STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 150, SERVICE EMPLOYEES' INTERNATIONAL UNION, AFL-CIO, Complainant, vs. APPLETON MEMORIAL HOSPITAL, Respondent.	:	Case XI No. 16038 Ce-1444 Decision No. 11661

Appearances:
Bachman, Cummings & McIntyre, Attorneys at Law, by Mr. Thomas A. Wilson, appearing on behalf of the Complainant.
Quarles, Herriott, Clemons, Teschner & Noelke, Attorneys at Law, by Mr. Laurence E. Gooding, Jr., appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Commission on September 20, 1972, at Appleton, Wisconsin, before Commissioner Jos. B. Kerkman; and the Commission having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Local 150, Service Employees' International Union, AFL-CIO, referred to herein as the Complainant, is a labor organization with offices at 135 West Wells Street, Milwaukee, Wisconsin.

2. That Appleton Memorial Hospital, referred to herein as the Respondent, is a private nonproprietary hospital having its facilities at 1818 North Meade Street, Appleton, Wisconsin.

3. That at all times material herein the Respondent has recognized the Complainant as the exclusive bargaining representative of certain of its employes; that in said relationship the Respondent and the Complainant have been at all times material herein signators to a collective bargaining agreement covering wages, hours and conditions of employment of such employes; and that said agreement provides that grievances may be presented to the Wisconsin Employment Relations Commission as alleged violations of said agreement in a complaint of unfair labor practices, and does not provide for final and binding arbitration of grievances.

4. That the collective bargaining agreement in force between the parties, which became effective October 15, 1969, and which was extended from year to year thereafter, and by specific signed agreement between the parties was extended until 30 days after the lifting of the wage-price freeze in the year 1971, provided as follows:

"ARTICLE XIV
Vacations

. . .

Section 2. All full-time employees who have been in the service of the Hospital for a period of six (6) years of continuous service, shall receive three weeks vacation with pay in accordance with their normal schedule of hours.

. . .

Section 6. Employees, upon making a request reasonably in advance of the time of taking their vacation, shall receive their vacation pay prior to the taking of the vacation. Vacations must be earned at the time of payment and taking.

Section 7. Vacation period shall be from employee's anniversary date to anniversary date.

Section 8. Vacations earned must be taken during the following vacation period. There shall be no pay in lieu of vacation."

5. That Article XIV of the collective bargaining agreement between the parties was modified effective May 1, 1972, to read as follows:

"ARTICLE XIV
Vacations

. . .

Section 2. All full-time employees who have been in the service of the Hospital for a period of five (5) years of continuous service, shall receive three weeks vacation with pay in accordance with their normal schedule of hours.";

and that no other changes were made to the provisions of Article XIV of the collective bargaining agreement effective May 1, 1972.

6. That Edward Harbath, an employee of the Respondent, completed five years of continuous service in the employ of the Respondent on December 26, 1971, and that Harbath is a regular full-time employe of the Respondent and included in the unit covered by the aforementioned collective bargaining agreement.

7. That subsequent to May 1, 1972, Harbath requested a third week of vacation to be taken during the month of October; and that his request for additional vacation was denied by the Respondent.

8. That Harbath grieved the Respondent's decision; that said grievance was processed through the final step of the grievance procedure by the Complainant; and that the Respondent, at all times material hereto, denied that Harbath was entitled to any additional vacation prior to December 26, 1973.

Upon the basis of the above and foregoing Findings of Fact the Commission makes the following

CONCLUSION OF LAW

That by refusing to grant the request for a third week of vacation in October of 1972 to Edward Harbath, Appleton Memorial Hospital violated, and continues to violate, the terms of the collective bargaining agreement between it and Local 150, Service Employees' International Union, AFL-CIO, and by such violation, Appleton Memorial Hospital has committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law the Commission makes the following

ORDER

1. That Appleton Memorial Hospital immediately cease and desist from refusing to grant a third week of vacation to Mr. Edward Harbath.

2. That Appleton Memorial Hospital take the following affirmative action which will effectuate the policies of the Wisconsin Employment Peace Act:

(a) Notify Local 150, Service Employees' International Union, AFL-CIO, and Mr. Edward Harbath that it will schedule a week of vacation for Harbath in accordance with the scheduling requirements of the collective bargaining agreement.

(b) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this Order as to what steps it has taken to comply therewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

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Jos. B. Kerkman, Commissioner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On September 13, 1972, the Union filed a complaint with the Commission alleging that Appleton Memorial Hospital committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act by refusing to grant a third week of vacation to employe Harbath, pursuant to Article XIV, Section 2 of the collective bargaining agreement existing between the parties. The Employer waived the 10-day notice provision of 111.07(2)(a) of the Act, with respect to the scheduling of the hearing conducted on September 20, 1972, during the course of which the Employer made oral answer on the record. During the course of the hearing all material facts were stipulated and the parties made oral argument at the conclusion of the hearing. Transcript was mailed to the parties on November 23, 1972.

POSITION OF THE PARTIES:

The Union argues that the collective bargaining agreement entered into between the parties on May 1, 1972, made employes eligible for three weeks of vacation after five years of continuous service, a reduction from six years of continuous service effective upon the signing of the agreement, and points out that there is no language in the contract which requires an employe to wait until his following anniversary date before becoming entitled to the improved vacation benefits.

The Employer argues that Section 7 of Article XIV provides that the vacation period shall be from employe's anniversary date to anniversary date, and construes that to mean that vacations earned in a given year are earned up to, but not beyond the anniversary date of the employe's original date of hire. It further argues that an employe's vacation entitlement is fixed for the entire year from anniversary date to anniversary date as of the anniversary date, and that since Harbath's anniversary date fell on December 26, 1971, his vacation entitlement from December 26, 1971, to December 26, 1972, was fixed under the terms of the former collective bargaining agreement, and not the agreement entered into by the parties on May 1, 1972. The Employer contends that since Harbath's vacation was fixed from December 26, 1971, to December 26, 1972, by the terms of the expired agreement, he would not become entitled to additional vacation benefits under the present collective bargaining agreement until he had reached his next anniversary date on December 26, 1972. In support of his position the Employer relies on two arbitration cases: Maui Pineapple Co., 47 LA 1051, in which Arbitrator Ted T. Tsukiyama held that "vacation benefits were properly determined according to contract in effect when vacation anniversary date occurred, even though new contract containing increased vacation benefits was in effect when vacations were actually taken"; and on National Brewing Co., 41 LA 483, in which Arbitrator Dexter Delony held that "under contract providing for particular vacation benefits during first two years of contract, and increased benefits during third year of contract, employees whose employment anniversary dates fell between first of calendar year and date of beginning of third year of contract's term are not entitled to increased benefits even though they did not take their vacations until after beginning of third year of contract."

The Employer further argues that if the provisions of the collective bargaining agreement dealing with vacations had been negotiated implementing a decrease in vacation entitlement, that the Commission would find Harbath entitled to his vacation benefits under the old agreement and not under the new.

DISCUSSION:

The Commission rejects the argument of the Employer that the collective bargaining agreement provides for improvement in vacation entitlement only upon reaching an anniversary date at a time when the present collective bargaining agreement is in force. The language of Article XIV, Section 2, provides only that full-time employes of the Hospital employed for a period of five years of continuous service shall receive three weeks of vacation with pay. Section 2 does not specify that vacation entitlement is determined as of the anniversary date. The Employer would have the Commission construe Section 7 of Article XIV, which provides that vacation periods shall be from the employe's anniversary date to anniversary date, as meaning that the anniversary date must be attained before the negotiated improvement in vacation becomes effective. The Commission can place no such construction upon Section 7. It is the conclusion of the Commission that Section 7 merely determines when vacations shall be taken and does not establish the date that vacations are earned. This conclusion is buttressed by Section 8 of Article XIV which states that "Vacations earned must be taken during the following vacation period. There shall be no pay in lieu of vacation." It is clear to the Commission that the language of Section 7 was negotiated to set up a period of time in which vacations must be taken or forfeited and does not go to the question of amount of vacation earned.

Even if the Commission were bound by the decisions of the arbitration cases cited by the Employer, the Commission distinguishes the instant case from those cited. In Maui Pineapple Co., supra, the language was significantly clearer. It read:

> "Section 11B. VACATIONS WITH PAY--INTERMITTENT EMPLOYEES ...An intermittent employee who on any vacation anniversary date has been an employee of the Company for a continuous period of at least one (1) year and has worked less than 1400 hours since his preceding vacation anniversary date shall on such anniversary date be eligible for a vacation and vacation pay (computed at a rate to be determined as set forth in the preceding paragraph) in accordance with the following schedule:..." (emphasis added)

There could be no doubt that under the language quoted above the employe must reach his anniversary date before being entitled to increased vacations. In National Brewing Co., supra, the language read:

> "Section 25. Vacations.
> (a) Upon their attainment of the anniversary of their employment, as defined in paragraph (c) of this Section 25, employees shall be entitled to vacation with pay in accordance with the following schedule:..."

Arbitrator Delony in National Brewing Co. stresses the words "attainment of the anniversary of their employment" in the language quoted above.

In the instant case we have no such precise language to consider and the Commission concludes that the improved vacations are available to all employes who qualify immediately upon signing of the collective bargaining agreement effective May 1, 1972.

With regard to the Employer's argument that the Commission, or any court or arbitrator would hold that the anniversary date under the previous collective bargaining agreement would govern the employe's vacation entitlement, if vacation benefits were contracted rather than expanded, the Commission notes that Arbitrator Thomas H. Tongue in the Truck Operators League of Oregon, Inc., 46 LA 374, held that "under new contract reducing eligibility requirements for three and four week vacations, and made retroactive to May 1, employees whose employment anniversary dates occurred prior to May 1, but who took vacations after that date, are entitled to vacation benefits under new contract, rather than under contract effective as of their anniversary dates." The Commission notes that Arbitrator Tongue based his award on language quite similar to that in the instant case. The language he construed reads:

> "Section 3. All employees who have been in the employ of the Employer eleven (11) years or longer shall be granted three (3) weeks' vacation with pay at their regular wage scale."

The Employer is therefore ordered to notify the Union and the grievant that he is entitled to an additional week's vacation under the terms of the parties' collective bargaining agreement.

Dated at Madison, Wisconsin, this 7th day of March, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Zel S. Rice II, Commissioner

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Jos. B. Kerkman, Commissioner