BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BARRON COUNTY (DEPARTMENT OF SOCIAL SERVICES)	Case 78 No. 41714 MA-5437
and	
NORTHWEST UNITED EDUCATORS	

Appearances:
Mr. Alan D. Manson, Executive Director, Northwest United Educators, on behalf of the Union.
Ms. Kathryn J. Prenn, Mulcahy & Wherry, S.C., on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1987-88 collective bargaining agreement between Barron County (Department of Social Services), hereafter the County, and Northwest United Educators, hereafter the Union or NUE, the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a dispute regarding the County's implementation of the vacation provision of the relevant collective bargaining agreement. The undersigned was designated Arbitrator, and after having made full written disclosures to the parties to which there were no objections, hearing in this case was held on April 24, 1989 in Barron, Wisconsin. No stenographic transcript of the proceedings was made and the parties submitted all post-hearing briefs, including Reply Briefs by July 7, 1989.

ISSUE:

The parties stipulated to the following issue:

> Did the County violate the 1987-88 collective bargaining agreement by the manner in which it implemented the new vacation language in 1988; if so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE XXVII - VACATION

27.01 Annual: All regular full-time employees in the bargaining unit shall receive the following vacation with pay:

After one year of employment, one week of vacation
After two years of employment, two weeks of vacation
After four years of employment, two weeks and one day of vacation
After five years of employment, two weeks and two days of vacation
After six years of employment, two weeks and three days of vacation
After seven years of employment, two weeks and four days of vacation
After eight years of employment, three weeks of vacation
After nine years of employment, three weeks and one day of vacation
After ten years of employment, three weeks and two days of vacation
After eleven years of employment, three weeks and three days of vacation

After twelve years of employment, three weeks and four days of vacation
After thirteen years of employment, four weeks of vacation

Effective January 1, 1988, add the following:

After fourteen years of employment, four weeks and one day of vacation
After fifteen years of employment, four weeks and two days of vacation
After seventeen years of employment, four weeks and three days of vacation
After nineteen years of employment, four weeks and four days of vacation
After twenty years of employment, five weeks of vacation

ARTICLE II - GRIEVANCE PROCEDURE

. . .

5. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to or delete from the express terms of the agreement.

FACTS:

The NUE has represented two separate bargaining units (professional and non-professional) of employes of the Barron County Department of Social Services under one contract for several years. Article 27 of the 1985-86 agreement provided that covered employes would receive a maximum vacation of four (4) weeks "after" the employe had been employed by the County for thirteen (13) (or more) years. The language of Article 27 was changed as part of a voluntary settlement of the 1987-88 contract. There, the NUE and the County agreed that effective January 1, 1988 the maximum allowable vacation earned by covered employes would gradually increase to a maximum of five (5) weeks of vacation "after" twenty (20) years of County employment. The language detailing the increased vacation benefit mirrored the language that had been used previously in Article 27 with the exception of the introductory words used to indicate when the enhanced vacation would become available: "effective January 1, 1988, add the following".

This increased vacation, effective in the second year of the contract, was undisputedly proposed by the County and was clearly "traded" during the parties' negotiations for a reduction (also effective in the second year of the agreement) in the maximum sick leave accumulation for new hires (from 180 days to 120 days).

It is also undisputed that the County's practice for more than 20 years has been to credit employes with their annual vacation only upon the celebration of the anniversary date of their employment with the County. Furthermore, it has been the County's consistent policy never to prorate vacation. Thus, employes with more than one year's County service who terminate their employment have been paid only for such unused vacation as they were credited with following their most recent anniversary date.

The only exception to this general approach of anniversary date vacation accrual without proration has been done regarding employes hired on or before January 1, 1965. Several years ago, when the County abrogated its merit pay plan and its policy of requiring that all vacation be used up during each calendar year, the County undisputedly adjusted employe dates of hire if they had been hired on or before January 1, 1965 to list all such hire dates as January 1, 1965. Two current employes, Ness and Abbuehl, covered by the relevant contract herein fall within this group and they have been affected by this adjustment. Their seniority dates have been adjusted to January 1, 1965.

In addition, in line with its overall practice, it has been the County's consistent policy that County employes who have terminated employment shortly after their anniversary date have been granted full payment for any unused vacation for that year. Finally, employes who have terminated their employment before reaching the first anniversary of their hire have consistently received no vacation pay, consistent with the County's anti-proration policy. 1/

The evidence also showed that during contract and settlement negotiations for the 1987-88 contract, the parties did not discuss how vacations would be computed in the future; there were no discussions regarding changing from the anniversary date vacation accrual policy to a calendar year or prorated policy; and there were no discussions of any transitional plan or any short-term proration of the new vacation benefit during 1988. Finally, there were no discussions between the parties of the possibility of any windfall in vacation benefits for some less senior employes. Indeed, it is apparent from the record that the windfall potential of the Article 27 language was not realized by the parties until after settlement and ratification of the 1987-88 agreement had been accomplished.

The instant grievance was filed on October 28, 1988 following an exchange of letters beginning with the Union's September 14th letter requesting an adjustment in the vacation of the following eleven (11) employes:

NAME	HIRE DATE
Ness	(9/1/61)
Abbuehl	(1/1/65)
Newman	(7/16/69)
Keppen	(9/1/69)
Krovosa	(4/27/70)
Lindeman	(10/18/71)
Peterson	(2/1/72)
Borger	(2/15/72)
Stearns	(5/8/72)
Maas	(4/1/74)
Fankhauser	(6/17/74)

From the initiation of the grievance to date, the County took the position that each employe could be credited with and receive the additional vacation benefit they were entitled to pursuant to the new vacation language as of their anniversary dates of employment which fell on and after January 1, 1988 but that there would be no proration of the enhanced vacation benefit during 1988.

Both Ness and Abbuehl were granted an additional five (5) days (one week) of vacation in 1988 since their seniority/hire dates had been previously adjusted to January 1, 1965, as discussed above. Hence, the parties were and are in agreement regarding the disposition of Ness and Abbuehl. However, with regard to the remaining nine (9) employes listed above, the NUE has sought proration of their 1988 vacation and the County has refused to adjust their vacation allotment for 1988 relying upon its above-described position against proration.

As a practical matter, the evidence here demonstrated that employe Krovosa, who celebrated her hire on April 27 received 24 days of vacation benefit as of April 28, 1988. Thus, although both employes Newman and Keppen had greater seniority than Krovosa (having been hired on July 16, 1969 and September 1, 1969 respectively as compared to Krovosa's hire dated of April 27, 1970), Krovosa was able to begin using the new vacation benefit before Newman and Keppen. And Krovosa received the same number of vacation days that Keppen and Newman did following their anniversary dates of employment in 1988. However, it is also clear that Newman and Keppen were credited with 25 days of vacation following their anniversary dates of hire in 1989 which was more than Krovosa and other less senior employes received. Thus, any possible inequities created by the County's implementation of the new vacation language were wholly and undisputedly corrected in 1989.

POSITIONS OF THE PARTIES:

Union

The NUE has argued that it is intrinsically unfair and contrary to

1/ County records indicated that between 1984 and 1988, four employes who terminated their employment prior to reaching the first anniversary of their hire were not paid for any vacation time. Also, in one instance during this 1984-88 period, employe McGee who was hired on February 19,1985 and quit on February 28, 1986 received pay for one (1) week's vacation. The County Director of Social Services testified, further, that since her hire into the Department in the early 1960's, the above described vacation policies have been in place. The NUE offered no contradictory evidence regarding these past practices.

generally accepted labor relations principles for more senior employes to receive the same or less vacation in any calendar year than less senior employes. NUE asserted that the language "Effective January 1, 1988, add the following" supports its argument that the County should have prorated the increased vacation benefit as of January 1, 1988. Thus, the NUE contended that the fairest method of crediting vacation during the 1988 transition year would be to prorate vacation in 1988 upon the passage of the January 1, 1988 effective date of the new vacation language.

For example under the NUE's analysis, employe Newman, hired July 16, 1969, should have received a 1988 vacation adjustment, as follows: 9.17 days (at the 1986 rate of 20 days for the period prior to January 1, 1988) plus 12.46 days (at the 1988 rate of 23 days for the period after January 1, 1988). This approach, the NUE argued, would support the general intent and meaning of the new vacation language, proposed by the County. In this regard, the NUE argued that the language, "Effective January 1, 1988 . . ." clearly indicates that the County intended that the new vacation benefit should be accrued and enjoyed in 1988 (but not before), and that the County had intended that the enhanced vacation benefit should be available to employes as of January 1, 1988, not on their various individual anniversary dates.

The NUE also argued that since the County had proposed the new vacation language, it was incumbent upon the County to make clear to the Union during negotiations, how the language would be applied or interpreted. Absent evidence to show the County had clearly described the further operation of the new language, NUE asserted, the arbitral principle that language should be construed against the drafter should be applied by the Arbitrator here. In addition, the NUE asserted that the arbitral principle of interpreting contract language so as to avoid harsh or absurd results should be applied in this case. Thus, since the County's interpretation of the vacation language had resulted in some less senior employes receiving and using the new vacation benefit before some of the more senior employes, the NUE concluded that this harsh result should be remedied.

Based upon the facts and the equities here, the NUE sought a make whole remedy for the nine (9) employes listed above (either in vacation time off or in pay at current rates) for the 1988 vacation they should have received and enjoyed in 1988.

In its Reply Brief, the NUE pointed out that just as wages are paid at the rate in effect at the time the work is performed, so should vacation be used and paid at the pay rate and vacation day rate in effect at the time the vacation is taken. Therefore, NUE asserted that since the vacation rate changed effective January 1, 1988, vacation should have been prorated from that effective date forward.

County

The County argued that Article 27 is clear: that the language "After four-teen years of employment, four weeks and one day of vacation . . ." must control the point of accrual of the new increased vacation benefit for each eligible employe, and the language, "Effective January 1, 1988 . . ." merely indicates the date after which the occurrence of each eligible employe's anniversary date will trigger the increased vacation credit and accrual.

This interpretation, the County urged, was also clearly supported by the County's well-known and consistent past practice of crediting vacation only upon the passage of the employe's anniversary date of hire without proration. In addition, the County asserted that the Union had failed to meet its burden of proof in this case. In this regard, the County contended that the Union had failed to prove any factual justification, past practice or any mutual agreement by the parties to put a transitional prorated vacation plan into effect. The County pointed out that given the fact that the NUE never requested a change in the County's anniversary date vacation accrual and usage policy, the parties could rightly assume that the old vacation accrual system would apply to the new vacation benefit. Thus, in the County's view, the words "Effective January 1, 1988 . . ." must be read to mean that the additional vacation would not become available until the second year of the contract.

In conclusion, the County urged the Arbitrator to disregard the NUE's equity arguments since Article 27 is generally fair, providing more vacation for the more senior employes. The County sought denial and dismissal of the grievance in its entirety.

The County also filed a Reply Brief herein, directed to three specific points. First, the County recounted the facts regarding the difference between the nine employes affected by this case and the Ness and Abbuehl situations. Second, the County emphasized that the Union has produced no evidence to support a change in the County's practice of crediting employe vacation. Finally, the County asserted that it has never awarded fractional days of vacation, contrary to the Union's calculations in its Initial Brief and, the County contended, no inequities could result from its implementation of the new vacation language, as more senior employes were actually credited with more vacation upon the passage of their anniversary dates in 1988.

DISCUSSION

Although the NUE's equity arguments are compelling in part, the facts of this case require that the grievance be denied. The new vacation language is clear, in my view. I note that the new vacation benefit language proposed by the County mirrored the substance of the old vacation language exactly. This wording directly and strongly supports a conclusion that the County intended to apply the new language as of January 1, 1988, exactly as it had applied the old language: upon the passage of each employe's anniversary date. Furthermore, this wording should have put the parties on notice as to the future interpretation of the new language.

The fact that the new language also contained the phrase "Effective January 1, 1988, add the following . . ." does not require a different conclusion. The language which follows the "effective" phrase actually applies to the new language that follows and not to the benefit itself. The "effective" language merely makes clear when the new benefit may first be enjoyed: for example, only after fourteen years of employment may an employe receive four weeks and one day of vacation. Such language regarding the effective date of a described benefit is ordinarily and necessarily found in multi-year agreements such as the one in issue here. Indeed, the undisputed facts show that the new vacation benefit was intended to become available only during 1988 (upon each employes anniversary date), as part of a "trade" relating to new hire sick leave accumulation, also effective beginning in 1988.

If the parties had intended to prorate the new vacation benefit in 1988, they could have expressed that intent in the collective bargaining agreement. To prorate vacation here even if it is only for the 1988 year, is simply unsupported by any contractual provision, bargaining history, past practice or other factual justification. In this regard, I note particularly that the manner in which the County implemented the new vacation benefit was entirely consistent with its well-established past practice regarding vacation accrual and usage. Based upon the relevant evidence and argument, I must dismiss the grievance in its entirety.

AWARD

The County did not violate the 1987-88 collective bargaining agreement by the manner in which it implemented the new vacation language in 1988.

Dated at Madison, Wisconsin this 28th day of August, 1989.

By _____
Sharon Gallagher Dobish, Arbitrator