BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SHAWANO COUNTY (MAPLE LANE HEALTH CARE CENTER)	Case 100 No. 44584 MA-6350
and	
MAPLE LANE HEALTH CARE CENTER EMPLOYEES LOCAL 2648, AFSCME, AFL-CIO	

Appearances:

Godfrey and Kahn, S.C., by Mr. Dennis W. Rader, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of the County.

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53179, appearing on behalf of the Union.

ARBITRATION AWARD

Shawano County (Maple Lane Health Care Center), hereinafter referred to as the County, and Maple Lane Health Care Center Employees Local 2648, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the benefit date of employes moving from part-time to full-time status. Hearing on the matter was held in Shawano, Wisconsin on February 7, 1991. A stenographic transcript of the proceedings was prepared and received by the undersigned by February 21, 1991. Post hearing arguments were received by the undersigned by June 19, 1991. Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

ISSUE:

During the course of the hearing the parties agreed to leave framing of the issue to the undersigned. The undersigned frames the issue as follows:

> "Did the County violate the collective bargaining agreement when it established an eligibility date for benefits for employes who move from working twenty (20) hours or less, receiving no benefits to part-time/full-time receiving benefits status?"
>
> "If yes, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS:

Section IX

Vacation

A) Vacation allowance shall be:

If employed:

One (1) year, but less than 3 years - One (1) week (5 working days);

Three (3) years, but less than 9 years - Two (2) weeks (10 working days);

Nine (9) years, but less than 15 years - three (3) weeks (15) working days;

Sixteenth (16) years - Four (4) weeks (20 working days).

The above accumulation shall be based on the employee's anniversary date of employment. All vacation shall be used up within twelve (12) months of the date earned, or shall be lost to the employee.

. . .

Section X

Sick Leave

A) All employees within twelve (12) months of continuous employment who are off work due to sickness or injury not covered by Worker's Compensation shall be entitled to sick leave with pay. Said employees shall earn one (1) day of sick leave for each month of service. Unused sick leave shall accumulate to a maximum of ninety (90) days.

B) Employees with less than one (1) year of service shall not be entitled to sick leave pay. However, such employees shall accumulate sick leave and shall be credited with twelve (12) days of accumulated sick leave upon completion of one (1) year (twelve (12) months) of service.

. . .

Section VI

Part-Time Employees

A) Regular part-time employees are employees who work between 20 but less than 40 hours per week.

Employees considered regular part-time shall receive pro-rated fringe benefits based upon the hours normally worked.

B) Employees who work a regular schedule of hours but less than 20 hours per week shall not receive pro-rated fringe benefits.

C) Employees who were hired before 1/1/87 and were working a 32 hour week receiving health insurance benefits shall continue to receive these benefits.

D) Employees in the Dietary Section who were hired prior to 1/1/87 and receiving pro-rated fringe benefits shall continue to receive these benefits.

. . .

Section VIII

Holidays

B) To be eligible for holiday pay, an employee must be a regular employee with six (6) months or more of seniority and must work his/her scheduled day before and his/her scheduled day after the holiday, unless granted permission to be off work by the administrator.

. . .

Section XI

Insurance

A) The Employer agrees to pay ninety percent (90%) of the family premium, and one hundred percent (100%) of the single premium of the employees' hospital-surgical group insurance plan.

B) To be eligible for hospital/surgical insurance, an employee must be a regular employee with six (6) months or more seniority.

. . .

Section XII

Job Posting and Seniority Rights

A) It shall be the policy of the Employer to recognize seniority in filling vacancies, making promotions and in laying off or rehiring, provided, however, that the application of seniority shall not materially affect the efficient operation of the Maple Lane Health Care Center.

B) Seniority shall be based upon the actual

length of service for which payment has been received by the employee.

. . .

Section XXIII

Longevity

Each full-time employee and each regular part-time employee who works an average of thirty-two (32) hours per week or more, after the completion of five (5) years of service shall receive the following longevity pay: Two percent (2%) of the average monthly wage, multiplied by the number of years of service, shall constitute the longevity pay. Said payment shall be made annually in December.

BACKGROUND:

Amongst its various governmental functions the County operates a seven (7) days per week twenty-four (24) hours per day health care center in Shawano, Wisconsin. The County and the Union have been parties' to a series of successive collective bargaining agreements and the contractual provisions identified above have remained unchanged since at least the 1984-1985 collective bargaining agreement. The County has, when employes have changed job status from regular part-time no benefits to regular part-time/full-time benefit status (i.e. working twenty hours or more per week) established an employe benefit date effective with the date the employe changed job status.

The instant matter arose when Carlene Strauss, hereinafter referred to as the grievant, requested and was denied a sick leave day. The grievant commenced employment with the County at sixteen (16) hours per week. During September of 1990 she commenced working twenty (20) or more hours per week. At that time the County established a benefit date for the grievant. On May 5, 1990, the grievant filed a grievance because she was denied a sick leave day. Thereafter the grievance was processed to arbitration in accordance with the parties' grievance procedure.

At the hearing the County's bookkeeper/payroll clerk, Sandy Knutson, testified that since at least 1987 she has established benefit dates for employes and that this was the method she was trained in by her predecessor. Elaine Sturgis, the County's Personnel Director and County Coordinator, testified that no grievances over the method in which the County calculates benefits have been raised since at least 1984. Florence Withers, the Union President, testified there had been problems with benefit dates seven (7) or eight (8) years ago and that she thought that they had all been resolved to back to the employe's date of hire. Withers also testified that there had been a problem with her own benefit date at that time but that it had been resolved. However, Withers also testified she had always worked more than twenty (20) hours per week, that she thought that when the matter had been resolved when it was originally raised concerning her own benefit date that thereafter all benefit dates would be the same as the employe's date of hire, and that she was unaware if any of the employes involved with the matter seven (7) years ago worked less than twenty (20) hours per week.

Union's Position

The Union contends the collective bargaining agreement's provisions on sick leave, vacation, health insurance, holidays, and longevity are clear and

unambiguous. The Union asserts there is not a "mutual" practice regarding benefit dates and that the County's reliance on benefit dates or past practice does not invalidate the express provisions of the collective bargaining agreement. The Union also points to Florence Withers' testimony and asserts the Union believed benefit dates had been eliminated.

The Union argues that while custom and past practice are used frequently to establish the intent of contract provisions which are ambiguous or so general as to be capable of different interpretations, they will not be used to give meaning to a provision which is clear and unambiguous. The Union points to Section XI, Paragraph B, and argues that in order to be eligible for insurance an employe must be a regular employe with six (6) months or more of seniority. The Union stresses that seniority is based upon actual length of service. The Union contends the same argument applies to Section VIII, Holidays. The Union argues Section IX, Vacations, is based upon an employe's anniversary date of employment. The Union asserts that the collective bargaining agreement does not provide any exceptions. The Union argues the County's unilateral exceptions for benefit dates are in violation of the terms of the agreement.

The Union also argues that Section XXIII, Longevity, calibrates payments in accordance with service. Service is defined to mean uninterrupted service. The Union argues full years of employment are counted and fractional years of employment are disregarded. The Union contends that if an employe works more than thirty-two (32) hours per week the employe is entitled to have all full years of employment counted. The Union argues that a full year of employment can be either full time or part time with fractions of the calendar being disregarded. The Union stresses the County can not rightfully claim that an employe who worked thirty (30) hours per week for twenty (20) years and then took a full time position must then work an additional five (5) years to achieve longevity pay.

Turning to Section X, Sick Leave, the Union contends sick leave with pay is granted to all employes with twelve (12) months of continuous employment. The Union acknowledges that employes with less than one (1) year of service are not entitled to use sick leave. However, the Union argues employes who have completed one (1) year of service are entitled to use their accumulated sick leave.

The Union contends the benefit date established by the County is an employer invention. As imaginative as a benefit date might be, the Union argues, it is not a creation of the collective bargaining process. The Union stresses the parties intentionally used year of service and continuous employment to regulate eligibility. The Union argues the County has abandoned the simple clarity of the collective bargaining agreement and compounded eligibility requirements.

The Union concludes it is time for the County to administer the collective bargaining agreement correctly and consistently. The Union stresses the alleged practices do not override the terms of the agreement. The Union argues there is one (1) seniority system throughout the bargaining unit for full and part time employes. The Union asserts this is a system of continuous service understood by all. The Union further asserts that continuous service, length of employment is the system the parties incorporated into the collective bargaining agreement as the work requirements for eligibility for vacation, sick leave, holidays and insurance. The Union concludes the parties did not intend to have employes serve two (2) waiting or qualifying periods for benefits.

The Union would have the Undersigned sustain the grievance, order a make

whole remedy, and retain jurisdiction for ninety (90) days to resolve any questions regarding remedy for certain employes.

County's Position

The County contends the Union's position is in direct conflict with the collective bargaining agreement and past practice. The County argues the Union is essentially seeking the elimination of benefit dates with the only justification for such a demand the apparent Union claim that it secured the County's agreement to eliminate benefit dates seven (7) years ago. The County contends no such agreement was ever reached. In support of its position the County points to the testimony of bookkeeper/payroll clerk Sandra Knutson. Knutson testified that she has been calculating benefit dates since 1987. Further, that she was so inundated with verbal requests for benefit status that she developed a form for employes to use when requesting benefit status. The County argues the use of benefit dates was no secret and even if one were to give the Union the benefit of the doubt as to whether it actually knew benefit dates were in use, the fact the Union should have known is inescapable. The County also contends without the use of some process to develop an average hours of work for each employe significant parts of the collective bargaining agreement are rendered meaningless. The County asserts it must be able to identify employes who are to receive prorata benefits and those employes who should receive no benefits.

The County asserts the County policy of computing benefit dates is a past practice. Personnel Director Sturgis testified no change in the use of benefit dates or its calculation had occurred since 1984. Knutson testified she had been taught the process by her predecessor in May, 1987. Each and every employe who worked twenty (20) hours or more had the benefits date policy apply to them with direct impact on the extent of benefits each employe would receive. The County contends the openness of the process was readily ascertainable as demonstrated by the employes who routinely sought information on their benefit status. The County points out that the fact no employe ever grieved the benefit status date or that the Union ever sought to change the process in negotiations demonstrates the Union's acceptance of the process.

The County also argues the Union's witnesses only serve to demonstrate that the practice was in existence. Rachel Carlson, a ten (10) year employe who worked at sixteen (16) hours per week during her first four (4) years of employment, yet has a benefit date which equals her hiring date, failed to disclose that she was a dietary employe and as such was grandfathered under Section VI, Paragraph D. Carlson did not know of any employes outside of the dietary section who worked less than twenty (20) hours per week and had a benefit date which equalled their hiring date. Union President Withers' testimony was that she always worked more than twenty (20) hours per week so she would have a benefit date that was the same as her hiring date.

The County asserts it is entitled to continue the past practice during the term of the instant collective bargaining agreement and that neither party can repudiate the practice. Any change, the County argues, would destroy the practice. The County further asserts the Union has waived any right to modify the past practice. The County argues it was incumbent on the Union to seek such a change at the negotiations table, particularly given the survival of the practice under several successive collective bargaining agreements. The County also asserts the grievance process is not the appropriate forum for the Union to use to seek a change in the past practice. The County argues the Undersigned is only empowered to correct violations of the collective bargaining agreement and past practice and nothing more.

The County also contends the past practice of benefit days is necessary

to an otherwise ambiguous collective bargaining agreement. The County acknowledges that the agreement is clear concerning employes who work an average of twenty (20) hours or more per week. However, the County stresses the agreement is silent concerning how prorata benefits are to be calculated. Here the County acknowledges that the term "benefit date" does not appear in the collective bargaining agreement. However, the County argues that the processes used to adhere to the terms of the agreement are often developed outside of the four corners of the agreement. The County contends that this is what has happened in the instant matter. The County asserts that many years ago it developed a process which has come to be known as a "benefit date" to comply with the clear meaning of the agreement. The County concludes this process has risen to the level of a past practice. The County argues that without the benefit date process it would have no way to compute the prorata entitlement of benefits. The County contends it is entitled to develop a process to implement the terms of an otherwise ambiguous agreement and, having no objection from the Union, continue in its use of that process.

The County concludes its arguments by stressing that the Undersigned should not substitute his judgement in place of an established past practice. The County would have the Undersigned deny the grievance.

DISCUSSION

Section VI, Paragraph A, of the parties' collective bargaining agreement defines a regular part-time employe as one who works between twenty (20) but less than forty (40) hours per week. Such employes are "regular part-time" and are to receive pro-rated fringe benefits. Section VI, Paragraph B, describes a second type of employe. This employe works a regular schedule but works less that twenty (20) hours per week. Such employes are not to receive pro-rated fringe benefits. The record demonstrates that these two (2) paragraphs have been in existence in the parties' collective bargaining agreement since at least 1984. The Union has argued the County, in creating a benefit date for employes who move from non-benefit status to benefit status, had violated Section VII, Holidays; Section IX, Vacation; Section X, Sick Leave; Section XI, Insurance; and Section XXIII, Longevity. However, given the collective bargaining agreement's definitions of a regular part-time employe, the collective bargaining agreement's clear denial of pro-rated fringe benefits for employes who work less then twenty (20) hours per week and the long standing application of the agreement the Undersigned finds no merit in the Union's argument that the collective bargaining agreement clearly and unambiguously prevents the establishment of benefit dates. The Undersigned has carefully reviewed the fringe benefit provisions cited by the Union in reaching this conclusion.

Section VIII, Holidays, requires an employe to be a regular employe with six (6) months or more of seniority in order to be eligible for holiday pay. Thus there are two (2) requirements an employe must meet in order for an employe to be eligible for Holiday pay. First, the employe must be a regular employe. An employe who works less than twenty (20) hours of a regular schedule is clearly not defined as a regular employe in Section VI, Paragraph "B". Second, the employe must have six (6) months or more of seniority. The Undersigned finds the County must keep an accurate record of when an employe moves from the status of an employe who works less than twenty (20) hours of a regular schedule per week to the status of a regular part-time employe who is working more than twenty (20) hours per week or to a full-time employe to determine whether the employe is eligible for holiday pay. The record demonstrates the County, for employes who are hired to work less than twenty (20) hours per week, makes a determination after the employe's first six (6) months of employment to determine what was the employe's average hours of work in order to determine whether the employe is eligible for holiday pay.

Thereafter the County does this calculation on an annual basis. In the areas of sick leave and vacation the County does the calculation on the employes anniversary date. Given the agreement's silence on when the calculation is to be done and the length of existence of the County's system of calculation, and Section VI's definitions of employes, the Undersigned finds the County's actions do not violate the collective bargaining agreement.

Section IX, Vacation, specifically states the accumulation of vacation benefits is based upon an employe's anniversary date of employment. However, as noted above, Section VI, Paragraph B, specifically prohibits employes who work less than twenty (20) hours per week from receiving pro-rated benefits. To conclude that an employe who works less than twenty (20) hours per week would move along the vacation schedule would in effect negate the specific language of Section VI, Paragraph B. Section IX, Paragraph A, does specifically state that if employed one (1) year but less than three (3) years the vacation allowance is five (5) working days. The Union has not claimed that employes who work less than twenty (20) hours per week should receive this benefit but has claimed such employes should receive an improvement in their benefit status because of their date of employment. Such a result would in effect improve an employe's benefit status. This type of result is clearly prohibited by Section VI, Paragraph B, which clearly states employes who work less than twenty (20) hours per week do not receive pro-rated fringe benefits.

Section X, Paragraph B, specifically states employes with less than one (1) year of service shall not be entitled to sick leave pay. This provision goes on to state... "...such employes shall accumulate sick leave and shall be credited with twelve (12) days of accumulated sick leave upon the completion of one (1) year (twelve (12) months) of service.". Employes who work less than twenty (20) hours per week do not accumulate sick leave. If their status changes during the first year of employment, such as the grievant's in the instant matter, they do not have twelve (12) days of accumulated sick leave at the end of the first year of employment. The intent of this provision is clear. Not only must an employe work at least one (1) year prior to the use of any sick leave, but the employe must have accumulated twelve (12) days of sick leave, pro-rated in the case of employes who work more than twenty (20) hours per week. To conclude otherwise would require the County at the completion of one year of service to grant to an employe who changed benefit status during the year twelve (12) days of sick leave. Clearly such a conclusion would negate Section VI, Paragraph B. Thus, the intent of this provision is that an employe must be in a status where the employe is accumulating benefits so that at the end of one (1) year the employe has twelve (12) days of sick leave or at least twelve (12) prorated sick leave days.

In reviewing both Section XI, Insurance, and Section XXIII, Longevity, the Undersigned notes the following. Both have length of service requirements, Insurance requires six (6) months or more of seniority, Longevity requires five (5) years of service. Both also require employes to be a regular employe in order to be eligible for the benefit. The Undersigned finds that these two (2) provisions are ambiguous as to whether the employe is required to be a regular employe during the entire length of the service requirement or only a regular employe at the time the employe meets the length of service requirement. Such ambiguity can best be resolved by looking at the parties' practice. Since at least 1984 the County has established benefit dates for employes. The record also demonstrates that at a minimum at least two employes, Messner hired in 1984 and Zabel hired in 1982, would have longevity (as well as vacation, sick leave, holidays) impacted by the establishment of benefit dates. No grievances have been filed over any employe's benefit date. Therefore the Undersigned concludes the practice is controlling in the instant matter.

The Undersigned also finds the Union argument that the practice of

establishing benefit dates had been eliminated by pointing to the testimony of Union President Withers to support it's position to have no merit. Withers' testified she believed benefit dates had been eliminated when, three (3) years after she commenced employment with the County in 1981, she had a problem with her own benefit date and it was eliminated. At that point she believed all benefit dates had been eliminated. However, Withers' also testified she worked more than twenty (20) hours per week. 1/ Thus, no benefit date should have been established for her. Rachel Carlson, who testified she only works sixteen (16) hours per week, is a ten (10) year employe and has a benefit date which equals her date of hire, also testified she works in the Dietary Section. 2/ Section VI, Paragraph D, specifically grandfathers employes hired prior to January 1, 1987 and receiving fringe benefits to continue to receive fringe benefits. There is no evidence which would demonstrate that the County had at any time eliminated the benefit date for any employe who was hired to work less than twenty (20) hours per week. Absent such evidence the Undersigned cannot conclude the County ever agreed to eliminate the benefit date it has established for employes who move from non-fringe benefit status to fringe benefit status.

Therefore, based upon the above and foregoing, and the testimony, evidence and arguments presented by the parties, the Undersigned concludes the County did not violate the collective bargaining agreement when it established a benefit date for employes moving from non-benefit status to benefit status. The grievance is denied.

AWARD

The County did not violate the collective bargaining agreement when it established a benefit date for employes moving from working less than twenty (20) hours per week, no benefits to full-time/part-time receiving benefits status. The grievance is therefore denied.

Dated at Madison, Wisconsin this 31st day of October, 1991.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator

1/ Transcript, page 48.

2/ Tr., p. 43.