IN THE MATTER OF ARBITRATION	**OPINION & AWARD**
-between-	**Grievance Arbitration**
EDUCATION MINNESOTA	**Re: Family Medical Leave**
-and-	**B.M.S. No. 08-PA-1284**
INDEPENDENT SCHOOL DIST. 2853 **LAC QUI PARLE, MINNESOTA**	**Before: Jay C. Fogelberg** **Neutral Arbitrator**

Representation-

For the Union: Rebecca Hamblin, Staff Attorney

For the Employer: Kevin Rupp, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article XV, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the procedure. A formal complaint was submitted by the Union on behalf of the Grievant on March 14, 2008, and eventually appealed to binding arbitration approximately one month later, when the parties were unable to resolve the matter to their mutual satisfaction during discussions

at the intermittent steps.[1] The undersigned was then selected as the Neutral Arbitrator to hear evidence and render a decision from a panel provided to the parties by the Minnesota Bureau of Mediation Services. Subsequently, a hearing was convened in Madison, Minnesota on November 12, 2008. There, the parties were afforded the opportunity to present position statements, testimony and supportive documentation. At the conclusion of the proceedings, each side indicated a preference for submitting written summary statements. They were received on December 15 ,2008, at which time the hearing was deemed officially closed. The parties have stipulated that all matters in dispute are properly before the Arbitrator for resolution on their merits, and while they were unable to agree to a precise statement of the issue, the following is believed to constitute a fair description of the matter to be resolved.

The Issue-

Did the District violate the terms of Article IX, Section 5 (Family & Medical Leave) of the parties' Master Agreement when they denied the written requests submitted by the Grievants Kristyanna Brandriet and Chris

[1] On May 27, 2008, the parties executed a Memorandum of Understanding (Joint Ex. 8) adding another bargaining unit member, Chris Koosmann, as a second grievant, based upon similar facts and issues concerning her leave request.

Koosmann, to apply their unused paid sick and personal leave benefits during their anticipated absence due to the birth and subsequent care of their children in 2007 and 2008, respectively? If so, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The adduced evidence indicates that Ms. Brandriet and Ms. Koosmann are licensed Special Ed instructors employed by Independent School District 2853 (hereafter "District", "Employer" or "Administration"). Both teachers are members of the bargaining unit represented by Education Minnesota ("Union" or "Association") who, together with the Employer has negotiated and executed a labor agreement (Joint Ex. 1) covering terms and conditions of employment for the teaching staff employed in the District.

In early 2007, Ms. Koosmann submitted a written request, per the terms of Section 9.5 of the Labor Agreement, to take a leave of absence under the Family & Medical Leave provisions found therein, "...in connection with the birth of my child" (Joint Ex. 4). Specifically, she asked for ten weeks of leave and to "...substitute my accumulated paid sick leave and paid personal leave...during this time" (*id.*). In November of

that same year, Ms. Brandriet made a similar request of the Administration, seeking twelve weeks of leave "…in connection with the birth of my child" (Joint Ex. 3). Like Ms. Koosmann, Ms. Brandriet sought to "….substitute my accumulated paid sick leave and paid personal leave" in place of unpaid Family Leave "during this time" (*id.*).

At their regularly scheduled meeting in November of 2007, the School Board approved Ms. Brandriet's request (Joint Exs. 5). Similarly, the at their December 2007 meeting, they approved Ms. Koosmann's request (Joint Ex. 6). In both instances, the consent was for the time requested. However the Board minutes did not specify whether granting the leaves was with or without pay.

In February of 2008, Ms. Brandriet received paperwork from the District's Payroll Clerk, Sue Volk, indicating that she would be given only eight weeks of the requested twelve as paid leave, and that the remaining time off of work would be unpaid under the terms of Section 9.5 of the Contract (Union's Ex. 3). In addition, Ms. Koosmann received an e-mail from Ms. Volk that same month indicating that she was only eligible for six weeks of paid leave for the birth of her son, and that the rest would also be considered unpaid leave (Union's Ex. 4). Subsequently, after Ms. Brandriet spoke with the acting Superintendent at the time, Ray Farwell,

she received an e-mail from Ms. Volk dated March 5, 2008, stating that she (Volk) had been instructed by Mr. Farwell to inform her that the twelve weeks of Family & Medical Leave ("FML") had been approved as "paid sick leave" (Union's Ex. 3).

On March 13, 2008, representatives of the Union met with School Board members to discuss the claims of the two teachers. At that time the Board indicated their belief that Section 9.5, and the election to take paid sick and/or personal leave, was limited to the actual time of disability of the mother, and that the applicable language was not intended – nor had it ever been applied – to allow for a bargaining unit member to take the full twelve weeks of FML as paid leave. Thereafter, when the parties continued to disagree over the interpretation and application of Section 9.5, a formal grievance was submitted by the Union on behalf of Ms. Brandriet (which was subsequently paired with Ms. Koosmann's complaint) and eventually appealed to binding arbitration for resolution.

Relevant Contract Provisions-

Article IX
Leaves of Absence

Section 1. Disability/Sick Leave:

A. At the beginning of each school year, each full-time teacher will be credited with fifteen (15) disability/sick leave days and will continue to earn such leave at the rate of fifteen (15) days for each year of service.

B. * * * Unused disability/sick leave days may accumulate in this account to a maximum of 112 days of disability/sick leave per teacher.

* * *

D. Disability/sick leave with pay shall be allowed by the School District whenever a teacher's absence is due to illness or disability which prevents his/her attendance at school and performance of duties on that day(s).

E. The School District may require a teacher to furnish a medical certificate from a qualified physician as evidence of disability/illness indicating such absence was due to disability/illness in order to qualify for disability/sick leave pay. In the event that a medial certificate will be required, the teacher will be so advised.

* * *

Section 5. Family & Medical Leave:

Subd. 1. Pursuant to the Family and Medical Leave Act, an eligible teacher shall be granted, upon written request, a leave up to a total of twelve (12) weeks of unpaid leave per year in connection with

1) the birth and first-year care of a child.
2) the adoption or foster placement of a child

* * *

Subd. 4. The teacher may elect to substitute paid sick leave or paid personal leave for leave otherwise provided under this section.

Positions of the Parties-

The **UNION** takes the position in this matter that the District has violated the clear language in Section 9.5 of the parties' Labor Agreement when it denied paid sick leave in the amount specified by the two Grievants in 2007 for the birth and care of their first-born children. In support of this claim, Education Minnesota maintains that a plain reading of the applicable provisions in the section allow for the teacher to make the election of using accumulated paid or personal leave in lieu of taking unpaid leave as specified in subdivision 1 of Section 5. The Board's interpretation of this language, according to the Association, is erroneous as there is no requirement anywhere in Section 9.5 that the teacher produce a written notice from their physician indicating a disability in order to substitute sick leave. Yet that is precisely what was sought in advance of issuing the paid leave. Further, they contend that the School Board

approved both leave requests as submitted, and that the Board members had in their possession the written notices from each Grievant, wherein the substitution of paid sick/personal leave was specified, prior to granting the respective requests. The Association argues that under the terms of Section 9.5, the option for substituting paid sick and/or personal leave is the teacher's – not the Employer's. Further, they point out that during the course of bargaining over the 1997-99 Agreement, the District sought to add new language to the Section allowing the Administration to require that the teacher take paid sick or personal leave, thereby making the election an option of the Employer rather than the instructor's alone. This proposal however, did not find its way into the new Contract, and there has been no significant change in the language since that time. Finally, they note that Ms. Brandriet had her twelve weeks of paid leave approved by the Superintendent in March of last year, after she spoke with him about the matter. For all these reasons then, they ask that both grievances be sustained and that these two teachers be made whole.

Conversely, the **EMPLOYER** takes the position that there was no violation of the parties' Master Agreement when they refused to pay sick leave and/or personal leave to the Grievants who had been approved for FML by the School Board at the end of 2007. In support of their claim, the

District contends that the use of the permissive verb "may" as opposed to the mandatory verb "shall" found in subdivision 4 of Section 9.5 is significant as it does not obligate the Employer to grant paid leave to someone in the bargaining unit who opts to take part of the time off utilizing accumulated sick and/or personal leave. Further, the Administration argues that Section 9.5 cannot be read in a vacuum. Rather, it must be viewed in conjunction with the remainder of the Contract and more particularly the balance of Article 9. Section 1 of the article entitled "Disability/Sick Leave" establishes the benefit and how it is to be accumulated. Moreover, Section 5 says nothing about deducting sick leave or personal leave from an employee's "bank" when they are taking FML. In addition, Section 1 allows the Administration to require medical certification verifying an illness or disability. Here, the Union seeks to ignore those provisions when interpreting Section 5. Furthermore, the District asserts that the Association's interpretation is inconsistent with the past practice of the parties. It is unrefuted that for the thirteen years the language has been in the Contract, no teacher has ever been allowed to utilize sick leave when he or she has not been sick. What the Grievants are seeking here is to avail themselves of this (limited) benefit in a manner that is unprecedented and never intended. The Family Medical Leave Act

specifically referenced at the beginning of Section 9.5 grants FML to an employee for a limited number of specified occurrences. The Act itself does not provide for sick leave usage application to those circumstances enumerated. The Union here bears a very heavy burden of demonstrating via a preponderance of the evidence, that a teacher can exhaust his/her accumulated sick leave up to twelve weeks when in fact they are not actually sick or disabled during all or part of that time. Finally, they note that this same issue was brought before another arbitrator in Minnesota approximately three years ago, and the complaint was denied. For all these reasons then, they ask that the grievances of Ms. Brandriet and Ms. Koosmann be similarly denied in their entirety.

Analysis of the Evidence-

Any examination of the proffered evidence in a matter of contract interpretation such as this, necessarily begins with an in depth look at the provision or provisions that are in issue. In this instance it is readily apparent that the dispute centers on the wording in Article IX, "Leaves of Absence."

Both sides have argued that the language they deem most relevant within this portion of their Labor Agreement is clear and unambiguous on its face. Yet at the same time, they view the article quite differently.

Indeed, plausible contentions have been made for each of their respective positions.

The Union carries the initial burden of proof here to demonstrate by a preponderance of the evidence that the Board's actions in denying these grievances resulted in a violation of the parties' Collective Bargaining Agreement. To that end, the Association maintains Section 5 of Article IX is a separate and distinct provision. They note that it makes no reference to any other section in the Article, and that there have been no relevant changes to it since it was first added during negotiations regarding the 1995-97 Contract.[2] Further, the contention is made that there is nothing contained in Section 5 requiring an employee to produce medical certification as evidence of a disability/illness in order to qualify for the paid leave. While this is an option reserved to the Employer in Section 1(E), no similar obligation is found in Section 5, as there is no language found there indicating that FMLA is subservient to or part of any other "leave" provision of the Article.

I would agree with the Union that there is nothing in 9.5 requiring a teacher to produce medical certification in connection with his/her

[2] The record shows that during bargaining over the successor (1997-99) Agreement, the District sought to add language that would have given them the authority to require a teacher to substitute paid leave for leave otherwise provided under what is now Section 5, but were unsuccessful (Union's Ex. 1; testimony of Union Chief Negotiator Ron Koester).

request to take Family Medical Leave. Rather, as the Association has accurately noted, the crux of the matter to be resolved is whether an employee eligible for leave under Section 5, and who elects to substitute paid sick or personal leave pursuant to Subdivision 4, is limited by the requirements of Section 1.

In connection with Subdivision 4 of 9.5, the Employer argues that by incorporating the permissive verb "may," the parties have agreed that the District has the discretion to deny the requested use of sick leave to a member of the bargaining unit under the terms of a request for Family and Medical Leave. Such an interpretation however, flies in the face of the clearly worded election contained in the one-sentence paragraph. It is the "teacher" who may elect to substitute paid sick or personal leave for unpaid FMLA. Nowhere in this sub-section is there any reference to discretion on the part of the Administration. Indeed, in light of the plain construction of the sentence, it would require a monumental leap of faith to endorse such an allowance.

At the same time however, finding that the election in subdivision 4 belongs to the teacher rather than the Employer, does not resolve the issue at hand.

The District makes a far more convincing argument when it

asserts that Section 5 cannot be read in a vacuum as the Association asserts. Rather the article – and indeed the entire Contract - must be read as a whole. The infirmity of the Union's reasoning is that it ignores a most basic tenet of contract interpretation which holds that parties to a bargained agreement would not craft a provision that is meaningless. *Maritime Service Committee, Inc.,* 49 LA 557 (1967). In their treatise on labor and employment arbitration, authors Bornstein & Gosline have observed:

> "Because it can be assumed the parties did not intend one provision of the contract to cancel out another provision, if the language is susceptible to two constructions, one that will carry out the objectives of the contract and the other that will not, the first construction should prevail. *All language should be given meaning and should not be ignored. Effect should be given, if possible, to every word, sentence, and clause in the contract. No words should be rejected as unnecessary if they can be given a reasonable interpretation. An interpretation that gives meaning to every part of the contract is preferred to one that gives no effect to one or more parts*" (from: *Labor & Employment Arbitration*, Matthew Bender, 1993 et seq. §14.02 [1][d], at p. 14).

An adoption of the Union's argument would require the reader to turn a blind eye to the very first section of Article IX which includes equally clear and unambiguous language. More particularly, as it relates to the instant dispute, paragraph "D" (*supra*) provides that disability/sick leave

pay earned by members of the bargaining unit "shall be allowed," provided an express condition is satisfied. That is, that the ".....teacher's absence is due to illness or disability *which prevents his/her attendance at school and performance of duties on that day(s)*" (emphasis added). Both Grievants have acknowledged that they were not disabled or ill for the entire duration of their absence when they took their leave under Section 5. Moreover, Mr. Koester agreed with the District that if a teacher uses his/her sick leave pursuant to Section 9.5, subd. 4, it is necessarily deducted from their accumulated "unused" leave which is specifically referenced in Section 1 of the same article.

Based upon the foregoing analysis, while at first glance the language in Subdivision 4 of Section 9.5 would appear to plainly support the Association's argument, its adoption would essentially result in the evisceration of the requirements - also set forth in clear language – found in Section 9.1(D) that paid sick leave be allowed whenever a teacher is ill or disabled preventing him/her from performing their assigned instructional duties. Viewed then in its entirety, I conclude that the language crafted by the parties placed into Article IX mandates that when Section 5, Subd. 4 is read in conjunction with Section 1, Paragraph D of the same article, a teacher may elect, "....to substitute paid sick leave or paid personal

leave" when taking Family and Medical Leave to the extent that their absence, "....is due to illness or disability which prevents his/her attendance at school and performance of duties....."

As the clear language in Article IX supports the District's position more than the Association's, other interpretative aids such as consideration of past practice is not necessary. Nevertheless, assuming *arguendo* that the applicable provisions are ambiguous, I find insufficient evidence in the record establishing a clear and consistent practice by the parties one way or another.[3] The Employer offered documentation purporting to show that since the FMLA language was added to the Labor Agreement, no teacher has received more than six or eight weeks of paid sick leave, as a substitution for unpaid Family and Medical Leave (Administration's Ex. 1). At the same time however, it is unclear whether the teachers utilized in their data were aware of the Grievants' current interpretation and approach to the issue. In addition, as the Union has observed, it is not known whether those listed in the exhibit had earned a sufficient amount of sick leave to request ten or twelve weeks similar to what Ms. Koosmann and Ms. Brandriet had sought. And finally, a question remains as to whether the leave taken was toward the end of the school

[3] Both sides addressed past practice at the hearing and in their respective written summaries.

year and thus those in the compilation may not have been making application for as much paid time off as the Grievants here. The evidence proffered simply does not satisfy many of the antecedent conditions - such as acceptability, clarity, longevity and mutuality – necessary to establish a bona fide past practice.

The Union makes a cogent argument with regard to another portion of Section 5. Referencing a teacher's substitution option in Subd. 4, "....for leave otherwise provided under *this* section," the Association notes that within Subd. 1 of Section 5, adoption and foster placement are specifically cited as reasons for taking Family and Medical Leave (Joint Ex. 1; emphasis added). Certainly it is difficult to imagine a situation where such an event would result in a bargaining unit member being ill or disabled as contemplated in 9.1(D). The Union's contention is illuminating, and indeed somewhat troubling in light of the conclusions reached here concerning the clarity and significance of the relevant language set forth in 9.1 of the article. Nevertheless, I find that it saddles the section with more weight than it can bear.

It was aptly demonstrated, over the course of the hearing, that when Section 5 was placed into the parties' Contract it was done with the mutual recognition that, as the FMLA was a new law affecting the

bargaining unit membership, it should therefore be referenced in the 1995-97 Agreement. The entire law was not reproduced in the Contract, however. Rather, a portion of it was paraphrased in order to make the language grievable and recognizing its significance. As the Administration points out, Subdivision 4 of Section 9.5 is a rough summary of §2612(d)(2)(B) of the Act, which concludes with the following: "....nothing in this subchapter requires an employer to provide paid sick leave or paid medical leave *in any situation in which the employer would not normally provide any such paid leave*" (emphasis added). In light of the clear language in 9.1(D), and the wording of the law itself, I must respectfully disagree with the Union's position as it pertains to Section 5, Subd. 1(2) of Article IX.

Although the evidence and arguments regarding the interpretation of the relevant language in the Master Agreement favor the District's position, the particular facts, as they pertain to the experience of the two teachers leading up to the submission of their complaints, do not. It is uncontroverted that in both instances, they made proper written requests to the District Superintendent for their leave, while at the same time exercising their right to substitute paid sick and personal leave. Their letters to then Superintendent Farwell, in relevant part, were identical. They

sought to "...substitute [their] accumulated paid sick leave and paid personal leave" for a specific amount of time off (Ms. Brandriet for12 weeks and Ms. Koosmann for 10; Joint Exs. 3 & 4). At the very minimum, such clear wording should have lead members of the Board who subsequently considered the requests at their regular scheduled meeting, to inquire further if they believed their interpretation of Article IX was at odds with the Grievants'. That however, did not happen. Rather, both leave requests were granted for the time period each had asked for. This was done during two successive regularly scheduled School Board meetings in late 2007 (Joint Exs. 5 & 6). In Ms. Brandriet's case, the Board, under the section titled "Personnel," approved her request without qualification. The notation of this particular action in the same document, bordered on a second leave request made by another teacher (Patzer). In both instances the heading used simply states "Leave Request" (*id.*). Yet, quite unlike the Grievant's, Ms. Patzer's is identified in the minutes as "*unpaid* leave." Such evidence demonstrates that the Board was cognizant of the differences between paid leave and unpaid leave applications. While there was no similar juxtaposition reflected in their December 2007 minutes, when Ms. Koosmann's request was approved, neither is there an indication that they were, in any way, qualifying her

application. That did not occur until two months later when Ms. Volk sent an e-mail to the Grievant (Union's Ex. 4).

Two other salient facts have influenced the decision reached here. First, on March 14, 2008, Ms. Brandriet received written notice from the Administration indicating that Superintendent Farwell had indeed approved her request to substitute twelve weeks as paid sick leave (Union's Ex. 3; p. 6). Nothing was placed in the record to refute the action, save for the former superintendent's nebulous statement, under cross-examination, that the approval forwarded to Ms. Brandriet was "a mystery" to him.

Finally, I note the unrefuted fact that since the end of 2007, when the Grievants' leave requests were formally accepted, no action has ever been taken by the School Board to rescind same (testimony of former Superintendent Farwell and former School Board member Rodney Weber).

The District, in defense, argues that the applicable language in the parties' Master Contract determines the teachers' rights, not the School Board. In addition they maintain the Board did not understand that they were granting paid sick leave for the time sought by the Grievants. Neither argument is particularly persuasive. The Lac Qui Parle School Board, not unlike most other school boards in the state, is expected to

make numerous decisions that directly involve the terms and conditions of labor agreements executed between employee bargaining units and the District. The granting or denial of leave requests – both paid and unpaid - are personnel actions routinely considered at their regularly scheduled monthly meetings. Moreover, in the instant case, the evidence conclusively demonstrates that the Superintendent specifically granted Ms. Brandriet's request in writing, and that all Board members had both Grievants' written requests for the leave well in advance of their meetings, and presumably were vigilant in their review of them prior to formally taking action. Additionally, the record shows that Ms. Koosmann was physically present at the December 2007 meeting and could have answered any questions the Board may have had concerning her request. When this evidence is considered collectively, I find that both Grievants were justified in relying upon the written representations of their School Board and/or the District's Superintendent.

Award-

Based upon the foregoing, I conclude that the Grievants' complaints are sustained. While the applicable language in the Master Agreement needs to be considered as a whole and as such, supports the Employer's

interpretation, in this particular instance the very unique facts surrounding the two grievances indicates that both Ms. Koosmann and Ms. Brandriet were effectively granted their applications for ten and twelve weeks of paid sick leave respectively per the actions of the School Board and the Administration, and are therefore entitled to relief. Accordingly, Grievant Brandriet shall forthwith be compensated for three additional weeks and three days pay at the appropriate rate which is to be deducted from her accumulated sick leave, while Grievant Koosmann is to be granted three weeks and four days pay at the appropriate rate, similarly to be deducted from her sick leave bank.

In making this award, it should be understood that but for the facts unique to this particular dispute, no relief would have been granted to the two Grievants under the terms of Article IX, as the position taken by the Employer, in connection with their interpretation of the language in issue, is deemed to be the most reasonable.

Respectfully submitted this 2nd day of February, 2009.

/s/_____
Jay C. Fogelberg, Neutral Arbitrator