IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN:

HUTCHINSON SCHOOL DISTRICT, ISD #423,

EMPLOYER,

and

HUTCHINSON EDUCATION ASSOCIATION,

UNION.

ARBITRATOR'S AWARD

BMS CASE No. 09-PA-0947

Christian Ochsendorf Grievance

ARBITRATOR:	Rolland C. Toenges
GRIEVANT:	Christian Ochsendorf
DATE OF GRIEVANCE:	March 4, 2009
ARBITRATOR SELECTION NOTICE:	June 30, 2009
DATE OF HEARING:	January 21, 2010
POST HEARING BRIEFS RECEIVED:	March 9, 2010
DATE OF AWARD:	April 5, 2010

ADVOCATES

FOR THE EMPLOYER:	FOR THE UNION:
Joseph E. Flynn, Attorney	Rebecca H. Hamblin, Attorney
Knutson, Flynn & Deans	Education Minnesota

WITNESSES

Daron Vander Heiden, Superintendent	Cari Ann Squier, 09-10 President
	Daniel Brinkman, 08-09 President
	Christian Ochsendorf, on LOA

ALSO PRESENT

Tammy Barnes, Field Staff, Education Minnesota

Kristina Vorlicek, Secretary

COURT REPORTER

Sheila G. Smith

Ask, Trondson & Smith, LLC

ISSUE

Did the Employer violate Article XII, Section 7 the 2009-09 Collective Bargaining Agreement when it refused to reinstate the Grievant from his leave of absence, for the 2009-10 school year. If so, what should the remedy be?

JURISDICITION

The matter at issue, regarding the Employer's refusal to reinstate the Grievant prior to expiration of his leave of absence, came on for hearing pursuant to the "Grievance Procedure" contained in the Collective Bargaining Agreement between the Parties. The Grievance Procedure, Article XVI, in relevant part, provides as follows:

> "Section 1. Grievance Definition. A "grievance" shall mean an allegation by a teacher resulting in a dispute or disagreement as to the interpretation or application of any term or terms of this Agreement. . . "
>
> "Section 5. Adjustment of Grievance. The School District and the teacher shall attempt to adjust all grievances which may arise during the course of employment of any teacher within the School District in the following matter [manner]:
>
>> Subd. 2. Level II. In the event the grievance is not resolved at Level I, the decision rendered may be appealed to the superintendent of schools, provided such appeal is made in writing within three (3) days after receipt of the decision in Level I. If a grievance is properly appealed to the superintendent, the superintendent or a designee shall set a time and meet regarding the grievance within ten (10) days

after receipt of the appeal. Within five (5) days after the meeting, the superintendent or a designee shall issue a decision in writing to the parties involved." [Emphasis Added]

"Section 6. Denial of Grievance. Failure by the School Board or its representative(s) to issue a decision with the time periods provided herein shall constitute a denial of the grievance and the teacher may appeal to the next level." [Emphasis Added]

"Section 7. Arbitration Procedures. In the event that the teacher and the School District are unable to resolve any grievance, the grievance may be submitted to arbitration as defined herein.

Subd. 1. Request. A request to submit a grievance to arbitration must be in writing signed by the aggrieved party, and such request must be filed in the office of the superintendent within five (5) days following the decision in Level III of the grievance procedure.

Subd. 2. Prior Procedure Required. No grievance shall be considered by the arbitrator which has not been fist duly processed in accordance with the grievance procedure and appeal provisions.

Subd. 3. Selection of Arbitrator. Upon the proper submission of a grievance under the terms of this procedure, the parties shall, within five (5) days after the request to arbitrate, attempt to agree upon the selection of an arbitrator. If no Agreement on an arbitrator is reached, either party may request the BMS to appoint an arbitrator, providing such request is made within ten (10) days after request for arbitration. Failure to agree upon an arbitrator or the failure to request an arbitrator from the BMS within the time periods provided herein shall constitute a waiver of the grievance. Upon receipt of a list of five (5) arbitrators from the BMS, the parties shall within five (5) days alternately strike names from the list until only one (1) name remains, which person shall serve as the arbitrator. If the parties are unable to agree who shall strike the first name, the question shall be determined by the flip of a coin.

Subd. 4. Submission of Grievance Information.

a). Upon the appointment of the arbitrator the appealing party shall within five (5) days after notice of appointment forward to the arbitrator, with a copy to the School Board, the submission of the grievance which shall include the following:

1. The issues involved.

2. Statement of facts.

3. Position of the grievant.

4. The written documents relating to Section 5, Article XVI of the grievance procedure.

b). The School Board may make a similar submission of information relating to the grievance either before or at the time of the hearing, with a copy to the Association.

Subd. 5. Hearing. The grievance shall be heard by a single arbitrator and both parties may be represented by such person or persons as they may choose and designate, and the parties shall have the right to a hearing at which time both parties will have an opportunity to submit evidence, offer testimony, and make oral or written arguments relating to the issues before the arbitrator. The proceeding before the arbitrator shall be a hearing de novo.

Subd. 6. Decision. The decision by the arbitrator shall be rendered within thirty (30) days after the close of the hearing. Decisions by the arbitrator in cases properly before him shall be final and binding upon the parties, subject, however to the limitations of arbitration decisions as provided by PELRA.

Subd. 7. Expenses. Each party shall bear its own expenses in connection with arbitration, including expenses relating to the party's representatives, witnesses and any other expenses which the party incurs in connection with presenting its case to arbitration. A transcript or recording shall be made of the hearing at the request of either party. The parties shall share equally fees and expenses of the arbitrator, the cost of the transcript or recording if requested by either or both parties and any other expenses which the parties mutually agree are necessary for the conduct of the arbitration.

Subd 8. Jurisdiction. The arbitrator shall have jurisdiction over disputes or disagreement relating to grievances properly before the arbitrator pursuant to the terms of the procedure. The jurisdiction of the arbitrator shall not extend to proposed changes in terms and conditions of employment defined herein and contained in this written Agreement. Nor shall any arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure as outlined herein, nor shall the jurisdiction of the arbitrator extend to matters of inherent managerial policy, which shall include but are not limited to such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, and selection and direction and number of personnel. In considering any issue in dispute, in its order the

arbitrator shall give due consideration to the statutory rights and obligations of the public School Board to efficiently manage and conduct its operation with the legal limitations surrounding the financing of such operations.

Section 8. Grievance Form. Grievances must be filed on the form provided as Attachment D. Forms shall be supplied by the School District."

The matter in dispute, GENERAL LEAVE OF ABSENCE, is covered by Article XII, of the Collective Bargaining agreement, which provides as follows:

"Section 7. General Leaves of Absence.

Subd. 1. Teachers with a minimum of five (5) years[1] of experience in the School District, and ten years of teaching in the State of Minnesota may apply for an unpaid leave of absence, subject to the provisions of this Section. The granting of such leave shall be at the discretion of the School District. [Emphasis Added]

Subd. 2. Such leave may be granted by the School District. The following will be taken into consideration when determining whether to grant a leave:

a. The continuity of the instructional program.

b. The availability of qualified candidates to replace the teacher.

c. The rationale/purpose for the leave as presented by the teacher in written format to the District's designee.

(For insurance benefits and seniority, see Sections 12, 13 and 14 of this Article.)

Subd. 3. The teacher shall notify the district no later than February 1 of the year in which their leave expires of their intention to return or not to return.[2] Failure to notify the district will be considered the teacher's resignation." [Emphasis Added]

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[1] It is noted that the Five (5) year requirement first appeared in the Collective Bargaining Agreement effective July 1, 2005. The previous requirement was three (3) years.

[2] It is noted that the February 1, date first appeared in the Collective Bargaining Agreement in effect from July 1, 2007 through June 30, 2009. In previous Agreements, the date was April 1.

The Parties selected Rolland C. Toenges as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The Arbitration hearing was conducted in accordance with the terms and conditions of the Collective Bargaining Agreement (CBA) between the Parties and the Public Employment Labor Relations Act (MS. 179A.01 – 30).

The Parties were afforded full opportunity to present evidence and testimony bearing on the issue in dispute. All witnesses were sworn under oath and were subject to cross-examination.

The Parties stipulated to the issue before the Arbitrator. A stenographic record was made of the hearing and a copy provided to the Arbitrator and both Parties.

BACKGROUND

Hutchinson IDS #423 (Employer) is a public school system. The System consists of three districts: 1). Hutchinson Public School District; 2). New Century Charter School District and, 3). New Discoveries Montessori Academy School District. There are 10 elementary schools, seven (7) middle schools and seven (7) high schools. Hutchinson has a population of about 14,000 residents. Hutchinson High Schools have a student population of approximately 1,000. The School District has some 480 employees.

Education Hutchinson[3] (Union) is the exclusive representative of teachers employed by Hutchinson IDS #423. The Bargaining Unit consists of all teachers licensed by the State of Minnesota as a professional employee, excluding managerial and supervisory employees.

Christian Ochsendorf (Grievant) began teaching at Hutchinson Schools during the 2000 – 01 school year. The Grievant is licensed to teach emotional/behavior

[3] The Union has recently changed its name from Hutchinson Education Association to Education Hutchinson.

disorders, specific learning disabilities and physical education. As a licensed teacher, he is a member of the Union.

The first year at Hutchinson Schools, the Grievant taught special needs students at the high school. The Grievant was then assigned to teach at "Cornerstone," a program serving the educational needs of students in the McCleod County Treatment Program. Teachers from Hutchinson Schools staff Cornerstone, although it is not a Hutchinson School program. The Grievant would seek direction from then Hutchinson Superintendent, Dan Overbeke when a need arose.

In April 2005, the Grievant requested and on May 16, 2005 was granted a five-year leave of absence from his teaching position. In his request, he told the Employer that he had an opportunity to work outside the teaching field with a local construction company. The leave granted the Grievant is scheduled to expire at the end of the 2009-10 school year. According to the terms of the current CBA, the Grievant is required to request reinstatement from the leave no later that February 1, 2010 to be eligible for reinstatement.

The Grievant's leave was granted under the terms and conditions set forth in the 2005 -07 CBA, which at that time, required a minimum of three (3) years teaching experience with the Employer. Teachers are covered by Minn. Stat. Section 122A.46, the "Extended Leave of Absence Law," but the Grievant was not eligible for a leave under this law as he did not meet the minimum teaching experience requirements.

During the first and second years of his leave, the Grievant worked for Marcus Construction Company and the third year for Yale Mechanical. As economic conditions resulted in a downturn of the construction industry, the lack of opportunity in the construction industry caused the Grievant to seek reinstatement with the Hutchinson School District.

In the spring of 2007, the Grievant spoke with then Superintendent Vander Heiden and Assistant Superintendent Allen Stockman about his interest in returning to a teaching position with Hutchinson Schools for the 2008 – 09 school year. Vander

Heiden informed the Grievant that it was within the Employer's discretion whether to allow him to return from his leave prior to its expiration. Although the Grievant understood the Employer would get back to him regarding his request, he did not hear anything further. The Grievant did not contact his Union at this time.

On March 30, 2008, the Grievant again contacted the Employer in writing and requested to return to Hutchinson at the beginning of the 2008 -09 school year.

In the interim, the Grievant secured employment with Swan's Food Home Service Delivery Company. In late summer of 2008, when the Grievant realized he would not be returning from his leave of absence for the 2008 - 09 school year at Hutchinson, he secured a teaching position with the Watertown-Mayer School District and has continued employment there through the present.

On January 27, 2009, the Grievant sent a letter to the Hutchinson Superintendent informing him that he planned to return at the end of his leave and also requested to return early for the 2009 – 10 school year. On February 3, 2009, the Grievant received a written response informing him that, because he was holding a full-time teaching position at another School District, the Employer was under no obligation to reinstate him. The Employer cited the provisions of Minn. Stat. Section 122A.46, which provides that the Employer is not obligated to reinstate a teacher from a leave of absence who takes a full-time or part-time teaching position in another Minnesota school district.

The Grievant then brought the matter to the attention of the Union, who filed a grievance March 4, 2009 on his behalf, claiming a violation of the CBA. The matter was processed through the CBA Grievance Procedure without resolution. Accordingly, the matter is now before the instant arbitration proceeding for resolution.

EXHIBITS

JOINT EXHIBITS:

J-1. Collective Bargaining Agreement, July 1, 2007 through June 30, 2009.

UNION EXHIBITS:

U-1. Collective Bargaining Agreement, July 1, 2007 through June 30, 2009.

U-2. Grievance documents.

U-3. Letter, Ochsendorf to District, requesting a leave of absence, April 14, 2005.

U-4. Letter, District to Ochsendorf, granting leave of absence, May 16, 2005.

U-5. Letter, Ochsendorf to District, request for reinstatement, March 30, 2008.

U-6. Letter, Ochsendorf to District, RE: Request for reinstatement, January 27, 2009.

U-7. Letter, District to Ochsendorf, reinstatement request denied, February 3, 2009.

U-8. Excerpts from 2003-3005 CBA, "General Leaves of Absence."

U-9. Excerpts from 2005-2007 CBA, "General Leaves of Absence."

EMPLOYER EXHIBITS:

E-1. Minn. Stat., Section 122A.46, Extended Leaves of Absence.

E-2 Calendar of events – February, March & April 2009.

POSTION OF THE PARTIES:

THE UNION SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The instant matter is governed by the CBA, not statute.[4]
- Accordingly, the Employer's response to the Grievant of February 3, 2009 was misplaced and the Employers basis for denying reinstatement is not applicable to the instant matter.

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[4] The Parties stipulated at the hearing that the instant matter is governed by the CBA, not the Statute, as the Grievant was not eligible for the leave at issue under the statute.

- The Union properly combined Level 1 and 2 of the Grievance Procedure because there was no Building Administrator at Cornerstone with whom to file a Level 1 grievance.
- The Level III Grievance appeal by the Union was timely filed because the Employer never scheduled a Level II hearing. Therefore, the timeline for the Union to appeal never started running.
- The Union should not be punished for the Employer's failure to comply with the Grievance Procedure.
- It is the Employer, not the Union that violated the CBA Grievance Procedure when it failed to schedule a Level II meeting, as required by the CBA.
- The Grievance Procedure language that provides, failure to issue a decision shall constitute a denial of the Grievance, does not apply here. It was the Employers failure to schedule the due process meeting, a prerequisite to a decision, that caused the Union not to proceed with an earlier appeal.
- Compounding the Employer's failure to process the grievance in good faith, Superintendent Vander-Heiden told Brinkman that he would be getting back to him and would schedule a time for the Parties to meet in an attempt to resolve the matter. Vander-Heiden never did fulfill his duty and now raises a timeline issue against the Union.
- Both the former and current Union Presidents testified that teachers felt that they could return from a General Leave of Absence at the beginning of any year within the duration of the leave.
- Although the CBA language states the latest date by which a teacher can give notice of intent to return from leave, it does not state an earlier date for which a teacher cannot give notice.
- Given that teachers are under an annual contract, both the Grievant and Union understand that a request for reinstatement would apply only at the beginning of a school year.

<u>THE EMPLOYER SUPPORTS ITS CASE WITH THE FOLLOWING:</u>

- It is apparent from the Grievant's March 30, 2008 letter, as well as his January 27, 2009 letter, requesting reinstatement from his General Leave of Absence, that he understood that he could not return early as a matter of right. In both instances, he noticed the Employer that he planned to return after completion of his leave, but also requested to come back earlier.
- Although there has been some confusion, the instant grievance comes under the jurisdiction of the CBA, Article XIII, Section 7.

- The language of Article XII, Section 7, Subd. 3, makes it crystal clear that a teacher has no right to return from a General Leave of Absence prior to the expiration of the leave.

- Not only is the CBA language clear, but the underlying rationale clearly supports the purpose of the language; namely, the ability of the School District to employ the best possible replacement for the absent teacher to ensure the quality of the educational program.

- It is understandable, even regrettable, that the Grievant and Union focusing on self interest might conclude that he could come in and out of the School District at will, without giving due consideration to the interests of the School District and his replacement.

- Accordingly, the grievance must be denied because the Union utterly failed to support its claim of a CBA violation with any creditable evidence.

- The Grievant's claim for damages must be denied. The record shows that the first time the issue of damages was raised was at the commencement of the arbitration hearing. As such, this claim is not contained in the statement of the Grievance brought by the Union.

- The Arbitrator must consider the particular grievance before him as framed by the Union in Exhibit #2 and as framed by Union Counsel in her opening statement of the issue.

- It is clear that there is no grievance before the arbitrator relating to the rights of the parties for the 2010 – 11-contract year. No such grievance has been presented nor has the Employer responded to such a grievance. Neither has the Employer prepared to defend for such a potential future event.

- It is not possible for the Arbitrator to rule on a matter that is not yet ripe and which may or may not ever occur.

- It is anticipated that the Union will seek an advisory opinion from the Arbitrator on the Grievant's right to return for the 2010 – 11 school year. Such a grievance is not before the Arbitrator – only the Grievant's right to return for the 2009 – 10 school year is before the Arbitrator.

- Article XVI, Section 7, Subd. 8, of the CBA, speaks to the jurisdiction of the Arbitrator: "The Arbitrator shall have jurisdiction over disputes or disagreement relating to grievances properly before the arbitrator pursuant to the terms of this procedure."

- The CBA further provides: "Nor shall any arbitrator have jurisdiction over any grievance which has not been submitted to arbitration in compliance with the terms of the grievance and arbitration procedure as outlined in this article. . ."

- It is respectfully urged that the Arbitrator not give an advisory opinion and speculate on what the circumstances and facts may be in the future.
- The grievance should be dismissed for failure to observe the timelines of the Grievance Procedure.
- The Union was untimely at various steps of the Grievance Procedure. While the record is not clear as to how many times, it is clear that it occurred on at least one occasion. (Transcript at pages 128-132.
- The Union's failure to observe the timelines further deprives the Arbitrator of jurisdiction of the instant matter.
- The Employer respectfully requests the grievance be denied.

DISCUSSION ON THE PROCEDURAL ISSUE

The instant matter raises the following threshold issue:

1. Were procedural defects present in processing the instant grievance? If so, were they sufficient to cause the grievance to be waived?

The first instance when the Grievant requested reinstatement was March 30, 2008. The Grievant placed the Employer on notice of his intent to return ". . . after my leave of absence is complete." The Grievant also indicated he would like to come back a year early, which he identified as the start of the 2008 – 09 school year. Since the Grievant's General Leave of Absence will expire at the end of the 2009 – 10 school year, the effect of the request was to return two years early, The Grievant met with Assistant Superintendent Stockman, but there was no follow-up with the Grievant. The Grievant did not pursue the matter further at that time.

The next time the Grievant requested reinstatement was January 27, 2009. The Grievant again placed the Employer on notice of his intent to return ". . . after my leave of absence is complete." The Grievant said he would be available to start back in the fall of 2009, which would have been one year before the expiration of his leave.

On February 3, 2009 the Employer responded to the Grievant's request. The Employer cited a state statute, which provides that the Employer is not obligated to reinstate a teacher granted a leave of absence under the provisions of Minn. Stat. Section 122A.46, if the teacher is employed as a teacher with another Minnesota School District.

The record shows that there has been confusion regarding the application of this statute in the instant matter. The provisions for a "General Leaves of Absence" in the CBA and "Extended Leaves of Absence" in the statute are similar, but the minimum experience requirements and right to reinstatement before expiration differ. At the time the Grievant requested leave, he met the minimum qualifications for a General Leave of Absence under the CBA, but did not meet the minimum qualifications under the statute. Therefore, the authority for his leave came from the CBA, not the statute. Superintendent Vander Heiden acknowledged in his testimony that the Employer ". . . was incorrect in applying the statute."

On March 4, 2009, the Union filed a grievance alleging violation of Article XII, Section 7 of the CBA. The remedy sought was assignment of the Grievant to a teaching position for the 2009 – 10 school year. The record shows that as of March 25, 2009, there had been no response from the Employer.[5]

On April 16, 2009, the Employer acknowledged receipt of the Union's Level III appeal and denied the grievance. The Employer denial was based on its belief, at the time, that the matter was covered by Minn. Stat., Section 122A.46.

The Employer further took the position that it did not recognize the Level III grievance as creditable, as it had not met the procedural requirements of the CBA Grievance Procedure. The following reasons were given:

- This grievance does not meet the standard to be heard by an arbitrator.[6]

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[5] Union Exhibit #2, page 2.

[6] Cited was Article XVI, Section 7, Subd. 2.

- There was no Level I grievance submitted to the building administrator.[7]
- Following the district denial of the Level II grievance, a written appeal was not submitted within the 5-day timeline. According to the grievance timeline, the district should have received the written Level III Appeal by March 25, 2009. The district received the written appeal by certified mail on April 4, 2009, seven working days after the deadline.[8]

The Arbitrator's analysis of the record, relevant to the Grievance Procedure events, shows the following:

1. February 3, 2009 – Date of Letter sent to Grievant by Employer informing him that his request to be reinstated from his leave will not be granted and Employer is under no obligation to reinstate him.
    - The record does not show when the Grievant received this letter.
2. March 4, 2009 – Date of grievance filed on behalf of Grievant by Union President Brinkman.
    - The grievance was dated 20 working days[9] after the date of the Employer's February 3, 2009 letter and is in compliance with Article XVI, Section 4. (February 16, being Presidents Day, is not counted as a working day)[10]
    - Brinkman personally delivered the grievance to Superintendent Vander Heiden. Vander Heiden testified that he accepted it as a Level II grievance. Vander Heiden could have instructed Brinkman to present the grievance to a lower level administrative person, if he wanted the grievance treated as a Level I.
    - Considering the nature of the grievance, it is axiomatic that the administrative decision required would obviously be made at the Superintendents level.

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[7] Cited was Article XVI, Section 5, Subd. 1.

[8] Cited was Article XVI, Section 5, Subd. 4.

[9] The CBA in Article XVI, Section 3, Subd. 2 defines working days as all week days not designated as holidays by state law.

[10] Article XVI, Section 2, Subd. 2 DAYS.

3. April 2, 2009 – Date of Union's appeal to Level III.

   - The CBA requires that the Superintendent shall set a time to meet[11] regarding the Level II grievance within ten (10) days after receipt.

   - The Superintendent's ten (10) working days to schedule the required meeting expired on March 18, 2009. He then shall issue a decision within five (5) working days after the meeting, which expired on March 25, 2009.

   - The earliest the Union could be sure that the Superintendent was not going to respond to its Level II grievance would be at the end of the working day on March 25, 2009. Thereafter, the Union had five (5) working days to file a Level III appeal to the School Board, which expired on April 2, 2009.

   - The School Board acknowledged receipt of the Union's Level III grievance on April 4, 2009.[12] April 4 is not counted as a working day under the CBA as it was a Saturday. The difference between the date of the grievance and the date it was acknowledged by the Employer was not explained. A logical explanation is the time difference was due to it being routed to the County Board Chair?

4. April 16, 2009 – Date of Employer response to Union's Level III grievance.

   - The School Board had thirteen (13) working days to schedule a meeting, which would have expired on April 14, 2009. The School Board had ten (10) days following its meeting to issue a decision, which would have expired on April 28, 2009.[13]

5. April 24, 2009 – Date of Union's grievance appeal to arbitration.

   - The Union had five (5) working days to appeal to arbitration, which expired on April 23, 2009.[14]

   - Brinkman executed the Union's grievance appeal on April 23, 2009[15] and the Employer acknowledged receipt on April 24, 2009.

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[11] Article XVI, Section 5, Subd. 2.

[12] Union Exhibit #2, page 3.

[13] Article XVI, Section 5, Subd. 4.

[14] Article XVI, Section 7, Subd. 1.

[15] Union Exhibit #2, page 4 – date of Brinkman's signature.

- The CBA provides that the appeal to arbitration must be filed in the office of the Superintendent within five (5) days following the Level III decision, which expired April 23, 2009.[16]

6. April 30, 2009 – Date of Union's request for a list of arbitrators from the Bureau of Mediation Services.

   - The Parties had ten (10) days to request the list of arbitrations from the Bureau of Mediation Services following the Union's appeal to the arbitration, which expired on May 7, 2009.[17]

FINDING ON PROCEDURAL ISSUE

The Arbitrator does not find a sufficient basis to rule that the grievance fails due to procedural defects.

While it may be argued that the Union's arbitration appeal may have been one day overdue, there is no evidence that the Employer's position was in any way prejudiced. While it can also be argued that the Employer did not have the option of scheduling a Level II grievance meeting and issuing a decision thereafter, there is no evidence that the Union's position was prejudiced.[18]

DISCUSSION ON THE MERITS

During the hearing it was clarified and stipulated by the Parties that the Grievant's leave of absence was granted under the terms and conditions of the CBA, rather than under the statute. Therefore, the statute is not relevant to the instant matter.

The Employer's response of February 3, 2009, to the Grievant's request to be reinstated from his leave of absence early, gave two reasons for denial. One of these

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[16] There is a notation on the Union's arbitration appeal by the secretary that it was received on April 24, 2009. It is not clear whether the document was actually delivered late on April 23, but not seen by the secretary until the following day.

[17] Article XVI, Section 7, Subd. 3.

[18] Article XVI, Section 5, Subd. 2 provides that the Employer shall set a time and meet and shall issue a decision.

reasons, statutory, has been addressed and found to be unsubstantiated. Therefore the issue before the Arbitrator is whether the Employer violated the CBA by refusing to reinstate the Grievant before the expiration of his five-year leave of absence.

The statement in the Employer's February 3, 2009 response, "Furthermore, ISD 423 is under no obligation to reinstate your employment," is presumed to be based on the Employer's mistaken reliance on presumed rights under Minn. Stat. 122A.46.

In its Post Hearing Brief, the Employer cautions the Arbitrator that the matter of the Grievant's reinstatement at the end of his leave is not before the Arbitrator in the instant proceeding. The Arbitrator is in agreement that this is the case and is not issuing a decision on this matter. However, the Employer, through Superintendent Vander Heiden's testimony raised this issue during the hearing and the Arbitrator feels compelled to comment.

Vamder Heiden testified that the Grievant, now teaching, was not eligible for reinstatement because he was in violation of his leave of absence agreement to pursue employment outside the teaching field. Vander-Heiden further testified; "Right, we would not have allowed a leave for somebody to leave our district and teach in another public school."[19]

Although the instant issue is whether the Employer violated the CBA by not reinstating the Grievant early, Vander-Heiden's testimony implies that he considers the Grievant in violation of his leave agreement and simply not eligible for reinstatement.

To consider the Grievant in violation of his leave agreement because he has a teaching position in another public school amounts to what is called a "catch 22." The Grievant requested reinstatement prior to seeking another teaching position.

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[19] Vander-Heiden testimony at page 100-101.

The reason he sought a teaching position in another public school was because he could not find employment outside the teaching profession and was refused reinstatement. It is clear that the reason he is teaching in another public school is not because that is his preference, but because the Employer has refused to reinstate him.

The terms and conditions that apply to a "General Leaves of Absence" are found in Article XII, Section 7 of the CBA. The language provides that; "The granting of such leave shall be at the discretion of the School District." The Grievant, having been granted a five (5) year leave, obviously met the required conditions. The most relevant provision to the instant matter is the following:

> "Article XII, Section 7, Subd. 3. The teacher shall notify the district no later than February 1 of the year in which their leave expires of their intention to return or not return. Failure to notify the district will be considered the teacher's resignation."

Neither this provision, nor any other in Section 7, addresses a situation where a teacher, while on leave, requests reinstatement before its expiration. Further, there is no evidence in the record of other teachers who may have requested reinstatement prior to expiration of their leave and, if so, how it was handled.

Union Witness, Cari Ann Squier, testified that ". . . others have returned within five (5) years . . . " Squier gave no specific examples. Further, even if true, the length of the leave would need to be known to determine if reinstatement was early.

In the absence of language addressing the matter at issue, or any history of how such requests have been handled in the past, the Arbitrator must rely on commonly accepted principles of contract law. When interpreting a contract it is presumed, absent evidence to the contrary, that the mutual interests of the parties are served by the agreement.

An agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation is referred to as an "illusory contract" and is

unenforceable.[20] Also commonly considered unenforceable is the principle of "unjust enrichment," that holds that "one shall not unjustly enrich himself at the expense of another."[21]

While the Grievant has the opportunity to pursue other employment interests for five (5) years, the Employer must arrange to replace him during this period. Obviously, the Employer's ability to attract a quality replacement teacher depends on the level of job security that can be offered. It is axiomatic that while the Grievant has five (5) years to freely pursue other career interests, the Employer. who suffers the burden of covering the absent Grievant's duties, justly should not be obligated to interrupt the arrangement to further accommodate the Grievant.

FINDING ON THE MERITS

A reasonable interpretation of Article XII, Section 7, Subd. 3 is that the Employer is not obligated to reinstate a teacher on a General Leave of Absence until expiration of the leave.

AWARD

There are no procedural defects sufficient to result in waiver of the grievance.

The Employer did not violate the CBA by denying the Grievant reinstatement prior to expiration of his leave of absence.

The Grievance is denied.

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[20] Black's Law Dictionary, 2001.

[21] Elkouri & Elkouri, Fifth Edition at pp. 574.

CONCLUSION

The Parties are commended on the professional and through manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 6th day of April 2010 at Edina, Minnesota.

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ROLLAND C. TOENGES, ARBITRATOR