

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration Between:

████████████████████ SCHOOLS

-and-

MICHIGAN AFSCME COUNCIL 25,
LOCAL ██████

Arbitrator:
ELLIOT I. BEITNER
FED ID: ██████████

Grievant: ██████ Employee Benefits

OPINION AND AWARD

An arbitration hearing was held on April 28, 2010 at the school offices in ██████ Michigan. At the hearing the parties had an opportunity to present sworn testimony, to cross examine witnesses and to offer documentary exhibits into evidence. The parties also filed post hearing briefs that were received on June 8, 2010, at which time the hearing was declared closed.

Present for AFSCME 25, Local ██████ (hereinafter referred to as the Union) were:

DAN HAMILTON, Staff Representative
████████████████████ Local 1346 President
████████████████████ Chief Steward
████████████████████ Food Service Coordinator
████████████████████ Grievant

Present for the ████████████████████ Schools (hereinafter referred to as the Employer) were:

████████████████████, Attorney
████████████████████ Director Nutrition Service
████████████████████ Executive Director

BACKGROUND

The grievance, filed on March 11, 2008, alleges the Employer violated Article 17, Section 14 when it did not allow [REDACTED], a head cook with 24 years of seniority, to use accrued sick days and be compensated for days employees were not needed to work due to in-service days, conference days or holiday recesses.

Article 17, Section 14 Miscellaneous - General reads:

Section 14

A ten month employee who maintains a minimum of ten (10) sick days or more may elect to use four (4) accumulated sick or personal days to make up for pay on in-service days during holiday recess and conference days. An employee who maintains a minimum of twenty (20) days may use up to nine (9) accumulated sick or personal days for this same purpose. Employees may not take non-comp days in lieu of sick/personal days in order to qualify for this additional pay.

The grievant, at the start of the school year, had at least 10, but less than 20, accrued sick days. She used two of those days on January 3 and January 4, 2008, when the schools were closed for the Christmas holiday break. She attempted to use additional days from her sick leave bank for February 18, 19 and 20, 2008 when the school was closed for mid-winter break, but was allowed to use only two of the sick days. Employees accrue one day of sick leave for each month of employment. It is the position of the schools that the entitlement to use sick days for in-service days, holiday recesses or conference days when employees are not scheduled to work is limited to four days for the entire school year. It is the position of the Union that the contract language does not restrict use to only four days during a school year.

Article 17, Section 14 was negotiated in the contract about eight years ago and has remained unchanged in successor agreements. [REDACTED] the Food Service Coordinator with 27 years of

seniority, testified that she was on the Union negotiating team when the language was negotiated. She said the Union proposed the provision in order to cut down on absenteeism. She said no discussion occurred at the bargaining table about "school year".

██████████ ██████████ the Local President, stated the Schools had never previously told the Union that Article 17, Section 14 was intended to mean school year.

In 2004, Ms. ██████████ was allowed to use six sick days for holidays, conference days or in-service days. ██████████ ██████████, the Director of Nutritional Service, acknowledged the grievant was paid for six sick days for time when employees were not working because of in-service days, conferences days or holiday recesses, but stated she should have been restricted to four days and was paid for two days in error.

The grievance remained unresolved in the grievance procedures and was processed to this arbitration hearing.

OTHER RELEVANT CONTRACT PROVISIONS

ARTICLE 3 **EFFECT OF AGREEMENT**

* * *

Section 3

The rights of the School Board to effectively administer the school system are recognized by the Union and shall be administered in accordance with the Agreement. All management rights and functions, except those which are clearly and expressly abridged by this Agreement or any supplement to this Agreement, shall remain vested in the Employer. It is expressly recognized, merely by way of illustration and not by way of limitation, that such rights and functions include but are not limited to management of the School District, supervision of operations and personnel, control of property, determination and direction of the work force and

maintenance of an orderly, effective and efficient operation within the financial resources of the District.

* * *

ARTICLE 6 **GRIEVANCE PROCEDURE**

Section 1

A claim by an employee, groups of employees, or the Union that there has been a violation, misinterpretation or misapplication of any provision of this Agreement or any protest against disciplinary action, shall be deemed a grievance under this Contract and will be subject to the grievance procedure hereinafter provided.

* * *

Section 5

* * *

Step 4

If the Board and the Union are unable to resolve any grievance, the grievance may be submitted to arbitration within forty-five (45) working days after the decision of the Board or designated representative. The grievance shall be considered submitted to arbitration when written notice is submitted to the Board by the union informing the Board of the Union's intent to arbitrate the grievance. AFSCME Council 25 Arbitration Department and the Board will establish an Ad Hoc list of arbitrators that is acceptable to both parties.

The parties may agree, in writing, to hold an arbitration case in abeyance. An Arbitration case not held in abeyance or where the parties have not attempted to select an arbitrator within one-hundred twenty (120) days of the Union's written intent to arbitrate will be declared abandoned at the termination date of the contract.

Section 6

The arbitrator shall have no power or authority to add to, detract from, alter, or modify the terms of this Agreement; however, the parties agree that he/she has the right to grant a monetary award.

Section 7

Each party will bear the full costs for its side of the arbitration and will pay one-half (1/2) of the costs for the arbitrator.

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ARTICLE 14
PAID FOR LEAVE TIME

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Section 4 - Paid for Leave Schedule

Sick leave may be used in accordance with the schedule specified herein, for personal or family illness, bereavement and unavoidable emergencies.

- a. **Personal Illness:** Bonafide physical incapacity to report for and discharge duties, to the extent of unused days credited.
- b. **Family Illness:** Bonafide pressing need due to illness of an employee's spouse or children or parents to a total of three (3) days annually. Not more than one (1) day will be allowed to a father when his wife gives normal birth.
- c. **Bereavement:** Leave, up to a maximum of six (6) days when required will be granted in the case of death of an employee's father, mother, father-in-law, mother-in-law, spouse, children, brother, sister, grandmother, grandfather or grandchild. The amount of days which will be approved will depend upon travel and circumstances involved and six (6) days is not to be regarded as the norm. One (1) day leaves may be granted to funerals of others than the immediate family. Up to three paid days of bereavement will not be deducted from the employee's leave bank. Employees will give twenty-four (24) hours notice for bereavement leaves, when possible.
- d. **Personal Days:** Up to four (4) days will be allowed for personal days to be used at the employee's discretion. These days will be deducted from the employee's sick day bank. Prior notification must be given to the immediate supervisor. Use of personal days where notice given is two (2) work days or less shall be subject to the approval of the immediate supervisor.

However, the use of personal days will be limited on the work days immediately before or immediately after a holiday or vacation period to those matters which are emergency in nature or which cannot be scheduled at any other time. The Human Resource Office shall have the discretion to approve the use of personal days at such time. The parties recognize that personal days are not to be used to extend holidays or vacations.

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ARTICLE 17
MISCELLANEOUS - GENERAL

* * *

Section 14

A ten month employee who maintains a minimum of ten (10) sick days or more may elect to use four (4) accumulated sick or personal days to make up for pay on in-service days during holiday recess and conference days. An employee who maintains a minimum of twenty (20) days may use up to nine (9) accumulated sick or personal days for this same purpose. Employees may not take non-comp days in lieu of sick/personal days in order to qualify for this additional pay.

POSITION OF THE PARTIES

EMPLOYER

It is the Employer's position that the Management Rights section of the contract - "Effect of Agreement" gives management all rights and functions except those restricted by the Agreement. The Employer had the right to restrict the provision in question to the school calendar year. The Employer states that Article 17, Section 14 is clear and unambiguous and requires no interpretation. An arbitrator would be acting beyond his authority were he to uphold the grievance. The Sixth Circuit Court of Appeals has not been reluctant to set aside an arbitration award when it has found the arbitrator discarded clear and unambiguous contract language.

UNION

The Union's position is that Article 17, Section 14 does not state that the provision is restricted to the school calendar year, but that the provision provides only that a ten month employee *maintain a minimum of ten sick days or more.* (Emphasis added.)

Moreover, in 2004, the School allowed the grievant to use six sick days when school was closed to employees. The Union asks that the grievant be awarded one day pay and that the provision be interpreted in accordance with the Union's grievance.

DISCUSSION AND DECISION

The grievance is one of contract interpretation. It is correct, as the Employer argues, one example does not establish a binding past practice, but the payment in 2004 is consistent with the Union's position. The Employer is correct also that clear and unambiguous contract language requires no interpretation and discussions at the bargaining table or any other parol evidence are not relevant. However, to me, the language is not clear or unambiguous as argued by the Schools as to whether the four days are limited to the school academic year. The operative word in the provision is that a ten month employee *maintain* a minimum of ten sick days. By using the word maintain, the language strongly suggests the parties intended not to restrict this provision to the school year. The contract also restricts an arbitrator's authority and prohibits him from adding, subtracting or altering the collective bargaining agreement. I would be violating the contractual limitation of my power were I to read into Section 14 the restriction argued by the Employer.

It is apparent that both parties consider the issue significant beyond whether the grievant herself should be awarded a sick day. In the grievance steps, the Employer offered to pay her for the day in question with the understanding that the settlement would not set a precedent and could not be relied upon in the future. In this award, I am holding that the provision allows an employee who

maintains 10 days in his sick bank to apply sick time as specified in Section 14. If the parties wish to restrict the provision to the school year, they will have an opportunity to change Section 14 when they negotiate a new collective bargaining agreement.

In conclusion, the grievance is granted. The Employer shall pay the grievant one sick day and deduct one day from her sick leave bank.

Dated: June 25, 2010



ELLIOT I. BEITNER, Arbitrator