

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
 : Case 190  
 OUTAGAMIE COUNTY PROFESSIONAL : No. 44602  
 POLICE ASSOCIATION : MA-6357  
 :  
 and :  
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 OUTAGAMIE COUNTY :  
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Appearances:

Mr. Frederick J. Mohr, Attorney, appearing on behalf of the Association.  
Davis and Kuelthau, S.C., by Mr. Lon D. Moeller, appearing on behalf of

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ARBITRATION AWARD

The Employer and Association above are parties to a 1988-89 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 resolve the vacation payout grievance of Ken White.

The undersigned was appointed and held a hearing on November 29, 1990 in Appleton, Wisconsin, 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 December 19, 1990.

STIPULATED ISSUES:

1. Was the County's refusal to pay Ken White for accrued vacation time a violation of the collective bargaining agreement?
2. If so, what is the remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE VII - GRIEVANCE PROCEDURE

7.02 - Only matters involving the interpretation, application or enforcement of this Agreement which may arise between the County and the employee (employees) or the County and the Association shall constitute a grievance and shall be processed in the following manner by the aggrieved employee or the Association Board of Directors. Individual grievances shall be signed by the aggrieved party. Association grievances shall be signed by the Association Grievance Committee. The written grievance shall include a listing of the section violated, the details of the violation and the remedy requested. If these items are not listed, the grievance will be returned for the items to be included.

. . .

Step 4. The grievance shall be considered settled in Step 3, unless the Association notifies the Personnel Director in writing within five (5) days of receipt of the written determination of the Personnel Director or last date due, of its intent to appeal the matter to arbitration. At the same time, the Association shall request the WERC to submit a panel of five (5) arbitrators to the parties. The parties shall alternately strike names from the panel until one remains, who shall be appointed the arbitrator. The Association shall make the first strike. The decision of the arbitrator shall be final and binding on the parties and the arbitrator shall be requested to issue a decision in writing within thirty (30) days of the conclusion of the testimony and argument. In rendering his decision, the arbitrator shall neither add to, detract from nor modify any of the provisions of the Agreement.

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ARTICLE XII - VACATIONS

12.06 - In case of termination for reasons other than discharge for cause or voluntary separation

without a thirty (30) day notice or without remaining in active employment during the thirty (30) days after notice of termination, an employee will be paid for his/her authorized but unused and/or his/her accrued but unauthorized vacation allowance on the following basis:

a) An employee who terminates employment prior to completing one year of continuous service shall not be eligible for any payment whatsoever.

b) An employee, except one listed in paragraph (a), will receive payment for all vacation allowance authorized the previous January 1 but unused at the date of termination, provided however that if such employee terminated employment prior to completing an anniversary year of continuous service, such employee will not be eligible for payment for any additional vacation allowance authorized because the employee would have moved to a higher vacation eligibility level.

c) An employee, except one listed in paragraph (a), will receive payment for accrued but unauthorized vacation allowance on a pro-rata basis from the previous January 1 to the date of termination (computed to the nearest one-quarter month) and based on such employee's eligibility level as of the date of termination and the accrual provisions contained in Section 12.02.

. . .

#### ARTICLE XXXI - SAVINGS CLAUSE

31.01 If any article or section of this Agreement or addendums thereto shall be held invalid by operation of law or by any tribunal or competent jurisdiction, or if compliance with or enforcement of any article or section should be retained by such tribunal, the remainder of this Agreement and addendums shall not be affected thereby and the parties shall enter into immediate collective bargaining negotiations for the purpose of arriving at a mutually satisfactory replacement for such article or section.

#### DISCUSSION:

The facts are not significantly disputed. Officer Ken White was employed as a Deputy Sheriff from June 12, 1989 to July 28, 1990. At the time of his resignation he had accrued 27 hours vacation for 1989 and 28 hours for 1990. The collective bargaining agreement introduced into the record has not been changed for the subsequent agreement, and the parties stipulated that Article 12.06 was not discussed in the bargaining.

White testified that he gave two weeks' notice prior to his July 28, 1990 resignation. He was not paid for his accrued vacation time, despite raising the question with an assistant in the Personnel Department, Personnel Director Emil Meyer and a lieutenant and sergeant within the Sheriff's Department. White testified that neither Lieutenant Schmoll nor Sergeant Behrent gave him any reason why he should not be paid the benefit, but that Meyer told him that he would not be paid. Schmoll testified that he did not tell White anything other than that he would call Meyer and ask him to look at the question. Sheriff Thomas Drootsan testified that two prior resigning employees had given less than thirty days' notice, had been refused the payout of vacation, and had filed grievances. Drootsan testified that the County refused to arbitrate the grievances and the Union dropped them.

Association attorney Mohr testified that when the two previous employees left the department, in February, 1988, he argued to the County that Chapter 109 of the Wisconsin Statutes required that the County pay the accrued vacation pay since the employees gave at least two weeks' notice. Mohr testified that the County's attorney, Roger Walsh, told him that the County would not arbitrate the issue because this was a statutory allegation. Mohr testified that after he looked at the economics of filing a prohibited practice complaint or lawsuit, he decided that the Association would spend more to pursue the matter than the employees could possibly get back. Mohr testified that the Union did not pursue it further, but did not feel that it was condoning the employer's position by not pursuing the complaint at that time.

In its brief the Association argues that a proper reading of Section 12.06, deleting the exclusions, would be "in case of termination. . .an employe will be paid for his/her authorized but unused and/or his/her accrued but unauthorized vacation allowance on the following basis:. . ." The Association contends that White's situation falls within the exclusions omitted from the above paragraph, and is therefore not addressed in that paragraph. The Association further notes that White's situation is not addressed in either Section A, B or C of the remainder of 12.06. Thus, argues the Association, the contract language does not address at all what occurs to employes who give less than thirty days notice, and the presumption must therefore be that there is no penalty for the failure to give thirty days' notice. The Association contends in addition that if applied according to the Employer's view, this language would violate Section 109.01, Wis. Stats., and the contract should be interpreted so as to find it legal. The Association further argues that White could have used up his vacation while employed, and should not be subjected to a forfeiture merely because he accrued it until he decided to resign. The Association requests that the County be ordered to pay the accrued and earned vacation time.

The Employer contends that the language of Section 12.06 provides specifically that employes seeking to receive their accrued vacation allowance upon termination must give thirty days' notice. The Employer argues that the language is clear and unambiguous, and that this requirement is fair and reasonable as found by arbitrators in prior cases. The County further argues that the past practice of refusal to pay employes in similar circumstances further supports its position. The County contends in this regard that in one of those grievances the Association had alleged that the County had not treated employes in a uniform and consistent fashion under Section 12.06, but declined to amend its grievances so as to assert contractual violations and dropped both matters short of arbitration. Finally, the County argues that the Association began its proceeding with this grievance by alleging that the County violated Chapter 109 of the Wisconsin Statutes, and that it abandoned that claim at the hearing herein. The County requests that the grievance be denied.

Contrary to the Union, I find that Section 12.06 can reasonably be read only as implying on its face that employes who give less than thirty days' notice are excluded from receiving the payout of accrued vacation pay referred to in that clause. The fact that employes who give more than thirty days' notice receive the benefit on its face implies that those who give less than that amount will not receive the benefit, and this is given further force by the fact that in that clause these employes are equated with employes who are

discharged for cause. I therefore find that the collective bargaining agreement clearly and unambiguously on its face denies the payout of vacation pay to the grievant.

The arguments made by both parties with respect to equity and past practice are therefore irrelevant. I will note, however, that the past practice is entirely consistent with my reading of the face of the clause, while general arguments of fairness such as those advanced by the Association carry weight only where the collective bargaining agreement is ambiguous. Here, the parties have agreed upon a formula for payout of accrued vacation pay which reflects a common practice in labor negotiations, in which vacation pay is in effect used as a device to encourage employes to give substantial notice of intended resignation.

As to the Association's argument concerning the interpretation of Chapter 109 of the Wisconsin Statutes, I note that contrary to the County's hopes, the Association did not entirely abandon this line of argument in its brief. Section 7.02 of the collective bargaining agreement, however, clearly specifies that "only matters involving the interpretation, application or enforcement of this Agreement. . . shall constitute a grievance. . ." The contract thus, as is common practice, denies to an arbitrator serving under its terms the authority to interpret, apply or enforce statutes which may in part govern employes' working conditions. If the Association chooses to pursue a Chapter 109 right in another forum, that is its privilege; but I have no authority under this Agreement to consider such claims. Similarly, an argument that the collective bargaining agreement is invalid in Section 12.06 by virtue of that statutory section lacks, in this case, either the persuasive force of a prior ruling by a competent tribunal that the Employer has violated Chapter 109, or a remedy which would vary the result in this case. In fact, a finding that Section 12.06 was invalid would not necessarily extend the benefits referred to therein to any additional classes of employes automatically; instead, Section 31.01 of the collective bargaining agreement would specify that that Section would become void and the parties would enter into immediate negotiations over its replacement. I therefore find that upon each of the grounds asserted by the Association, the County has not violated the Agreement.

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

AWARD

1. That the County's refusal to pay Ken White for accrued vacation time was not a violation of the collective bargaining agreement.
2. That the grievance is denied.

Dated at Madison, Wisconsin this 5th day of March, 1991.

By Christopher Honeyman /s/  
Christopher Honeyman, Arbitrator