IN THE MATTER OF ARBITRATION BETWEEN

AFSCME, Local #456 [Terry Bibeau]

And

Opinion and Award

Independent School District #316, **BMS Case No. 10-PA-1207**

Coleraine, Minnesota

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of AFSCME, Local #456

Sarah Lewerenz, Esq.

Duluth, Minnesota

On behalf of Greeway-Coleraine School District

John Colosimo, Esq.

Virginia, Minnesota

JURISDICTION

In accordance with the Agreement between the Board of Education Greenway Schools (ISD #316) and the American Federation of State, County and Municipal Employees, AFL-CIO, Local Union No. 456, July1, 2007 to June 30, 2009; and under the jurisdiction of the State of Minnesota Bureau of Mediation Services, St. Paul, Minnesota, the above grievance arbitration was submitted to Joseph L. Daly, arbitrator, on November 30, 2010. Post hearing briefs were filed by the parties on January 10, 2011. By letter dated January 12, 2011, Mr. Colosimo objected to an affidavit of attorney James Balmer, which was filed with AFSCME's Post-hearing brief. By e-mail dated January 24, 2011, Ms. Lewerenz objected to a letter received by her client, Terry Bibeau, from Superintendent Mark Adams dated January 17, 2011, informing Mr.

Bibeau "to submit your resignation for purposes of retirement." "If you fail to submit your written resignation within 30 calendar days of the date of this letter, the district will proceed to propose you for termination." On January 25, 2011, the respective advocates and the arbitrator held a conference call to discuss the January 17 "resign or be terminated" letter and the affidavit from Mr. Balmer. This decision was rendered by the arbitrator on February 11, 2011.

ISSUES AT IMPASSE

The Union states the issues as: 1) Did the School District violate the Collective Bargaining Agreement when it unilaterally changed how employees on worker's compensation make-up pay, accrue vacation, sick leave and the amount of longevity they are paid? [Post-hearing Brief of Union at 5]; 2) Is the January 17, 2011, letter from Superintendent Mark Adams to Mr. Bibeau a "blatant attempt to avoid the potential results of [the arbitrator's] award in this matter?" [Union e-mail to Arbitrator Daly dated 1/21/11].

The School District states the issues as: 1) Is the grievance untimely and therefore should not be considered by the arbitrator since it is invalid? [Post-hearing brief of School District at 4]; 2) Whether the collective bargaining agreement mandate that fringe benefits such as sick leave, vacation credits and longevity pay do not continue to accrue annually when the employee is disabled collecting Worker's Compensation Benefits and is unable to work? [Id.]; 3) Whether the Minnesota Worker's Compensation Statute, Minn. Stat. §176.021, Subd. 5, contemplates that employees receiving Worker's Compensation benefits are only entitled to payment for their accumulated benefits at the time of their work related injury and are not entitled to annual accumulation of said benefits. [Id. at 8]; 4) Whether the affidavit of Attorney James Balmer should be rejected by the arbitrator because Mr. Balmer never testified at the arbitration hearing and the School District was denied the opportunity to cross examine him. [e-mail from Mr. Colosimo dated January 12, 2011 to Arbitrator Daly]; 5) Whether the letter of January 17, 2011, to Mr. Bibeau telling him to resign or be terminated, has any relevancy to this arbitration.

POTENTIALLY APPLICABLE CONTRACTUAL PROVISIONS

ARTICLE I
PURPOSE AND AGREEMENT

Section A.

It is the intent and purpose of the parties hereto to set forth herein the basic Agreement covering rates of pay, hours of work, and other conditions of employment to be observed between the parties hereto.

Section B.

The provisions of the Agreement constitute the sole procedure for the processing and settlement of any claim by an employee or the Union of a violation by the Employer of this Agreement. As the representative of the employees, the Union may process grievances through the grievance procedure including arbitration in accordance with this Agreement to adjust or settle the same.

ARTICLE II
RESPONSIBILITIES OF PARTIES
Section A.

Each of the parties of this Agreement hereby acknowledges the rights and responsibilities of the other parties and agrees to discharge its responsibilities under this Agreement.

Section B.

The Employer, including its managerial, supervisory and representatives at all levels, is firmly bound to observe the conditions of this Agreement.

ARTICLE III
RECOGNITION
Section A.

The Employer hereby recognizes Local Union 456 and Minnesota Council 65, American Federation of State, County and Municipal Employees, AFL-CIO, as the exclusive representative for collective bargaining purposes for all employees of Independent School District No. 316, Coleraine, Minnesota, who are public employees within the meaning of Minnesota Statute 179A.03, subd. 14, excluding supervisory, confidential and instructional employees.

Section B.

The Employer shall not enter into any agreement with the employees coming under the jurisdiction of this Agreement, either individually or collectively, which in any way conflicts with the terms and conditions of this Agreement. No discrimination shall be exercised against any employee because of race, creed, sex, color or political belief.

Section C.

The Employer agrees to deduct from the salary of each employee who has signed an authorized payroll deduction card a sum certified by the Secretary of Local 456, which are Union dues of the Union, such deductions to be made from the payroll period ending the second period of each month, and to transmit to the Financial Secretary of Local No. 456 the total amount so deducted, together with a list of names of employees from whose pay deductions were made. Deductions may be terminated by the employee giving thirty days written notice to the Secretary of the Local, after which the Secretary shall notify the Business Office to stop deductions. Fair share deductions shall also be made for those employees who are not Union members.

Fair Share Fee:

In accordance with M.S. 179A.06, subd. 3, as amended, any employee included in the appropriate unit who is not a member of the exclusive representative may be required by the exclusive representative to contribute a fair share fee for services rendered by the exclusive representative. The fair share fee for any employee shall be in an amount equal to the regular membership dues of the exclusive representative, less the cost of benefits financed through the dues and available only to members of the exclusive representative, but in no event shall the fee exceed 856 of the regular membership dues.

The exclusive representative shall provide written notice of the amount of the fair share fee assessment to the Director, the school district, and to each employee to be assessed the fair share fee.

A challenge by an employee or by a person aggrieved by the assessment shall be filed in writing with the Director, the school district, and the exclusive representative within thirty (30) days after receipt of the written notice. All challenges shall specify those portions of the assessment challenged and the reasons therefore, but the burden of proof relating to the amount of the fair share fee shall be on the exclusive representative. The school district shall deduct the fee from the earnings of the employee and transmit the fee to the exclusive representative thirty (30) days after the written notice was provided or, in the event a challenged is filed, the deductions for a fair share fee shall be held in escrow by the school district pending a decision by the Director, PERB or court. Any fair share fee challenged shall not be subject to the grievance procedure.

The exclusive representative hereby warrants and covenants that it will defend, indemnify, and save the school district harmless from any and all actions, suits, claims, damages, judgments and executions or other forms of liability (liquidated or unliquidated) which any person may have or claim to have, now or in the future, arising out of or by reason of the deduction of the fair share fee specified by the exclusive representative as provided herein.

ARTICLE IV
SENIORITY
Section A.

An employee's regular scheduled day shall equal one day of seniority. (i.e., actual days worked, vacation, holidays, paid sick leave, personal business days, bereavement leave days, paid disability, Union days, workers compensation days, sick child care days, snow days, authorized leave of absence not to exceed 5 days).

ARTICLE V
GENERAL PROVISIONS

Section A.

Representatives of the American Federation of State, County and Municipal Employees, AFL-CIO, shall have access to the premises of the Employer at reasonable times and subject to reasonable rules to investigate grievances and other problems with which they are concerned.

Section B.

There shall be no replacement of regularly employed employees by voluntary or relief workers for all school activities, excluding use of technicians who are employees of a for-profit professional artist or performance company; ticket takers and concession stand workers. When such request by outside organizations are made of the school district for the use of buildings, equipment, or transportation vehicles, it shall be the responsibility of the Employer or a delegated authority to make the working assignment, be they an employee of the school district or any other qualified person not employed by the school district.

Section C.

The Employer will erect and maintain a bulletin board of reasonable size to be placed in each one of the district buildings, which bulletin board shall be for the use of the Union to post any notices or documents relating to Union affairs.

Section D.

The Employer and the Union shall work to the end of abolishing all part-time jobs wherever possible.

Section E.

All employees who are scheduled to work in more than one building within an eight (8) hour shift and travel by employee providing his own transportation is authorized, shall received the legal rate for the necessary mileage involved.

Section F.

Whenever an employee of the Employer is selected as a jurist and whenever such employee is required to vacate himself from his regular duty of

service because of jury duty, or is subpoenaed as a witness for I.S.D. #316 court related matters, such employee shall be compensated the difference in each daily wage by the Employer, not to exceed a maximum day's wages, including the compensation received by serving as a jurist.

Subject to all terms and provisions of M.S.A. 192.26, employees who are members of the National Guard, Naval Militia, or any other component of the Militia, or who are members of the Officers Reserve Corps, the Enlisted Reserve Corps, Naval Reserve, Marine Reserve component of the Militia or Naval forces of the United States, shall be entitled to a leave of absence without loss of pay, seniority status, efficiency rating, vacation, sick leave, or other benefits for all time, but not exceeding 15 days in any calendar year, when engaged with such organization or component in training or active service ordered or authorized by proper authority pursuant to law.

Corps, Naval Reserve, Marine Reserve component of the Militia or Naval forces of the United States, shall be entitled to a leave of absence without loss of pay, seniority status, efficiency rating, vacation, sick leave, or other benefits for all time, but not exceeding 15 days in any calendar year, when engaged with such organization or component in training or active service ordered or authorized by proper authority pursuant to law.

Section G.

Except for the management rights reserved in Article VI, Section A, all matters not covered by this Agreement shall be negotiated between the Board of Education and the Union.

Section H.

No employee shall engage in Union activities during the time he/she is on duty, except that members of the Union's negotiating committee or its special consultants, not to exceed five (5) in a number, shall, upon proper application, be excused without loss of pay for working time spent in negotiation sessions with the Board or its representatives. No employee shall use school facilities for union activities during the school day, nor shall any employees use school facilities for planning or engaging in strike activities or union activities which are adverse to the school district's operation.

Section I.

In the event a general layoff is contemplated, the Employer shall advise the Union, employees, or their known representative, to discuss the problem with them before any action is taken.

Section J.

Whenever employees report to duty and due to inclement weather school is closed, employees shall be excused from work for the day, or any part or fraction of a day, and shall not be required to make up work time for such excused periods. Whenever employees are unable to report to work because of inclement weather, they shall not be required to make up work time for such excused day

when school is closed. If inclement weather occurs during a regular scheduled vacation period (Christmas, Easter, etc.), the time off is to be made up.

Section K.

Employees may be granted a leave of absence. Authorized leave to be determined by supervisor if a suitable replacement can be found.

Section L.

Personnel Files. An employee shall be entitled to review evaluation reports, disciplinary notices or records, and attendance records contained in the School's personnel file during reasonable times and in the presence of a representative of the School District, and the Union at the request of the employee. An employee shall be granted, upon their request, the first copy of items placed in their personnel file records and/or copies relative to a grievance related matter, at no cost to the employee.

Copies other than those regarding a grievance related matter or those granted in addition to the initial copy may be charged at cost to the employee.

Section M.

Fiscal Concerns Committee. In the interest of providing a vehicle by which the employees and the Employer can work together to better address fiscal expenditures within the School District, as a joint effort,

The Employer agrees to establish and activate a fiscal concerns committee consisting of equal representation of the Employer and the Union, of not less than two (2) members each. Such committee shall become active no later than June 1, 1992.

The committee shall review requests for School District expenditures and thereafter make recommendations to the School Board regarding any expenditures to be made as a result of such requests.

Section N.

Employees required to possess a boiler license or commercial passenger Class B State school bus endorsement license shall be reimbursed 100% by the employer for required license fees.

Section O. Drug and Alcohol Testing Policy

The parties agree to adopt the District Drug and Alcohol Testing Policy as an attachment to and extension of the Collective Bargaining Agreement.

The provisions of this Policy are intended to comply with the Omnibus Transportation Employee Testing Act of 1991, Minnesota State Statutes, and relevant
Department of Transportation regulations.

Accordingly, violations of said policy shall be subject to the grievance and arbitration procedure as set forth in the parties Collective Bargaining Agreement.

Section P. Comparable Worth/Job Evaluation Committee

The parties agree to establish a Comparable Worth/Job Evaluation Committee, to be comprised of equal representation by the employer and the Union, Union to select its representatives to serve on such committee.

The Committee shall be charged with reviewing and evaluating AFSCME Local #456 job classifications. The Committee shall evaluate and assign points values to newly created position whenever such are established and with re-evaluting existing positions whenever the job duties of a classification are amended to add additional job skills, training and/or educational requirements or other factors which are likely to increase the point values of such classification. The parties agree to implement said Committee no later than two (2) months after the conclusion of these negotiations. The Committee shall begin by reviewing existing job classifications.

Job classifications which have significantly changed shall be updated to reflect the employee's job duties, knowledge requirements (i.e., education, on-the-job training, etc.) and responsibilities, and the same shall be submitted to the hob evaluation process.

The Committee shall review any new job and determine its proper job classification. Jobs that have significantly changed will be reviewed by the Joint Job Classification Committee.

Should such determination show the position as rated higher than currently rated, any affected employee shall be paid the new rate commencing with the beginning of the immediately following pay period.

If a position is devalued, the incumbent or new employee will be red-circled until such time as such employee qualifies for the next step increase.

Requests for jobs to be re0-evaluated by either management or the bargaining unit shall include specific justification for the review.

The job evaluations shall be completed using the State Job Match for Schools, or an equivalency.

Section Q.

Should the School District enter into a collaborative agreement with other school districts in Itasca County, all School District employees who were employed by the School District prior to January 1, 2005, will have their seniority protected as well as their salary and benefits.

Section R.

The School District shall not contract out unit work through June 30, 2006.

ARTICLE XI
VACATION
Section G. Vacation Accrual During Income Disability Leave.

Employees who are on leave of absence due to medical disability other than a work-related disability and are receiving the income disability insurance benefits shall continue to accrue seniority and vacation benefits during and up to the end of 60 working days of said leave. An employee who continues on said leave of absence for more than 60 working days shall continue to accrue seniority after said time, but shall not accrue added vacation time.

ARTICLE XII
SICK LEAVE
Section E.

If an employee of the School District shall receive a compensable injury and have accrued benefits under either sick leave or vacation plan, the School District shall pay the difference between the compensation received by the employee and his regular monthly pay rate, same to be deducted from the said accrued vacation or sick leave benefits; the employer will provide payments described in this Section during the period of disability. It is understood that the additional payments made to the employee over and above that paid by Workmen's Compensation shall not exceed the amount of credits which an employee is entitled to from such accrued or sick leave benefits.

Section F.

No sick leave credit will be accrued while an employee is away from work due to an authorized leave of absence, sickness or disability.

Section H.

All employees who have used all of the accumulated sick leave days at that time shall be granted any vacation credits on an even pro-rated amount on a period of less that one year. After an employee has exhausted his/her accumulated sick leave days, he/she shall continue on the group long term disability insurance provided by the Employer. He/she shall continue to hold employee status with the Employer as long as he/she is actively covered by any one of the above areas of coverage.

Section J.

If an employee becomes disabled or dies while employed for the District, any unused portion of the employee's accrued sick leave shall be used to pay for the employees' dependents hospital/medical insurance premiums until the employee's sick leave fund is exhausted, providing the employee was enrolled

under the dependent coverage insurance prior to his/her death. In the event a deceased employee's spouse remarries, the aforementioned benefits shall cease.

ARTICLE XXII
FAIR PRACTICE

It is the policy of the Board of Education of Independent School District No. 316 to comply with federal and state law prohibiting discrimination and all requirements imposed by or pursuant to regulations issued thereto, to the end that no person shall, on the grounds of race, color, national origin, creed, religion, sex, marital status with regard to public assistance, age, or disability be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any educational program or activity operated by the District for which it receives federal financial assistance.

POTENTIALLY APPLICABLE MINNESOTA STATUTES

Minnesota Statutes § 176.021, Subd. 5. Accumulated credits, additional payments. If employees of the state or a county, city or other political subdivision of the state who are entitled to the benefits of the worker's compensation law have, at the time of compensable injury accumulated credits under a vacation, sick leave or overtime plan or system maintained by the governmental agency by which they are employed, the appointing authority may provide for the payment of additional benefits to such employees from their accumulated vacation, sick leave or overtime credits. Such additional payments to an employee may not exceed the amount of the total sick leave, vacation or overtime credits accumulated by the employee and shall not result in the payment of a total weekly rate of compensation that exceeds the weekly wage of the employee. Such additional payments to any employee shall be charged against the sick leave, vacation and overtime credits accumulated by such employee.

FINDINGS OF FACT

1. The parties stipulated certain facts.

   The stipulated facts are:

   A. A long time Greenway-Coleraine employee and AFSCME member, Hal Leasure, would have testified that he had, from September 2000-January 2001, received worker's compensation make-up pay.

   B. Mr. Leasure would have testified he had accrued vacation and sick leave and received longevity as if he was a full-time employee during the time he received worker's compensation make-up pay. The employer agreed that it had no ability to refute Mr. Leasure's testimony.

C. The grievant, Terry Bibeau, is a long-time employee of Greenway-Coleraine who is now totally physically disabled, not able to return to work with the district and is now receiving Social Security disability payments.

D. Mr. Bibeau received Worker's Compensation make-up pay in April 2008 for an injury not related to the instant manner. He also received Workers' Compensation make-up pay at that time. Additionally, as vacation and sick leave accrual pay records show, he continued to receive vacation, sick leave accrual and longevity as if he were a full-time employee during that time.

E. Mr. Bibeau injured his shoulder on the job on March 19, 2009. That injury was serious enough that he had to have surgery to replace the shoulder joint. After he was injured, Mr. Bibeau initially accumulated vacation and sick leave at the full-time rate and received his full longevity pay. Because of the way vacation accrual is recorded, the initial rate of accrual for the 2009 injury does not show up in the documents of the School District; but the parties agree that Mr. Bibeau initially would have been awarded vacation at the full-time rate.

F. At approximately the same time that Mr. Bibeau was out of work due to his shoulder injury and receiving Workers' Compensation and Workers' Compensation make-up pay from the District, School District employee and AFSCME member Brian Hongo was also out on Workers' Compensation and Workers' Compensation make-up pay. Mr. Hongo was injured in early April 2009 and also received vacation, sick leave accrual and longevity pay as if he was a full-time employee.

G. Sometime after July 1, 2009, the School District decided to award vacation and sick leave accrued by employees on Worker's Compensation make-up pay as if the employees were one-third part-time employees since the District was only paying the one-third make-up pay. It is not possible to determine exactly when the district retroactively made the unilateral change in the accrual rates. But Mr. Bibeau's sick leave accrual records for July 2009, printed on March 27, 2010, show that a change was made to his sick leave accrual.

2. Terry Bibeau, was employed by Independent School District #316 in the capacity of a mechanic/bus driver. Prior to the injury of March 19, 2009, Mr. Bibeau was also injured on the

job in 2008 and received Workers' Compensation benefits for approximately three weeks. During that three-week period, Mr. Bibeau received sick leave, vacation accrual and accrued longevity benefits as a full-time employee.

3. Mr. Bibeau's March 19, 2009, injury required surgery to replace the shoulder joint. As a result of this particular injury and surgery, Mr. Bibeau is permanently totally disabled and is now receiving Social Security Disability income. Mr. Bibeau concedes that he will never be able to return to work at Independent School District #316.

4. Since March 19, 2009, Mr. Bibeau has been collecting Worker's Compensation payments from the Workers Compensation Insurance Fund equivalent to approximately two-thirds of his salary. He also received one-third from make-up pay from the School District From March 19, 2009 through July 1, 2009, Mr. Bibeau continued to accrue full sick leave, vacation credits and was paid longevity pay as a full-time employee.

5. On July 1, 2009, Independent School District #316 hired Mark Adams as its superintendent. After Superintendent Adams and his new business manager, Mark Case, were hired, they discovered that the book-keeping at the School District "had not been up to par." [Testimony of Superintendant Adams].

6. Upon examining the books, Mr. Adams and Mr. Case determined that, in their opinions, the School District was erroneously allowing Mr. Bibeau's sick leave and vacation leave to fully accrue as a full-time employee. Further, Mr. Bibeau was also being compensated for longevity pay as a full-time employee. Superintendent Adams testified at the arbitration hearing that two former superintendents of the School Districts told him that they did not authorize the full accrual of Mr. Bibeau's sick leave, vacation credits or longevity benefits. They did not know how such full accrual occurred. Superintendent Adams testified that he examined the School District's records and did not find any Board minutes or Board resolutions authorizing the full accrual of these benefits. The book-keeper/payroll clerk who handled such matters is no longer working for the School District.

7. Superintendent Adams testified at the arbitration hearing that he did not know why Mr. Bibeau , Mr. Leasure and Mr. Hongo had been given full accrual of their sick leave, vacation credits and longevity benefits when they were receiving Workers Compensation payments, but most likely the bookkeeper/payroll had erroneously credited these benefits without authorization. Superintendent Adams further testified that after the School District realized the error, the School District pro-rated those items to one-third of their full amounts, i.e. proportionate to the amount the School District was paying to make up the difference in Mr. Bibeau's salary. According to the testimony of Superintendent Adams, Mr. Bibeau was receiving two-thirds of his salary from Workers' Compensation Insurance and one-third of his salary from the School District in the form of pro-rated sick leave, vacation credits and longevity benefits. From the perspective of Superintendent Adams, Mr. Bibeau was being fully compensated at his customary salary and benefits amount, yet not performing any work for the School District; nor would he ever return to his job with the District.

8. Superintendent Adams and Mr. Case also testified that they have since been advised by the School District attorney that it may have been improper to compensate Mr. Bibeau for the pro-rated one-third of his accrued sick leave, vacation credits and longevity benefits since that may have been more compensation than was proper. [Post-hearing brief of School District at 3].

9. Mr. Bibeau filed a grievance on January 21, 2010 stating in applicable part:

> Employer has pro-rated longevity benefit payment, intends to pro-rate sick leave & vacation leave accruals. Violations inclusive of but not limited to: Past Practice, Transportation Effects Bargaining Agreement, School Board Meeting of April 29, 2009, Article I, Article II (Section A & B), Article III, Article V, Article XI (Section G) Article XII (Section H) & Article XXIII. [Union exhibit page 50].

10. The basic arguments of the Union are:

    A. The School District violated the Collective Bargaining Agreement when it unilaterally changed how employees Worker's Compensation make-up pay accrued vacation and sick leave and the amount of longevity they were paid.

    B. The Collective Bargaining Agreement makes clear that employees on Worker's Compensation make-up pay shall be considered the same as regular full-time employees.

C. “Employees” are entitled to the benefits of the Collective Bargaining Agreement.

D. The past practice regarding Worker’s Compensation make-up pay is clear and consistent and supports the union’s position that employees on worker’s compensation make-up pay are entitled to accrue vacation, sick leave and receive longevity as full-time employees.

E. The state’s Worker’s Compensation law does not prohibit the continued accrual of vacation and sick leave by an employee collecting worker’s compensation.

F. The contract language bases longevity pay not on an employee’s current hours, but on the hours worked after 15 years of service. [See generally Post-hearing brief of union pages 1-12].

For a remedy the union asks that Mr. Bibeau be awarded the sick leave, vacation accrual and longevity pay he would have received had he been properly paid throughout 2009 and 2010 and into the future. [Id. at 18]. The Union also asks that, because of the continuing difficult relationship between the parties, the arbitrator retain jurisdiction to ensure the award is properly implemented.

11. The basic arguments of the School District are:

A. The grievance is untimely and should not be considered by the arbitrator since Mr. Bibeau did not submit a written grievance to the School District until January 21, 2010 while the School District began to pro-rate Mr. Bibeau’s benefit accrual in July of 2009. Therefore Mr. Bibeau’s grievance was not submitted within 14 days of the pro-rating of his benefits.

B. The terms of the Collective Bargaining Agreement govern this matter and these terms unambiguously mandate that fringe benefits such as sick leave, vacation credits and longevity pay do not continue to accrue annually when an employee is disabled, collecting worker’s compensation benefits, and is unable to work. The School District cites Article XII, Section E, Article XII, Section F, Article XI, Section A, Article XI, Section G, Article X, Section A, Article IV, Section A, Article XV, Section A. The School District also cites Minn. Stat. §176.021, Subd. 5 arguing that the statute “does not require the School District to pay any vacation, sick leave, or overtime benefits for people who are receiving worker’s compensation benefits. The

statute says 'the appointing authority may provide for the payment of additional benefits to such employees from their accumulated vacation, sick leave or overtime credits'" [Post-hearing brief of School District at 9]. "The payment of said benefits is optional and is indicated by the work 'may' instead of 'must'." [Id.].

C. The erroneous and unauthorized payment of fringe benefits to School District employees while they are collecting Worker's Compensation benefits and are unable to work does not create a past practice requiring the continued payment of such benefits. [Id. At 10] In fact, argues the School District, "the CBA…unambiguously sets forth that employees such as Mr. Bibeau who are disabled and cannot work do not continue to accrue benefits such as sick leave, vacation credits or longevity pay, so there is no need for this arbitrator to even consider past practice. Because the conduct of allowing employees' benefits to accrue while they are not working and were collecting worker's compensation was not assented to by the School District and was a mistake by the bookkeeper/payroll clerk, there has not been a mutually established rule. Therefore there can be no past practice. Just because something may have happened in the past does not make it a 'past practice'". [Id. At 12].

DECISION AND RATIONALE

These basic facts are clear: 1) As of November 30, 2010, the date of the Arbitration hearing, Mr. Bibeau is not able to return to his job with the District; 2) Mr. Bibeau is now receiving Social Security Disability payments. He was granted Social Security Disability payments before the arbitration hearing. From March 19, 2009 through July 1, 2009, Mr. Bibeau received from the School District a one-third make-up payment toward his salary; and continued to accrue full sick leave, vacation credits, and longevity pay as a full-time employee.

When Superintendent Mark Adams took over on July 1, 2009, he and his new business manager, Mark Case, discovered that the bookkeeping at the School District "had not been up to par." Upon examining the books, they agreed that the School District was "erroneously" allowing Mr. Bibeau's sick leave, vacation and longevity to accrue as a full-time employee, even though he was receiving two-thirds of his pay through Workers Compensation insurance and only one-third of his pay from the School District. In their judgment he was not a full-time employee at that time. Consequently, they decided that he could not fully accrue sick leave,

vacation and longevity since he was only being paid one-third of his salary by the School District and had not returned to his job and likely would not be returning to his job. They did not find any Board minutes or Board resolutions authorizing full accrual of these benefits. It was their judgment that the bookkeeper/payroll clerk who had handled such matters and was no longer employed by the School District had erroneously allowed Mr. Bibeau to accrue vacation, sick leave and longevity as though he were a full-time employee.

Mr. Bibeau will not ever return to his job with the District and is presently pursuing a Workers' Compensation claim for a permanent injury. He is presently receiving Social Security Disability. After Superintendent Adams and Mr. Case "realized the error, the School District prorated those items to one-third of their full amounts, proportionate to the amount the School District was paying to make-up the difference in Mr. Bibeau's salary." [See Finding of Fact #7]. Superintendent Adams testified that, from his perspective, Mr. Bibeau was being fully compensated at his customary salary and benefits amount, yet not performing any work for the School District. Further, as of November 30, 2010, the date of the Arbitration hearing, Superintendant Adams now knows that Mr. Bibeau will never return to his job with the District.

Superintendent Adams sought an opinion from the School District's attorney and was advised that since Mr. Bibeau was never going to return to work for the School District he should resign or be terminated. As a consequence, after the arbitration hearing, but prior to this arbitration decision, the School District sent a letter to Mr. Bibeau dated January 17 telling Mr. Bibeau to resign or be terminated.

The Union's position is that the School District has violated the Collective Bargaining Agreement by unilaterally changing from past practice how employees who are receiving Worker's Compensation make-up pay can accrue vacation, sick leave and longevity. The Union points out that two other employees who had been out on work related injuries received make-up pay, and full accrual of vacation, sick leave and longevity. The School District says this was a mistake and does not establish a past practice. The School District points out that there are no Board minutes or Board resolutions authorizing the full payment of such benefits while a worker is out on Worker's Compensation injury leave. The School District contends that the terms of the Collective Bargaining Agreement "unambiguously mandate that fringe benefits such as sick leave, vacation credits and longevity pay do not continue to accrue annually when an employee is disabled, collecting [W]orker's [C]ompensation benefits, and is unable to work." The School

District cites Article XII, Section E, Article XII, Section F, Article XI, Section A, Article XI, Section G, Article X, Section A, Article VI, Section A, Article XV, Section A. The School District also cites Minn. State §176.071, Subd. 5 which makes the payment of vacation, sick leave or overtime benefits to people who are receiving worker's compensation benefits "optional." [See Finding of Fact #11B].

Mr. Bibeau has declared by stipulated fact that he "is now totally physically disabled, not able to return to work with the District and is now receiving Social Security Disability payments." [See Finding of Fact #1C]. Consequently, as a matter of stipulated fact, at least as of November 30, 2010, the date of the arbitration hearing, Mr. Bibeau admits that he can no longer be an employee of the District. The Affidavit of Mr. Balmer is accepted as evidence in the Arbitration case.

Past practice cannot be established when an error has occurred due to "below par" bookkeeping. Nothing in the contract can be interpreted to permit Mr. Bibeau --who is never going to return to his job with the School District; who has filed for and been granted Social Security Disability payments; and who has a Worker's Compensation lawsuit pending -- to accrue certain benefits "ad infinitum." Mr. Bibeau admittedly is unable to return to his job with the School District. The reason for Worker's Compensation disability benefits and Social Security Disability benefits is to provide a safety net for workers who are injured on the job and/or are disabled and can no longer work. The School District is not required to continue employing and paying salary and benefits "ad infinitum." A mistake by a bookkeeper/payroll clerk, with no assent by the School District/School Board, cannot establish a past practice. Simply because an erroneous, unapproved action occurred several times in the past does not make it a past practice.

The School District alleges that since Mr. Bibeau did not submit a written grievance to the School District fourteen days after the prorating of his benefits began then his case is not arbitrable. However, each and every time Mr. Bibeau's benefits were prorated gave him an opportunity to file a grievance. He had a continuing grievance. Therefore, the School District's contention that the grievance was not submitted within fourteen days of the first prorating of his benefits is rejected.

However the substance of the School District argument is compelling. Perhaps the moment Mr. Bibeau was no longer an employee of the District was when he was told by his

doctor that he could never go back to work for the School District because of his injury; or when he filed for and received Social Security Disability benefits; or when he sought Worker's Compensation alleging he that because of the injury he was not able to return to his job. Perhaps for all those reasons he then was no longer an employee. And perhaps the School District should have offered Mr. Bibeau to "resign or be terminated" when any of those occasions occurred. But the School District has now done so after the Arbitration hearing.

It is held that Mr. Bibeau cannot claim more than the one-third benefits the School District has paid to him since July 1, 2009. Premised on the above analysis, Mr. Bibeau may even owe the School District since he was receiving one-third accrued benefits and one-third make-up pay even though it was clear he was never coming back to be in the employ of the School District. But since many of the mistakes were because of the School District's "sub par" bookkeeping and "erroneous payments" by the bookkeeper/payroll clerk, equity does not permit the School District to recoup those erroneous payments. But as of the date Mr. Bibeau is required to "resign or be terminated" [See January 17, 2011 letter from Superintendent Mark Adams to Mr. Bibeau] the School District is no longer required to accrue any benefits. Because on that day there is no doubt that Mr. Bibeau is no longer an employee of the School District. This Collective Bargaining Agreement does not require paying a former employee any salary or benefits. It is clear that the Collective Bargaining Agreement assumes that the employee out on Workers Compensation due to an injury suffered at his job will be eventually returning to his job. The facts are clear in this case that Mr. Bibeau will never be returning to his job.

The grievance by the Union and Mr. Bibeau is denied. It is specifically held that nothing in the Collective Bargaining Agreement between AFSCME Local #456 and Independent School District #316 requires the School District to continue paying Mr. Bibeau past his resignation or termination date and nothing requires the School District to accrue benefits past his resignation or termination date. The School District, as a matter of equity, will have no claim on the erroneous payments and accruals it made to Mr. Bibeau up to the date of his resignation or termination.

February 11, 2011

Date

Joseph L. Daly
Arbitrator