



the School District argues that these same sources authorize it to deny leave requests based on operational considerations. The grievances proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits. At the hearing, the parties voluntarily waived the 30-day deadline specified in the parties' collective bargaining agreement for an arbitrator's decision.

## **ISSUES**

Did the Employer violate the parties' collective bargaining agreement when it denied the leave requests of Michael McKenzie and Dean Shawbold? If so, what is the appropriate remedy?

## **RELEVANT CONTRACT LANGUAGE**

### **ARTICLE XII**

#### **LEAVES OF ABSENCE**

Section 1, Subd. 5: Teachers may use up to two (2) personal days per school year for individual reasons. This day or these days will be deducted from the teacher's accumulated leave account. Days to be requested must be submitted in writing, for prior approval, to the Human Resources Office at least five (5) working days in advance unless a unique situation occurs. Personal days cannot be transferred to the next Agreement or another school year.

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Section 3. Discretionary Days: Teachers will be granted five (5) discretionary days per contract period for individual reasons. Daily deductions will be at the current salary (exclusive of TRA and FICA) rates for reserve teachers for full and half days. Days to be requested must be submitted in writing to the Human Resources Office at least five (5) working days in advance unless a unique situation occurs. Discretionary days can be transferred to the next Agreement and accumulated up to a maximum of ten (10) discretionary days all of which can be used in one school year.

## **FACTUAL BACKGROUND**

In December 2010, Dr. Michael McKenzie requested to take five days of leave from January 10, 2011 to January 14, 2011. His request was to take two of those days as personal leave and three of those days as discretionary leave. Under the parties' agreement, personal leave days are with pay, while teachers must reimburse the School District for the cost of hiring a substitute teacher to cover discretionary leave days. McKenzie testified that he had made a similar request on six prior occasions, and that the School District had approved each of those requests. On this occasion, however, the School District denied McKenzie's leave request. In his third step response to the grievance challenging this decision, Superintendent Michael Lovett took the position that a five-day absence close to the end of the first semester was not in the best interests of the students.

Dean Shawbold, on January 11, 2011, requested to take four discretionary days of leave in February 2011 which he intended to use for a family trip. The School District had approved twelve similar requests by Shawbold in the past. This time, however, the School District did not approve the four-day request, but instead approved a shorter one day leave. Director of Human Resources Chris Picha testified that Shawbold's supervisor felt that the length of the leave requested was not in the best interests of his students.

The pertinent contract provisions relating to discretionary and personal leave have evolved over time. The agreement, beginning in 1983, first authorized employees to take up to five days of discretionary leave. The contract language also required teachers to submit their request at least five days prior to the beginning of the desired leave period.

The 1997-99 contract additionally provided that teachers could take two “personal leave” days during the same contract period. This benefit was added at the same time that the School District added three instructional days to the school calendar.

The 1999-2001 contract added the requirement that personal leave requests must be submitted “for prior approval” at least five working days in advance. Elsa Pope, the School District’s former Director of Human Resources from 1987 to 2009, testified that the School District sought this change because a number of teachers believed that they did not need prior approval in order to take personal leave days. Pope testified that the School District did not seek to add similar language to the contract provision governing discretionary leave because teachers already understood that prior approval was needed for discretionary leave requests.

The 2001-03 collective bargaining agreement additionally altered both the personal leave and discretionary leave provisions by substituting the language “days to be requested” for the former language of “days to be taken.” As a result, employees are required to submit leave requests in writing at least five days in advance of the desired leave commencement.

The 2007-09 agreement adopted an amendment providing that teachers could carry over up to five discretionary days to the next contract period and that up to ten discretionary days could be used in one school year.

Both parties assert the existence of a past practice concerning the interpretation and application of this contract language. Pope testified that she denied approximately five discretionary day requests and between three and five personal day requests each year during the 22 years in which she served as Director of Human Resources. This general practice was corroborated by Assistant Superintendent David Law who testified that he denied requests for

discretionary leave and personal leave during his tenure (2007-10) as a principal in the School District.

Pope testified that when she received leave requests from too many teachers for the same day, her practice was to call the teachers requesting leave and discuss the possibility of scheduling the leave for a different time period. She testified that she generally denied a leave request only in situations where she could not get a sufficient number of volunteers to modify their requests.

The School District submitted evidence showing that it granted the vast majority of leave requests. This evidence shows that the School District granted 96.7% of all discretionary day leave requests submitted during the 2010-11 school year, with the result that it denied only eight days of requested discretionary leave. During that same year, the School District granted 99.4% of all personal leave requests, with only five days being denied.

At the arbitration hearing, Picha testified that she denied McKenzie's leave request because she was concerned about the possible lack of substitute teachers during the requested January 10-14, 2011 leave period. Picha testified that she generally encounters difficulties finding a sufficient number of substitutes whenever more than 50 teachers are absent on a school day. She testified that an average of 6% of the School District's 545 teachers, or 33 in total, are absent on any given school day. She further pointed out that 39 teachers were scheduled for professional development activities for Wednesday, January 13 resulting in a projected total of 72 teachers absent from the classroom on that day. She also testified that it was more difficult to find substitute teachers during the one or two weeks before and after winter break.

Superintendent Lovett offered a somewhat different explanation in denying McKenzie's grievance at step 3 of the grievance procedure. In his written response, Lovett stated:

The School District has an established past practice of denying requested leave when the leave request is not in the best interests of the students. Based on a review of current and past practices, the following are standards the School District uses in making decisions on whether to approve or deny leave requests:

- a) Reason for the request,
- b) Attendance of the employee making the request including the record of previous leaves;
- c) Length of time requested by the employees;
- d) The day or days in a school calendar requested by the employees;
- e) The number of other requests which have been made by other staff members, including the total number of which have previously been approved for that date;
- f) The number of licensed substitute teachers available on that day;
- g) The consequences of employee absences on that day or days for student and educational programs; and
- h) Other factors pertaining to the educational program.

Superintendent Lovett concluded his written response by stating, “the above standards were applied to your requested leave and your leave was properly denied.”

With respect to Shawbold’s February 14-18 leave request, Picha testified that a half-time teacher such as Shawbold is only entitled to one-half of the discretionary days authorized by the parties’ agreement, which she suggested amounts to two and one-half days during the two-year contract period. The Union, on the other hand, points out that Shawbold only requested leave from his half-time schedule during the four days in question.

The Union, in its post-hearing brief, attempted to rebut much of the past practice described by Superintendent Lovett. The Union’s brief presented data from the 2010-11 school year that purports to show that the School District generally did not rely on the following bases to deny individual leave requests:

- Conflicts with staff development days;
- Days adjacent to breaks;
- The first and last weeks of a semester;
- The asserted reason for desiring leave; and
- The employee's attendance record.

The Union also submitted evidence concerning the School District's negotiation proposal during the current round of negotiations with respect to employee leave requests. This proposal, which is still under consideration, includes amending Article 12 to provide for the following:

- A limit on the number of teachers taking personal or discretionary leave in a building equivalent to ten percent of the teacher population in that building;
- A prohibition of the use of personal or discretionary leave during the first and last weeks of the school year;
- A prohibition on the use of personal or discretionary leave on the days prior to and after winter and spring break; and
- An explicit grant of discretion to the district to deny personal and discretionary leave requests.

## **POSITIONS OF THE PARTIES**

### **Union**

The Union contends that the School District violated the parties' collective bargaining agreement by denying leave requests made by McKenzie and Shawbold. The Union maintains that the plain language of Article 12, Section 5 requires the School District to grant discretionary leave time upon request. In addition, the Union asserts that the School District's past practice has been to grant virtually all requests for either personal or discretionary leave. In this respect, the Union points out that the School District has granted the exact same request as made by each of the grievants on numerous prior occasions. The Union argues that the School District,

contrary to its current position, did not have a past practice of limiting leaves due to considerations involving conflicts with staff development days, days adjacent to breaks, the first and last weeks of a semester, or the employee's attendance record. Finally, the Union contends that the School District, in light of its position in current contract negotiations, is seeking to obtain in arbitration what it has not been able to achieve in negotiations.

### **School District**

The School District maintains that its denial of the McKenzie and Shawbold leave requests was consistent with both the terms of the parties' agreement and with the parties' past practice. The School District, first of all, points to the contract language adopted in 1999 explicitly providing that requests for personal days must be submitted for prior approval. The School District asserts that similar language was not adopted with respect to discretionary day requests because everyone already understood that School District approval was needed for such requests. The School District also contends that a binding past practice supports the School District's ability to deny teacher leave requests on the basis of operational needs. The School District further argues that it had valid operational bases to deny the leave requests submitted by McKenzie and Shawbold in this instance.

## **DISCUSSION AND OPINION**

### **The Contract Language**

The plain language of the parties' collective bargaining agreement provides the starting point in any contract interpretation dispute. In this respect, Article XII provides as follows:

Section 1, Subd. 5: Teachers may use up to two (2) personal days per school year for individual reasons. This day or these days will be deducted from the teacher's accumulated leave account. Days to be requested must be submitted in writing, for prior approval, to the Human Resources Office at least five (5) working days in advance unless

a unique situation occurs. Personal days cannot be transferred to the next Agreement or another school year.

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Section 3. Discretionary Days: Teachers will be granted five (5) discretionary days per contract period for individual reasons. Daily deductions will be at the current salary (exclusive of TRA and FICA) rates for reserve teachers for full and half days. Days to be requested must be submitted in writing to the Human Resources Office at least five (5) working days in advance unless a unique situation occurs. Discretionary days can be transferred to the next Agreement and accumulated up to a maximum of ten (10) discretionary days all of which can be used in one school year.

At least three portions of these provisions appear to be relevant to this dispute. First, both sections state that leave days are “to be requested” which implies that such a request may be denied. Second, and more explicitly, Section 1 states that a request for personal leave is subject to “prior approval.” Conversely, the absence of the “prior approval” language in Section 3 suggests that teachers may be entitled to use discretionary leave without first having to obtain such “prior approval.”

### **Past Practice**

It is well-recognized that a clear and well-established course of past practice may provide significant guidance in interpreting the terms of a collective bargaining agreement. A “past practice” arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. Richard Mittenenthal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 605-30 (6th ed. 2003).

In this case, both parties assert the existence of a past practice that supports their respective positions. The Union maintains that the School District’s longstanding practice has been to approve virtually all leave requests. In particular, the Union points out that the two

grievants have had numerous leave requests that in previous years have been approved that are identical in scope to the leave requests which were denied for 2011.

The School District claims a much different past practice. The School District contends that a past practice exists of denying leaves that interfere with basic operational needs.

According to Superintendent Lovett, these operational needs encompass a broad array of factors such as the reason for the leave, the length of the leave, conflicts with staff development days, days adjacent to breaks, the first and last weeks of a semester, the availability of substitute teachers, and the teacher's overall attendance record.

The actual past practice of the parties lies somewhere in between these two extremes and is best encapsulated by the testimony of Elsa Pope who served as the School District's Director of Human Resources for 22 years. She testified that she routinely reviewed leave requests for approval and that she denied approximately five discretionary leave requests and between three and five personal leave requests each year. Pope indicated that the School District's principal concern was to ensure sufficient daily coverage of teaching assignments. Pope stated that when she received leave requests from too many teachers for the same day, her practice was to call the teachers requesting leave and discuss the possibility of changing the leave to a different time period. She testified that she generally denied a leave request only in situations where there were not a sufficient number of substitutes available to cover classes. On cross examination, Pope acknowledged that she did not have a blanket policy of denying leave requests based upon the reason, timing, or length of a leave request.

In a nutshell, the relevant past practice can be summarized as follows: 1) the School District granted the vast majority of leave requests; but 2) exercised discretion to deny those leave requests for which adequate teaching coverage was jeopardized due to the number of leave

requests and the availability of substitutes; and 3) other factors were not used as a basis to deny leave requests except to the extent that they related to the adequacy of class coverage.

### **The Instant Grievances**

Dr. McKenzie requested five days of leave during January 2011. Superintendent Lovett expressed concerns with regard to timing and length in denying the grievance at the third step. Although these concerns are not without some merit, they are not within the ambit of the existing past practice for denying a leave request. On the other hand, Chris Picha testified that she initially denied Dr. McKenzie's request because of concerns with respect to class coverage. She explained that the high number of staff development absences scheduled for January 13, 2011, combined with other factors made it likely that there would not be sufficient substitutes available to cover for the high number of anticipated teacher absences on that day. The School District's denial of the leave request for that day on this basis, accordingly, is consistent with past practice.

Mr. Shawbold requested four days of leave during February 2011. His supervisor denied the leave on the basis of its length which is a reason that is not consistent with past practice. At the arbitration hearing, Picha offered an additional objection claiming that a half-time teacher such as Shawbold is entitled to only one-half of the discretionary days authorized by the parties' agreement, which she suggested amounts to two and one-half days during the two-year contract period. While Picha's contention that a part-time teacher enjoys only a pro rata entitlement to the agreement's leave entitlement likely is correct, Shawbold's request does not exceed that entitlement since he only requested leave from his half-time schedule during the four days in question. Thus, the School District's denial of Shawbold's requested leave is not consistent with the parties' agreement or with past practice.

Since the School District's actions with respect to these two leave requests did not result in any loss of pay or benefits, this decision is merely declaratory in nature. The parties, of course, are free to supersede this decision by a newly crafted agreement at the bargaining table.

### **AWARD**

The grievance is granted in part and denied in part. The Employer's actions were consistent with the parties' agreement and past practice in denying Dr. McKenzie's request for a five-day leave during January 2011. On the other hand, the Employer acted contrary to the parties' agreement and past practice in denying Mr. Shawbold's request for a four-day leave during February 2011. The parties are directed to conform to this decision's construction of Article XII going forward absent a negotiated agreement to the contrary.

Dated: November 9, 2011

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Stephen F. Befort  
Arbitrator