southern Door Education Association jointly requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff as arbitrator of a dispute concerning the denial of teacher Nancy Skadden's request for paid personal leave to attend farm mediation training in Madison for a full day on Friday, December 6, 1991 and for one half day on February 14, 1992. A hearing was held in Sturgeon Bay, Wisconsin on August 27, 1992 at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. No stenographic record was made of the proceeding. The parties waived the submission of briefs and the case was closed with oral arguments.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties were unable to stipulate to an issue and agreed that the undersigned should frame the issue in his Award. The issue may be fairly stated as follows:

Did the District violate the collective bargaining agreement, specifically Article VIII, §E, when it denied Nancy Skadden's request for paid personal leave on December 6, 1991 and February 14, 1992? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE IV - GRIEVANCE PROCEDURE

When a request has been made for arbitration, the following procedures shall be established.

1. Jointly request a panel of five (5) from the WERC.
2. Alternately strike names from panel submitted -- the fifth and remaining party shall be the arbitrator (toss of coin will determine who strikes first.)
3. The arbitrator shall conduct a hearing, hear evidence and give an opinion as quickly as possible after the close of the hearing.
4. The Southern Door Education Association and the Board of Education shall share equally the expense of the arbitrator.
5. The decision of the arbitrator shall be final and binding on both parties.
6. The arbitrator shall have no power to add or to subtract from the terms of this Agreement.

ARTICLE VIII - ABSENCES

E. Personal Leave. Teachers may be excused from school during the work day, with prior approval from the district administrator, for necessary personal business which requires a teacher's presence during the school day and which cannot be rescheduled outside the normal school day.

F. All other absences, other than sick, personal, or emergency leave, will be considered a leave of absence without pay. A day's pay under this clause will be 1/190 of the yearly contracted salary. A half-day's pay under this clause will be 1/380 of the yearly contracted salary.

BACKGROUND

There is no dispute about the facts giving rise to this grievance. The District is a public employer providing general educational services to children in southern Door County, Wisconsin. The Association is the exclusive bargaining representative for teachers in the District's employ. The grievant, Nancy Skadden, is an eighth grade language arts teachers, with 20 years of service.

For many years, the District has offered paid personal leave to teachers to attend to business during the school day which cannot be rescheduled to another time. In bargaining over the 1981-83 contract, language was drafted reflecting this practice:

Teachers may be excused from school during the work day, with prior approval from the district administrator, for necessary personal business which requires a teacher's presence during the school day and which cannot be rescheduled outside the normal school day.

In the 1983-84 negotiations, the teachers expressed a concern about the consistency with which this language was being administered. The language was not changed, but the form for requesting leave was redrafted, and the parties reached an understanding that they would conduct a joint review of the purposes for which leave had been approved in the past and that those reasons would be considered legitimate in the future.

In 1989, a dispute arose over the request of a teacher, Terry Bobbe, for personal leave for a reunion of her university choir. The District denied the request, instead granting leave without pay, and a grievance was filed which was ultimately heard by Arbitrator Lionel Crowley. Arbitrator Crowley issued his Award on August 1, 1989, granting the grievance. In his opinion, Arbitrator Crowley stated in part:

Article VIII, Section E provides that personal leave requires the prior approval of the district administrator. While the plain language gives the district administrator discretion to grant or deny personal leave, the administrator must exercise such discretion in an equitable and consistent manner. Each request must be viewed on its own facts but equitable treatment requires the granting or denial of a request in accordance with past practice The Association's and employees' expectations and understandings as to the granting of leaves is not subject to the personal interpretation of each administrator but rather depends on the interpretation of the contract and its consistent application no matter how many changes occur in the administration. Otherwise, the Association would have to continually bargain on personal leave on each change in administrator.

Arbitrator Crowley reviewed the uses of paid personal leave during 1988-89, including attending the Lions convention, taking a car in for service, a business meeting, various family celebrations, moving, graduations and Christmas concerts. He concluded:

Given the above instances, the undersigned finds that the necessary personal business requirement of Article VIII is broadly interpreted so that separating recreation from business is difficult if not impossible. ... Although this is a close case, the evidence demonstrated that there was not a valid distinction between the grievant's request for personal leave and the District's past practice as evidence (sic) by those leaves that were granted. In short, the Administrator did not exercise his discretion in a consistent manner in denying the grievant's request....

The Arbitrator ordered the District to make the grievant whole by paying her for the day she had requested.

While the Bobbe dispute was pending, the parties were in negotiations over the 1989-91 contract. The District proposed to limit the use of personal days to one per year. The dispute over the contract was ultimately resolved in mediation by an interest arbitrator, with the personal leave language remaining unchanged. This settlement took place after the Award in the Bobbe case.

In negotiations over the 1991-93 contract, the Board again sought to place a one day cap on personal leave, as well as limiting the purposes for which personal leave could be used:

"...Teachers shall be allowed one day of personal leave per year. It is expressly understood that personal leave will not be approved for reasons of recreation, union business, to seek employment elsewhere, physical examinations, inservice days, and on days immediately before or after any holiday or vacation periods."

The 1991-93 contract was settled without any change in the personal leave language.

In the Fall of 1991, the grievant Nancy Skadden became interested in participating in the Wisconsin Farm Mediation and Arbitration Program (WFMAP). The program trains volunteers to serve as mediators, resolving disputes between farmers and their creditors. Persons participating in the program are not paid for their services, although they do receive reimbursement for mileage and expenses. Once successfully trained, the volunteers are assigned cases in their geographical area. The number of cases assigned varies according to availability, but average three to four per year. The program is run by the State of Wisconsin, and is administered by Dennis McGilligan.

A WFMAP training session was scheduled for Friday, December 6th and Saturday, December 7th in Madison. On November 20th, Skadden requested a day of paid Personal

Leave under Article VIII §E to attend the session on the 6th. Her principal, Gary Langenberg, discussed the request with District Administrator Joe Innis. They denied the request and Skadden filed the instant grievance. She later submitted a request for a half-day of paid personal leave for additional training on February 14, 1991, and this request was also denied. That denial was made part of this grievance as well. In both instances, Skadden was given leave without pay under Article VIII §F to attend the session.

THE POSITIONS OF THE PARTIES

The Position of the Association

The Association takes the position that the Crowley Award controls this dispute and that the standard under that Award is whether the request for personal leave is similar to past requests which have been approved. Here the grievant wished to participate in a civic activity, being trained to provide a valuable service for farmers in the area. The Association notes the rural character of the District, and the benefit that District residents may realize as a result of the grievant's efforts. The Association stresses, however, that this particular grievance is limited to the request for one and a half days of leave for training, and does not implicate any future time demands by the farm mediation program. The training here is not different in character from leaves the District has granted to attend 4-H events, lead religious retreats, and attend conventions of the Lions Club or the Wisconsin Association of School Boards. The grievant herself has in the past been granted four days of personal leave to travel to Washington D.C. to lobby the federal government on education issues. Thus, the Association argues that the grievance should be granted and the grievant awarded pay for the days she participated in mediation training.

The Position of the District

The District takes the position that this leave request is different in character from those made in the past because it involves the possible commitment of large amounts of time away from school in the future. The District did not arbitrarily deny this request. Innis contacted the program administrator, Dennis McGilligan, and learned that a mediator might do three to four cases per year, with each case taking two or three days to complete. Innis decided that it was not in the District's interest to have a teacher absent for this much time each year, out of only 178 contact days. Even the grievant indicated that she would use at least four and one-half days each year for mediation. The potential for this much absence by a skilled and experienced teacher undermines the educational goals of the District, as well as costing money for substitute teachers. The District notes that the clear language of the contract grants the administrator the right to pre-approve personal leave requests, and this language cannot be overridden by a past practice. The administrator did not exercise his discretion in an arbitrary or unfair manner, and the arbitrator should defer to his judgment.

The District also notes other features which distinguish this case from past requests. No leave has ever been approved for training before, very few cases of multiple days in one school year have been approved, and Skadden was to receive compensation for her services. For all of these reasons, the District believes that the grievance should be denied.

DISCUSSION

The Standard to be Applied

The Association relies upon the 1989 Crowley Award, asserting that it definitively establishes a right to paid personal leave where similar requests have been granted in the past.

The District argues that the clear language of the contract allows denial of personal leave, so long as the denial is not arbitrary, and that neither past practice nor the Crowley Award can modify that clear language. The District also argues that this case is unique and must be considered on its own merits.

The language regarding Personal Leave is set forth in Article VIII, §E:

E. Personal Leave. Teachers may be excused from school during the work day, with prior approval from the district administrator, for necessary personal business which requires a teacher's presence during the school day and which cannot be rescheduled outside the normal school day.

The Crowley Award interpreted this language, and in particular addressed the range of discretion granted the District Administrator to approve and deny requests. Crowley determined that this discretion was not unlimited. Rather, the administrator was required to exercise his authority "in an equitable and consistent manner." The measure of equity was to be the standards established by the District itself in acting on prior requests for personal leave.

While the standards had not been articulated, the arbitrator divined the de facto standards from a review of the reasons given for leave in the past.

The District in this case invites a second look at this issue. As the undersigned indicated at the hearing, the traditional principles of labor relations dictate deference to a prior interpretation of the same language. More importantly, the parties' own contract dictates this deference. The parties have agreed, in Article IV, that the "decision of the arbitrator shall be final and binding on both parties." To relitigate the issue of how wide ranging the administrator's discretion is in denying leave requests is to treat the Crowley Award as something less than "final and binding." In extreme cases, it may be appropriate to revisit an issue, as where the prior Award patently ignores the contract language. Here, Arbitrator Crowley applied a fairly standard analysis, and reached a result which is not at odds with the express contract terms and is completely consistent with the agreement reached by the parties in their 1983-84 bargain, ie that the standard for approving leaves would be defined by past

practice.

The conclusion that the Crowley Award controls is buttressed by the bargaining history on personal leave since the Award was issued. The Board was plainly displeased with the broad scope of the personal leave provision, and made proposals in both the 1989-91 negotiations and the 1991-93 bargaining to limit the amount of leave available and the purposes for which the leave might be used. Despite these efforts, the language remained intact through the two sets of negotiations following the issuance of the Crowley Award. Where an interpretation has been made, and the parties do not change the language in subsequent negotiations, it must be assumed that both have acquiesced in the interpretation. Thus the undersigned rejects the District's argument that a denial of personal leave must be sustained unless it is arbitrary. Instead, a denial of paid leave for personal business must be measured against the past practice of the District.

The Request for Leave

The primary objection raised by the District to Skadden's request for personal leave to secure training as a farm mediator is that her participation in the farm mediation program may require substantial amounts of time away from the classroom in the future. This is a reasonable concern. The District estimates their potential exposure to be eight days per year.

Skadden herself testified that she would anticipate spending four and one-half days per school year on farm mediation. While it is easy to understand the District's concern over Skadden's future plans, the fact remains that this grievance does not involve a request for time off to perform farm mediations. The day and a half in the 1991-92 school year was for attendance at a training program. A review of past requests for personal leave shows that the vast majority of requests involve family events or illnesses. However, there are several instances of paid time off for class work and conferences. 1/ The records do not indicate whether these classes and conferences were primarily related to improving teaching skills and the like, but given the generally lax standards employed in the past, the undersigned cannot assume that such a nexus between the leave request and teaching duties has existed. Thus it appears from the record evidence that the general character of Skadden's request for personal leave in the 1991-92 school year is similar to requests made and approved in the past. 2/

1/ For example, Association Exhibit #8 shows the following approved uses of personal leave in the 1991-92 school year - pg. 2: Laurie Connell - Course at GB; pg. 9: Nancy Small - Conference; pg. 12: Mary Bilodeau - Seminar; pg. 15: Erika May: School Board Convention.

2/ In arriving at the conclusion that this training program is consistent with past uses of personal leave, the undersigned expresses no opinion about the District's right to prohibit the use of personal leave for an on-going activity, such as farm mediation, should such a

In addition to its objections to the character of the leave request and the "foot in the door" implications for farm mediation in the future, the District attempts to distinguish this request for leave from past requests because it involves more than a single day in a school year and because the grievant was to receive reimbursement for her expenses. Neither argument is tenable. First, the District did not know about the additional half day of training in February when it denied the request for a day off in December, so the denial cannot have been made on that basis. Second, there are many cases of multiple days of personal leave in the same school year for a single purpose. 3/ Thus the District is factually incorrect in its claim. While the great majority of personal leave requests are for one day or less, it is not unusual for the District to allow more than one day of personal leave for a single purpose in a school year.

As for the argument that this leave request could be denied because the grievant was to receive reimbursement for her expenses, the undersigned cannot discern why the District believes this is significant. Certainly if the grievant was attempting to pursue a second career for profit on the District's time, the issue of compensation would come into play. That is not this case. Nothing in the record suggests that there has ever been a policy against allowing personal leave for activities involving reimbursement of mileage and expenses, nor is there any apparent basis for such a policy.

The District has a reasonable concern about overuse of personal leave for an on-going activity such as farm mediation. However, the instant grievance does not directly involve that issue. The request in this case was for a day and a half for participation in a training program. Applying the standard developed in the 1983 negotiations and articulated in the Crowley Award, the undersigned concludes that this request was consistent with past requests for personal leave, both in its general character and in its duration. Thus the District violated the contract by denying the request. The appropriate remedy is to pay Nancy Skadden for the day and a half she spent in the training program.

On the basis of the foregoing, and the record as a whole, the undersigned makes the

request be made in the future.

3/ Again, Association Exhibit #8 shows the following instances of approved requests for personal leave of more than one day in the 1991-92 school year - pg. 2: Chriss Dauber - Daughter to College - 1-1/2 day; pg. 3: Milton Delwiche - Wife in hospital - 2 days; pg. 6: Sandy Krause - Fathers funeral - 2 days; pg. 9: Patricia Schwartz - Sons wedding - 2 days; pg. 15: Carol Patterson - Father terminally ill - 2 days. Additionally, there are numerous instances of non-consecutive days of personal leave where the same reason is given on each request.

following

AWARD

The District violated the collective bargaining agreement, specifically Article VIII, §E, when it denied Nancy Skadden's request for paid personal leave on December 6, 1991 and February 14, 1992. The appropriate remedy is to make her whole, by paying her a day and a half of salary at her 1991-92 rate.

Signed this 3rd day of September 1992 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator
P. O. Box 1375, Racine WI 53401