

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 NORTHWEST UNITED EDUCATORS : Case 21
 : No. 47428
 and : MA-7265
 :
 UNITY SCHOOL DISTRICT :
 :

Appearances:

Mr. Kenneth J. Berg, Executive Director, Northwest United Educators,
 appearing for the Union.
 Weld, Riley, Prenn & Ricci, Attorneys at Law, by Ms. Kathryn J. Prenn,
 appearing for the District.

ARBITRATION AWARD

Northwest United Educators, herein the Union, and the Unity School District, herein the District, jointly requested the Wisconsin Employment Relations Commission to designate the undersigned as an arbitrator to hear and decide a dispute between the parties. The undersigned was so designated. Hearing in the matter was held in Balsam Lake, Wisconsin on August 17, 1992. No stenographic transcript of the proceeding was made. The parties completed the filing of post-hearing briefs on September 21, 1992.

ISSUE

The parties stipulated to the following issues:

1. Did the District violate the collective bargaining agreement when it deducted one day's pay from the grievant's paycheck for November 1, 1991? If so, what is the appropriate remedy?
2. Was it proper for the payroll deductions to occur in advance of the days off without pay? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE XIV - LEAVES OF ABSENCE

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- C. Personal leave: One day off per year (non-accumulative) shall be available for necessary personal business that cannot be resolved outside the normal school day. A teacher desiring such days shall notify his principal, or the district administrator, at least one (1) working day in advance, of the reason for the request and why it cannot be resolved outside the normal school day. This time shall not be used to extend a weekend or vacation period and shall not be used for non-business matters. Three days per year shall be available for personal leave under the following conditions:
 1) 48 hour notice; 2) substitute available; 3)

cost of substitute be deducted from pay. No more than 20 percent of the teachers in any one building (or five teachers whichever is less) may exercise personal leave days on the same day.

As clarification for Article XIV - Paragraph C, it is understood that one day referred to on line 4 is separate and independent of the three days referred to on line 7. Any employee may opt to take one or more of the three days without having first used the first day. The first day is available under the conditions described within the first 7 lines of the paragraph. The three days are at the employee's discretion except days which clearly constitute gainful employment during the normal contract day.

At the employee's option, the employee may use the fourth personal leave day subject to the conditions prescribed for use of the three days for which the employee pays the cost of the substitute teacher.

ARTICLE XVIII - MEMORANDUM OF AGREEMENT

- A. This agreement, reached as a result of negotiations, represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. It is agreed that this Agreement may not be modified in whole or in part by the parties except by an instrument voluntarily signed by both parties. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control, however, this section shall not be construed to be a waiver of the duty of the employer to bargain the impact of its decision on wages, hours, and conditions of employment.

ARTICLE XXII - CALENDAR

- A. The first and second snow days are not to be made up. The third and beyond are to be made up, exact days for make-up to be negotiated.

ARTICLE XXVII - PAYROLL

- A. Payroll dates shall be the fifth and twentieth of each month.

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BACKGROUND

In September, 1991, the three grievants requested leaves of absence for the week of October 28 through November 1, 1991, to go on a hunting trip. Two of the grievants, Rick Kemis and Elliott Paulsen, requested the use of four paid personal leave days with Friday, November 1, 1991, to be an unpaid leave of absence day. The third grievant, Jon Reiten, requested the use of three paid personal leave days with two unpaid leave of absence days.

The District's teachers are paid on the 5th and 20th of each month on either a 20 or a 24 payroll system. If possible, the District makes payroll deductions for approved leaves in the payroll immediately preceding the date of the leave. When the leaves of absence are not known in advance, the deductions are made in the payroll immediately following the date of the leaves. The deductions for the unpaid leaves of the three grievants were made from their paychecks of October 20, 1991.

On November 1, 1991, the District's schools were closed due to a snow storm. Article XXII of the contract provides that the first and second snow days are not made up. Since the November 1, 1991 school day did not have to be made up, the District's teachers, with the exception of the three grievants, did not lose pay for that day.

The grievants grieved both the loss of pay for November 1, 1991, and the deduction for unpaid leaves of absence in the payroll preceding the leaves.

POSITION OF THE UNION

Although there have been only three similar incidents in the past five years, all three involved the same teacher and were handled the same. In both 1985 and 1989 Cheryl Parkins was on a no-payday when school was cancelled. She did not lose any pay for either occasion. In 1990, Parkins was on a personal leave day on March 8 when school was cancelled. She was not charged for the cost of a substitute teacher although she expected to pay that cost when the leave was granted. The District presented no evidence to show it had handled similar situations in a different manner.

Between 1987 and 1991, there were only four emergency school closing days. Because of such an infrequent occurrence, the three prior incidents involving Parkins are sufficient to establish a practice. The Principal (Gail Becker) who approved Parkins' leaves was an agent of the District and, thus, was able to establish a practice through her actions.

The teachers, who were told not to come to work on the snow day, were free to go where they wanted. Consequently, the fact that the grievants were away from the area on the snowday is not significant.

POSITION OF THE DISTRICT

Paid snowdays are a benefit only for those employes who are otherwise available to work. Each of the three grievants had requested November 1, 1991, as an unpaid leave day. Thus, they were not in the same situation as other employes who were available for work on that date.

The contract does not address the issue of teachers who are in a non-pay status on snowdays. If the arbitrator granted the relief requested by the Union, such an act would add a provision to the contract. The arbitrator does not have the authority to amend the contract.

There is not a binding past practice under which employes, who were on leave on a snowday, have their leave time restored. Parkins stated she could testify with certainty about only one instance (March 8, 1990) when a personal leave day was reinstated due to a snow day. Such a reinstatement was contrary to the directive of the District Administrator, Gary Lilyquist and was done without his knowledge or approval. The Principal who restored Parkins' leave no longer works for the District.

Even if a practice was found to exist, the practice would not be dispositive of the instant case. Parkins was scheduled to use a paid leave on the snowday, as compared to the grievants who were on unpaid leave. The Union failed to present evidence of a prior instance in which an employe was scheduled to be on an unpaid leave, but received pay for a snowday.

DISCUSSION

The only specific prior incidents, of a related nature to the instant case, all involved Cheryl Parkins. In 1985, Parkins was scheduled to take personal leave days with pay on March 1 and 4. Due to a snowstorm on March 4, the airport in Minneapolis, Minnesota was closed. Thus, she was unable to return home until March 5 and missed school on that date. She returned to school on March 6, but did not lose pay for her absence on March 5. She did telephone a secretary on March 4 to inform the District of her absence on March 5, but had no discussion with anyone else concerning pay for March 5. Teachers were allowed four personal leave days under the 1984-85 contract. There were no records produced to show which category of pay Parkins received for March 5.

In 1989, Parkins was scheduled to be gone on personal leave with pay on February 3 and 6. School was cancelled on February 3 due to the weather. Parkins was absent on February 7 also. She was charged for two personal leave days and did not lose any pay. Parkins did testify that she might have called in sick and received sick leave pay for February 7.

In 1990, Parkins was scheduled to be on personal leave with pay on March 8 and 9. School was cancelled on March 8 due to a storm. Parkins was paid for both days, but was charged with taking a personal leave day only on March 9 and not on March 8, the snowday.

Such a background is insufficient to establish the existence of a binding practice, even if one ignores the argument that Parkins received more lenient treatment from a former supervisor than was authorized by the District Administrator. While it is clear that Parkins was paid but not charged with the use of a personal leave day in 1990, the record is unclear as to exactly what happened in 1985 and 1989. Parkins testified that she was charged for two personal leave days and may have used a sick leave day for the third day of her three day absence in February, 1989 when school was cancelled on one of those three days. Similarly, Parkins did not lose any pay in March of 1985 when she returned to school a day later than planned due to a snowstorm. Again, Parkins thought she was charged with using only two personal days for the three days absence, but she did not discuss with anyone how pay for the third day would be recorded or allocated.

The foregoing history fails to exhibit the criteria which generally are relied upon to demonstrate a binding practice to handle situations where an employe is on paid personal leave on a day when schools are closed as a snowday. The incidents involving Parkins do not show a pattern which is either consistent or readily ascertainable over a reasonable period of time. Further, there is no evidence that the alleged practice was clearly enunciated.

The District accurately argues that, even if a binding practice had been found, there is a critical distinction between Parkins and the grievants in this case. In each of the incidents involving Parkins, she was scheduled to be on paid leave on the snowday, while the grievants herein were scheduled for unpaid leave on the snowday. The record fails to provide any examples where an employe was paid for a snowday when the employe had scheduled that day as an unpaid leave of absence.

Consequently, it is concluded that the District did not violate the contract when it deducted one day of pay for November 1, 1991, from the paycheck of each grievant.

As argued by the District, there is no contract language regarding the procedures for making payroll deductions for unpaid leave days. It was the uncontradicted testimony of the District Administrator that, since at least July of 1988, the practice has been to make deductions for unpaid leave and/or for substitute pay from the paycheck immediately preceding the date of absence if possible. Otherwise, the deduction has been made from the check immediately following the absence. There were no examples presented to the contrary.

In the instant case, the deductions were made from the paychecks issued to the grievants on October 20, 1991, which was the pay date immediately preceding the unpaid absences of the grievants, i.e., November 1, 1991 for all three grievants and also October 31 for Reiten. Such a deduction appears to have been consistent with the District's practice.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the District did not violate the collective bargaining agreement when it deducted one day's pay from the grievants' paychecks for November 1, 1991; that it was proper for the payroll deductions to occur in advance of the days off without pay; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin this 15th day of December, 1992.

By _____
Douglas V. Knudson, Arbitrator