STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| LOCAL 150, SERVICE & HOSPITAL EMPLOYEES' INTERNATIONAL UNION, AFL-CIO, Complainant, vs. APPLETON MEMORIAL HOSPITAL, Respondent. | Case XVI No. 21863 Ce-1740 Decision No. 15679-A |

Appearances:
Mr. Thadd M. Hryniewiecki, Business Representative, appearing on behalf of Complainant.
Quarles & Brady, S.C., Attorneys at Law, by Mr. Laurence E. Gooding, Jr., appearing on behalf of the Respondent.

## FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local 150, Service & Hospital Employees' International Union, AFL-CIO, herein Complainant or Union, having requested the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and decide a dispute between it and Appleton Memorial Hospital, herein the Respondent or Hospital, allegedly pursuant to the terms of its existing labor agreement; and on June 28, 1977, the Commission having appointed Robert M. McCormick, a member of its staff, to act as impartial arbitrator; and on July 8, 1977, at outset of hearing conducted by said designated arbitrator, at Appleton, Wisconsin, the Union having advised the arbitrator that it had erroneously requested arbitration, though the collective bargaining agreement contained no such impasse procedure; and that as a result the parties having agreed that the dispute could be heard and decided as a complaint of unfair labor practices before said staff member acting as an Examiner pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act, (WEPA); and the Commission having on July 19, 1977, issued an Order Setting Aside Appointment of Arbitrator, and having confirmed by separate Order, on said date, the appointment of Robert M. McCormick, as Examiner to hear and decide the complained of matter pursuant to Section 111.06(1)(f) and 111.07(5) of WEPA; and at outset of said complaint hearing conducted on July 8, 1977, the parties having waived the procedural requirements of Section 111.07 and Wis. Adm. Code, ERB 2.05 through 2.06, including provision for a transcript of record 1/; and during the course of hearing the parties having submitted oral and documentary evidence and argument on the record, and having further agreed to rely upon the handwritten notes of said Examiner as the official record; and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusion of Law and Order.

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1/ The parties' waiver of transcript of record has been treated as a waiver of Section 227.09, Stats., (Chapter 227, Administrative Procedure Act, as amended.)

## FINDINGS OF FACT

1. Local 150, Service and Hospital Employees' International Union, AFL-CIO, is the exclusive bargaining representative for all full-time and part-time nonprofessional employes working twenty or more hours per week employed by the Hospital, excluding supervisors, clerical, RN's licensed practical nurses, technicians and students.

2. The Appleton Memorial Hospital, is a private, nonproprietory corporation, which operates a general hospital at 1818 North Mead Street, Appleton, Wisconsin and is an employer within the meaning of Section 111.02 of WEPA, and to a limited extent is subject at least to the provisions Section 111.06(1)(f) and 111.07 of WEPA.

3. The Union and the Hospital were parties to a collective bargaining agreement effective from October 1, 1976 at least to October, 1977, and in effect for all time material herein. The agreement contains a grievance procedure but does not provide for final and binding arbitration for resolution of unresolved grievances. The agreement contains among its terms, the following provisions material herein:

### ARTICLE XII
### Vacations

Section 1. All full-time employees who have been in the service of the Hospital for a period of one (1) year of continuous service or more, shall receive two (2) weeks vacation with pay in accordance with their normal schedule of hours. All full-time employees must work at least 1500 hours per year to be eligible for vacation. In event said employee works less than 1500 hours his vacation shall be pro-rated.

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. All full-time employees must work at least 1500 hours per year to be eligible for vacation. In event said employee works less than 1500 hours his vacation shall be pro-rated.

Section 3. All full-time employees, whose anniversary dates fall after October 1, 1974, who have been in the service of the Hospital for a period of fifteen (15) years of continuous service, shall receive four (4) weeks of vacation with pay in accordance with the normal schedule of hours. All full-time employees must work at least 1500 hours per year to be eligible for vacation. In event said employee works less than 1500 hours his vacation shall be pro-rated.

Section 4. Part-time employees who have worked one (1) year or more of continuous service shall receive two (2) weeks vacation with pay computed on the average hours worked during the previous year. Part-time employees, whose anniversary dates fall after October 1, 1973, who have been in the service of the Hospital for a period of five (5) years, shall receive three (3) weeks of vacation with pay computed on the average of hours worked during the previous year. Part-time employees, whose anniversary dates fall after October 1, 1974, who have been in the service of the Hospital for a period of

fifteen (15) years, shall receive four (4) weeks of vacation with pay computed on the average of hours worked during the previous year.

Section 5. In the event a holiday occurs during the vacation period of any employee such employee may have an additional day's pay or an additional day off in lieu thereof, at the option of the employee to be exercised prior to taking his vacation, provided the selection of the additional day may only be scheduled at a time agreeable with the Hospital.

Section 6. Senior employees shall have the privilege of choosing vacation dates within their classifications; this selection must be approved by the Department Head. Should conflict result, the Hospital and the Union shall make every effort to resolve the area of conflict.

Section 7. 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 8. Vacation period shall be from employee's anniversary date to anniversay [sic] date. Eligibility for vacation shall be determined as of the employee's anniversary date.

Section 9. Vacation earned must be taken during the following vacation period. There shall be no pay in lieu of vacation.

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ARTICLE XVII
Grievance Procedure

Section 1. The Hospital agreed to meet with duly accredited officers and committees of the Union upon grievance matters pertaining to the meaning or application of this contract. Grievances shall be dealt with first through the immediate supervisor, then through the head of the department, and in case of failure to resolve the grievance within five (5) working days thereafter, then the grievance shall, within the next succeeding three (3) working days be put in writing and promptly submitted to the Director of Personnel.

Upon request of the Union, the Director of Personnel will provide for a meeting of Union and Hospital representatives for purposes of discussing said grievance within five (5) working days. The Hospital shall provide written disposition within three (3) working days of the meeting.

If the matter is not satisfactorily adjusted at the above level within eight (8) working days from the time it is presented to the Director of Personnel, then the party wishing to carry the matter further may present the matter to the Wisconsin Employment Relations Board as an unfair labor practice for violating the terms of a collective bargaining agreement pursuant to the provisions of Chapter 111 of the Wisconsin Statutes including judicial

review, and this shall be the sole and final remedy of both parties.

4. The previous 1975-1976 labor agreement contained identical vacation clauses with respect to both full entitlement at the same graduated levels for length of service, as well as identical "pro rata" provisions. The parties' 1974-1975 collective bargaining agreement did not contain a 1500 hour requirement for a full vacation entitlement, or a pro-rata provision but contained the following provisions material herein:

ARTICLE XII
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.

. . .

Section 4. Part-time employees who have worked one (1) year or more of continuous service shall receive two (2) weeks vacation with pay computed on the average hours worked during the previous year. Part-time employees, whose anniversary dates fall after October 1, 1973, who have been in the service of the Hospital for a period of five (5) years, shall receive three (3) weeks of vacation with pay computed on the average of hours worked during the previous year. Part-time employees, whose anniversary dates fall after October 1, 1974, who have been in the service of the Hospital for a period of fifteen (15) years, shall receive four (4) weeks of vacation with pay computed on the average of hours worked during the previous year.

. . .

Section 8. Vacation period shall be from employee's anniversary date to anniversary date. Eligibility for vacation shall be determined as of the employee's anniversary date.

Section 9. Vacations earned must be taken during the following vacation period. There shall be no pay in lieu of vacation.

5. The parties in their 1975 negotiations for a 1975-1976 labor agreement changed the vacation language of their agreement. Prior to October 1975, the labor agreement provided for full weeks of vacation entitlement for employes employed on their anniversary dates, irrespective of the number of hours per year that each may have been on leave of absence or layoff.

6. The record evidence of bargaining table conduct leading to the adoption of the vacation provisions in the 1975-1976 agreement indicates that prior to the adoption of Article XII, Sections 1, 2 and 3, Hospital bargainers requested changes in the Vacation Article, so as to prevent an employe from securing a full vacation, who had taken a leave of absence in the course of his earning period for his next vacation, and who thereafter had reached his next anniversary date.

7. Graydon Corpean was first employed as of November 10, 1969 and worked as a Mechanic II in Plant Operations on the day shift. Corpean received all of his earned vacation entitlement for his seventh anniversary year of employment completed on November 11, 1976, namely, "three weeks of vacation for five years or more," pursuant to Article XII, Section 2 of the agreement.

8. On June 3, 1977, Corpean terminated his employment, some five (5) months prior to his eighth anniversary date of employment. Upon termination, the Hospital did not pay Corpean a pro-rata vacation for the period from November 11, 1976 to June 3, 1977.

9. The uncontroverted evidence reveals that since at least 1975 the Hospital has not paid any pro-rata vacation to any employe who had terminated prior to his next anniversary date of employment in either 1976, or 1977, after having received his full vacation for the previous anniversary year's earning period. In the course of said period no grievances were filed by the Union, or by any employe, challenging said Hospital application of Article XII.

10. On May 12, 1977 Corpean filed a grievance which reads as follows:

> Nature of Grievance: I feel it is proper and right for Appleton Memorial Hospital to pay me pro-rated vacation time. Refer to Section 2, Page 10, of the Articles of Agreement.
>
> Adjustment Desired: One week pro-rated vacation time would be due me.

Said grievance was processed through the final step of the grievance procedure by the Union. The Hospital denied Corpean's request for an additional one week pro-rated vacation.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

## CONCLUSION OF LAW

That Appleton Memorial Hospital did not, and has not violated, the terms of the collective bargaining agreement between it and Local 150, Service Hospital Employees' International Union, AFL-CIO, by its refusal, on May 12, 1977, to pay Graydon Corpean, a pro-rata vacation of one week's entitlement; that the provisions of Article XII, condition the vesting of a vacation, pro-rata or full entitlement, upon an employe's completing his earning period as an active employe to the next anniversary date of employment; and therefore, said Respondent has not committed, and is not 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 Examiner makes the following

## ORDER

That the complaint filed in the above-entitled matter be, and the same hereby is dismissed.

Dated at Madison, Wisconsin this 19th day of March, 1979.

By Robert M. McCormick
Robert M. McCormick, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On July 8, 1979 the Union filed a complaint on the record in accordance with a stipulation of the parties to have the Commission treat an abortive Union request for grievance-arbitration as a complaint of unfair labor practices pursuant to Section 111.06(1)(f) and 111.07 of WEPA. The Union alleged therein that the Hospital violated the vacation provision of the existing collective bargaining agreement by its failure to pay Graydon Corpean a pro-rata one week's vacation for the time period from November 10, 1976 to June 3, 1977, the latter being the date of Corpean's termination.

The parties waived the notice provisions of Section 111.07(2)(a) and waived transcript of the proceedings and made oral arguments on the record. There is little dispute as to the facts.

The issue of contract interpretation involves whether the contract language relied upon by the Union, Section 2 of Article XII, by its clear import, modifies the longstanding interpretation of Sections 1 to 3 together with Sections 8 and 9, as said provisions previously applied to full vacation entitlement. The parties agree that at least since 1974 2/, the latter provisions required that an employe complete his one year earning period to the anniversary date of his employment before a full vacation was earned for taking in the next year.

POSITIONS OF THE PARTIES:

The Union urges that the language of Section 2 of Article XII (applicable to 5-15 years of service) in the last two agreements, clearly modifies the aforementioned "anniversary-date" vesting principle by providing, "in the event said employe works less than 1500 hours, his vacation shall be pro-rated."

The Union argues that at least since the 1975-1976 agreement, when the parties first adopted the 1500-hour requirement for full vacations (Section 1-3), and for pro-rata vacations for those working less, said clear language changed the 1974-1975 agreement and the effect of Circuit Court case governing full entitlement. Now, with respect to vacations other than full entitlement, the Union contends that employes who have more than one, five and fifteen years of service respectively, who quit before their next anniversary date, are entitled to pro-rata vacations at date of termination.

The Hospital contends that the age-old principle, affirmed by the 1974 Circuit Court decision, that vacations are "earned in the year between anniversary dates for vesting and taking in the following year", still obtains, pursuant to Section 1, 2, 3, 8 and 9, when construed together. The Hospital relies upon the result reached by Arbitrator Donald B. Lee in Oshkosh B'Gosh Inc. and United Garment

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2/ See Appleton Memorial Hospital v. WERC, Case No. 17032, Circuit Court, Outagamie County (3/74), (reversing the Commission in Decision No. 11161, 3/73.)

Workers Local #126, 2/77; wherein the arbitrator could find no clear contract language that would effectively vest vacation for a grievant who had terminated before "a required on the payroll date." Said arbitrator found that the overwhelming evidence of past practice of the parties in applying the vacation provision in question, established that employes had to be actively employed on the crucial anniversary date, before a pro-rata vacation would vest.

DISCUSSION:

The Examiner is constrained to reject the contention of the Union that the language which prescribes the 1500-hour requirement and the concepts of pro-rata vacations, clearly establishes the vesting of a pro-rata vacation. The Union has failed to prove that the terms of Section 2 can be exculpated from the remaining vacation provision, especially Sections 8 and 9, as controlling contract language which is clear and unambiguous. The undersigned will not consider the terms of Section 2 in a vacuum. The parties have adopted a longstanding interpretation of Sections 8 and 9, which requires that in order for a vacation to be earned, the employe must complete an earning period of service and be actively employed on his anniversary date.

An examination of Sections 1-3, when considered with Sections 8 and 9, persuade this arbitrator that the language of Section 2 is ambiguous. Said verbiage, first adopted in the 1975-1976 agreement, does not clearly revoke the concept of "vesting as of anniversary date" for employes who terminate between anniversary dates.

An examination of all of the material sections, namely, Sections 1 to 3, and Sections 8 and 9, considered in the light of the surrounding circumstances, i.e. evidence of past practice and bargaining table conduct, convinces the arbitrator that the parties have not varied the principle established in the Outagamie Circuit Court case, supra.

The evidence of past practice in uncontroverted, and establishes that no employe since 1975, who terminated before his next anniversary date, after having received all of his previously earned full vacation, did in fact receive any payment of pro-rata vacation. There were twenty-two such terminations from 1975-1977.

Similarly, evidence of bargaining table conduct leading to the changes in the 1975-1976 agreement indicate that the Union and Hospital adopted the 1500-hours-requirement for eligibility for a full vacation, and the pro-rata language of Sections 1 to 3, as a response to the Hospital's bargaining request that employes on leave of absence not be treated the same for purposes of earning vacations, as employes who have been actively employed throughout the year.

Viewing all of the language of Article XII material herein, in light of such record evidence covering past practice and bargaining-table-conduct lead the undersigned to conclude that the pro-rata language of Section 2 does not effectively vest a pro-rata vacation for Corpean, because the grievant was not actively employed on November 10, 1977, his anniversary date establishing eligibility for vacation.

Based upon the foregoing Findings of Fact, Conclusion of Law and discussion thereon, the Examiner has dismissed the instant complaint.

Dated at Madison, Wisconsin this 14th day of March, 1979.

By Robert M. McCormick
Robert M. McCormick, Examiner