

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

WEST BEND EDUCATION ASSOCIATION

and

WEST BEND JT. SCHOOL DISTRICT NO. 1

Case 68  
No. 46817  
MA-7076 (Lupton)

Appearances:

Cedar Lakes United Educators, 411 North River Road, West Bend, WI 53095 by Mr. John Weigelt, UniServ Director, appearing on behalf of the Association.  
Ms. Ann Weiland, Attorney at Law, W182 N9052 Amy Lane, Menomonee Falls, WI 53051 appearing on behalf of the District.

ARBITRATION AWARD

The West Bend School Joint District No. 1 (hereinafter referred to as the District) and the West Bend Education Association (hereinafter referred to as the Association) jointly requested that the Wisconsin Employment Relations Commission appoint Daniel Nielsen as arbitrator of a dispute over what constitutes a holiday or a break under the collective bargaining agreement. The undersigned was appointed. A hearing was held on June 16, 1992 at which time the parties were afforded full opportunity to present such evidence, stipulations, and arguments as were relevant. A stenographic record was made of the hearing and a transcript was received on July 3, 1992. The parties submitted post-hearing briefs and reply briefs, the last of which which was received by the undersigned on September 23, 1992. Now, having considered the evidence, the arguments of the parties and the record as a whole, the undersigned makes the following Award

FACTUAL BACKGROUND

There is no dispute about the facts. The District is a municipal employer providing general educational services to the people of West Bend in southeastern Wisconsin. The Association is the exclusive bargaining representative for the District's teachers, and is affiliated with the Wisconsin Education Association Council (WEAC).

Paul and Carol Lupton and Don and Bobbette Gibbons are all teachers in the West Bend School District. In the Fall of 1990, the two couples planned a seven day vacation trip to Seattle, Washington, leaving on Wednesday, October 24th and returning on Tuesday, October 30th.

School was not in session on the 25th and 26th because of the annual WEAC teachers'

convention. The four teachers submitted a timely request for time off from school for October 29th under the "personal business" section of the collective bargaining agreement:

6. Personal Business

In the event of pressing personal business which a teacher cannot otherwise take care of outside of such teacher's building hours, a maximum of two (2) days of leave per school year will be allowed and paid on the basis of the teacher's per diem salary being subject to a deduction equal in amount to the per diem rate for substitute teachers in the District. Personal business leave will be granted if notice of the teacher's intent to take such leave is received by his or her building principal or Administrator of Pupil Services at least five (5) school days prior to the scheduled date of such leave and the teacher has made arrangements satisfactory to such principal or Administrator of Pupil Services for covering such teacher's assignments on the leave day; provided that, in an emergency situation shorter advance notice will be acceptable if the teacher's building principal or Administrator of Pupil Services is satisfied that the requisite arrangements for assignment coverage have been accomplished by such teacher. This leave may not be used for purposes of extending a holiday or vacation recess nor shall such leave be accumulative. Exceptions to the prohibition of leaves prior to or after vacations or holidays must be approved in advance by the Superintendent.

This language has been understood by the parties to permit teachers to use personal days without stating the nature of the personal business so long as the request is submitted at least five school days prior to the leave, and does not extend either a holiday or a vacation recess. In cases of late requests or an extension of holidays or vacation recesses, the District is allowed to ask the nature of the personal business and has discretion to determine whether it is "pressing personal business" under the contract.

The requests were denied, since the District viewed them as an attempt to extend a vacation recess, i.e. the two day break for teachers' convention. The four teachers were instead allowed to take the day off without pay under another provision of the contract. A grievance was filed over the denial, and was not resolved in the lower steps of the grievance procedure.

Additional facts, as necessary, are set forth below.

PERTINENT CONTRACT LANGUAGE

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**ARTICLE VIII. PROVISIONS PERTAINING TO HOURS**

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**7. Early Departure**

A teacher may, on occasion, be granted permission by the building principal/Administrator of Pupil Services to depart the building after the last class period for students and before the ending time of building hours; provided, however, that before a teacher's request to depart may be considered, such principal/Administrator of Pupil Services shall first determine, in his sole discretion, that such departure will not interfere with the performance of the teacher's customary duties and that because of unusual circumstances the teacher cannot readily arrange to attend to the matter giving rise to such request outside of building hours.

On the last school day prior to Thanksgiving, Christmas and Easter vacation recesses, the foregoing sentence shall not be applicable, and the teachers shall be free to depart the building after the last class period for students on such school day. Teachers will also spend time out of school hours preparing for instruction, in pupil and parent conferences, and in other activities related to instruction and co-curricular activities.

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## **ARTICLE IX. ABSENCES**

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### **6. Personal Business**

In the event of pressing personal business which a teacher cannot otherwise take care of outside of such teacher's building hours, a maximum of two (2) days of leave per school year will be allowed and paid on the basis of the teacher's per diem salary being subject to a deduction equal in amount to the per diem rate for substitute teachers in the District. Personal business leave will be granted if notice of the teacher's intent to take such leave is received by his or her building principal or Administrator of Pupil Services at least five (5) school days prior to the scheduled date of such leave and the teacher has made arrangements satisfactory to such principal or Administrator of Pupil Services for covering such teacher's assignments on the leave day; provided that, in an emergency situation shorter advance notice will be acceptable if the teacher's building principal or Administrator of Pupil Services is satisfied that the requisite arrangements for assignment coverage have been accomplished by such teacher. This leave may not be used for purposes of extending a holiday or vacation recess nor shall such leave be accumulative. Exceptions to the prohibition of leaves prior to or after vacations or holidays must be approved in advance by the Superintendent.

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## **ARTICLE XXIII. ARBITRATION**

1. If a grievance is submitted to arbitration, the District and the Association shall jointly request the Wisconsin Employment Relations Commission to appoint one of its commissioners or qualified staff members to serve as an arbitrator to determine the disposition of such grievance in accordance with the provisions of this Agreement.

2. The sole function of the arbitrator shall be to determine whether or not the rights of a teacher have been violated by the District contrary to an express provision of this Agreement. The arbitrator shall have no authority to add to, subtract from, or modify this Agreement in any way. The arbitrator shall have no authority to impose liability upon the District arising out of facts occurring before the execution day or after the termination of this Agreement.

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#### APPENDIX D-1

#### WEST BEND JOINT SCHOOL DISTRICT NO. 1 1990-91 CALENDAR

August 27, 28, 29	No school for students (K-12) Teacher Workdays (one day will be scheduled as an inservice day)
August 30	First day of school
September 3	Labor Day
October 25, 26	No school for students (K-12) Teachers' Convention
November 16	No school for students (K-12) Parent Conferences 8:00 a.m. - 12:00 noon
November 22, 23	Thanksgiving recess
December 21	Last day of classes before Christmas
January 2	Classes resume
January 22	No school for students (K-12) Teacher Workday

February 22	No school for students (K-12) Teacher Inservice (A.M.)
March 28	Last day of classes before Easter
April 8	Classes resume
May 27	Memorial Day
June 10	1st Snow Make-up Day
June 11	2nd Snow Make-up Day
*June 7, 10, or 11	Last day of classes
*June 8 or 12	No school for students (K-12) Teacher Workday

\*Depending on the number of Make-up Days needed.

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## ISSUE

The parties were unable to arrive at a stipulation of the issue, and agreed that the arbitrator should frame the issue in his Award. The Association proposes that the issue focus on the specific days in dispute in this case:

"Do the days of Teachers' Convention constitute either a holiday or a vacation recess for application under Article 9, Section 6 of the Master Agreement?"

The District argues that the issue is broader:

"What calendar days are included in the prohibition of the use of personal business days contained in the last two sentences of Article IX, Section 6 and did the employer violate that section by denying the grievants the use of personal business days on October 29, 1990?"

## Arguments

The Association objects to the District's framing of the issue as an attempt to broaden the scope of the case beyond the actual grievance, and as an invitation to the arbitrator to exceed his

contractual authority. The case before the arbitrator deals exclusively with whether teachers can use personal leave on the day before the WEAC Teachers' Convention. Article XXIII of the contract provides in part:

2. The sole function of the arbitrator shall be to determine whether or not the rights of a teacher have been violated by the District contrary to an express provision of this Agreement. The arbitrator shall have no authority to add to, subtract from, or modify this Agreement in any way...."

The Association argues that the District is seeking a modification of the contract via arbitration, which should not, and contractually cannot, be permitted.

The District seeks an interpretation that finds all days off from school, other than normal weekends, are holidays or vacation recesses for the purpose of the limitations in Article IX. It maintains that the Association's narrow framing of the issue will leave a lingering dispute over the meaning of Article IX, and that common sense dictates an Award which completely resolves the confusion over what constitutes a "holiday or vacation recess" under that Article. The Arbitrator cannot resolve this grievance without giving meaning to that phrase, and in so doing the Arbitrator should consider all of the evidence offered as to the parties' intent in bargaining and their practice in administering the provision.

### Discussion

Arbitration is a consensual process, and the scope of the arbitrator's authority is defined by the agreement of the parties. Inasmuch as there is no separate submission agreement in this case, the arbitration clause of the contract controls. That clause speaks in terms of "a grievance" being submitted to arbitration, and identifies the "sole function of the arbitrator" as being "to determine whether or not the rights of a teacher have been violated by the District contrary to an express provision" of the contract. There is neither a grievance pending over fact situations other than that involving these four teachers, nor any question of a violation of contract rights in connection with any days other than the annual teachers' convention. Absent a grievance or an alleged contract violation, the contract recognizes no role for an arbitrator in offering opinions and advice. To the extent that the District seeks an advisory opinion about Article IX's application to fact situations other than that presented by the grievance, it asks the arbitrator to exceed his authority.

As a practical matter, determining whether Article IX, §6's reference to "holiday or vacation recess" includes teacher convention days will very likely yield an analysis that offers guidance in other fact situations involving the same language. That outcome, however, flows from the need to logically order and explain the decision in this specific grievance, rather than any roving commission for the arbitrator to reach beyond this case and address issues in the abstract.

Having reviewed the grievance documents and the relevant portions of the contract, the

arbitrator believes that the issue in this case is:

Did the District violate Article IX, §6 of the contract when it denied the grievants' request to use personal business days for their absence on October 29, 1990? If so, what is the appropriate remedy?

## ARGUMENTS OF THE PARTIES

### The Position of the Association

The Association takes the position that the language of the contract is clear and unambiguous and does not require any interpretation. The two days of teachers' convention are neither "holiday" nor "vacation" recess as those terms are commonly understood. The convention is geared to professional development, and features workshops and other work related activities. A holiday or vacation, in contrast, contemplates time away from work. While these four grievants used the convention days as part of a vacation, the contract prohibits extending a vacation recess via personal days. Thus it speaks to the character of the time period, rather than the purpose to which any individual puts the time.

The Association notes that its witnesses were both long-time members of the bargaining committee who were thoroughly familiar with the contract. According to these witnesses, the reference to "vacation recess" in Article IX includes those breaks referenced under early departure days in Article VIII, §7 -- Thanksgiving, Christmas and Easter. The holidays -- Labor Day and Memorial Day -- are designated as such in the negotiated calendar. Days on which school is not in session, but which are neither holidays nor vacation recess days, are referred to as "unpaid days" and are designated on the negotiated calendar with an "X".

The Association argues that the District should negotiate a change in Article IX if it wishes to narrow the use of personal days, rather than seek change in the guise of a grievance arbitration. There is no evidence that the extreme position taken by the District -- that the prohibition extends to all non-work days which are not weekends -- was ever communicated in bargaining or intended by the parties. Although the District sought to show some evidence of a past practice of allowing days off without pay, the District's witness was unable to state whether the personal day benefit had even been requested in many of these cases. The only District exhibit that was on point included a letter from the then-employment relations coordinator for the District, settling the Pearl grievance in 1984, and stating that the Monday following the WEAC convention was not considered an extension of a school recess under Article IX. Thus the District's own officials have acknowledged in the past that teachers should be allowed to use personal days in conjunction with the teachers convention.

For all of these reasons, the Association asks that the grievance be granted.

## The Position of the District

The District takes the position that bargaining history and past practice clearly establish that all days on which school is closed are considered to be a "vacation recess" as that term is used in Article IX. A vacation recess is a period during which the school's activities are suspended. This describes what happens when the annual teachers' convention takes place, and it should be considered a vacation recess. The District notes that teachers are free to attend the convention or not, as they choose, and that these four grievants are perfect examples of the freedom teachers have to use the time as a vacation from school.

The District argues that the contract, when read as a whole, plainly prohibits using personal business days in conjunction with any other break from school. Of particular importance are the negotiated calendars, which are separate from the contract document but represent the agreement of the parties on how instructional activities are to be apportioned through the school year. Both parties agree that holidays are marked with a triangle on the calendars, and that this point of reference serves to define the term "holiday .. recess" in the contract. The same is true, the District avers, of the vacation recesses. All of the calendars for the past ten years show days marked with an "X" denoting days when school is not in session for teachers. The break periods around Thanksgiving, Christmas and Easter, which both parties admit are vacation recesses, are designated with a series of "X's". It stands to reason, the District argues, that the other days marked by an "X", including the days of teacher convention, should be treated the same way.

Bargaining history demonstrates that the parties focused on the procedure for securing a personal business day as a matter of right under the contract, rather than specifically discussing which periods were vacation recesses under the language. Association witnesses acknowledged that no direct discussion were had on the meaning of "holiday and vacation recess", but argue that this was because the parties simply assumed that vacation meant only Thanksgiving, Christmas and Easter. Contrary to this assumption, the District suggests that the lack of any discussion on the topic of how to distinguish a vacation recess from other time off shows that the parties did not make any such distinction -- the term was intended to include all time off during the school year. The District also notes that the Association itself, in 1977, proposed to include teachers convention among the "vacation recesses" justifying early release time under Article VIII, §7. The Board rejected the proposal because weather conditions in October did not present the same travel problems for teachers that might be experienced during the other vacation recesses. This exchange demonstrates that both parties viewed the teachers convention as being a vacation recess. While the Association claims that Article VIII contains an exhaustive list of vacation recesses, the Board urges that the language be read as simply a specification of three of those recesses when, as noted above, both parties felt that weather conditions merited an early release from school. This reading is more consistent with bargaining history.

The Association's reliance on the Pearl grievance settlement is totally misplaced and misconstrues that case. The grievant in that case sought to extend the teacher convention vacation

recess and his request was denied. He then explained that the reason was attendance at a fiftieth wedding anniversary celebration in New Orleans. This is precisely the type of pressing personal matter that warrants a discretionary waiver of the limitations in Article IX, which is what the District did in that case. The employee relations coordinator did write that "This leave is not considered an extension of a school recess", but the preceding portion of his memo makes it clear that the District's reason for granting the request was because of the fiftieth wedding anniversary. The Pearl case, understood in context, supports the District's interpretation of Article IX.

The District points out that the whole purpose of the limitation on the use of personal days to extend vacation recess is to avoid unnecessary absence from school and prevent a concentration of personal days on any given day, thus straining the supply of substitute teachers. This rationale applies with equal force to teachers convention as to the other breaks in the school year. Arbitrators have traditionally been strict constructionists when dealing with work requirements around vacations and holidays, and the District urges the arbitrator here to continue in that tradition, lest the central reason for these limitations be lost in the process of carving out exceptions.

For all of the foregoing reasons, the District asks that the grievance be denied.

## DISCUSSION

The issue in this case is whether the phrase "vacation recess" in Article IX encompasses the annual two day teachers' convention. The collective bargaining agreement and the negotiated calendar denote days on which school is not in session, but do not directly define which of these periods are vacation recesses. The term is not unambiguous, in the sense that reasonable arguments may be made in favor of each party's interpretation. The plain language of the contract does, however, tend to support the Association's position on this grievance. The District argues that every non-holiday on which school is not in session is a vacation recess. Each of these days is a recess from school, but the contract does not speak in terms of simply a "recess" or "school recess". The word "vacation" modifies the word "recess" in Article IX, and this strongly suggests that the parties were contemplating a narrower set of days than the all-inclusive meaning urged by the District. "Vacation" carries with it a connotation of some extended period away from work, and is commonly used in connection with those break periods the parties concede as vacations from school -- the Christmas vacation, the Easter vacation and the summer vacation. The two day break for the annual teachers' convention would not, in ordinary usage, be termed a vacation, notwithstanding the fact that these grievants used it for that purpose. 1/

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1/ In this regard the undersigned agrees with the Association's argument that it is the character of the days, rather than the use to which individual teacher puts them, that controls for the purpose of Article IX.

While the language of the contract favors the Association's position, it is not conclusive and the arbitrator has undertaken a review of the various arguments put forward by the parties to buttress their competing interpretations. By and large, the arguments are unsupported by the record evidence.

The Association argues that the contract does define "vacation recess" in Article VIII, where it defines those days on which days a teacher may leave early from school:

On the last school day prior to Thanksgiving, Christmas and Easter vacation recesses, the foregoing sentence shall not be applicable, and the teachers shall be free to depart the building after the last class period for students on such school day....

Nothing in the phrasing of this contract section supports the notion that this is intended to be a comprehensive listing of vacation recesses. If it were, there would be no need for the specification of each recess. The summer vacation recess is not referred to at all in this section. In addition, the parties agree that Thanksgiving is a holiday recess, rather than a vacation recess, for purposes of Article IX. The undisputed evidence of bargaining history shows that the purpose of this section is not to define vacation recesses, but to specify days on which a teacher may leave early because travel conditions may be difficult. For this reason, the undersigned also rejects the District's claim that the Association's attempt in bargaining to add the day before teachers' convention to the list of early release days constitutes an admission that the convention is a vacation recess. Contrary to both parties' arguments, there is simply no evidence that the negotiators ever intended that Article VIII have any bearing on the meaning of "vacation recess".

Both parties also cite past practice as supporting their interpretations. The District introduced evidence of numerous instances in which teachers used unpaid leave rather than personal days in conjunction with the teachers' convention. While the District argues that this proves an understanding on the part of faculty members that the convention is a vacation recess, the Superintendent conceded on cross-examination that he did not know whether these teachers had already used their personal days for the year, and that it would not be uncommon for a teacher to reserve personal days for use at another time during the year. Given this, it is not possible to draw any reliable conclusion from the instances cited by the District.

The Association points to a 1984 letter from Paul Vance, the employee relations coordinator for the District, in which he approved a Personal Day for teachers Gary and Kathleen Pearl on the Monday following the teachers' convention. In the letter, Vance stated that the day off was not considered an extension of a school recess. The Association cites this as evidence that the District did not treat the convention as a recess. Read in its entirety, the Vance memo does not stand for this proposition. In the portion of the memo preceding the cited passage, Vance reviews the compelling personal reasons for the leave and states "Therefore, I am approving a Personal Business day..." A fair reading of the memo makes it clear that the decision was predicated on the

reasons for the leave. A reasonable argument can be made that this case is an example of the discretionary authority of the District to waive the ban on extending recesses under Article IX.

By far the most persuasive argument in favor of the District's position is that the purpose of limiting extensions of recesses via Personal Days is to prevent large numbers of absences on a given day. Allowing the use of Personal Days in conjunction with the teachers' convention would undercut this goal, particularly since the contract contains no limitation on the number of teachers who may use a Personal Day at any one time. However, even the District's interpretation does not address all such days during the school year (the opening of hunting season, and various religious holidays, for example). Moreover, the fact that the District may have had this aim in bargaining does not automatically translate into an assumption that its goal was completely met.

The undersigned does not doubt the sincerity of either party in putting forth its interpretation of the Personal Days language. The exact meaning of the term "vacation recess" was not addressed in bargaining, the contract contains some ambiguity, and the evidence of past contract administration is inconclusive. On balance, however, the common meaning of the word "vacation" in a school setting persuades the undersigned that the parties did not mutually intend a prohibition on the use of Personal Days in conjunction with the annual teachers' convention.

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

#### AWARD

The District violated Article IX, §6 of the contract when it denied the grievants' request to use personal business days for their absence on October 29, 1990.

The appropriate remedy is to direct the District to make the grievants whole, by paying them for a personal business day (assuming that they did not otherwise use the personal day during the balance of the school year) for the unpaid day of leave they used on October 29, 1990.

The undersigned will retain jurisdiction over this matter, solely for the purpose of clarifying the remedy, for a period of thirty days following the issuance of this Award.

Signed this 16th day of November, 1992 at Racine, Wisconsin:

Daniel Nielsen /s/  
Daniel Nielsen, Arbitrator

