Brodsky #1

AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Union

-and-

Employer

Employee 1/ Death Leave

Hearing Date: 4/6/06

BACKGROUND

The grievant, Employee 1, has been employed as a teacher by the Employer [hereafter "Employer" or "Employer" for approximately 13 years. He is a member of the Union thereafter "UNION"]. The Union and the Employer are parties to a collective bargaining agreement ["CBA"][1] . Employee 1 has been a Grievance Chairperson for the Union for approximately the last four years and also functions as a Building Representative. He has assisted in representing the UNION in the last two contract negotiations.

On March 27, 2005, Employee 1's mother-in-law died.[2] The Employer was on spring break from March 25 through April 1, 2005. School resumed on Monday, April 4, 2005. His mother-in-law's funeral was held during the week that school was not in session. The grievant needed additional death leave after school resumed. He returned to work on Monday April 4, but apparently e-mailed his principal and his superintendent that he

needed to be absent April 5 and 6 for death related reasons. While in school on April 4, he prepared lesson plans for his students for the days he would be gone. When Employee 1 later needed to meet with a trust attorney for estate matters regarding his late mother-in-law, he requested May 17, 2005 in advance as a third leave day related to the death in his family.

The Employer had no problem allowing Employee 1 death leave for April 5 and 6, but Superintendent 1 denied the grievant's request for May 17. The superintendent told Employee 1 that if he wanted to take May 17 for this reason, he would have to use one of his personal leave days. Employee 1 took the day as a personal leave day.

The Union filed the subject grievance to protest the Employer's denial of Employee 1's request for the May 17 third day regarding a death in his family. The grievance alleged violations of Article III(A)[3], Article X(B)(1.), Article X(I-I), and Article X[X(C).[4] The Employer denied the grievance and it was processed through the contractual grievance procedure. A level II hearing was held on August 4, 2005 and the Employer denied the grievance on August 16, 2005. The Union appealed the grievance to arbitration through the American Arbitration Association ["AAA"]. Arbitrator Deborah M. Brodsky was selected to hear the case. A hearing was held in City A on April 6, 2006. The Employer was represented by Consultant 1 and the Union was represented by Person 1. Both parties had the full opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses, and

[1] As of the time of the arbitration hearing, the parties were still operating under an expired CBA dated 2001 to 2005 and were in the process of mediation in an attempt to negotiate a successor agreement

[2] His wife is an only child.

present oral and written argument. Both parties opted to file post-hearing briefs in support of their positions. Additional information was exchanged by the parties after the hearing. AAA received the parties' post-hearing briefs by May 30, 2006 and then mailed them to the Arbitrator.

ISSUE

Did the Employer violate the collective bargaining agreement when it failed to approve the grievant's request for a third day of non-consecutive leave under Article X (B)(1) to meet with a trust attorney to handle affairs related to the death of his mother-in-law?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE X — LEAVE OP ABSENCE:

Ex-tended Periods, **Union Pu**rposes, Special Purposes

B. Leave of absence with pay not chargeable against the teacher's allowance shall be granted for the following reasons;

1. A maximum of five (5) days per school year per death in the immediate family upon the approval of a Board representative. One (I) day for the death of a brother-in-law or sister-in-law.

H. For purposes of definition under all leave sections, the immediate family shall include: spouse, child, father, mother, brother, sister, father-in-law, mother-in-law, grandparent and grandchild, and the ward of a legal guardian. The Board reserves the right to request proof of legal guardianship.

[3] Article III(A) in pertinent part prohibits discrimination against any teacher by reason of his membership in the Union or his institution of any grievance under the labor agreement with respect to any terms or conditions of employment_

[4] Article XIX (C) provides in part, "No teacher shall be disciplined, reprimanded, reduced in rank or compensation

or deprived of any professional advantage without just cause..."

THE UNION'S POSITION

The Union alleged that the Employer's action in denying Employee 1's May 17 death leave request was in violation of Article X, Paragraph (B) (1). Employee 2, Employee 3, Employee 4 and Employee 1 all testified on behalf of the Union.

All the Union witnesses have been employed by the Employer for a minimum of 13 years and all have held or currently held Union offices. Employee 2 is a past president and past bargaining chair who testified that he has been on every bargaining team since 1975. Employee 3 has been with the Employer for 32 years and has been bargaining CBAs since 1985. She is currently in the process of negotiating the new agreement. Employee 4 has been 15 years with the Employer and has been treasurer of the Union for the past 13 years. Employee 1 stated that he as served on the last two contract negotiation teams on behalf of the Union.

The Union pointed out that the only relevant changes to the subject death in the family leave language took place in 1990 and 1994. In the 1990 contract, the language was changed from 5 days per school year to 5 days per death per school year and the definition of covered immediate family changed to include ward of a legal guardian. In the 1994 contract one day of death leave was added for brother-in-law or sister-in-law. Other than that, the language has remained constant since at least 1975.

Employee 2 testified that his father died on May 10, 1994 and he took May 10-13 (4 days) off under that provision. He stated that he later took May 27, 2004 off as death leave to take care of some related legal matters, His principal signed off on this and the superintendent at

the time (Superintendent 2) approved it. On September 25, 2003 Employee 2's mother died. He stated he was off on death leave on September 25 and 26 and then again on October 9 and October 10, 2003 related to property matters from the death and to meet with the minister regarding a memorial service to be held on Saturday October 11, 2003. Employee 2 said although these were nonconsecutive days they were approved and Superintendent 1 was the superintendent when he took such leave in 2003. Employee 2 stresses that he has served under approximately 9 superintendents and that no one, to his knowledge, was denied death leave, during the past 30 years, even if it was for non-consecutive days. He added that three other bargaining unit members in his building lost a parent in the 2003-04 school year (Employee 5, Employee 4 and Employee 6) and he believed that all had their nonconsecutive death days approved. Employee 2 stated that the subject contract language has been consistently interpreted to allow for such absences for the past 30 years.

Employee 3 stated that her mother died over summer break on June 30, 2002, but in mid-September of that year she took death leave to deal with the estate attorney. She explained how the leave forms were utilized; that when an employee needed such leave, they would call the substitute caller to request a sub and then the form would be filled out after they returned. She said Superintendent 3 was the superintendent in 2002 at the time and he made no objection to her leave usage in September. Employee 3 testified that she was aware of other employees who used such leave considerably after the death **including** Employee 6 who used a few days immediately after her father's death in 2003 and some several weeks later for a memorial service, Employee 2, and Employee 5, whose mother died in November of 2003. Employee 3 said Employee 5 used 3 or 4 days right away and then one several weeks later for paperwork. Ms. Employee 3 said she sits on the Contract Maintenance Committee [“CMC”], which meets

monthly to deal with individual concerns and building concerns. Employee 3 testified that the word "approval" in Article X (B)(1) has always interpreted as equivalent to "notice". She said the word "approval" has been in the Contract since before she started negotiating.

Employee 4 testified that she used the leave on September 16, 2003 regarding her father who had died on July 23, 2003 (when school was not in session). She said she took the leave to discuss estate matters with the attorney. She said she fined out the same form mentioned by Employee 3 [5] and her principal approved it as non-chargeable leave.[6] Superintendent 1 was the superintendent at the time of approval. Employee 4 said that she is on the CMC and attended the April 2004 meeting where Superintendent 1 brought up Article X, Paragraph (B) (1) "in passing." She said the Union disagreed with how Superintendent 1 said he interpreted the provision.

Employee 1 said when his mother-in-law died in 2005, he did not use the form previously mentioned because Superintendent 1 changed the procedure, so he e-mailed his principal and he thought he copied the superintendent. He said Superintendent 1 rejected *his* request for a third day stating that he did not deem it to fall under Article X(B)(I). Employee 1 said that when he filed the grievance to prepare for the hearing he requested other staff attendance records to ascertain whose death days were charged to what code, but the Employer denied the Union's request on three occasions, Employee 1 said he interviewed other members of the bargaining unit to see who had taken such leave in the recent past. As *a* remedy, the Union requested, *inter cilia,* that Employee 1's personal day be restored to him for the May 17, 2005 day that was improperly charged.

All the Union witnesses agreed that the Employer has not attempted to change the

relevant Article X, Paragraph (B)(1) language in any contract negotiations, but Superintendent 1 has unilaterally decided to change the longstanding interpretation of that provision.

THE EMPLOYER'S POSITION

The Employer insisted that its actions were in compliance with the language of Article **X,** Paragraph (B)(1). Superintendent 1 testified on the Employer's behalf He stated that "approval" meant that the Employer has the right to decide if such leave will *be* granted. Approval is not the same as notification. Moreover, Superintendent 1 testified that at the April8, 2004 CMC meeting, he made it clear what the criteria for death leave approval would be. Reading from his personal notes from that meeting: he recalled:

> Discussed funeral days (Article X, Section B, Sub paragraph 1). That if an immediate family member passed away the employee needed to get to the superintendent to get approval to take the days, per the contract, (I am the Board representative). I would not hesitate to give 5 days for any instance if they took all the days at this time. 1 would allow them to take one later if it is for the memorial service, We had a teacher take 2 days at the death, I day for a memorial service and later took 2 days to extend a vacation. This is not acceptable.

Superintendent 1 testified that when he announced this at the CMC meeting, no one objected and no grievance was filed.

The Employer further argued that since Article X (13)(1) clearly and unambiguously used the phrase "upon approval of a Board representative" there is no need to resort to considering past practice in interpreting this provision. In addition, Article XXII,

[5] Submitted as Union **Exhibit** # 4.

[6] In *an* attachment to *the* Employer's post-hearing brief. the Employer includes a summary sheet (which indicates no particular author and whose authenticity and foundation have not been testified to) entitled, "Regarding Article 'CBI records for employees mentioned at Arbitration hearing," In it, *inter alia,* the Employer contradicts Ms.

Employee 4's testimony. This *5uteirmiry* sheet is not admitted into the record as evidence.

Paragraph (C) states that ".,.no past practice shall be used to contradict any specific provision of the contract." Finally, the Employer contended that the Union failed to prove that any other cited articles were violated. The Employer asserted that the Union did not show that Employee 1 was discriminated against based on his union activity,' nor did it show that having to use his personal days in lieu of death leave deprived him of some professional advantage.[9]

In addition, at the hearing the Employer pointed out that in recent negotiations, the Employer asked the Union to provide **it** with a list of past practices and this was not on it.

In its post-hearing brief, the Employer argued that there is nothing contractually impermissible about Superintendent 1 applying different criteria for approval than superintendents in the past may have used.

DISCUSSION AND FINDINGS

Although the Employer is correct in noting that the provision at issue uses the term"approval,"[10] the criteria necessary to trigger approval is only evident when one looks further than the four corners of the contract The Union, through its witnesses and through

[7] Employer Exhibit I (although these are labeled as "Minutes for Contract Maintenance Meeting April 8, 2004." **Superintendent 1** indicated that these are his unofficial personal notes.
[8] *Article* III (A).
[9] under Article XIX (C).
[10] Although unlike other contractual provisions, which specifically state ˜Superintendent" this provision explicitly says "upon approval of a Board representative." Other persons besides the superintendent would obviously fit this category.

the history of the contract language at issue has demonstrated under what circumstances approval is granted. So long as the leave related in some way to the death of a covered family member had approval always been given (Until Employee 1's disputed situation). This included non-consecutive days and days to cover legal and property matters directly related to the death. This testimony indicated something more than just a past practice, it is the accepted mariner that both parties have consistently interpreted the "upon approval" phrase of Article X, Paragraph (B)(1), over some 30 years." Thus, the parties' interpretation of the provision is not using a past practice to contradict Article X (B)(1); instead it shows that approval will be forthcoming so long as the leave requested is directly related in some way to the death of a covered family member.[12]

Even if Superintendent 1 indeed spoke the words at the April 8, 2004 CMC meeting that his personal notes indicated, he did not have the ability in that forum to unilaterally change the criteria for approval of a contractual leave. Again, the relevant contract language states:

> B. Leave of absence with pay not chargeable against the teacher's allowance shall be granted for the following reasons:
>
> 2. A maximum of five (5) days per school year per death **in the immediate** family upon the approval of a Board representative. One (1) day for the death of a brother-in-law or sister-in-law.
>
> [Emphasis added].

What this provision does not say is quite telling. It does not call the leave "funeral leave"" or "bereavement leave."[14] It makes no mention of for what purpose the leave must be used (to attend a funeral service" or a memorial service only). Moreover, it does not

specify that the leave days must be taken consecutively. On the one hand, the Employer relies on the seemingly clear language in stressing that the decision to approve the leave is up to the "Board representative," but the clear language also says that a non-chargeable leave of absence shall **be granted** for such a covered death. The arbitrator has purposely referred to this leave a "death leave" in this opinion, because death in the immediate family is the only stipulation specifically provided for in the contract to precipitate such leave. The Union witnesses have shown that for the past thirty years principals have summarily approved such leaves, and superintendents have rubber stamped such approval. Even if Superintendent 1 was used to more restrictive language at his previous school Employer, he did not have the unilateral

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[11] Thus, the Union was not obligated to include this in the Employer's requested list of past practices.

[12] Although in this opinion, this interpretive tool is being accepted in support of the Union's argument, only recently did this Arbitrator rule similarly in support of an employer who argued that consistent method of how a job posting should be awarded supported its interpretation of how seemingly clear contract language had been interpreted by the panties. *Mercy Hospital-Cadillac and SEIU Local 79* (unpublished opinion dated June 16, 2006),

[13] The fact that the previously utilized form (Union Ex. 4) used the term "Funeral Leave" for shorthand payroll coding purposes is not determinative, since the relevant contract language does not use the term "funeral."

[14] For a strikingly similar case regarding bereavement leave, *see Keota Community School District,* 114 LA 1802 (Feldman, 20(70).

[15] Contrast this language with Article IX (B) (5) which provides for a paid leave of absence chargeable against the teacher's allowance to be granted for "time necessary for attendance at the funeral service of persons who relationship to the teacher warrant such attendance."

right to carry that inapplicable interpretation over to City A, which had a well established interpretation of its own language and the corresponding criteria for which approval shall be given.

Interestingly, the record in this case has indicated that the bargaining unit members in the Union have been judicious in their use of death leave days. Many, including the grievant, did not attempt to use the full maximum of five days provided for in the CBA. Employee 1 himself came to work on Monday April 4, 2004 in order to provide lesson plans for a substitute teacher when he was going to be off, even though he may not have had his heart into working that day, and was not obligated to work that day.

Even when the superintendent made his unilateral declaration of new death leave criteria at the CMC April 8, 2004 meeting, he explained that his decision was based on one employee's rumored abuse by taking belated death leave time attached to a Thanksgiving holiday, in Superintendent 1's view "to extend her vacation." At the subject arbitration hearing, however, he specifically said such leave would be permissible for a memorial service even if it were attached to a vacation. The disparaged employee, Employee 6, was never apparently asked for her side of the story, but the superintendent's unsubstantiated belief formed the basis for his new restrictive interpretation of the subject language. Even if there had been abuse of the leave in the past, which the Employer certainly did not prove, the proper forum to change the contract language is the bargaining table, riot a contract maintenance meeting. The Union had no reason to object to the superintendent's declaration at or after the April 8, 2004 CMC meeting, because the Union had no reason to believe that such a statement now governed the prospective interpretation of the subject

language. To object at that point would have been premature, since no bargaining unit member had then been personally affected by this unilateral modification.

Moreover, there is no indication that the relevant contract language has not properly served the parties over the past 30 years. Deaths in the family are perhaps one of the most sensitive issues and this is a benefit that has been bargained for. Both the contract language and goodwill go a long way with regard to understanding the pain and the administrative issues that go hand in hand with the death of a loved one. Mutual trust and compassion are essential at these difficult times.

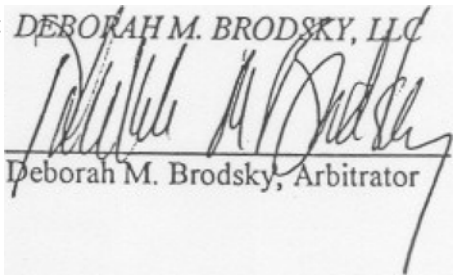
If abuse is genuinely evident in any particular leave, certainly the Employer may address this on a case by case basis, The record has not shown that members of the UNION are likely to use this benefit willy-nilly. Moreover, nothing in the record of Ms. Employee 1 indicated that his request for May 17, 2.005 as a third death Leave day to handle his mother-in-law's estate issues was disingenuous or that it should not have been granted approval under the previously agreed to and consistently interpreted standards for such approval. In Employee 1's situation, Superintendent 1's decision not to approve the May 17 requested death leave date was not contractually permissible under the well accepted interpretation of the language of Article X (B)(1).

Although the Union raised allegations of other contractual violations in the subject grievance, no others were proven in the subject record.

AWARD

Based upon the above analysis and the record as a whole, the Union proved that the Employer did not have the authority to unilaterally change the thirty year accepted interpretation of the subject death leave language. Any such changes must be negotiated at the bargaining table. Therefore, the Employer is proved to have violated the contract when Superintendent 1 failed to grant Employee 1's requested third death leave day for May 17, 2005, and instead had him take a personal day to cover the absence. The Employer is hereby ordered to immediately re-store Employee 1's personal day and to recede the relevant absence as a non-chargeable death leave day. Furthermore, the Employer is hereby directed to cease and desist from continued restriction of such death leave unless the modification of the relevant contract language is agreed upon in negotiations with the Union. The grievance is therefore granted to this extent.

By: DEBORAH M. BRODSKY, LLC



Dated : *July 3,* 2006