

BEFORE THE ARBITRATOR

In the Matter of the  
Arbitration between

West Metro Education Program (WMEP)

And

BMS Case No. 12-PA-0607

West Metro United Educators (WMUE)

Appearances:

Attorney Ann Goering, Ratwik, Roszak & Maloney, on behalf of West Metro Education Program.

Attorney Nicole Blissenbach, Education Minnesota, on behalf of West Metro United Educators.

**ARBITRATION AWARD**

The above-captioned parties, hereinafter referred to as the WMEP, or the District, and WMUE, or the Union, respectively, are parties to a collective bargaining agreement providing for final and binding arbitration. The undersigned was selected from a panel provided by the Minnesota Bureau of Mediation Services pursuant to said agreement. Hearing was held in Plymouth, Minnesota on June 12, 2012. No stenographic transcript was made. Briefs were filed and the hearing was declared closed on July 16, 2012. All parties were given the opportunity to appear, present evidence and testimony, and to examine and cross-examine witnesses. Now, having considered the evidence, the positions of the parties, the contractual language and the record before her, the undersigned issues the following Award.

**ISSUE:**

The parties could not agree with regard to framing the issue.

WMUE would frame the issue as follows:

Did WMEP violate the collective bargaining agreement when it unilaterally deducted three (PTO Paid Time Off) days from the grievant, Edna McKenzie's paid time off bank? If so, what is the appropriate remedy?

WMEP proposed the following:

Did WMEP violate the terms of the contract by requiring the grievant to use PTO (Paid Time Off) for her absence from work from October 12, 2011, through October 14, 2011?

The undersigned hereby frames the issue as follows:

Did the District violate the parties' collective bargaining agreement when it deducted three PTO days from Edna McKenzie's PTO time bank for October 12, 2011 through October 14, 2011? If so, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS:**

**ARTICLE VIII  
LEAVES OF ABSENCE**

Section 8.1 PAID TIME OFF (PTO) LEAVE. Paid Time Off (PTO) is defined as absence used for illness, adoption, religious holidays, personal use (non-vacation) and paid child care leave. Paid Time Off does not include such absences as bereavement (Section 8.3) jury duty (Section 8.8) military leave (Section 8.9) sabbatical leave (Section 8.10) and any unpaid leave.

Subd. 8.1.a. All full-time teachers as defined in Section 2.2 shall be credited with twelve (12) days of Paid Time Off (PTO) per contract year. The credit shall be made at the beginning of each school year. Part-time teachers shall accrue PTO days on a pro-rata basis. If a teacher leaves the District having used more PTO days than he/she has accumulated, the District shall reduce the teacher's final paycheck for any unearned PTO days on a pro-rata basis.

Subd. 8.1.b. At the beginning of each contract year, the teacher's unused PTO days from the previous year shall be added to the teacher's previously accumulated PTO balance.

Subd. 8.1.c. If the accumulated PTO balance, at the end of any school year, exceeds 65 days, days over 65 shall be sold at the rate of \$95/day to be deposited into a Post-Retirement Health Care Savings Plan, established by the Minnesota State Retirement System, for each teacher.

Subd. 8.1.d. A teacher may use PTO days, up to the amount accumulated for reasons defined in 8.1. The principal will require the teacher to seek approval for PTO usage in excess of three consecutive days, except in cases of illness or emergency. The teacher shall inform the principal when illness or emergency leaves exceed three days.

Subd. 8.1.e. PTO days may be taken in half-or full-day increments only. No PTO days will be granted for illness or emergency during the first or last five student contact days of the school year. Pre-approval by the principal is required if PTO is used (other than for illness or emergency) on the workday immediately preceding or following a holiday or other school break.

Subd. 8.1.f. Upon termination of a teacher's employment for any reason, all accumulated PTO days shall be immediately and automatically cancelled.

**Section 8.6 OTHER LEAVES OF ABSENCE WITHOUT PAY.** Other leaves of absence without pay will be considered for purposes such as study, teaching in a foreign country, accompanying spouse or domestic partner on temporary assignment out of the area, recuperation, need to care for a seriously ill child, spouse, domestic partner, parent, or for other purposes approved by the Superintendent.

Subd. 8.6.a. Length. The length of a leave may normally be for one year or less. Leaves under this Section may be renewed annually, but for not more than three (3) years. In total.

## **ARTICLE XI GRIEVANCE PROCEDURE**

**Section 11.1. DEFINITION.** A grievance shall mean an allegation by a teacher, group of teachers or WMUE representative resulting in a dispute or disagreement between the teacher, group of teachers or union and the District as to the interpretation or application of this Collective Bargaining Agreement.

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**Section 11.8. ARBITRATOR'S JURISDICTION.** The arbitrator shall have jurisdiction over disputes or disagreements relating to grievance properly before the arbitrator pursuant to the terms of this procedure. The arbitrator shall not have the power to add to, subtract from, or to modify in any way the terms of this Agreement. The decision of the arbitrator shall be final and binding on all parties to the dispute.

### **BACKGROUND:**

The facts leading up to the instant grievance are not in serious dispute. The grievant, Edna McKenzie, a licensed special education teacher employed by the District since 2005, filed EEOC charges of discrimination and retaliation as well as an internal complaint of discrimination with the School Board Chair at the commencement of the 2011-2012 school year. In early September of 2011, McKenzie and WMEP agreed to mediation of her EEOC charges, which was scheduled for October 11, 2011. While the mediation was pending, the District sought to interview McKenzie, whose attorneys expressed concern that the interview would adversely impact the pending EEOC mediation. As a result of those discussions, the parties reached a compromise. WMEP initially requested that McKenzie go on leave, initially proposing that she use all of her accumulated PTO days and then be placed on administrative leave, through the date of the mediation. McKenzie, through her attorneys, informed WMEP that she was not interested in using up all of her accumulated PTO time, but agreed to use 5 days of PTO leave after which she would be placed on paid administrative leave. WMEP agreed and requested the PTO to cover September 16, and 19-22. Beginning on September 23, 2012, McKenzie was placed on paid administrative leave. It is clear from the testimony of all

parties and the exhibits that this compromise was entered into to cover the time through the date of the mediation only. The September 16, 2011 letter confirming the compromise indicates as follows:

As we discussed yesterday, both parties agree it is appropriate for Ms. McKenzie to go on leave through the date of mediation, October 11, 2011. Using the automatic absence reporting system (AESOP), Ms. McKenzie should report her (sic) for today and continuing for four more days, and should designate it as PTO leave. As we discussed, the District will enter administrative leave with pay for Ms. McKenzie, beginning Friday, September 23 and continuing through October 11. Kindly let Ms. McKenzie know that she should enter her absence in AESOP [the District's time accounting system.]

The EEOC mediation was held on October 11, 2011 where the parties reached a tentative agreement that would have ended the employment relationship between McKenzie and WMEP provided certain conditions were met. The District's legal counsel was to draft the settlement agreement and send it to McKenzie's representatives. There was no discussion by either party as to whether McKenzie was to return to work pending the finalization of the settlement and it is fair to conclude, based upon his testimony, that Superintendent Dan Jett, did not expect McKenzie to return to work pending the finalization of the settlement.

McKenzie received a first draft of the settlement on October 13. She did not believe that it reflected the terms to which the parties agreed. Her representatives agreed to communicate her concerns with the District. The second draft, which she and her representatives reviewed on October 14, also failed to address her concerns and McKenzie changed her mind about terminating her employment relationship with the District. She informed her representatives that she would be returning to work on the next work day, Monday, October 17, 2011. Her representatives communicated this to the District's representative and the District then sent her a message directing her to return on October 17 for a meeting with Superintendent Jett.

McKenzie had not heard anything from the District about returning to work prior to receiving this letter.

There is some dispute as to what actually was said during the October 17, 2011 meeting. McKenzie claimed that Jett expressed his displeasure with her refusal to sign the settlement agreement while he denied that he did so. It is, however, undisputed that Jett informed McKenzie that three PTO days were being deducted from her PTO bank for October 12, 13, and 14, 2011. It is also undisputed that this decision was made by the District and that McKenzie never requested or agreed to PTO leave for this time period. This is the subject of the instant grievance.

## **POSITION OF THE PARTIES:**

### **Union**

Citing testimony by Jett confirming that PTO leave is an employee-initiated leave, the Union alleges that the District's unilateral deduction of the three PTO days from McKenzie's leave bank without a PTO leave request from McKenzie violates the Master Agreement because it resulted in her not being provided with the contractually required amount of PTO leave. Citing section Section 8.1, Subd. 8.1.a of the agreement, it notes that all full-time teachers shall be credited with twelve (12) days of Paid Time Off (PTO) per contract year.

According to the Union, McKenzie never requested PTO leave or agreed to the use of PTO leave for the days in question. As an employee-initiated leave, the District cannot choose to assign PTO days as it sees fit because PTO leave is solely available upon the request or agreement of the employee. This is the case because the word "used" in the definition of PTO as set forth in Section 8.1 denotes some type of action on the part of the employee. When employees take PTO leave, they report the leave in the automatic absence reporting system (AESOP). This is exactly what McKenzie did for the five days of PTO leave used prior to the mediation. She never requested or reported PTO leave in the AESOP for October 12-14.

Noting that the District had no problems communicating with McKenzie about her PTO leave use leading up to the mediation, the District made no request of McKenzie after the conclusion of the mediation about requesting her to use additional PTO leave. Just as McKenzie refused to use all of her accumulated PTO leave prior to the mediation, McKenzie would have declined to use her accumulated PTO days pending the finalization of the settlement agreement. Through her testimony, she made it clear that had she known the District would deduct PTO leave for the disputed days, she would have reported to work. The District, however, never gave her the option.

No one expected McKenzie to return to work pending the finalization of the settlement agreement. She had a legitimate expectation that her placement on paid administrative leave would continue until the settlement agreement was finalized. Even if the District could show that there was an expectation that McKenzie would return to work following the mediation, the District failed to communicate that expectation to McKenzie. She should not lose a contractual benefit or be punished for the District's failure to communicate the options available.

The Union stresses that the October 14 e-mail from the District, ordering her to report to work on October 17 for a meeting with Superintendent Jett, was sent only after McKenzie informed her representatives that she would not be signing the settlement and wished to return to work. It made no mention of PTO leave. Given that this is the case, the Union argues that the District expected McKenzie to remain on paid leave pending the finalization of the settlement agreement. If it expected McKenzie to return to active duty the day following the mediation, regardless of the result, it should have informed

McKenzie of a re-entry meeting on October 12, 2012. This did not happen. Because she was not provided with this option, it is eminently reasonable for her to assume that she remained on paid administrative leave until October 17, 2011. This unilateral action was the denial of a choice to return to work. In support of its contention that she was denied a choice to return to work, as an auxiliary argument, the Union claims that because the District never contacted McKenzie during these three days, this is strong evidence that it did not expect her to report to work and supports her understanding that she was to remain on paid administrative leave. To buttress this argument, it notes that even when she returned to work on October 17, the District did not have an assignment for her. This also suggests that McKenzie was to remain on paid administrative leave pending the finalization of the settlement agreement. It is assumed that if the District expected her or any employee to return to work on a specified date, that it would make plans for that employee's return to work. This refutes the District's contention that she was only placed on administrative leave through October 11, 2011. The fact that it had no assignment for her indicates that it did not expect McKenzie to return to work on October 12, 2011.

McKenzie did not abuse her placement on administrative leave nor did she take an inordinate amount of time to review the draft settlement proposals. As soon as she realized that the agreement would not reflect the terms of the mediation as she understood them, she notified the District of her intention to return to work. She did not take advantage of her placement on paid administrative leave. Had the District informed her that PTO days would be deducted or that she would be on unpaid status pending the finalization of the settlement agreement, she would have returned to work.

The District was capable of requesting McKenzie to return to use her PTO days or to return to work during the three days in question, but it did neither. In fact, it did nothing to disabuse her of her understanding that she remained on paid administrative leave. She should not lose the three PTO days because the District failed to adequately communicate its expectations, thereby allowing her to make an informed choice.

In the Union's view, the deduction of the PTO days is retaliation for McKenzie's decision to reject the settlement agreement. The District took this adverse employment action unilaterally after she declined to sign in retaliation for her decision to reject the settlement and release of claims. When asked if the PTO days would have been deducted pending finalization of the settlement agreement had she ultimately signed it, Superintendent Jett refused to answer. Given McKenzie's testimony that Jett expressed his displeasure with her refusal to sign at the October 17 meeting, it should be concluded that the District's decision to deprive McKenzie of the collectively-bargained PTO benefit is retaliation for her decision to reject the agreement.

The Union requests that the grievance be sustained and that the District be ordered to restore the three PTO days to McKenzie's PTO leave bank.

## **District**

The District insists that Superintendent Jett did not authorize any additional days of paid administrative leave beyond October 11, 2011. Jett testified that he did not, nor would he have authorized additional paid leave for McKenzie while she considered the tentative settlement agreement. It stresses that McKenzie admitted on cross-examination that there was no agreement that administrative leave would extend past October 11, 2011. McKenzie had not taught for four weeks as a result of the mutual agreement of the parties for McKenzie to be on leave. Jett learned late in the afternoon of October 14 that the agreement had fallen through and that he requested through legal counsel that McKenzie report to his office on Monday morning so that arrangements for the training she had previously requested could be arranged. Nothing in the e-mail requesting McKenzie's return sent after the end of the work day addresses the issue of paying McKenzie for October 12-14.

According to the District, this case is about what the collective bargaining agreement does and does not say about employee absences from work. In its view, McKenzie was absent from work on October 12-14. McKenzie and the Union would like those days to be classified as "paid administrative leave" instead of PTO leave. However, the term "paid administrative leave" appears nowhere in the collective bargaining agreement. The District and McKenzie reached an agreement through counsel, as memorialized in two letters, one before and one after her leave. McKenzie, herself acknowledges that there was no agreement that paid administrative leave would extend past the date of the mediation, October 11, 2011. Notwithstanding that there is no agreement that paid administrative leave extended past October 11 and while there is no language regarding paid administrative leave in the collective bargaining agreement, the Union and McKenzie claim that the paid administrative leave simply continued in the absence of any agreement at all. This is simply not the case.

Absent the express agreement memorialized by the parties, the collective bargaining agreement applies. It provides for several types of leaves of absence but the most applicable type to this situation is Paid Time Off Leave as defined in Section 8.1. Following the tentative settlement agreement, McKenzie's absence from work was for personal reasons, either to meet with her attorneys or to consider the settlement proposals or to otherwise make decisions related to her continuing employment. The only provision in the contract that provides for payment to an employee when he or she is absent from work under such circumstances is PTO. The District properly attributed her absence to PTO.

According to the District, the Union and McKenzie's argument that no one told her to be at work for the three disputed days that she was absent and that no one told her that her absence would be attributed to PTO in the event that a settlement could not be reached must fail based upon the following logic. The collective bargaining agreement sets forth the number of duty days for each full-time teacher for the school year. There are 184 duty days for each teacher. The District published the calendar of duty days pursuant to the contract and this informed McKenzie of the dates when she was

responsible for either being at work or being on leave pursuant to the terms of the contract. This provided McKenzie notice, through both the contract and the school calendar of her obligations under her employment contract to either be at work or be on leave pursuant to the terms of the collective bargaining agreement during the 184 duty days. The only applicable provision in the contract for her absence from October 12-14 is PTO.

McKenzie's argument that there was nothing for her to do on October 17 when she reported to the Superintendent's office is also misplaced. Nothing in the contract requires the District to send teachers home with pay because here is no specific work assignment for them at any given moment. The District's assignment upon her return was an appropriate assignment for her. The District does not have to allow employees to be on vacation and can, in fact, assign them to come to work.

The District asserts that the Union and McKenzie are asking the arbitrator to "add to" the collective bargaining agreement an additional term that does not exist: three days of paid administrative leave. There is no ambiguity in the contract that needs to be interpreted. To grant three pays of paid administrative leave would be to add a provision to the contract that does not exist. Similarly there is no ambiguity in the agreement regarding paid administrative leave that needs to be interpreted. Paid leave, it was agreed, would commence on September 23 and end on October 11, 2011.

With regard to the Union's argument that the District had some type of ill motive, the district disputes this citing arbitral precedent. This is a case of contract interpretation and the collective bargaining agreement here has not been violated. McKenzie's absence was for personal reasons, as enumerated under the PTO provision and it was used appropriately. The grievance should be denied.

Finally, the District notes that the settlement fell through after three days, but these circumstances could have continued for weeks because the Age Discrimination in Employment Act provides for a period of consideration for up to twenty-one days prior to signing it and an additional seven days to change one's mind after signing and rescind the agreement. Under the Union's theory, the District might have had to continue the "paid administrative leave" that it never agreed to for over a month.

The District concedes that upon reaching the tentative agreement on October 11, neither the district nor McKenzie addressed the issue of what would happen if the agreement fell apart. This, it submits, does not however mean that McKenzie should be paid for these days under the circumstances. There is one provision and only one provision that addresses this: Article 8.1. The Union is arguing that so long as McKenzie had the legal right to rescind it, she should be considered on paid administrative leave. Nothing in the collective bargaining agreement calls for this.

The grievance should be denied because the District did not violate the collective bargaining agreement. McKenzie was properly charged PTO for the three days she was absent following the expiration of her paid administrative leave.

**DISCUSSION:**

Analysis of the instant dispute must start with the side agreement which all parties agreed that they entered into with respect to McKenzie's status up to and including the date of the mediation. It is evident that this agreement was clear and succinct as to how McKenzie would use leave time up to and including that date. Clearly, neither party thought about what would happen after the paid leave expired on the date of the mediation if the settlement fell through. Neither party contemplated what McKenzie's continuing status would be in this event because all parties assumed that McKenzie would be severing her employment status with the District as a condition of the proposed mediated settlement.

The Union makes much of the fact that the District never contacted McKenzie and requested her to return to work or discussed how her status after the mediation was to be addressed, but this argument is a red herring. It is obvious that the District did not contact her and offer a return to work or extension of the paid leave because until late Friday afternoon on October 14, it believed that McKenzie was going to sign some version of the mediated settlement agreement. Only when McKenzie, through her representatives, informed the District that she was not going to sign the agreement and desired to return to active employment did the issue of McKenzie's leave status arise.

The Union is essentially arguing that at all times after the side agreement on McKenzie's leave status expired, the burden was then on the District to contact McKenzie and to tell her when and where to appear for active duty. There is nothing, however, in the collective bargaining agreement which addresses whose responsibility it is to initiate a return to active duty under these circumstances.

The Union points to the agreed-to side agreement to support its argument. The side agreement on leave usage up to and including the date of mediation is crystal clear. It does succinctly set forth the dates of leave up to and including the mediation, but does not contain any additional provisions for the time after the mediation date. Having expired as of the date of the mediation, it cannot be relied upon to support the argument that McKenzie was entitled to continue on paid administrative leave for that additional period of time. The Union is essentially arguing that McKenzie's "assumption" that she would remain on paid leave after the expiration of the agreement entitles her to paid leave for the three additional disputed days. This argument must fail for a number of reasons. First, the District was clear in allocating who was responsible for how many days in the side agreement. Second, under the Union's logic, McKenzie may have been entitled to remain out of work on paid leave for the entire time statutory time period to which she was entitled to consider the settlement agreement, twenty-eight days.

But third, and most importantly, the Union cannot point to any provision nor is there any language in the collective bargaining agreement which supports the Union's theory that McKenzie was entitled to rely or assume that the side agreement granting the paid administrative leave status after usage of five PTO days would continue. Neither party made any provisions, either in the side agreement or the contract, for this situation

because all parties assumed as of the date of the mediation that they had negotiated a settlement whereby McKenzie would sever the employment with the District..

This being the case, discussion about how McKenzie wished to account for the calendar days not covered by the side agreement once she notified the District that she did not wish to sign the settlement and desired to return to active duty was entirely appropriate. What the District did, however, by unilaterally assigning PTO to cover the disputed days, violated the parties' collective bargaining agreement. Given that all parties agree that PTO is employee-initiated, the District, when it unilaterally deducted the three days PTO without giving McKenzie the option to utilize unpaid leave, violated Section 8.1.d. because it did not give McKenzie the right to utilize all of the leave options set forth in the agreement. While the undersigned is aware that neither party argued that Section 8.6 was applicable, it is clear that unpaid leave was also an option that McKenzie could have considered. This is especially the case since she had the right to determine how she would use or save her PTO days and the agreement gives her the right to deposit unused PTO days into a Post-Retirement Health Care Savings Plan.

The Union argues that the District's action in docking McKenzie the three unused days was punitive in nature. Even assuming that was uncontroverted and firmly established, the collective bargaining agreement does not provide for the remedy requested by the Union, i.e., that paid leave status be continued for the three disputed days based upon some theory of retaliation.

Because the District did not give McKenzie the choice as to how she wanted to account for the three disputed unworked days, it violated Section 8.1.d. of the agreement. The appropriate remedy is to offer McKenzie a choice between the various appropriate leaves set forth in the agreement, namely, PTO or unpaid leave and to order that the District comply with the agreement.

Accordingly, it is my decision and

### **AWARD**

The District did violate the parties' collective bargaining agreement when it unilaterally deducted three PTO days from Edna McKenzie's PTO time bank for October 12, 2011 through October 14, 2011.

The District shall offer McKenzie a choice between the various appropriate leaves set forth in the agreement to cover the three days referred to above and comply with the leave provisions of the agreement in the future.

Dated this 23rd day of July, 2012, in Madison, Wisconsin.

By  \_\_\_\_\_  
Mary Jo Schiavoni, Arbitrator