STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. SCHOOL DISTRICT OF FREDERIC, Respondent.	Case 19 No. 46417 MP-2534 Decision No. 27113-A

Appearances:

Mr. Michael J. Burke, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. Stevens L. Riley, 715 South Barstow, Suite 111, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 17, 1991, Northwest United Educators filed a complaint with the Wisconsin Employment Relations Commission alleging that the School District of Frederic had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act. On January 8, 1992, the Commission appointed Lionel L. Crowley, a member of its staff, to act as the Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held in Frederic, Wisconsin on March 25, 1992. The parties filed briefs which were exchanged on June 9, 1992. The Examiner having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Northwest United Educators, hereinafter referred to as NUE, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and is the exclusive collective bargaining representative of employes in a bargaining unit of all regular full-time and regular part-time noncertified employes of the District excluding the Financial Secretary, the Assistant Financial Secretary, all supervisory, managerial, temporary, confidential, and casual and all other employes. Its principal offices are located at 16 West John Street, Rice Lake, Wisconsin 54868.

2. The School District of Frederic, hereinafter referred to as the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at 301 Birch Street, Frederic, Wisconsin 54837.

3. The NUE and the District are parties to a collective bargaining agreement effective for the time period of July 1, 1990 through June 30, 1992. This contract does not contain any grievance procedure and does not provide

for final and binding arbitration. Said agreement contains the following language in Article VII, Compensation and Benefits, Section I:

> I. Vacation: The vacation schedule for employees with a twelve-month contract:
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> 1. One year of employment - one week
> 2. Three years of employment - two weeks
> 3. Seven years of employment - three weeks
> 4. Twenty years of employment - four weeks
> 5. Twenty-five years of employment - five weeks
>
> Employees with anything other than a twelve-month contract will not receive paid vacation.

It also provides the following language in Article X, Working Conditions:

> . . .
>
> D. This Agreement shall supersede any rules, regulations or practices of the District which are contrary to or inconsistent with its terms.
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> . . .
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> I. For purposes of this Agreement, one year of experience is credited to each employee on his/her anniversary date of employment.

4. The parties' first collective bargaining agreement was negotiated for 1985-1986 and the vacation schedule was adopted verbatim from the District's personnel policy that was in existence prior to the first collective bargaining agreement. Under the personnel policy, employes hired prior to 1967 had to work a specific contract period and could then take vacation. Employes hired after 1967 were permitted to take vacation in the same year it was earned. After 1983, all employes were permitted to take vacation in the year it was earned. Employes earned one week of vacation during their first year of employment and could take one week of vacation during this same period. After three years of employment, employes earned two weeks of vacation and could take that amount during the year in which it was earned. Similarly, after seven years of employment, employes earned three weeks and could take it during the year it was earned.

5. James Ryan began his employment with the District as a twelve month custodian on March 18, 1984 and was continuously employed in that position until his retirement on July 1, 1991. At the time of his retirement, Mr. Ryan took the position that he was immediately entitled to three weeks of vacation on March 18, 1991, under Article VII, Section I and should be paid vacation through July 19, 1991. Mr. Ryan was the first full-time employe to retire under the collective bargaining agreement. The District's Superintendent, Wallace Koel, informed Mr. Ryan that vacation must be earned during the year it is taken and that he was eligible for 11.5 days as of July 1, 1991 (8.5 months at 10 days/yr and 3.5 months at 15 days/yr) and as he had taken 10 days, he had 1 1/2 days left which were to be used prior to July 1, 1991. Mr. Ryan did not use the 1 1/2 days and the District considered it forfeited and so Mr. Ryan received no vacation pay after his retirement on July 1, 1991. The instant complaint was filed over the amount of vacation, if any, that was due

Mr. Ryan, at the time of his retirement on July 1, 1991.

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The parties' collective bargaining agreement does not contain a grievance procedure culminating in final and binding arbitration, and thus, the jurisdiction of the Wisconsin Employment Relations Commission may be invoked to determine whether said agreement has been violated in violation of Sec. 111.70(3)(a)5, Stats.

2. The District's calculation of vacation benefits upon Mr. Ryan's retirement on July 1, 1991, was in accordance with Article VII, Section I of the collective bargaining agreement, and therefore, was not violative of Sec. 111.70(3)(a)5, Stats.

3. The District's requiring Mr. Ryan to use 1 1/2 days prior to July 1, 1991, was not in accordance with the collective bargaining agreement so the forfeiture of the 1 1/2 days violated Article X, Sec. D of said collective bargaining agreement, and consequently, was violative of Sec. 111.70(3)(a)5, Stats.

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

ORDER 2/

IT IS ORDERED that the District, its officers and agents shall immediately:

1. Pay James Ryan for 1 1/2 days of vacation at the rate he was earning on July 1, 1991, together with interest at the statutory rate 3/ on this amount.

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

3/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the agency. The instant complaint was filed on October 17, 1991, when the Sec. 814.04(4) rate was "12 percent per year." Section 814.04(4), Wis. Stats. Ann. (1986). See generally Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) citing Anderson v. LIRC, 111 Wis.2d 245, 258-9 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, 1983).

2. The remainder of the complaint alleging a violation of Section 111.70(3)(a)5 as to the amount of vacation earned and due Mr. Ryan as of July 1, 1991, is hereby dismissed.

Dated at Madison, Wisconsin this 19th day of June, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

FREDERIC SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the NUE alleged that the District had committed a prohibited practice in violation of Sec. 111.70(3)(a)5, Stats., by denying James Ryan three weeks of vacation upon his retirement on July 1, 1991, in violation of the parties' collective bargaining agreement. The District answered the complaint by denying that it committed any prohibited practice and asserted that James Ryan had received all the benefits due him under the collective bargaining agreement.

NUE'S POSITION

NUE insists that this is a straight forward case of contract interpretation. It submits that as of Mr. Ryan's anniversary date on March 18, 1991, he was eligible for three (3) weeks paid vacation and because he used no vacation after that date, he was entitled to this amount of vacation time (15 days) at his regular hourly rate. NUE contends that this is a case of first impression as Mr. Ryan is the first full-time twelve month employe to retire, so there is no past practice that is relevant to this dispute. It argues that while the language of Article VII, Section I is confusing as to a new employe's vacation schedule, there is no confusion for any employe who has completed seven (7) years of employment. It claims that the vacation benefit vests immediately and is not earned monthly like sick leave as the clear and unambiguous language does not support such an interpretation. It maintains that the clear language of the agreement supersedes the practice of the District which attempts to harmonize the employe's anniversary date with an annualized vacation entitlement based on a fiscal year. NUE submits that the District has erroneously interpreted the contract language and the issue did not become apparent until Mr. Ryan's retirement. It seeks the conclusion that the vacation schedule is based on the employe's anniversary date and it requests the District reimburse Mr. Ryan for fifteen (15) days.

DISTRICT'S POSITION

The District contends that the language of Article VII, Section I must be interpreted in light of the parties' past practice which consisted of employes earning and taking vacation benefits on a monthly basis from the first day of employment. It submits that this practice arose out of the requirement to report vacation benefits on a fiscal year basis rather than an anniversary date basis and the District's allowing the use of vacation during the first year of employment. The District argues that when the present contract language was negotiated in the first contract in 1985, the parties put into the agreement the then present practice regarding vacations and adopted the language upon which those practices were based directly from the pre-existing personnel policy. It claims that the vacation policy has been consistently interpreted and applied the same, pre - and post-contract, and was explained to Mr. Ryan when he was hired in 1984. The District points out that the practice of monthly accrual is established in the annual reports for each fiscal year as well as the manner in which vacation eligibility was actually computed and paid. The District insists that the anniversary date establishes the time when an increase in monthly accrual begins but requires a full year of work to accumulate the higher amount. It maintains that employes were well aware of this as they were required to fill out a vacation accrual form.

With respect to the 1.5 days the District conceded Mr. Ryan could use before his retirement, it states that employes who have earned vacation but

terminate their employment for any reason lose it, so Mr. Ryan had to use it prior to July 1, 1991, and because he didn't, he forfeited it. The District asks that the complaint be dismissed with prejudice.

DISCUSSION

Article VII, Section I provides as follows:

> I. Vacation: The vacation schedule for employees with a twelve-month contract:
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> 1. One year of employment - one week
> 2. three years of employment - two weeks
> 3. Seven years of employment - three weeks
> 4. Twenty years of employment - four weeks
> 5. Twenty-five years of employment - five weeks
>
> Employees with anything other than a twelve-month contract will not receive paid vacation.

This language is not sufficiently comprehensive to determine how vacation is earned and taken. For example, the language could be interpreted as requiring one full year of employment before any vacation vests and only after the employe attains one year of experience may the one week be used. After three years of employment, two weeks of vacation vest and can be used by the employe, and so on. On the other hand, the number of years of employment set forth in Subsection I can be interpreted as not establishing the time period required for vesting an amount of vacation but merely establishes the time frame for anticipating greater vacation amounts. For example, during the first year of employment, one week of vacation is earned and may be used and after three years of employment, two weeks of vacation are thereafter earned and may be used, etc. Thus, it must be concluded that the language of Article VII, Section I does not clearly and unambiguously describe how vacation is earned and used. The parties could have added the word "vested" to describe vacation after the number of years of employment or they could have added the word "eligible" after the years of employment which may have clarified the parties' intent. Thus, it is necessary to review past practice and bargaining history to determine what the parties intended as to the meaning of the vacation language.

The negotiation history indicates that the parties simply adopted the District's vacation language from its Non-Instructional Personnel Policy. 4/ In adopting this language, basically without discussion, the parties also adopted the policies interpreting that language where it is ambiguous. The evidence established that employes hired prior to 1967 had to work one full year before vacation was vested and before they could use any vacation. 5/ Employes hired after 1967 could anticipate vacation during the period it was earned. 6/ In 1983, the District was required to report unused or accrued leave for each employe to the Department of Public Instruction on a fiscal year

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4/ Ex - 3, TR-11, 14, 17-18.

5/ TR-22.

6/ Id.

basis. 7/ The District then began to treat both pre-and post-1967 employes the same, allowing all employes to take vacation during the year it was earned. 8/ The parties' first collective bargaining agreement was agreed to in the 1985-86 school year. Thus, it must be concluded that when the present contract language was adopted, it provided for the use of vacation in the year it was earned. The evidence failed to establish that the present language should be interpreted as vesting vacation as per the pre-1967 interpretation. Additionally, there was no evidence presented that the District's pre - 1985 application of vacation policy had changed or was not known or understood by employes. Therefore, the undersigned finds that Article VII, Section I, does not provide for the vesting of vacation after the years of service set forth therein but merely establishes the time frame for earning and using greater vacation amounts. Applying this interpretation to Mr. Ryan's seniority or anniversary date indicates that he began earning and could use three (3) weeks of vacation after seven (7) years of employment and he was not entitled to three (3) weeks immediately upon reaching seven (7) years of seniority because his vacation did not vest on that date. Thus, the District's calculations with respect to Mr. Ryan's vacation amounts due on July 1, 1991, were in accord with the terms of the agreement and did not constitute a violation of Sec. 111.70(3)(a)5, Stats.

The evidence established that Mr. Ryan earned 11.5 days of vacation and had used 10 days as of his retirement on July 1, 1991. The District asserts that he forfeited the day and one-half because Mr. Ryan didn't take it before the date of his retirement on the basis of District policy. 9/ In Phalo Corp., 52 LA 837 (Murphy, 1968), the arbitrator stated as follows:

> Today, it is almost universally accepted that vacation pay is deferred earnings. The old notion that vacation pay is a gratuity bestowed on an employee by a benevolent employer in order that the employee may enjoy a bit of leisure and recharge his batteries before returning to the daily grind is so out moded that express and unambiguous language is required before a forfeiture of vacation pay can be decreed.

Additionally, in Valeo v. J. I. Case Co., 18 Wis.2d 578 (1963), the Wisconsin Supreme Court stated:

> It seems to the majority of this court more compatible with the nature of vacation pay as compensation for work performed to hold, in the absence of provisions to the contrary in the agreement, that it accrued as services were performed under the agreement for the nine months prior to termination, such accrual being qualified only by the possibility of forfeiture of vacation rights under sec. 3 of Art. IX or failure to be in employe status as of June 1, 1960, but not being extinguished by the termination of the agreement.

There is no express or unambiguous language in Article VII, Section I or

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7/ TR-23.

8/ Id.

9/ TR-29.

any other part of the contract that provides a forfeiture of vacation upon retirement. The evidence further established that the District's policy on forfeiture was not in writing nor was it shown that said policy was part of the past practice of Article VII, Section I. 10/ In addition, there is nothing in the correspondence to Mr. Ryan that indicates that he must use the vacation or lose it. 11/ In the letter of May 22, 1991, from Superintendent Koel, in item 4., it is stated that the amount of vacation taken in the fiscal year was needed to determine Mr. Ryan's last working day. 12/ There seems to be no reason why Mr. Ryan couldn't change his last working day to noon on July 3, 1991. In the May 24, 1991 letter from Superintendent Koel, item 4. states that Mr. Ryan could take 1.5 days of vacation before July 1, 1991, but no reference to any forfeiture is contained in this letter and does not warn him that failure to use the vacation by July 1 will result in its loss. 13/ Additionally, Mr. Koel stated that if the audit showed that Mr. Ryan had more than 1.5 days coming, the appropriate adjustment would be made. 14/ Therefore, the undersigned concludes that there is no clear and unambiguous language or proven practice of forfeiture of earned vacation at retirement. Thus, the District

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10/ TR-41.

11/ Exs.-4,5.

12/ Ex-4.

13/ Ex-5.

14/ Id.

violated the agreement by not granting Mr. Ryan his 1.5 days of earned vacation, and therefore, the undersigned has ordered payment of the one and one-half days of vacation with interest at the statutory rate.

Dated at Madison, Wisconsin this 19th day of June, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner