

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
 :
MILWAUKEE DISTRICT COUNCIL 48, :
AFSCME, and its affiliated LOCAL 587 :
 : Case 317
 : No. 43445
and : MA-5976
 :
MILWAUKEE AREA DISTRICT BOARD :
OF VOCATIONAL, TECHNICAL AND :
ADULT EDUCATION DISTRICT :
 :
- - - - -

Appearances:

Podell, Ugent & Cross, S.C., by Mr. Jeffrey Sweetland, appearing on
behalf of the Union.
Quarles and Brady, Attorneys, by Mr. David B. Kern, and Ms. Katherine

Green,

ARBITRATION AWARD

The Employer and Union above are parties to a 1989-91 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 grievance of Millie Bodanske.

The undersigned was appointed and held a hearing on May 16, 1991 in Milwaukee, 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 July 3, 1991.

ISSUES:

The Union proposes the following:

1. Did the Employer violate the collective bargaining agreement when it denied
 - a. Millie Bodanske's 1989 vacation request?
 - b. Millie Bodanske's 1990 vacation request?
 - c. Rosanne Terry's 1990 vacation request?
2. Is Feisal Salahadyn's grievance moot?
3. If [2] is not so, did the Employer violate the collective bargaining agreement when it denied Feisal Salahadyn's 1990 vacation request?

The Employer proposes the following:

1. Did MATC unreasonably refuse to approve

- a. Millie Bodanske's 1989 vacation request?
- b. Millie Bodanske's 1990 vacation request?
- c. Roseann Terry's 1990 vacation request?

2. Is Feisal Salahadyn's grievance moot?

3. If [2] is not so, did MATC unreasonably refuse to approve Feisal Salahadyn's 1991 vacation request?

RELEVANT CONTRACTUAL PROVISIONS:

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Section 2 -- Steps

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Step 4. Appeal

If the grievance or complaint has not been resolved satisfactorily, it shall be presented by the Union steward, officer, or Union representative to the Director of Labor Relations within ten (10) working days of the response by the department head or regional administrator. The Director of Labor Relations shall hold a hearing and respond in writing to the Union steward, officer, or Union representative within ten (10) working days following the date the written appeal is received.

Step 5. Arbitration

If the grievance is not resolved satisfactorily, either party may appeal, within twenty-five (25) working days after the written response of the Director of Labor Relations, or designee is due, for arbitration. The provisions covering arbitration are as follows:

- a. Within five (5) working days of such appeal, either party may request the Wisconsin Employment Relations Commission to appoint an impartial arbitrator, who will arbitrate the grievance in accordance with Section 298.01 of the State Statutes.
- b. The arbitrator shall determine whether there has been a violation of one or more specific provisions of this Agreement, but shall have no power to amend this Agreement.

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Article VII - Vacations

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Section 2 -- Choice of Vacation Period

Vacation periods may be selected by employees at any time of the year with the approval of the department head. Such approval shall not be unreasonably withheld. If a number of employees in any category select the same vacation time, and if the number must be limited, preference shall be given on the basis of seniority in that classification.

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BACKGROUND:

This case involves four different requests for vacation, filed by three different employees at different times during 1989-91, but all in the same department. The Food Service Department operated by MATC is staffed by Food Service Worker I's, II's and III's and also by students. There is no dispute that for many years the Department has had a policy that employees can under normal circumstances obtain vacation only during periods when students are not present. The present grievances challenge that policy, as well as the specific denials in each case.

Millie Bodanske is a Food Service Worker III who orders produce, prepares fresh salads and fruits, and supervises a number of students and occasionally Food Service Worker I's. In 1989 and again in 1990, Bodanske requested the Monday, Tuesday and Wednesday of Thanksgiving week as vacation. In 1989 she made this request on October 4; in 1990, she made her request on July 18. In both cases the requests were in effect denied by her supervisor, Food Service Manager Ione Otto. 1/ While the parties dispute the quantity of work which needed to be performed during that three-day period, it is clear from the record that the Bodanske grievances, like the other grievances in this matter, were denied by Otto primarily on the basis of the standing policy against such vacation.

Bodanske and other Union witnesses testified without contradiction that the Thanksgiving week is the lightest student-contact week during the school year. Bodanske testified that in general when employees are absent, the work is covered by other employees or, if the absence is known in advance, by scheduling menus which can be prepared by fewer employees. There are three Food Service Worker III's, and although the second does primarily soups and the other meats and vegetables, they work together and are all capable of supervising other employees.

Roseann Terry is also a Food Service Worker III, and is supervised by Otto. She is the FSW III in charge of meats and vegetables, and normally takes her vacations at Christmas or in summer. In September, 1990 she asked for vacation in January, 1991, on the 9th, 10th and 11th when students would not normally be present. There is no dispute that that was a week used by the staff for preparing for the students' return, and that food preparation and setup is done during that period. Terry and other Union witnesses testified, however, that other employees were available, including employees who had

1/ In the second instance Otto checked with the labor relations department, since there was already a pending grievance on the issue, and that department issued the formal denial.

volunteered to work but were denied the opportunity, who could have performed her duties under the supervision of the other Food Service Worker III's.

Ione Otto, the Food Service Manager, testified that it has been the practice since 1963 that Food Service Workers take vacations during student breaks, although there have been exceptions due to circumstances. Otto testified that she needs everyone on duty, that the department is sometimes hurt by people being off due to illness, and that she does not want to make it worse. She testified that the Department has substantial absenteeism and that this has affected this policy. But she has told employees that they cannot have vacation time even in compelling circumstances such as weddings. In some instances, she testified, she has offered employees time off without pay.

Otto testified with respect to Bodanske's request that the three days prior to Thanksgiving involve inventorying and cleaning the cooler, preparing some foods for the following week, and otherwise tidying up. She conceded, however, that this is often a slow week. With respect to Terry's request, Otto testified that she denied this based on the fact that the Food Service Worker III's had requested to work that week several years earlier, and it was a good suggestion because they needed the time to prepare for the students' return. Otto testified that in that period the Food Service Workers had to prepare vegetables, make chili and taco sauce, and so forth because the cafeteria had been largely shut down for two weeks.

Otto also made it clear by her testimony that she considered that the Food Service operation was unique within the MATC structure, that the nature of the operation demands that employees be present when the students are, and that the three periods a year during which vacation is allowed by Department policy should be sufficient. Otto admitted that concerning the language "unreasonably withheld" in the collective bargaining agreement's reference to denial of vacation, she does not make such decisions on a case-by-case basis, but that it is a general policy with occasional exceptions. She stated that she would have to know the employee's reason for wanting vacation before granting an exception, and that with the Food Service Worker III's, it would be immaterial that neither of the other two FSW III's was requesting the same time off. Otto testified that if Bodanske had asked for any other three-day period in 1989 or 1990, it would have also been denied if it involved student-contact days.

Feisal Salahadyn testified that in February, 1991 he requested vacation for the first full week in May, because he was getting married on May 5. His supervisor, Harold Davis, told him it would be denied, even before he formally requested it. Later, then-Food Service Director Ann Reuther told him that he might be able to get a leave of absence [unpaid], but not vacation. Salahadyn filed a grievance, which ultimately was upheld by the Director of Labor Relations in the grievance procedure. Salahadyn then took the vacation he had asked for.

Several Union witnesses testified that the Department had for many years had a practice in which Food Service employees were permitted to eat a meal free of charge on the job, and that some years ago, management unilaterally abrogated this practice. The Union witnesses testified that they were told that the contract language superseded the past practice.

THE UNION'S POSITION:

The Union contends that in other departments, blanket no-vacation rules were replaced over the years by rules mirroring the requirements of Article VII, Section 2, but that Food Service has lagged behind. The Union points to prior arbitration decisions involving other employers as supporting the concept that if vacations "may be taken at any time during the year", the

burden is on the employer to demonstrate a reason for denying at any particular time, and blanket denials will not be tolerated by arbitrators. The Union contends that allowing employees to take time off without pay, instead of vacation, makes nonsense of the Employer's claimed reasons for needing the no-vacation policy in the first place, and that management is "bootstrapping" the requirement onto the employee to demonstrate justification for a leave. The Union further contends that as to both Bodanske's and Terry's vacation requests, the evidence in the record showed that other employees could have been designated and supervised to fill their place, and that such employees were both available and qualified. The Union argues that the no-vacation policy cannot be justified as past practice, because the contract contains no ambiguity making this past practice relevant, and because the Employer has previously availed itself of that principle in the "free lunch" issue. The Union requests that the arbitrator issue an award directing the Employer to cease and desist from further enforcement of the no-vacation policy.

THE EMPLOYER'S POSITION:

The Employer contends that it has an inherent and contractual right to determine when employees will receive approval to take vacation, and that Article VII, Section 2 does not infringe on this right. The Employer points to several prior arbitration cases involving MATC employees' vacation requests as demonstrating that it has the authority to determine when employees will receive approval for vacation. The Employer argues that even under the 1985-87 amendment to Article VII, Section 2, it does not have to add anything in negotiations to justify its position in its Food Service Department. The Employer contends that "not unreasonably withholding" vacation includes not unreasonably denying vacation in advance for broad periods of time, where appropriate. The Employer contends that the record demonstrates that in the Food Service Department, it has broad authority to reasonably withhold approval of vacations for Food Service Workers, because the nature of the Food Service Department demonstrates that employees must be there when school is in session.

The Employer contends that the Union is attempting to force the department to be managed in the fashion the Union would prefer, and that the Employer has no obligation to manage its affairs according to the Union's preference. The Employer points to Otto's testimony that the school routinely expects to do inventory and special food preparations to arrange for the Thanksgiving shutdown, and as to Terry's requested vacation period, this is an early startup period when FSW III's have requested to work in the past and when their presence is necessary in order to do productive setup work. The Employer cites several arbitration decisions to the effect that other employers have been permitted to ban vacations during broad periods. The Employer also contends that Food Service Worker I's have not normally been permitted to have the full responsibility of doing large-scale food planning.

The Employer further contends that the Union has waived its right to its preferred meaning of the vacation provision by not raising the issue in negotiations since 1985-87, because the department's practice continued before and after that date. The Employer requests that both of the grievances be denied.

DISCUSSION:

With respect to the statement of the issues in dispute, I find that in this particular case it makes very little difference which of the parties' preferred statements of the issue is adopted, as the result is the same in either event. I therefore adopt the Union's proposed statement of the issues, as it is the moving party.

With respect to the Feisal Salahadyn grievance, I agree with the

Employer. That grievance is moot because it was properly raised in the grievance procedure well in advance of the actual dates requested, and processed promptly through that procedure until the grievance was granted by management. Thereafter, Salahadyn took the vacation as if nothing had happened. Since there is no evidence that Salahadyn ultimately lost anything by management's action, there having been substantial lead time involved, it appears that the grievance was "resolved satisfactorily" within the meaning of Article VII, Section 1. That Section provides in Step 5 that "if the grievance is not resolved satisfactorily, either party may appeal . . . for arbitration." Since the grievance had been "resolved satisfactorily", the conditions required for an appeal to arbitration under Step 5 were not met, and the grievance is moot.

While the record contains several prior arbitration awards, and other evidence, concerning the denial of vacation in prior years in other departments, I find this evidence of minimal relevance, because the present grievances all relate primarily to a departmental policy that bars vacations for substantial periods of continuous time. By contrast, the departments involved in the Shaw and Jones arbitration cases were determining vacation requests on a case-by-case basis, according to the text of the arbitration awards in question. The Houlihan and Davis cases, meanwhile, involved fact situations still further removed from the present case.

Also, I find the evidence and arguments as to the particular reasons why Bodanske and Terry wanted vacation, and the circumstances of work in the particular weeks that their requests were denied, to be less than fully relevant. It is plain from Otto's testimony, and not disputed by either party, that the denials were in pursuance of the overall policy rather than based on the specific fact situation involved; and it is therefore the policy which primarily governs the case. The substantial quantity of argument and evidence related to the specific fact situations will therefore be referred to below only when essential.

In all three of the Bodanske and Terry grievances, I conclude that the record demonstrates that management has applied a standard other than what the collective bargaining agreement plainly provides for. Article VII, Section 2, by specifying that employees may take vacation at any time during the year with management approval, clearly creates a presumption that there is no period during the year when vacation can be automatically denied. Furthermore, the 1985-87 contract changes made explicit the requirement that approvals not be unreasonably withheld. The record demonstrates that the practice in this department, both before and since, has been to apply an entirely different standard. This standard, if it appeared in the contract, might be written: "An employee in the Food Service Department may request vacation at any time during the year, but such requests will be denied absent compelling circumstances. Instead of granting vacation, management may, at its option if satisfied that the employee has shown good cause, offer the employee an unpaid leave of absence." This is plainly the meaning of Otto's testimony. It is also plainly a different standard from that provided for by contract. And since the contract language is not ambiguous, the fact that the Union tolerated the department's practice for many years does not render the grievances meritless.

This conclusion does not require management to grant any and all vacation requests that employees may make. It is clearly within management's prerogative to maintain the efficient and orderly operation of the Department. But the requirement that vacation approval not be unreasonably withheld puts the obligation for producing a suitable reason on management, not on the employee, and there is little in the record to justify management's insistence that all employees must be present on each and every day that school is in session.

First, while Otto testified that there was absenteeism of approximately 12-13 days per year per employe on average, there are also employes who can be called in, and unlike the generally accepted use of the term "absenteeism", vacations are typically scheduled well in advance and arrangements can be made. Second, such testimony as was offered to buttress the contention that the FSW III's cannot be dispensed with on any particular day was conclusionary and was undercut by the absence of any demonstrated adverse consequence from such absences as they have undergone. Indeed, Bodanske testified that on the day of the hearing, when two FSW III's and Ione Otto were absent from the Department for a substantial period, arrangements were made to have a menu which other employes could handle. Furthermore, both Bodanske and Terry appeared, in the particular instances under discussion, to have requested vacation during weeks when the workload could be legitimately expected to be lighter than normal. There was no contrary testimony to the Union witnesses' testimony that Thanksgiving week was the lightest during the school year, and while the Department may have profited by agreeing to the FSW III's suggestion that they be called in prior to the start of school in January, the fact remains that students would not be present and that this work had not been deemed essential before the employes themselves proposed it.

I find the fact situations represented by the particular grievances, however, relevant only as illustrations of the principles raised by the grievance and responses. The particular instances testified to demonstrate only examples of days when the management's standing "all hands on deck" instruction is notably weak, not that there may not be other occasions during the year when circumstances make it possible for the Food Service Department to manage without the services of one or another employe from time to time. Since the vacation periods involved have gone by, and the Union is not requesting other than a cease and desist remedy, the specifics are less important than the policy, and I find that the policy is unreasonable within the meaning of Article VII, Section 2, because it withholds approval of vacation requests on a blanket basis.

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

AWARD

1. That Feisal Salahadyn's grievance is moot.
2. That the Employer violated the collective bargaining agreement by denying Millie Bodanske's 1989 and 1990 vacation requests and by denying Roseann Terry's 1990 vacation request.
3. That as remedy, the Employer shall, forthwith upon receipt of a copy of this Award, cease and desist from applying a policy of general refusal of vacation requests in the Food Service Department on all days when students are present.

Dated at Madison, Wisconsin this 17th day of September, 1991.

By _____
Christopher Honeyman, Arbitrator