

BEFORE THE ARBITRATION BOARD

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 ONEIDA COUNTY DEPUTY SHERIFF'S :
 ASSOCIATION/WISCONSIN PROFESSIONAL : Case 72
 POLICE ASSOCIATION : No. 44276
 : MA-6234
 and :
 :
 ONEIDA COUNTY :
 (SHERIFF'S DEPARTMENT) :
 :

Appearances:

Mr. Steven J. Urso, Representative, Wisconsin Professional Police Association/
Mr. Lawrence R. Heath, Corporation Counsel, appearing on behalf of the Employ

ARBITRATION AWARD

The Employer and Association above are parties to a 1989 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to act as Chair of a three-member Arbitration Board to resolve the vacation and holiday time carry-over grievance of Judith Baxter.

The Commission appointed Christopher Honeyman, a member of its staff; the Association appointed Philip Schmidt; and the County appointed Charles Rude. A hearing was held in Rhinelander, Wisconsin on October 17, 1990, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on November 23, 1990.

ISSUES:

The Association proposes the following issues:

1. Did the Employer violate the collective bargaining agreement by denying accrual and carry-over of vacation and holiday time earned in 1989 into 1990?
2. Did the Employer violate the collective bargaining agreement by denying holiday accumulation in 1990?
3. If (1) or (2) is so, what should the remedy be?

The Employer proposes the following:

1. Is the Grievant entitled to a vacation or holiday benefit while on Worker's Compensation leave status and while receiving full compensation under the terms of the contract, where there is no contractual provision or practice allowing for carry-over of such unused benefits at the end of the contract year?
2. If so, what should the remedy be?

STIPULATED FACTS:

A number of facts were stipulated by the parties, as follows:

Grievant Judith Baxter was first employed as a Clerk/Matron in October, 1983. On May 8, 1989 she was injured on the job, but worked eight hours on the following day and four more hours on May 10. Effective May 11, 1989 the Grievant was placed in off-duty status, and received Worker's Compensation from May 10, 1989 through May 10, 1990. As of the end of 1989 the Grievant had in her personal time account two sick days and 64.5 hours of compensatory time. She used these days, and twelve days of vacation, between May 11, 1990 and June 11, 1990. Since that date she has been on an unpaid leave of absence.

The terms and conditions of the 1989 collective bargaining agreement remained in effect through the date of the hearing in 1990, and since the 1989 collective bargaining agreement was settled during 1990, the Grievant received a retroactive adjustment of wages relative to the terms of that agreement, annualized to the effective rate of \$19,082.76 per annum.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE X - HOLIDAYS

Section 10.01 - Holidays: Each employee (excluding the Sheriff and Chief Deputy) shall be allowed nine (9) paid holidays as follows: New Year's Day, Easter Sunday, Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas Day, December 24th and Good Friday. In addition to the above-scheduled nine (9) holidays, each employee shall receive a floating holiday, to be available after the employee has completed his or her initial probationary period. In the event the employee is required to work on these holidays, he shall be given extra compensation of one (1) days pay, eight (8) hours, plus one (1) day off. For the purpose of this section, if the holiday falls on the employee's regular time off, or during his vacation, the employee shall receive an extra day off. Pay vouchers are to be submitted no later than the end of the month worked, approved by the Sheriff and the Law Enforcement Committee. The holidays shall be considered from 11:00 p.m. of the day before the holiday to 11:00 p.m. of the holiday itself.

Section 10.02 - Holidays for Cook/Clerk/Matrons: If a clerk/cook/matron works eight (8) hours or more on a designated holiday, she shall receive 16 hours pay for the holiday, plus the pay for all hours worked on that day. If the clerk/cook/matron is not scheduled to work the holiday, she shall receive no pay.

ARTICLE XI - VACATIONS

Section 11.01 - Vacation Schedule: Each employee (excluding the Sheriff) shall receive a vacation based upon two (2) weeks after one (1) year of service, three (3) weeks after eight (8) years, four (4) weeks after fifteen (15) years, five (5) weeks after twenty (20) years and six (6) weeks after twenty-five (25) years.

Section 11.02 - Vacation Week Definition: The vacation period shall be any time during the calendar year and may be staggered to prevent disruption of normal service. A week's vacation shall be considered six (6) working days.

Section 11.03 - Clerk/Cook/Matrons: The Clerk/Cook/Matrons will earn vacation in the same manner as 11.01 above. However, such vacation benefit will be pro-rated based on the hours worked in the previous year divided by 2,080. Vacation will not be taken but will be paid in cash at the end of the year.

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ARTICLE XIV - INSURANCE

Section 14.03 - Worker's Compensation: The worker's compensation coverage for each employee provided by the County shall be modified to provide that the employee shall receive 100% of his average weekly earnings in lieu of that provided in Chapter 102, Wisconsin Statutes. In the event of an employee being injured on the job, said employee shall receive the worker's compensation benefit to which he/she is eligible and be paid the difference between that benefit and the employee's regular pay based upon his/her normal work week (excluding overtime and premium pay). During the period of time the employee is receiving worker's compensation benefits, the County will pay the employer's and employee's contribution toward the Wisconsin Retirement System Fund and F.I.C.A. on the said difference between the worker's compensation benefit payment and the employee's regular pay. All other benefits to the employee shall accrue except for additional sick leave days. The provisions of this section shall also be available to the cook/clerks/matrons.

BACKGROUND:

Chief Deputy Jack Bergman testified that when a department employe does not use all of his or her vacation or holidays by the end of a calendar year, the days are "zeroed out". Bergman testified that the Employer's practice is that an employe can be in only one pay status, such as working, Worker's Compensation, sick or vacation, at a time. Bergman testified that an employe who becomes sick while on vacation cannot change status mid-stream. But Bergman admitted on cross-examination that in a case involving two detectives who were heavily scheduled at the end of the year, he may have allowed some banking of vacation into the following year. Bergman testified that in his twenty-two years in the department there has never been an injury of the length of the Grievant's, in which the employe remained on Worker's Compensation into the following year. Bergman also stated that he himself had lost a floating holiday by not taking it prior to the end of the year.

Bergman further testified that if an employe became sick prior to going on a scheduled vacation, he or she could have the time converted to sick leave, and might be paid out for the vacation if it was the end of the year. Bergman also testified that if an employe scheduled vacation for the last week of the year, and then became ill prior to that, he or she could use the vacation up rather than have the sick leave bank drawn down. But Bergman was unclear as to whether an employe was actually entitled to have vacation paid out in cash at the end of the year; he stated that the issue has never come up.

Personnel Director Carey Jackson testified that in the negotiations taking place at the time of the hearing for the 1990 contract, the Association proposed language for vacation carry-over which would be the same as the language in the Courthouse contract. Carey characterized the Courthouse language as working so that an employe could bank one week's vacation each year up to a maximum of four weeks, which could be used any time but paid at the rate originally earned. Carey stated that the policy against carry-over of vacation was a Sheriff's Department policy developed prior to his employment by the County.

WPPA Executive Director James Kluss testified that he has bargained for the deputies since about 1985, and that the issue of benefits accruing while on Worker's Compensation has never been a subject of negotiation since he has been involved. He testified that the Association proposed in 1990 that one week of vacation be bankable from one year to the next for all employes.

The Association's Position:

The Association contends initially that the injured off-duty employe is entitled to the same rights and benefits as if she were working. The Association argues that it would be discriminatory to treat an injured employe differently from any other employe solely because he or she was injured. The Association contends that the collective bargaining agreement does not provide the County with any authority to deny a pay-out of accumulated time, nor is there a past practice of not paying out vacation and holiday time under circumstances similar to the Grievant's. The Association points to Bergman's testimony that the circumstances of this case were unique during his twenty-two years with the department, and distinguishes this from a working employe's choice not to use up all of his or her vacation. The Association notes that Bergman testified that an employe could conceivably collect a cash pay-out of the vacation time owed at year's end, and contends that this shows that the department has no hard, fixed rule and no clear, consistent past practice. The Association argues that the department has exercised discretion and as a matter of fairness the discretion should be applied in favor of the Grievant.

The Association also contends that Article 14.03 specifies specifically that while sick leave does not accrue for an employe who is off on Worker's Compensation, "all other benefits to the employe accrue". The Association contends that this language is clear and controls this matter. The Association requests that the Arbitrators order the Employer to pay the Grievant compensation for all holidays and vacation time earned in 1989 and compensation for holidays accrued through June 11, 1990.

The Employer's Position:

The Employer contends that no employe can be entitled to more than 52 weeks of compensation in any given year. The Employer contends that while Article 14.03 of the Agreement provides that benefits "shall accrue" while an individual is off on Worker's Compensation leave, this does not mean "that the employe is entitled to piggyback. . . vacation on top of the combination of other types of compensation totaling 52 weeks in a given year that he or she is entitled to." The Employer argues that the Grievant was not penalized for her injury, because she was compensated for the full 52 weeks of 1989 and because no employe is allowed to carry over any such time. The Grievant was unable to change from Worker's Compensation status to vacation, and therefore lost the time as would any other employe.

The Employer contends that at any given time, an employe must be in one pay status or another, and that out of 52 weeks the employe is active on any days when he or she is not receiving vacation, holiday, sick leave or Worker's Compensation. She had twelve days vacation available to her on and after January 1, 1990, and was able to carry over two sick days and 64.5 hours of compensatory time, which she used after her Worker's Compensation term ended. Thus she was at no time in more than one pay status. The Employer requests that the grievance be denied.

DISCUSSION:

We find initially that the Association's statement of the issues fairly describes the questions involved, while the Employer's presumes answers to several disputed facts. We therefore adopt the Association's version.

While both parties have entered evidence and arguments with respect to the meaning of the Agreement's terms, and any practices which might exist, concerning employes generally and their rights to payout or carry-over of vacation at the end of the contract year, we find these facts and arguments irrelevant to the present case. In this Agreement the parties have, in Section 14.03, specified particular language with respect to the benefits available specifically to employes on Worker's Compensation leave, and this language clearly controls this dispute. Furthermore, we find the language to be clear and unambiguous.

The last sentence of Article 14.03 clearly shows that the Grievant, as a Clerk/Matron, is covered by this clause. The second to last sentence, in specifying that "all other benefits to the employee shall accrue except for additional sick leave days" unambiguously identifies the manner in which the Grievant's benefits are to be treated.

It is axiomatic in arbitration that words are to be given their ordinary and reasonable meaning, and the key word in the sentence cited is "accrue". A dictionary definition 1/ specifies three meanings: "To come into existence as a legally enforceable claim"; "to come by way of increase or addition"; and "to be periodically accumulated, whether as an increase or a decrease." These meanings, as well as the ordinary use of the word, establish that the Employer's obligation with respect to all benefits covered by the clause is that they continue to be accumulated at a rate commensurate with any other employe, but are not used up or otherwise abandoned until after the employe's Worker's Compensation status is terminated.

Thus it matters little whether or not employes who are actually working have any right to carry over vacation, receive a cash payout for vacation, or have their vacation (and holidays) "zeroed out" at the end of a calendar year; the parties' clear agreement is that in the case of employes on Worker's Compensation, these benefits "accrue". We therefore find that upon the termination of the Grievant's Worker's Compensation status, the Employer had an obligation to permit full use or payout of these benefits.

For the foregoing reasons, and based on the record as a whole, it is our decision and

AWARD

1. That the Employer violated the collective bargaining agreement by refusing to allow the Grievant to use her accrued vacation and holiday time at the time she ceased to be on Worker's Compensation in May, 1990.
2. That as remedy, the Employer shall, forthwith upon receipt of a

1/ Webster's Seventh New Collegiate Dictionary, G & C Merriam Co., 1972.

copy of this Award, make the Grievant whole by payment to her of a sum of money equal to the vacation and holiday time which she had accrued as of May 11, 1990.

Dated at Madison, Wisconsin this 7th day of February, 1991.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitration Board

Chair

Philip Schmidt /s/
Philip Schmidt, Arbitration Board Member

I dissent from the majority's opinion. My dissent is based simply from the standpoint of the employee's pay and benefits. There was no loss of either while she was absent due to a compensable injury, and the award "stacks" an additional benefit on what she has already received.

Charles A. Rude /s/
Charles A. Rude, Arbitration Board Member