BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
JACKSON COUNTY HUMAN SERVICES EMPLOYEES, LOCAL 2717-B, AFSCME, AFL-CIO	Case 77 No. 44268 MA-6231
and	
JACKSON COUNTY	

Appearances:
Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, appearing on behalf of the Union.
Mulcahy & Wherry, S.C., Attorneys at Law, by Ms. Kathryn J. Prenn, appearing on

ARBITRATION AWARD

Jackson County Human Services Employees, Local 2717-B, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Jackson County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Black River Falls, Wisconsin on September 27, 1990. The hearing was not transcribed and the parties submitted post-hearing briefs which were exchanged on November 2, 1990.

BACKGROUND

The basic facts underlying the grievance are not in dispute. The grievant was employed by the County for approximately 18 years when she was terminated by the County on June 12, 1989. She grieved the termination and an arbitration hearing was scheduled for October 11, 1989. A settlement of her grievance was reached on October 11, 1989, which provided in part, that the grievant would be considered a regular employe of the County until and including December 31, 1989, with all rights and benefits pursuant to the collective bargaining agreement and she would voluntarily resign her employment with the County and would retire effective at the end of the regular work day on December 31, 1989. By a check dated January 26, 1990, the grievant was paid for 30 days of accrued vacation. The grievant calculated that she was entitled to 48 1/2 days of vacation on the basis that she had carried over the maximum 30 days from 1988 and earned 20 days in 1989 while using only 1 1/2 days. The County asserted that she was only entitled to 30 days of vacation pursuant to the contractual vacation accrual cap. When this dispute was not resolved, the matter was appealed to the instant arbitration. At the hearing, the County asserted that the grievance was not timely filed. After testimony and oral argument on that issue, the undersigned issued a bench decision that the grievance was timely filed. The parties then presented evidence with respect to the merits of the grievance.

ISSUE

The Union frames the issue as follows:

> Did the County violate the agreement dated 10/11/89 or the collective bargaining agreement by the manner in which it compensated the grievant, Wilma Hoem, for termination vacation benefits? If so, what is the appropriate remedy?

The County frames the issue as follows:

A. Did the County violate the collective bargaining agreement by not compensating the grievant for more than thirty (30) days of vacation following her resignation?

B. If so, what is the appropriate remedy?

The undersigned adopts the issue as framed by the County.

STIPULATIONS

The parties stipulated to the following:

A. The grievant was on the County's payroll, but not on the job, for a six-month period ending December 31, 1989.

B. The grievant's vacation payout involves interpretation of the contract and flows from the collective bargaining agreement.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 4 - GRIEVANCE PROCEDURES

SECTION 1. A grievance is defined as any difference or dispute regarding the interpretation, application or enforcement of the terms of this agreement. The grievance procedure shall not be used to change existing wage schedules, hours of work, conditions and fringe benefits.

. . .

SECTION 4 - Steps in Procedure

. . .

Step 3. Any grievance which cannot be settled through the above procedure may be submitted to final and binding arbitration as follows: Either party may request the Wisconsin Employment Relations Commission (W.E.R.C.) to appoint one of their staff members as sole arbitrator. The decision of the arbitrator shall be limited to the subject matter of the grievance. The award of the arbitrator shall not modify, add to or delete from the express terms of the contract.

. . .

ARTICLE 9 - VACATIONS

SECTION 1. Regular, full-time employees shall earn and accumulate vacation as follows:

1. During the 1st and 2nd years of service 5/6 of a day per each month of service.
2. During the 3rd through the 5th years of service one (1) day per each month of service.
3. During the 6th through the 9th years of service one and one-quarter (1 1/4) days per month of service.
4. During the 10th through the 14th years of service one and one-half (1 1/2) days per each month of service.
5. During the 15th and each subsequent year, one and two-thirds (1 2/3) days for each month of service.

Vacation time shall not be taken in units of less than one-half (1/2) day. As of January 1, 1980, no employee may accumulate over thirty (30) days of vacation.

. . .

SECTION 4. Any employee who is laid off, retired or resigns from the service of the Employer prior to taking his vacation shall be compensated in cash for the unused vacation he/she has accumulated at the time of separation; provided, however, that any employee who resigns must give the Employer two (2) weeks notice

thereof to be eligible for said accrued vacation pay.

UNION'S POSITION:

The Union contends that the language of Article 9 which states, "no employee may accumulate over thirty (30) days of vacation," is ambiguous because the County claims that this language provides that an employe cannot accumulate over 30 vacation days at any time during the calendar year and the Union has taken the position that this language means that an employe cannot carry over more than 30 vacation days into the next calendar year. It argues that the ambiguity requires an examination of the past practice to determine the appropriate meaning of this language. It refers to the testimony of Vivian Heinz, who was the bookkeeper for the Department, who testified that after consulting the Department Head, Marshall Graff, she was instructed to merely limit vacation carryover to thirty days and employes were allowed to accumulate greater than the amount during the calendar year and she sent notes to employes toward the end of the calendar year informing them that they had to use the excess over thirty (30) days prior to the next calendar year. The Union notes that the grievant and other employes were allowed to accumulate more than 30 days during the calendar year in the past which was confirmed by the County's Personnel Department records and the computer print-out on employes' checks. It points to the retirement record of Lois Goldsmith, who retired on July 7, 1989 and was paid for 318 hours of accumulated vacation which was 39.75 days exceeding the 30 days by 9.75 days.

The Union answers the County's argument that the grievant should not be granted 18.5 additional days of vacation because she was already being paid while she was not working by pointing out the grievant worked until June, 1989 and earned vacation until that date and the settlement agreement granted her vacation benefits and because she was not working, she could not use vacation during that time. The Union insists that under the settlement agreement, the grievant is entitled to the same benefits as any other employe who would have retired at the end of December 31, 1989 and it entered the settlement agreement based on past occurrences which included accumulating more than thirty (30) days vacation and receiving payment for all accumulations upon retirement. The Union notes that there was no attempt to change the past practice until after the instant dispute arose. It requests the grievance be sustained and the grievant be paid for 18.5 days of vacation at her applicable rate.

COUNTY'S POSITION

The County, acknowledging that there is a difference in the parties' interpretation of Article 9, contends that it does not matter because the issue is how much vacation the grievant could have on the books at the end of the day on December 31, 1989. It submits that the answer is beyond debate because an employe cannot carryover more than 30 days of vacation at the end of the year. It notes that the evidence establishes that any vacation days in excess of 30 on the books at the end of the year are lost. It takes the position that even if the Union's interpretation is accepted, the 30 day cap is effective at year-end. It submits that there is no basis to distinguish the grievant from any other employe who has more than 30 days accumulated at years-end as the evidence demonstrates.

The County submits that the grievant's argument that she is entitled to be compensated for vacation because she couldn't use them makes no sense. It notes that the grievant was paid for the six months prior to December 31, 1989 even though she didn't work but if she had worked she would have had to use the 18 1/2 days of vacation or lose them and would have been paid for these 18 1/2 days during the six month period. It maintains that there is no way she would have been permitted to double up and get paid twice for the same day. It claims that she was given six months of vacation pay under the settlement agreement and can't be the beneficiary of this and then assert that she is entitled to additional vacation because she couldn't take it. The County concludes that the grievant was paid all the compensation to which she was entitled under the contract.

The County contends that there is no past practice in support of the grievant's position. It takes the position that Lois Goldsmith was paid in error because the County's Personnel Director position was vacant and the retirement payout was a mistake. The County also points out that the payout was at mid-year rather than year-end so under the Union's position, the 30 day cap would not apply as it does at year-end. It also notes that past practice requires an unequivocal, clearly enunciated and fixed practice over a reasonable period of time and this one instance fails to meet the requirements for a past practice.

The County reminds the undersigned of the contractual limitations on his authority which it points out prohibits the granting of a benefit beyond those expressed by the agreement. The County insists that granting the grievant's request for excess vacation days would violate the agreement. The County asks that the grievance be dismissed.

DISCUSSION

Article 9, Section 1 provides, in part, as follows: "As of January 1, 1980, no employee may accumulate over thirty (30) days of vacation." If this sentence is read literally, employes could never accumulate greater than thirty (30) days of vacation at any point in time. The evidence presented in this matter clearly established that the above quoted sentence was not interpreted and applied literally, but rather was solely a limitation on the carryover of accumulated vacation from one calendar year into the next. The testimony of Vivian Heinz, the grievant, Rolf Skogstad and Debbie DeGroot, as well as County's records with respect to vacation accrual, 1/ convince the undersigned that the provision set out above was interpreted and understood by the parties to allow more than a thirty (30) day accumulation of vacation during the calendar year, but all vacation that was unused and in excess of thirty (30) days at the end of the calendar year, December 31, was lost. Thus, the grievant could have accumulated more than thirty (30) vacation days in 1989 and in fact accumulated 48 1/2 days. The evidence established that she was paid for thirty (30) days of vacation and the issue is whether she is entitled to be paid for the other 18 1/2 days.

The Union has argued that past practice requires payment for the 18 1/2 days in that Lois Goldsmith was paid for all of her accrued vacation when she retired in July, 1989. 2/ The undersigned finds that the argument of past practice is not applicable. This was just a single incident and one incident is usually insufficient to establish a past practice. The County asserts that the payment to Goldsmith was a mistake. The undersigned is not persuaded that a mistake was made. Article 9, Section 4 states as follows:

> "Any employee who is laid off, retired or resigns from the service of the Employer prior to taking his vacation shall be compensated in cash for the unused vacation he/she has accumulated at the time of separation;..."

It appears that this section was applicable to Goldsmith and assuming she retired prior to taking her vacation, she was properly compensated in cash. The same result would be applicable if she had been laid off. Thus, Section 4 is applicable and Goldsmith's payout was not based on any past practice or mistake.

1/ U. Ex-5, 6, 7, 8, 9, 10.

2/ U. EX-8.

The resolution of the instant grievance is whether the grievant should be compensated in cash for the unused accumulated vacation at the time she resigned or retired. The operable language of Section 4 provides that the resignation or retirement must be "prior to taking his vacation." When this Section is read in conjunction with Section 1 of Article 9, the employe must take his vacation by the end of December 31 of the year or it will be lost. Had the grievant retired on December 1, 1989, she might have gotten all accrued vacation that was not used because she could have taken 18 1/2 days of vacation prior to December 31, 1989. By retiring at the end of December 31, 1989, the grievant was not retiring "prior to taking her vacation" as she had to have already taken it by then or it was lost. Although she couldn't take vacation under the settlement agreement because she wasn't working, the result is the same. 3/ The settlement agreement provides the same benefits to her under the contract as anyone else. Had an employe worked all of 1989 and accrued 48 1/2 days of vacation and then resigned at the end of the day on December 31, 1989, he would only be entitled to thirty (30) days of accrued vacation because he had to take all vacation in excess of thirty (30) days prior to the end of the day on December 31, 1989 or lose it and because he didn't use it for whatever reason, it is lost. The grievant must be treated the same and is therefore not entitled to the 18 1/2 days of vacation because she did not use it prior to the end of December, 1989 and lost it.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. The grievance was timely filed.

2. The County did not violate the parties' collective bargaining agreement by not compensating the grievant for more than thirty (30) days of vacation following her resignation, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 14th day of November, 1990.

By _____
Lionel L. Crowley, Arbitrator

3/ In Plabell Rubber Products, 89 LA 581 (Ray, 1987), a discharged employe was reinstated and ordered to be made whole. The arbitrator held that as the Company compensated him for time not worked during the period after discharge and before reinstatement, and one of the weeks for which he was being paid would have been his vacation week, the grievant had been made whole and was not entitled to a week of unpaid vacation.