BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
RACINE PROFESSIONAL EMPLOYEES ASSOCIATION	Case 372 No. 45518 MA-6628
and	
CITY OF RACINE (LIBRARY)	

Appearances:

Mr. Guadalupe G. Villarreal, Assistant City Attorney, City of Racine, City Hall, 731 Washington Avenue, Racine, Wisconsin 53403, appearing on behalf of the City.

Hanson, Gasiorkiewicz & Weber, S.C., Attorneys at Law, by Mr. Robert K. Weber, P.O. Box 1875, Racine, Wisconsin 53401, appearing on behalf of the Association.

ARBITRATION AWARD

The Racine Professional Employees Association, hereafter Association, and the City of Racine (Library), hereafter the City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission, hereafter Commission, to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On April 30, 1991, the Commission designated Coleen A. Burns, a member of its staff as Arbitrator. Hearing was held on June 19, 1991 in Racine, Wisconsin. The hearing was not transcribed and the record was closed on July 22, 1991, upon receipt of post-hearing briefs.

ISSUE:

The Employer raises the following issue:

> Is the grievance arbitrable?

The parties have stipulated to the following statement:

> Is the Grievant entitled to four weeks of vacation pursuant to Article XV, Section C.?

RELEVANT CONTRACT PROVISIONS:

ARTICLE I
Conditions and Duration of Agreement

A. Term: This Agreement shall become effective as of the first day of January, 1990, and shall remain in effect for a period of two (2) years through December 31, 1991, and from year to year thereafter unless either party gives notice to other by September 1, 1991, or September 1 of any year thereafter, to vacate or amend it.

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ARTICLE II
Recognition

The Employer herewith recognizes the Racine Professional Employees Association (R.P.E.A.), as the sole collective bargaining representative of the employees included within a collective bargaining unit consisting of all regular full-time and regular part-time professional employees of the City of Racine (excluding Health Department employees). Building Inspectors, Electrical Inspectors and Plumbing Inspectors in the employ of the City of Racine, excluding managerial, supervisory, confidential and casual employees.

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ARTICLE VIII
Grievance Procedure

A. Definition of a Grievance: Should a difference arise between the City and the Association or an employee concerning the interpretation, application, or compliance with this Agreement, such difference shall be deemed to be a grievance and shall be handled according to the provisions herein set forth.

. . .

E. Steps in Procedure:

Step 1: The employee, with his/her Association representative, shall reduce his/her grievance to writing on an approved form and shall present it to the employee's department head within fifteen (15) working days after he/she knew or should have known of the cause of such grievance. A copy of the grievance shall also be submitted at the same time to the Personnel Director by the Association. The department head may confer with the grievant and his/her Association representative before preparing the Step 1 answer.

The department head shall, within fifteen (15) working days of receipt of the grievance, inform the employee and his/her Association representative in writing of his/her decision.

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G. Arbitration: If the Association grievance is not settled at the second step, or if any grievance filed by the City cannot be satisfactorily resolved by conferences with the appropriate Association representatives, the grievance shall be submitted to arbitration upon request of either party within thirty (30) calendar days of receipt of the Step 2 answer.

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ARTICLE XV
Vacations

Members of the bargaining unit shall be entitled to a vacation with pay in accordance with the following:

A. First Year Employees: During their first calendar year of employment, new employees shall earn vacation at the rate of one-half (1/2) day per full month of employment up to November 1st, not to exceed (5) work days. (Example: An employee who starts work on August 1, 1980 is entitled to one and one-half (1 1/2) days' vacation in the calendar year 1980.) Thereafter, time in service on or before December 31st of each year shall be used as the basis for computing the length of vacation to which each employee is entitled. First-year employees must work one (1) full year from their date of hire before they are entitled to their full vacation accrual. (Example: An employee who starts work on August 1, 1980 would be on the payroll as of December 31, 1980 and would therefore be entitled to a full vacation allotment for 1981, provided the employee remained on the payroll until August 1, 1981, one (1) full year after date of hire.) First-year employees who terminate or are terminated before completion of one (1) year from their date of hire shall receive prorated vacation based on the number of full months worked from the previous December 31st, which number shall be placed as the numerator in a fraction whose denominator is the number twelve (12). Employees who terminate or are terminated before the completion of their probationary period are not eligible for the payment of earned vacation.

B. Other Employees: The vacation schedule shall be as follows:

Ten (10) work days after one (1) year of continuous employment;

Fifteen (15) work days after eight (8) years of continuous employment;

Eighteen (18) work days after fifteen (15) years of continuous employment;

Twenty (20) work days after fifteen (18) years of continuous employment;

Twenty-five (25) work days after twenty-four (24) years of continuous employment;

Time in service on or before December 31st of each year shall be used as the basis for computing the length of vacation to which each employee is entitled during the calendar year. Employees who terminate their employment during the calendar year are entitled to their full vacation allotment, provided they submit a two (2) week written notice of termination. Failure to provide a written notification

shall result in their vacation being prorated based on the number of full months worked from the previous December 31st, which number shall be placed as the numerator in a fraction whose denominator is the number twelve (12). Also, employees who are terminated for disciplinary reasons will also receive vacation on a prorated basis. Vacations must be taken during the calendar year in which they are earned and cannot be accumulated or carried over from year to year except as provided in paragraph D below.

C. Professional Library Employees: Library professional employees hired prior to January 1, 1988 shall continue to be entitled to 20 work days of vacation after one complete year of service up to twenty-three (23) years of service at which time they are eligible for 25 work days of vacation, as listed above. Professional library employees hired after January 1, 1988 shall follow the same vacation schedule listed in Section B. above.

. . .

G. Method of Selection: Vacation periods shall be selected by Department or Division by the employees prior to April 1st of each year unless otherwise mutually agreed between the Department Head and the employee. Selection of the dates shall be by departmental seniority.

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BACKGROUND

Prior to September 14, 1988, when the Association and the City executed their first collective bargaining agreement, all professional library employes received the same twenty (20) days of vacation regardless of the number of years worked. Maryann H. Owen, hereafter the Grievant, is employed by the City of Racine as a professional librarian. The Grievant became a full-time professional librarian on February 6, 1989. The Grievant received four (4) days of vacation in 1989 and received ten (10) days of vacation in 1990.

On March 28, 1990, the Grievant sent the following to Dr. Jay J. Chung, the Library Director:

> I am requesting that my vacation be the same length as the other professional librarians at Racine Public Library. Presently I receive two weeks vacation while the other librarians receive four weeks vacation.
>
> It is stated in the contract that professional librarians hired prior to January 1988 are entitled to four weeks vacation. (Please see attached copy of contract page.)
>
> I worked for the City of Racine and for the Racine Public Library for 2 1/2 years as a professional

> librarian before I accepted a full-time Children's librarian position in February of 1989. I was hired as a professional librarian during September of 1986 to work as a substitute in the Adult Department and was on the "Substitute List" until I accepted the full-time position I now hold.
>
> I have been on the City of Racine payroll since I was hired on September 5, 1986, and have the same employee number now (Number 2441) as I had then. (Please see attached copies of pertinent forms.)
>
> When I was informed of the opening for a Children's Librarian in December of 1988, I filled out an application form for the position and was permitted to apply as a City of Racine employee, before the position was to be made known to the general public.
>
> Due to the reasons given above, I feel I am entitled to the full four weeks vacation allotted to the other Racine Public Librarians employed prior to 1988. I have spoken with Mr. Harold Kobberwig, the President of the Racine Professional Employees Union, and he agrees that I should pursue this matter.
>
> I have included a copy of my resume which gives an account of my experience at Racine Public Library as well as others (sic) positions I have held.
>
> I would like to speak with you about my concerns. Please let me know when we may meet.

On November 2, 1990, the Grievant filed a grievance which stated "having been hired as a Senior Professional Librarian in September of 1986, I feel I am entitled to the vacation benefits as stated in the Union contract for Senior Professional Librarians hired prior to 1/1/88. I currently receive ten days vacation." In remedy of the alleged contract violation, the Grievant asked that she receive twenty days vacation per year.

POSITIONS OF THE PARTIES

Association

The Grievant commenced full-time employment on February 6, 1989 and would not have been entitled to twenty days vacation until February 6, 1990, which vacation right did not have to be exercised under the terms of the collective bargaining agreement in any particular time during the 1990 calendar year. Thus, a grievance filed at the end of the 1990 calendar year, as this one was, would be timely. Moreover, the grievance involves an ongoing violation and it is well established in arbitrable law that such a grievance may be filed at anytime during the continuancy of an ongoing policy.

The City raised the issue of arbitrability for the first time at hearing. The City waived its right to raise the timeliness issue by allowing the grievance to proceed to arbitration without making its objection (cites omitted). In the present case, the City has not been prejudiced and its liability has not been increased due to any delay by the Grievant. In such cases, a timeliness bar is a disfavored defense.

At all pertinent times, the Grievant was a regular, part-time employe for purposes of inclusion within the bargaining unit. The Grievant was hired prior

to January 1, 1988. Under the clear language of Article XV (C) she is entitled to 20 days of vacation. If the City had intended to limit vacation entitlement to regular full-time employes, it could have easily done so, as it did for sick leave benefits in Article XVII, Section B. Its failure to limit vacation eligibility to employes who worked full-time as of January 1, 1988, must be construed to mean that part-time professional library employes who thereafter became full-time employes, would be eligible for the same 20 days as everyone else.

The grievance must be sustained and the Arbitrator should compensate the Grievant in some fashion for time already lost as well as providing prospective relief.

City

The Grievant knew or should have known that she was not given the vacation days in accordance with her interpretation of the collective bargaining agreement as early as 1989, and for certain by April 1, 1990, when she was allowed to pick only four and ten vacation days respectively. By waiting until November 30, 1990 to file her grievance, the Grievant has failed to filed a grievance in a timely manner.

The Grievant was not hired as a full-time professional librarian until February 6, 1989. Prior to this date, the Grievant was a casual employe working as a substitute for other professional librarians as needed. She did not have a regular schedule, and worked a minimum of hours. Clearly, the language of Article XV (C) was intended to provide four weeks of vacation to those employes who were getting four weeks of vacation.

The grievance is not arbitrable because the Grievant failed to comply with the time limits of the grievance procedures contained in Article VIII. In the alternative, the evidence clearly establishes that the Grievant was not hired as a full-time employe prior to January 1, 1988. The Grievant is not entitled to four weeks of vacation. The grievance is without merit and should be dismissed.

DISCUSSION

Arbitrability

The City argues that the grievance was not filed within the time limits set forth in Article VIII and, therefore, the grievance is not arbitrable. As established by the testimony of Personnel Director Kozina, the City raised the issue of timeliness for the first time at the arbitration hearing. Each party should fully discuss its respective position while the grievance is being processed through the grievance procedure. However, contrary to the argument of the Association, the City's failure to raise the defense during the earlier steps of the grievance arbitration procedure does not preclude the City from raising the defense at the arbitration hearing.

Article XV, C, the provision alleged to have been violated, provides a vacation benefit after "one complete year of service". The Grievant completed one year of service as a full-time professional Librarian on February 6, 1990. Under the provisions of Article XV, G, vacations are to be selected prior to April 1st of each year, unless otherwise mutually agreed between the Department Head and the employe. On March 28, 1990, the Grievant provided the Library Director, Dr. Chung, with a letter requesting the four weeks of vacation provided in Article XV, C. The undersigned is satisfied that after one complete year of service as a full-time professional Librarian, the Grievant made a timely request for the vacation benefit provided in Article XV, C.

Article VIII, E, states that the Step One grievance is to be filed "within fifteen (15) working days after he/she knew or should have known of the cause of such grievance". Given the Grievant's timely request for four weeks of vacation in 1990, the undersigned is persuaded that the time limits for filing the Step One grievance should be tallied from the date on which the grievant knew or should have known that the City had denied her request for four weeks of vacation for 1990.

Dr. Chung does not recall discussing the March 28, 1990 vacation request with the Grievant, but does recall forwarding the request to the City's Personnel Department. The record fails to establish when, if ever, the City's Personnel Department, or any City representative, responded to the Grievant's written request of March 28, 1990. As the City argues, the Grievant received ten days of vacation in 1990. The record fails to establish that, at the time that the Grievant received the ten days of vacation, the Grievant knew that she would not receive more than ten days of vacation in 1990.

The Step One grievance was filed on November 2, 1990. It is evident that the City denied the vacation request of March 28, 1990 on December 12, 1990, when the City responded to the Step One grievance. It is not evident that, prior to December 12, 1990, the City had informed the Grievant that she would not receive four weeks of vacation in 1990.

Despite the City's argument to the contrary, it is not evident that the Grievant knew or should have known more than fifteen working days before she filed the Grievance of November 2, 1990 that the City had denied her request for four weeks of vacation in 1990. The undersigned rejects the City's assertion that the grievance is untimely and concludes that the grievance is arbitrable.

MERITS

The Association, unlike the City, argues that the Grievant is entitled to the vacation benefit provided in Article XV, C. Article XV, C, provides as follows:

> C. Professional Library Employees: Library professional employees hired prior to January 1, 1988 shall continue to be entitled to 20 work days of vacation after one complete year of service up to twenty-three (23) years of service at which time they are eligible for 25 work days of vacation, as listed above. Professional library employees hired after January 1, 1988 shall follow the same vacation schedule listed in Section B. above.

According to Personnel Director James Kozina, who represented the City when the City and the Association negotiated their initial contract, the City intended the language of Article XV, C, to provide a vacation benefit to full-time professional Librarian employes who were hired prior to January 1, 1988 and that the City intended full-time professional Librarians hired after January 1, 1988 to receive the vacation benefit provided in Article XV, B. According to Kozina, the City agreed to provide the fifth week of vacation to full-time professional Librarians hired prior to January 1, 1988 as a trade-off for the reduced vacation benefit afforded to full-time professional Librarians hired after January 1, 1988.

The testimony of the City's Personnel Director establishes the City's

intent with respect to Article XV, C, but fails to establish that the Association understood or agreed with this intent. Since the evidence of bargaining history does not demonstrate a mutual intent with respect to Article XV, C, such evidence is not persuasive.

Article II, the Recognition Clause, recognizes that the Association is the exclusive collective bargaining representative for the collective bargaining unit consisting of "all regular full-time and regular part-time professional employees of the City of Racine(excluding Health Department employees), Building Inspectors, Electrical Inspectors and Plumbing Inspectors in the employ of the City of Racine, excluding managerial, supervisory, confidential and casual employes." Given the fact that the Association represents both regular full-time and regular part-time professional employes, it is reasonable to conclude that, unless expressly stated otherwise, the provisions of Article XV, C, are applicable to both regular full-time and regular part-time professional Librarians.

As the Association argues, Article XVII, B, which provides a sick leave benefit, expressly states that the benefit is applicable to "all regular full-time employees". As the Association further argues, the language of Article XVII, B, supports the conclusion that had the parties intended the vacation benefit provided in Article XV, C, to be restricted to regular full-time employes, then the parties would have expressly stated such a restriction in the language of Article XV, C. Construing the language of Article XV, C, in a manner which is consistent with the other provisions of the collective bargaining agreement, the undersigned rejects the City's argument that the vacation benefit provided in Article XV, C, is limited to full-time professional Librarians hired before January 1, 1988.

As is evident from the language of the provision, Article XV, C, was intended to "grandfather" vacation benefits. Normally, a "grandfather clause" is intended to provide benefit protection to individuals who are bargaining unit employes at the time that the clause is agreed upon. In the present case, the "grandfathered" vacation benefit is available to "Library professional employees hired prior to January 1, 1988". 1/ Construing Article XV, C, in a manner which is consistent with the language of Article II, as well as giving effect to the usual intent of a "grandfather" clause, the undersigned is persuaded that Article XV, C, provides a vacation benefit to those professional

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1/ The Stipulation of Facts submitted by the parties, expressly states that prior to the collective bargaining agreement between the parties, all full-time professional Library employes received twenty (20) work days of vacation after one complete year of continuous service. The Stipulation of Facts, however, is silent as to whether part-time professional Library employes received any vacation benefits prior to the parties' initial collective bargaining agreement. Dr. Chung, the Library Director, who has been employed since 1987, stated that he was not aware that any part-time employe had received vacation benefits in the past. The Library Director acknowledged, however, that he was not very familiar with part-time benefits. The Grievant, who claims to have been a part-time professional Library employe in 1986, 1987, and 1988, did not receive any vacation benefits in 1986, 1987, or in 1988. The record presented at hearing suggests, but does not establish, that it was only full-time employes who received the four week vacation benefit prior to the time that the parties bargained their initial contract.

Librarians who are bargaining unit employes and who were employed in bargaining unit positions, i.e., regular full-time or regular part-time professional Librarians, prior to January 1, 1988.

The Grievant has been an employe of the City since September 5, 1986. When the Grievant worked for the Library in 1986 and 1987, she performed the duties of a professional Librarian. Between September 5, 1986 and January 1, 1988, the Grievant filled in for regular professional Librarians who were absent from work. The Grievant was called in to work on an as needed basis and had the right to refuse all offered work. In 1986, the Grievant worked all but one bi-weekly pay period from the date of her hire in September, until the end of the year, for a total of 129.5 hours. In 1987, the Grievant worked during three pay periods for a total of 17 hours.

As the Association argues, there are personnel records which identify the Grievant as a part-time employe. There are, however, no personnel records which indicate that, prior to January 1, 1988, the Grievant was considered to be a regular part-time employe within the meaning of the parties' collective bargaining agreement.

The undersigned is persuaded that, in deciding the question of whether or not the Grievant was a regular part-time professional Librarian prior to January 1, 1988, it is the nature and pattern of the Grievant's employment which is determinative. The nature and pattern of the Grievant's employment prior to January 1, 1988 demonstrates that the Grievant worked as an irregular part-time professional Librarian, rather than as a regular part-time professional Librarian.

In summary, the undersigned is not persuaded that, prior to January 1, 1988, the Grievant was employed as either a regular full-time or regular part-time professional Librarian. Accordingly, the Grievant is not a "Library professional employe hired prior to January 1, 1988" within the meaning of Article XV, C.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The grievance is arbitrable.

2. The Grievant is not entitled to four weeks of vacation pursuant to Article XV, Section C.

3. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 22nd day of October, 1991.

By _____
Coleen A. Burns, Arbitrator