BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| JACKSON COUNTY HIGHWAY EMPLOYEES, LOCAL 2717-C, AFSCME, AFL-CIO | Case 75 No. 43962 MA-6125 |
| and | |
| JACKSON COUNTY | |

Appearances:
Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Sparta, Wisconsin 54656, for the Union.
Mulcahy & Wherry, S.C., Attorneys at Law, 715 Barstow, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, by Ms. Kathryn J. Prenn, for the County.

## ARBITRATION AWARD

The above-captioned parties, herein the Union and the County, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute. Hearing was held in Black River Falls, Wisconsin on July 18, 1990. The hearing was not transcribed. Briefs and reply briefs were filed, the last of which was received October 1, 1990.

## ISSUE

The parties were unable to stipulate to the issue. The Arbitrator states the issues as follows:

> Did employes hired before January 1, 1981 lose vacation entitlements as a result of the change in the method of granting vacations which was implemented January 1, 1990? If so, what is the appropriate remedy? 1/

## BACKGROUND

This case involves the vacation accounts of 16 employes in the County Highway Department who were hired prior to January 1, 1981.

During negotiations for the parties' initial collective bargaining agreement, which covered the years of 1988 and 1989, the County proposed a vacation provision that differed from the policy it had been following under the personnel procedures it had developed when the employes were not represented by a collective bargaining representative. After lengthy discussions on this issue, the parties settled the collective bargaining agreement on the condition that the Union could arbitrate the question of whether the 16 employes would lose vacation entitlements as a result of the change. The parties thereby were intending to put before the arbitrator not a question of contract interpretation, but rather a question of fact regarding the County policy during a period of time when the employes were not party to a collective bargaining agreement and their conditions of employment were not goverend by any agreement.

At the time of these employes' hiring, the County's policy regarding vacation benefits differed from the policy the County followed after January 1, 1981, which also differed from the provision agreed to in the collective bargaining agreement and implemented on January 1, 1990. The exact nature of this earliest vacation policy is the crux of this dispute.

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1/ As a technical matter, the parties disagreed whether this arbitration was within or without the collective bargaining agreement; however, it is clear the parties intended the arbitrator to hear and decide the dispute described in this statement of the issue. The disputed accrual of vacation benefits, if any, occurred when the terms and conditions of employment were not governed by a collective bargaining agreement.

At the time of their hiring, these 16 grievants were not allowed to take vacation during their first year of employment or, in at least one case, during the calendar year in which they were hired. At the beginning of the second year, employes were given two weeks of vacation available for use at any time in that year. The central question is whether the vacation credited to the employes at the beginning of their second year was vacation that they had earned in the first year, or whether it was vacation that they would earn during the second year and were allowed to use prior to their having worked the entire year and having earned it. 2/

POSITIONS OF THE PARTIES

The Union

The Union asserts that its position, that the 16 affected employes earned vacation during their first year of employment, even though they were not permitted to take it until the beginning of the second year, is supported by the testimony of the three Union witnesses. It further asserts the County policy of paying out vacation benefits for the entire calendar year to employers who term-inated employment during the calendar year supports the Union position, because such a practice would have the effect of paying employes for unearned vacation unless the vacation being paid out had been earned during the previous year.

The County

The County relies upon the testimony of Joanne Capper, the Highway Department Clerk since 1973, who testified that prior to 1981, employes neither earned nor accrued vacation during their first year of employment. Capper also testified that after the 1980-81 transition to the County's revised vacation policy, no employes complained of having lost vacation. The County also notes the lack of documentary evidence to support the Union contention. The County acknowledges that employes hired after January 1, 1981 had an improved benefit compared to employes hired before that date, but at the same time, it argues that grievants have not lost any accrued vacation. Finally, the County asserts the Union's position would require the arbitrator to modify the contract.

The Union Reply Brief

Replying to the County, the Union asserts none of the grievants ever complained to Capper regarding their vacation credits because they were not adversely affected until the negotiation of the initial collective bargaining agreement, and because it was more appropriate for them to discuss the matter with the Personnel Director than with the Highway Department Clerk.

The County Reply Brief

The County disputes what it regards as an error in the Union brief by pointing out that after January 1, 1981, vacation continued to be granted at the beginning of the year for the entire year, and the change in the vacation benefit for first year employes did not affect the method of accrual which remained unchanged until January 1, 1990. The County insists the testimony of Capper is more decisive than the hearsay of the Union witnesses, and the Union should bear the burden of proving there has been a loss to the grievants.

DISCUSSION

This dispute is to be resolved solely on the basis of the distinction between vacation which was earned in the first year, but deferred until the second year of employment, and vacation which was earned in the second year, but was available to the employes for use at the beginning of that year. To a lay person, unconcerned with the technical source of the vacation entitlement, these two kinds of vacation look the same. It is precisely that outward "sameness" which has caused the problem in this case. The parties could harmlessly ignore this problem until all employes were placed on the same monthly vacation accrual system, but at that point, ignoring no longer worked.

The evidence presented at hearing was primarily confined to the parties' understanding of the policy in force during the time period in question. There was no documentation memorializing the County's policy regarding vacation. Similarly, there was no evidence of any occurrence which corroborated either

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2/ Beginning in January 1, 1981, at a time when the employes continued to be unrepresented and the County continued to set benefit levels unilaterally, the County began to credit new hires with ten days' vacation in their first year of employment, but restricted the use of those vacation days until after six months of employment. The parties do not refer to this set of employes in their arguments, and this background information is set forth only to explain why there is no dispute regarding employes hired during the January 1, 1981 to January 1, 1990 period.

parties' understanding: there was no evidence of anyone terminating employment during this period and requesting pay for the ten day's vacation allegedly accrued but not used during the first year, and there was no evidence of anyone's requesting more than a single year's vacation entitlement during a single year. If such had occurred, the County's treatment of that event would have revealed the County's vacation policy. In the absence of such an occurrence, this arbitrator must reach a conclusion based solely on conflicting testimony regarding what witnesses were told in a past time, over 11 years ago.

The Union witnesses were three employes who testified as to what they were told when they were hired. Richard Gibertson, hired in April, 1979, testified the Personnel Director told him that he earned vacation in his first year but did could not take any until January 1, 1980. This testimony supports the Union view. George Lewis, hired in approximately 1971, was told by Edgar Olson, who was Highway Commissioner at the time, that he would have to work one whole year without benefits, and that his benefits would start in the second year. This testimony is inconclusive since under both theories, the actual taking of vacation would not occur until the second year, and this testimony does not address the question of when the vacation was earned. LeRoy Olstad, hired in approximately 1973, testified that Olson told him he had to work one year before he had any vacation or holidays coming, but Olson never told him anything about where the vacation came from. Again, this testimony is inconclusive. Of the three witnesses, only Gilbertson's testimony supported the Union's position.

The County offered testimony by Joanne Capper, the Highway Department Clerk who kept vacation accumulation records from the beginning of her employment with the County, in 1973, until 1986 when those record-keeping responsibilities were taken over by another employe. Capper's testimony partially concurred with that of the Union witnesses: she confirmed that new employes could not use vacation during their first year, but did receive vacation credit at the beginning of their second year. The second part of her testimony, however, contradicted that of the Union witnesses. According to Capper, these 10 days were not earned in the first year, but were earned in the second year.

This question cannot be resolved by the packets of payroll records which indicate the paid hours the payroll department attributed to vacation, sick leave, and holidays benefits, since the records only indicate that no vacation was taken during the first year. None of the payroll records have a space to indicate whether the employe has any accrued or carried-over vacation, and therefore the records are silent as to the ultimate question in this case.

Likewise, the evidence regarding the County's method of paying out vacation benefits to employes who left during the calendar year cannot resolve this question. This evidence showed that the County would pay terminating employes for unused vacation as if they had worked for the entire year. Despite the Union's argument, this practice merely demonstrates that the County viewed vacation as a kind of lump sum compensation, instead of a compensation earned proportionately throughout the work year. This practice does not, however, demonstrate that the County regarded employes as having accrued a full year's worth of vacation during the first year of employment, for if such were the case, these employes would have received either ten days of vacation plus the unused portion for the current year, or merely ten days of vacation. Since the facts are otherwise, this payout of vacation pay does not corroborate the Union's understanding that employes earned vacation during their first year.

Ultimately, the evidence comes down to two contradictory statements, that of Gilbertson and Capper. It is entirely understandable that a person's memory as to the simple conversations involved could be blurred by the passage of more than ten years. Whose memory, then, is less likely to be assaulted by time? 3/

The Highway Clerk was called on to administer the vacation benefits on repeated occasions and was required by her job duties to deal with issues of earned and unearned vacation. By contrast, the individual employe had this arrangement explained to him on one occasion, and his job duties did not require him to work with personnel matters for other employes. Consequently, the circumstances of the Highway Clerk's employment make her memory more reliable in this matter than that of the individual employe.

In accordance with the Highway Clerk's understanding of the County's policy during this time when the employes were unrepresented and the County

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3/ Since the arbitrator is not interpreting a collective bargaining agreement, but rather determining what rights the parties had before there was a bargaining agent and a collective bargaining agreement, this issue is not governed by the principles of contract interpretation that take heed of only understandings that were shared by the two parties. The question here regards the County's unilateral vacation policy, and the instructions received by the Highway Clerk constitute competent evidence of that policy.

enacted its vacation policy by unilateral determination, employes hired prior to January 1, 1981 did not receive vacation during their first year of employment. They experienced a year of employment without the benefit of a vacation during that first year. 4/ Consequently, these employes had not been carrying over from year to year any vacation benefits accrued during their first year, and when the parties' initial collective bargaining agreement covering 1988 and 1989 was implemented on January 1, 1990, the new system of monthly accrual did not deprive these 16 employes of vacation credits to which they were entitled.

In the light of the record and the above discussion, the Arbitrator issues the following

AWARD

1. The employes hired before January 1, 1981 did not lose vacation entitlements as a result of the change in the method of granting vacations which was implemented on January 1, 1990.

2. The grievance is hereby denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 6th day of December, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Jane B. Buffett, Arbitrator

4/ Indisputably, these employes received a lower level of benefits than those hired after January 1, 1981, who did receive vacation in their first year, even though they could not use it for the first six months. For the employes involved in this case, the lower level of benefits was suffered during that first year. After that time, these employes, like all others (except those in the first year of their employment), could take vacation in advance of earning it, anytime after the first of the year. As noted in the BACKGROUND section, above, the system for taking vacation changed for all employes upon the implementation of the first contract on January 1, 1990.