OPINION AND AWARD

35-02-871377-0005-06-10
35-02-871378-0001-06-10

In the Matter of Arbitration Between the STATE OF OHIO DEPARTMENT OF YOUTH SERVICES And THE STATE COUNCIL OF PROFESSIONAL EDUCATORS, OHIO EDUCATION ASSOCIATION	Parties Grievance No. ~~10-03-880125-0010-06-10~~ Grievances of: Constance Norris & Hattie James Hearing: August 16, 1988 Award: January 23, 1989 Paul F. Gerhart, Arbitrator

Appearances

For the State of Ohio, Department of Youth Services:

John E. Patterson, Labor Relations Administrator
Granville ("Bud") Potter, Jr., Superintendent, Training Center for Youth
Deneen D. Donaugh, Labor Relations Officer

For the State Council of Professional Educators, OEA:

Henry L. Stevens, UniServ, Ohio Education Association
Carrie Smolik, Grievance Chairperson
Constance Norris, grievant
Steven Sunker, President, SCOPE
Hattie James, grievant
Borys Ostrowskyj, witness

Background

The State Council of Professional Educators, affiliated with the Ohio Education Association and National Education Association (the Association) is the bargaining representative for, among others, teachers at the Ohio Training Center for Youth which is operated by the Ohio Department of Youth Services (the Employer). During the term of their labor agreement dated July 1, 1986 through June 30, 1989 (the Agreement), the parties were unable to resolve a grievance involving requests for unpaid leave by Constance Norris and Hattie James, members of the bargaining unit. Under the provisions of the Agreement, Article 6, Arbitration, the undersigned was assigned by the parties to issue a final and binding decision in the matter.

Upon the mutual agreement of the parties, a hearing was held in the conference room of the Association's offices in Westerville, Ohio on August 16, 1988. At that time, the parties stipulated that the matter was properly before the arbitrator. During the course of the hearing, each party was accorded the opportunity to examine witnesses and present other evidence. Witnesses were not sworn but were separated. The parties waived oral argument and, instead, submitted post-hearing briefs which were exchanged through the arbitrator on October 1, 1988, at which time the record in the matter was closed.

Grievance

On March 1, 1988, Constance Norris submitted a request for leave without pay from July 25 through August 19, 1988. On 4/17/88, the request was disapproved by her appointing authority with the remark, "Long term absence will negatively disrupt program availability. Vacation hours are available." Mrs. Norris was apparently advised of this action on April 21.

Mrs. Norris then filed a grievance dated April 29, 1988, which states:

> Explanation of Grievance: Mrs. Norris received the attached denial for leave without pay on 4-21-88. As noted, the denial was made on the basis that the grievant had available vacation time and that her absence would negatively disrupt the program. Once again, as in last year's denial of Mrs. Norris's leave request, a substitute is available and willing to work.

A similar request was also denied again for teacher Hattie James on the basis of negatively disrupting program availability. The attached grievance settlement to grievance number G87-1377 was signed 3-1-88. We allege that these reasons for denial of requests for leave without pay are once again in violation of section 29.01 of the contract.

Additionally, we allege that this current denial appears to be an attempt by management to eschew the spirit and intent of the settlement. These actions are once again arbitrary, capricious and show a blatant disinterest on the part of management for harmonious and cooperative labor relations.

In recent discussions between Association representatives and the Office of Collective Bargaining on 4-28 and 4-29, 1988, it was agreed that leaves of absence without pay should only be denied on the basis of the availability of adequate staff, as stated in the contract. Management's attempt to manufacture other excuses for denial is improper.

Remedy Sought: The current request of leave without pay be immediately granted. A letter be forwarded to the superintendent, principal and vice-principal specifying the interpretation of the contract agreed to by the Association and the State of Ohio. That any usage of vacation, personal, or sick leave as a result of this grievance be restored to employees and that the Association be monetarily compensated by the Dept of Youth Services for expenses incurred in processing this redundant grievance, which is a result of management's failure to honor the previous settlement.

Issue

The issues before the arbitrator are set forth in Joint exhibit 3:

> Did the Department of Youth Services violate Article 29, Leaves of Absence Without Pay, Section 29.01 - Unpaid Leaves of Absence of the 1986-89 Agreement between the State Council of Professional Educators and the State of Ohio when members of the bargaining unit were denied leave of absence without pay? (If so, what shall be the appropriate remedy?)

Relevant contract provisions

ARTICLE 29 -
LEAVES OF ABSENCE WITHOUT PAY

29.01 - Unpaid Leaves of Absence

(A) Leaves and Duration.
The Appointing Authority may grant a leave of absence without pay to full-time and part-time employees. . . . Leaves of absence may be granted for a maximum period of six (6) months for any personal reason or to the beginning of the academic year (where the academic year is the work year), whichever is longer. . . . The Appointing Authority will grant leaves of absence dependent upon the availability of adequate staff to cover the work unit. Requests for leaves shall not be unreasonably denied.

ARTICLE 3 - MANAGEMENT RIGHTS

3.01 - Management Rights

Except to the extent expressly abridged only by specific articles and sections of this Agreement, the Employer reserves, retains, and possesses, solely and exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The sole and exclusive rights and authority of management include specifically, but are not limited to the following:

. . . . . .

6) Determine the adequacy of the work force; . . .

Evidence

Constance Norris, a grievant, testified she is a math teacher at the Ohio Training Center for Youth and has been there for 14 years. She stated her duties include individualized instruction with up to 12 students in a class.

Mrs. Norris testified that in 1987, she was denied a request for an unpaid leave of absence. She filed a grievance, and a settlement was reached. She identified Association exhibit 1 as that settlement. [The Employer objected to the introduction of the Settlement Agreement asserting that the parties had agreed in the document,

itself, that it was not to be used in subsequent proceedings. The arbitrator took that objection under advisement and indicated he would rule on its admissibility at the time of his award.] The settlement agreement states, in part, "1. Management will abide by Article 29.01 in responding to requests for leave without pay."

Mrs. Norris stated she again applied for leave in 1988. Coverage of her position was arranged with a Mr. Callahan, she stated, who was going to be available throughout the duration of her leave. Mrs. Norris stated that her principal understood that. She stated she had talked with Mr. Callahan to be sure he would be willing to cover her absence.

On cross-examination, Mrs. Norris testified that the students were criminal, many with emotional problems. The students range widely in ability. She has up to twelve students in a class and uses as many as eight different text books in a day, but students in the same text may be at different levels. Mrs. Norris stated she had a masters degree with certification in math. She stated that the work was demanding because of the necessity to keep track of where every student was.

Mrs. Norris stated that teachers tend to take leave both in summer and around Christmas. She agreed that the times when more traditional schools have vacation periods are the times when teachers at the Center prefer to take vacation time, but she also stated that is the time when substitutes are more readily available.

Mrs. Norris stated she talked with Mr. Callahan before she applied for the leave and mentioned Mr. Callahan's availability to Mr. Rovic and Mr. White at the time of her application. She stated that Mr. Rovic had never had any difficulty finding substitutes before when she had requested leave without pay. She also testified that the Department of Youth Services would save money by granting her leave without pay and hiring substitutes because they are paid less than she is.

Carrie Smolic, Grievance Chair for the State Council of Professional Educators, testified she was present at the settlement of Mrs. Norris's first grievance on December 11, 1987 (AX 1). She stated the meeting was conducted by Mr. Jack Burgess, Arbitration Chief for the Ohio Office of Collective Bargaining. She testified that the meaning of the statement, "Management will abide by Article 29.01 in responding to requests for leave without pay", was that leave of absence requests would not be unreasonably denied based on the adequacy of the work force.

On cross-examination, Ms. Smolic agreed that if the work force is not adequate, management could deny a leave of absence. Ms. Smolic stated she was unaware of the Department's efforts to obtain substitute teachers; that there was a budget for substitutes; and that child care, military, and association leave was mandatory under the Agreement, and that substitutes might be required to cover such leaves.

On re-direct, Ms. Smolic was asked how the Association interprets "adequate staff". She stated that if teachers are not actually on leave, and substitutes are available, the work force is adequate. In the instant grievance, this was the case because there were no long-term vacations planned, and the Employer's response did not mention adequacy of the work force. She stated the Agreement requires employees to request extended vacation leave during March of any year, so management would be aware if such occurrence were likely.

On cross-examination, Ms. Smolic stated that management would not know if requests for disability leave or emergency military leave might arise in advance, and that it is not possible for management to deny such leave requests.

Hattie M. James, a teacher of the developmentally handicapped at the Training Center for Youth, testified that the youth range in age from 12-18 but are extremely limited in all areas. She further testified she had applied for a leave of absence which was denied in 1987. She filed a grievance at that time because she did not think the leave was reasonably denied inasmuch as she had taken only two vacations in seven years. Her 1987 grievance was ultimately settled at a meeting in December 11, 1987 (AX 2). [AX 2 is essentially identical to AX 1 except that the grievant was Mrs. James instead of Mrs. Norris.]

Mrs. James testified that she again applied for leave in 1988, that class coverage was arranged, but the leave was denied. She received a notice from Superintendent Potter denying her leave.

On cross-examination, Mrs. James testified that she earned 120 hours per year of vacation leave. She stated she has never had a vacation leave request denied. Mrs. James stated that Norman Rovic had arranged for coverage of her classes in anticipation of her unpaid leave in 1988. She stated that she took several weeks of disability leave in 1987. She could not recall how much notice she gave for either leave request although she was sure it met the contractual requirements for prior notice.

Steven Sunker, president of the Association, testified he had been present for the negotiation of the Agreement and stated that the Association's interpretation of Article 29, Section 29.01, was that leave will be granted by the Employer for any personal reason and the only reason it might be denied is on the basis of availability or adequacy of the work force.

Mr. Sunker stated that there was a specific remark on the leave request form when it was denied that vacation balances were available. He said the Department of Youth Services apparently took the position that so long as vacation balances are available, that it would not approve unpaid leave requests. Mr. Sunker testified that each budget provides for substitute salaries. He stated that substitute coverage is arranged by the personnel officer of institution who secures the services of the substitute and the principal who designates specific day-to-day class coverage.

Mr. Sunker testified he was present at the settlement of the 1987 grievances of James and Norris (AX 1 & AX 2). During the discussion leading up to that settlement, he stated that Mr. Burgess agreed that personnel leave could be taken for any reason including extended vacation, death in the family, or going to school because the language in the Agreement says the leave may be taken for any personal reason. The Association thought the matter had been cleared up by Mr. Burgess's statement. [The Employer objected to this testimony on the grounds that the Settlement Agreement speaks for itself.] Mr. Sunker agreed that unpaid leaves would be granted only so long as there was adequate staff to cover the absence.

On cross-examination, Mr. Sunker reiterated that Mr. Burgess had agreed at the settlement meeting of December 11, 1987 that inadequacy of the work force would be the only reason for denying an unpaid leave request. He agreed that Section 3.01(6) provided that management had the right to determine the adequacy of the work force.

On re-direct examination, Mr. Sunker stated that on the basis of Article 30, first sentence, management would be aware of any plans by employees to take extended vacations.

Borys Ostrowskyj, a bargaining unit member employed at the Western Reserve Psychiatric Rehabilitation Center, testified he is an Association representative from the Department of Mental Health.

Mr. Ostrowskyj stated he had applied for a leave of absence without pay which was denied. He grieved because he thought it was denied unreasonably. At the Office of Collective Bargaining level, the grievance was granted. He stated he told his supervisor about his need for time off in April, 1987. At that time, he did not know whether anyone else might be on leave on the dates in question, but he was able to determine from the vacation request list that no one had requested vacation during the period in question. In October, 1987, Mr. Ostrowskyj testified his immediate supervisor had approved the request with no problem. The resolution of the grievance occurred in March, 1988.

On cross-examination, Mr. Ostrowskyj testified he was a teacher of adult basic education for people with behavioral and mental disorders. He stated the Department of Mental Health has no budget for substitute teachers because teachers cover for one another in the event of absence.

Granville ("Bud") Potter, Superintendent, testified he had made efforts to employ substitute teachers through news paper advertisements, Columbus Board of Education, and other sources and has been able to attract two substitutes. At the present time, only one is available. He stated that Mr. Callahan was not available to the Center on the date of the hearing (August 26) and that his last date of availability, by his choice, was August 12, 1988. His status is "intermittent" employee. As such, he gets credit for time in service and his education, and the Department can pay more than the old contract permitted for substitute teachers.

Mr. Potter stated he did not deny either leave request because there were vacation balances available. He said he denied the leaves because his budget allotment [for substitute teachers] was intended to cover only the paid leave people had available. It was not even adequate to do that. Employer exhibit 1 shows that in fiscal year 1988, $8200 of a total combined BYC/TCY allocation of $24,000 had been used because substitutes had simply not been available. In fiscal 1989 (beginning 7-1-88), the Training Center for Youth (TCY) allocation was $5,000, and as of August 12, 1988, $4,999.28 had been used. These funds were used to fulfill requests for leave other than those requested by the grievants at the hearing. Mr. Potter indicated he could request more funds, but there was no guarantee it would be received.

Substitute usage since July, 1988 (EX 2) shows the frequency of use of substitutes and that the agency has no problem with the use of substitutes as long as they are available. Mr. Potter also identified Employer exhibit 3,

showing the vacation and personal leave accruals for the staff in the bargaining unit. He noted that each year the staff accrues 2376.5 hours of vacation and personal leave; given the number of substitutes available and the budget, not all of these hours could be covered.

Mr. Potter testified that Mrs. Norris actually took three to four weeks of vacation leave during 1988. In addition, she requested unpaid leave of an additional four weeks. He testified that the kind of student at the Center had special needs and that it was important that there be continuity with the same personnel as much as possible. He stated that an eight week absence of a teacher would break the continuity that is desirable.

On cross-examination, Mr. Potter stated that the last statement was based on his own experience and not on any research data.

He stated he was familiar with the settlement of the first (1987) Norris grievance, but he did not have a copy of it. He said it was the policy of the Center to grant or not grant unpaid leave based on whether the Center could continue programming or not. Mr. Potter said he did not have adequate staff or resources to continue the program in the absence of the grievants. He said he relied on information from the principal, the deputy superintendent and other information to make the decision on whether there is adequate staff. He agreed that both the principal and assistant superintendent had approved the leaves in 1987, but stated that, "They had not considered the coverage in the manner that I asked them to consider the coverage. . . in what had been my experience in three other institutions." He testified that Principal Rovic had been at the Center since the 1960's and that the assistant superintendent had also been there when he (Potter) arrived.

He stated he considered only the institution's ability to continue the education program when disapproving the leave. He testified he disagreed with the conclusions of the principal and assistant superintendent who are charged with the responsibility for the education program and that he called them in and talked with them. He stated they now understand the circumstances differently.

Mr. Potter agreed that on the basis of Article 30, he, the principal, and assistant principal would know who had requested vacation by March 30 of any year. He stated that at times during the period of the leave request there were three other staff members off. Mr. Potter indicated that three absent staff were all that the Center could tolerate and still maintain program. Mr. Potter testified he had not

written the remarks section on the leave request form (JX 2). He stated he did not approve the leave request on the basis of how many people he had available. He said vacation hours were available and the Center would have to cover those as much as possible. "There is an encouragement towards taking vacation as opposed to other leave . . . if we have to cover both vacation and leave without pay that reduces further the allotment we have to cover leave."

Mr. Potter stated that there were 16 staff for whom leave coverage was necessary.

On re-direct, Mr. Potter testified he did not always follow the recommendations of his subordinates and that he is ultimately responsible for operations at the Center. He testified he was at the bargaining table at the time the Agreement was negotiated. He agreed that Article 29 gives the Employer the right to deny unpaid leave requests when the staff is inadequate. He said he could estimate both vacation and personal leave to be taken during a year, but he could not estimate sick leave. He also stated that he was unaware of any leave without pay that has been approved for the education staff. He said if he had coverage, and that he could get through his year, he would grant such leave.

On re-cross, Mr. Potter stated that even though he determined that Callahan would have been available until August 12, he would not have allowed the grievant to take unpaid leave up to that date because, "I had to plan ahead to allow for coverage of the total year." He testified that he could not use Mr. Callahan to cover unpaid leaves because he was needed to cover the paid leaves to which bargaining unit members were entitled. He said, "I would have had to leave other programs uncovered if I had used Mr. Callahan for these requests."

Position of the Association

The following is the arbitrator's summary of the argument contained in the Union's pre- and post-hearing briefs.

During 1987, both grievants applied for leaves of absence without pay pursuant to Article 29 of the Agreement. After the arrangement of appropriate coverage for the leaves, Mr. Norman Rovick, School Principal, approved the leaves. They were also approved by Assistant Superintendent, Ms. Evelyn Farmer, after she ascertained that coverages were adequate. One week later, for no

reason, Mr. Granville Potter, the new superintendent, disapproved the leaves anyway.

The Association initiated a class grievance which culminated in a settlement agreement signed by the appropriate parties including a representative from the Department of Youth Services. The settlement agreement states in pertinent part, "Management will abide by Article 29.01 in responding to requests for leaves without pay." Other departments have complied with the settlement agreement but the Department of Youth Services has not.

During 1988, the grievants again applied for leaves of absence without pay. As before, Mr. Norman Rovick, Principal, determined that coverage was adequate, with a substitute and other staff members. Again, the leaves were denied by Mr. Granville Potter and Ms. Percy Wright, Assistant Principal. The reason for the denial was not inadequate staff to cover the work unit. Instead, the reason for denial was negative disruption of program. Management pointed out the availability of vacation hours during the same time frame, providing ample evidence of the unreasonableness of the denial.

Management contends that Article 3, Section 3.01(6) gives them the authority to determine the adequacy of the work force. Both Mr. Rovick and Ms. Farmer are members of management staff. The Agreement states in Article 29.01(A), in pertinent part, "Leaves of absence may be granted for a maximum period of six (6) months for any personal reason . . . ."

Conclusion. Two issues should be addressed: (1) Was the availability of staff adequate to cover the work unit? In both instances, Management determined that staff coverage was adequate by the use of a substitute and/or existing staff. (2) Were the leaves unreasonably denied? Management has arbitrarily and unreasonably denied the grievants requests for unpaid leaves of absence in violation of Article 29, Section 29.01, paragraph (A).

Position of the Employer

The following is the arbitrator's summary of the argument contained in the Employer's opening statement and post-hearing brief.

The Ohio Training Center houses, for the State of Ohio, youths convicted of offenses that would be felonies but for the age of the offender. What constitutes an adequate staff

at such an institution must be the prerogative of the Employer.

The words of Section 29.01 are permissive. Leaves may be granted by the Appointing Authority. In other sections of Article 29, the leaves for child care and military service are mandatory.

In considering whether a leave can be approved, the Appointing Authority must keep in mind other types of leave, sick leave and the possibility of absences without leave that may be requested by employees. With only two substitutes available, the Employer has few alternatives.

Section 3.01(6), provides that one of the management prerogatives reserved by the Agreement is to determine the adequacy of the work force.

Finally, Steven Sunker, President of SCOPE, testified that management has the right to reasonably deny leave. Mr. Sunker further testified that the Agreement, Section 3.01(6) gives management the right to determine the adequacy of the work force. Grievants carry the burden of proving that management unreasonably denied the leave and that management was arbitrary and capricious in its determination of the adequacy of the work force, and they failed to do so.

Based on the evidence presented, this grievance should be denied. Grievant presented no evidence as to the availability of substitute teachers (adequacy of the work force); no evidence as to the substitute teacher budget; no evidence as to other leaves that need to be covered and no evidence advocating that denial was unreasonable.

Grievants testified they are professionals teaching students on an individualized basis. Further, the evidence indicates that Mr. Callahan was not available for the entire leave period. His decision to discontinue substitute teaching [in August] left the institution with only one substitute teacher. The institution made extensive efforts to obtain substitute teachers without success.

The Superintendent had only one substitute teacher to cover sick leave, disability leave, mandatory child care leave and military leave. In addition, he had to consider requests for vacation and personal leave. The large blocks of unpaid leave requested by the grievants, if granted, would have left the Superintendent with no ability to cover mandatory leaves. The grievants' leave requests were for the summer when a number of vacation and personal leave requests are submitted.

Management has the right to determine the adequacy of the work force and the right reasonably to deny unpaid leaves of absence. In order to maintain a correctional institution for youth it is essential that management have the right to reasonably control unpaid leaves of absence.

The requests for unpaid leave were reasonably denied in order to meet the operational needs of the institution. In this case the operational needs include the education of youth in the custody of the State and the safety of staff and community. The Ohio Department of Youth Services respectfully submits that this grievance must be denied.

Discussion

Admissibility of settlement agreement. In 1987, the Employer denied requests by Norris and James for leave without pay apparently in much the same manner it was denied in the instant case. They filed grievances in 1987, and a Settlement Agreement concerning these grievances was reached at third step on December 11, 1987 (AX 1). The Employer objected to the introduction of that Settlement Agreement, as well as to testimony regarding it. The settlement agreement provides as follows:

> 1. Management will abide by Article 29.01 in responding to requests for leave without pay.
>
> 2. Employee(s) and SCOPE/OEA agree to withdraw the aforementioned grievances and waive any and all rights they may currently or subsequently possess to receive any reparation, restitution or redress for the events which formed the basis of the aforementioned grievance or claim, including the right to have the grievances resolved through arbitration, or through resort to administrative appeal or through the institution of legal action.
>
> 3. SCOPE/OEA agrees to waive any and all rights it may currently or subsequently possess to obtain any reparation, restitution or redress for its' [sic] members as a result of the events which formed the basis of the aforementioned grievances or claim, including the right to have the grievances resolved through arbitration, or through resort to administrative appeal or through the institution of legal action.

The Employer's objection was based on its argument that paragraphs 2 and 3 were intended by the parties to preclude

the use of the settlement agreement as precedent and to prevent its introduction in future arbitration proceedings.

Although they speak to a waiver of rights based on ". . . the events which formed the basis for the aforementioned grievance . . .", paragraphs 2 and 3 say absolutely nothing regarding precedent or subsequent introduction of the settlement. Language similar to the above terms of the Settlement Agreement is regularly a part of grievance settlement throughout the field of labor-management relations because it clearly indicates that the grievance it governs has been finally settled--the same grievance or another grievance involving the same factual circumstances cannot be raised by the union or grievant again. The language does not prevent the raising of a grievance over different events nor does it prevent the referencing of the earlier grievance which was settled.

Where parties intend that a grievance settlement is not to be precedent setting, the usual practice in labor-management relations is to state as much in clear language. Where, as here, the settlement of a grievance is silent with respect to precedent, it must be taken by an arbitrator as the strongest form of "past practice" evidence. Both the settlement agreement, and testimony about the negotiations leading up to it, are therefore admissible and important for a consideration of the instant dispute.

Contract language. The first sentence of paragraph 29.01(A) provides that the "Appointing Authority may grant a leave of absence without pay . . . . ." The third sentence provides that, "Leaves of absence may be granted for a maximum of six (6) months for any personal reason . . . ." [Emphasis added.]

Through these sentences, the Agreement clearly gives the Appointing Authority the prerogative to grant leaves of absence for any personal reason for up to six months. Especially in the context of the other sections of Article 29, which mandate child care and military leave, they imply that the discretion to grant, or not grant, such leaves lies with the Appointing Authority.

If Section 29.01 ended with the words, "Leaves of absence may be granted for a maximum of six (6) months," the decision to grant or not grant leaves would clearly be a managerial prerogative subject only to the universal requirement that it not be exercised in an arbitrary, capricious, or unreasonable fashion. The addition of the words "for any personal reason" circumscribes the Employer's discretion, however. If the parties intended for these words to have no effect, they would not have agreed to them.

They are not qualified in any way. In this context, the only meaning they could have is that the reason stated by the employee when leave is requested will not be a consideration in whether leave is granted or not.

The last two sentences of the paragraph also circumscribe the Employer's prerogative:

> The Appointing Authority will grant leaves of absence dependent upon the availability of adequate staff to cover the work unit. Requests for leave shall not be unreasonably denied. [Emphasis added.]

In formal speech, the use of "shall" in the third person designates compulsion while "will" suggests futurity, not compulsion. However, Webster's New Twentieth Century Dictionary Unabridged, Second Edition, states that this historical formal convention is no longer reflected in prevailing usage [at p 1093]. The Union, in fact, contends that "will" in the first of the two above sentences was intended to imply compulsion, not merely futurity.

The Union's argument fails because of the context in which the word "will" occurs; "will" in the first sentence is juxtaposed with "shall" in the second. Where parties use two different words, there is a strong implication they intended two different meanings. The use of "shall" in the second sentence clearly implies compulsion, that is, that the Appointing Authority must not deny requests for personal leave "unreasonably". The use of "will" in the first sentence, then, must have been intended by the parties to have the alternative implication relating to futurity. That is, the sentence is merely intended to set a criterion for granting leaves in the future and, by itself, was not intended to establish a mandatory requirement for granting leave requests. Such a finding is reinforced by the obvious conflict that the opposite finding would create when this sentence is compared with the opening sentences of the Section which were discussed above.

With the finding that the first of the two sentences was intended to provide a criterion and not compulsion, another principle of contract interpretation becomes relevant. Where the parties list criteria for any circumstance, the presumption is that the list is exhaustive unless explicitly stated otherwise. Elkouri and Elkouri (How Arbitration Works, Third Edition, p 310) refer to this principle, "*expressio unius est exclusio alterius*," that is, to express one thing is to exclude others. By itself, the sentence, "The Appointing Authority will grant leaves of absence dependent upon the availability of adequate staff to

cover the work unit", suggests, on the basis of the above principle, that the only criterion for denying a leave is the inadequacy of staff. Had the Employer intended to rely on other criteria for granting or denying leave, they would have been listed, or a more general statement concerning the basis for denying leave would have been included.

The last sentence of the paragraph, "Requests for leaves shall not be unreasonably denied", follows immediately. Located where it is, it modifies and clarifies the preceding sentence and was not intended to be read in isolation. That is, while "availability of adequate staff to cover the work unit" is the criterion for deciding whether unpaid leave will be granted, such criterion must pass a "reasonableness" test. That is, in determining whether there is an "availability of adequate staff", the Employer must do so in a reasonable way.

Availability of adequate staff. The case therefore turns on (a) what constitutes "availability of adequate staff" and (b) the factual question of whether adequate staff was available.

Mr. Potter's testimony indicates he considered three factors in determining "availability of adequate staff": the annual budget for substitute teachers; the effect of a long-term absence by the grievants on the "continuity" of the educational program; and the actual physical availability of qualified substitutes at the time the grievants requested their leave.

With respect to budget, Mr. Potter stated, "I had to plan ahead to allow for coverage of the total year" (at p 10, above). He noted there were more hours of mandatory leave for the staff permitted under the Agreement than he had substitute budget to cover, and he reasoned that he could therefore not allow unpaid leave for the grievants.

On its face, it is obvious that the Employer must have funds available to pay substitutes if substitutes are to be available. Without funds, no staff would be available. The Association presented a *prima facie* case, however, showing that the individuals taking leave without pay would save the Employer at least as much as the Employer would have to pay in substitute wages. The Employer failed to rebut this assertion. The fact that the funds do not appear on the substitute budget line is not material. Any argument to the contrary is reminiscent of a game involving walnut shells and a pea. The money is obviously available and without some compelling argument to show why the Employer cannot redirect it, any argument regarding budgetary constraint is irrelevant.

With respect to "program continuity," Mr. Potter testified that the kind of student at the Center had special needs and that it was important that there be continuity with the same personnel as much as possible (above, at p 8). He stated that Mrs. Norris actually took three to four weeks of vacation leave during 1988. In addition, she requested unpaid leave of an additional four weeks.

Mr. Potter stated that in his opinion the quality of education suffers when continuity is interrupted. Despite the Union's contention to the contrary, the arbitrator is inclined to accept Mr. Potter's assertion as intuitively plausible. It is not clear what relevance it has, however. Any leave without pay necessarily would result in a discontinuity of teaching personnel. If continuity with the same personnel were used as a criterion for denying leave without pay, no such leave would ever be granted. Clearly, the parties did not intend such a nonsensical result when they negotiated the language concerning availability of adequate staff. Therefore, the phrase "availability of adequate staff" can not be interpreted to allow the Employer to deny leave without pay when alternative qualified staff are available.

Finally, Mr. Potter testified that despite the Center's best efforts, it had been able to attract only two individuals to work as substitutes. Moreover, one of these, Mr. Callahan, who had been identified as available by the Association, was not actually available to work throughout the period of leave requested by Ms. Norris (above at p 8).

There is no question that the Employer has the prerogative, as specified in Section 3.01(6), to determine the adequacy of the work force. Therefore, the numbers types and grades of employees, as well as any necessary reserve personnel, are at the discretion of the Employer. If the Employer has decided in a non-capricious manner that a given number of substitutes must be available, over and above those necessary to cover requested leave, such standard is within its prerogative. Denial of a Section 29.01 leave because there is inadequate substitute manpower to meet a previously established reasonable standard is not a violation of the Agreement.

Naturally, the number of substitutes required as a reserve pool must be reasonable, pursuant to the last sentence of Section 29.01. Past patterns of substitute usage would be a reasonable basis for determining need. Employer exhibit 2 shows that from July 5 through August 9, 1988, a period of 26 teaching days, both the available substitutes were in use on 18 days and at least one was used

on the remaining 8 days. In other words, there was almost no reserve pool of substitutes available, so that any additional absences by staff, whether contractual or otherwise, would have required a curtailment of program.

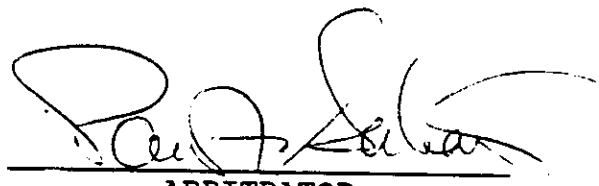
Factual determination. Section 3.01(6) assures the Employer the right to determine that there is not adequate staff when there are no reserve substitutes. A review of Employer exhibit 2 shows that Ms. Norris apparently took vacation leave from July 11 through August 5, so part of the usage of the substitutes can be attributed to her, but starting on August 8, she was apparently back in the classroom and still the two substitutes were fully employed. Ms. Norris's leave request included a period from July 25 to August 19. Had she been absent after August 8, however, the staff physically present would not have been adequate to maintain the educational program. Therefore, the Employer's denial of her leave was not in violation of the Agreement.

With respect to Mrs. James, the record did not include the dates of her leave request, so it is impossible to determine whether it was improperly denied. Inasmuch as it is the Union's burden to present sufficient evidence to prove its case in a matter of contact interpretation, there is no basis for finding a contractual violation.

Summary. Although the rationale of the Employer for denying the leave requested by the grievants was faulty in some respects, the Union failed to show that the Employer had established an unreasonable standard for availability of substitute staff or that it had been unreasonable in determining that there was not adequate staff during the period when grievants Norris and James had requested unpaid leave pursuant to Section 29.01. Therefore, the grievance must be denied.

AWARD

The grievance is denied.



ARBITRATOR

Cleveland,
Cuyahoga County, Ohio
January 23, 1989