BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
SHAWANO COUNTY (MAPLE LANE HEALTH CARE CENTER)	Case 117 No. 47434 MA-7266
and	
MAPLE LANE HEALTH CARE CENTER EMPLOYEES LOCAL 2648, AFSCME, AFL-CIO	

Appearances:
Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI
Mr. Dennis W. Rader, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street

ARBITRATION AWARD

According to the terms of the 1989-90 collective bargaining agreement between Shawano County (Maple Lane Health Care Center) (hereafter County) and the Maple Lane Health Care Center Employees, Local 2648, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission assign Sharon A. Gallagher to act as impartial arbitrator of the dispute between them regarding the proper interpretation of Article IX, Vacations which deals with vacation usage. The undersigned was designated as arbitrator and made full written disclosures to which no objections were raised. Hearing was held at Shawano, Wisconsin on June 3, 1992. No stenographic transcript was taken of the proceedings. The parties filed their briefs by July 7, 1992 and they waived their right to file reply briefs at the hearing herein.

ISSUE:

The parties stipulated that the issue to be decided herein shall be as follows:

> Whether vacation taken one day at a time can be taken in units of more than one day or in conjunction (with) other vacation or days off, or whether vacation can only be taken in separate days off.

Because this is a contractual interpretation case, no remedy (other than contract interpretation) is sought by the parties.

RELEVANT CONTRACT LANGUAGE:

The parties' 1986 collective bargaining agreement contained the following relevant language relating to vacation.

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 18 years - Three (3) weeks (15 working days);

Eighteen (18) years or more - 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.

B) The number of employees on vacation within a given classification during the rest of the year shall also be determined by the superintendent. Employees must take their vacation on consecutive days except those with two (2) or three (3) weeks vacation (10-15 working days), may divide their vacation in two (2) equal parts, each part to be taken on consecutive days.

. . .

In the 1987-88 labor agreement, the above-quoted contract language regarding vacation usage remained the same, but the parties agreed to add the following paragraph:

F) Vacation may be taken one week at a time. Vacation may also be taken 1 day at a time (provided the employee is entitled to at least two weeks and of that time, only 1 week may be used one day at a time) but not in conjunction with a sick day or holiday. Request for one day of vacation usage must be submitted 5 days in advance. Approval must be given prior to taking the vacation one day at a time by the employer.

In the 1989-90 labor agreement the parties amended the vacation language to delete the second sentence of Section B of the 1986 agreement (quoted above) while retaining the first sentence of Section B and remaining Section F from the 1987-88 agreement (quoted above). Thus, the language of Article IX Vacation in the effective agreement reads in relevant part as follows:

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.

B) The number of employees on vacation within a given classification during the rest of the year shall also be determined by the superintendent.

C) Employees who request one (1) week or more vacation time shall do so in writing on a form provided by the Employer at least fifteen (15) days in advance of the requested vacation. The superintendent shall notify the employee in writing that the request is granted or denied within one (1) week of the request.

F) Vacation may be taken one week at a time. Vacation may also be taken 1 day at a time (provided the employee is entitled to at least two weeks and of that time, only 1 week may be used one day at a time) but not in conjunction with a sick day or holiday. Request for one day of vacation usage must be submitted 5 days in advance. Approval must be given prior to taking the vacation one day at a time by the employer.

. . .

Finally, the County submitted a Union proposal for the most recently concluded negotiations for the 1991-92 agreement the following language relating to vacation usage:

F. Time Off Increments. Vacation may be taken one (1) week at a time. Employees may take one (1) week of vacation time off in any increment(s) they desire and at times of their choosing, provided said vacation time off has been approved by the employee's supervisor. Vacation may be take (sic) one (1) day at a time and in other increments of less than one (1) week i.e. two (2) days at a time, etc. provided the employee is entitled to at least two (2) weeks, and of that time, only one (1) week may be used one (1) day at a time but not in conjunction with a sick day or holiday. Request for one (1) day of vacation usage must be submitted five (5) days in advance. Approval must be given prior to taking the vacation one (1) day at a time by the

employer.

This language was not agreed to by the parties and it was not placed in the 1991-92 labor agreement.

BACKGROUND:

Under the vacation scheduling language, as it existed in 1986, a number of grievances were filed regarding the County's administration of the language. These grievances involved vacation requests as follows:

1) employe requested one week's vacation (after having taken one week's vacation) denied - employe required to take remaining two weeks' vacation at one time;

2) employe required to take her vacation in two equal parts where employe had wished to take one week and two week vacation segments.

After these grievances were filed, the parties changed the vacation scheduling language, and these grievances were settled as a part of the 1987-88 contract settlement. These grievance were, therefore, never arbitrated.

At the 1987-88 negotiations, the Union proposed that employes be allowed to take vacation one day at a time. According to Union representative Sutter-Balke, during these negotiations, the County representatives indicated that they were concerned that employes should not be able to use sick leave or holidays to extend single vacation days. Sutter-Balke also stated that when the Union explained at bargaining that under the Union proposal, they expected an employe would be able to take one day's vacation on Tuesday between regular days off on Monday and Wednesday, the County objected that this would be joining up time off in order to extend vacation. Sutter-Balke responded that unless this were allowed, employes would be penalized for having and using regular days off and this would be unfair. Sutter-Balke stated that by the end of the negotiations that day, she understood that the County would allow employes to use a single day's vacation in conjunction with their regular days off. Florence Withers (a member of the Union's negotiating team for the 1987-88 agreement) also stated that during negotiations, the County indicated that sick leave abuse might occur if employes were allowed to use a single day's vacation in conjunction with sick leave. Withers did not confirm or deny Sutter-Balke's assertion regarding the "understanding" reached in bargaining regarding single vacation day usage. In fact, Withers indicated she did not recall negotiation discussions on this point. No bargaining notes were proffered by the parties.

From 1987 forward, Union witnesses Florence Withers and Sutter-Balke admitted that the County had never allowed employes to take vacation in 2 day or 3 day segments. If an employe had three weeks' vacation entitlement, Withers stated the employe had to use it as follows: three consecutive weeks off or 5 consecutive work days off, 5 days off one day at a time and 5 consecutive days off. The evidence showed that since at least 1987, no employe has been allowed to take more than one single day's vacation in a given week. Employes have also been denied one day of vacation during a week where the employe involved was to take a holiday. There was no instance that any witness could recall where an employe had attempted to use a sick day during a week when the employe had requested and used a single day's vacation. The County has consistently denied employe requests to use a single day's vacation if used in conjunction with the employe's regular day off, with the exception of the following situations.

Ms. Sutter-Balke stated that in the Summer of 1989 on perhaps two separate occasions, she was granted single vacation days off "on either side of (her) two regular days off." 1/ During this period, Sutter-Balke worked part-time, four days per week, with Mondays and Wednesdays and every other weekend off. 2/

In regard to bargaining history, the County's witness, Center Administrator Arvey, stated that during negotiations for the 1987-88 contract, the Union explained that its proposal was designed to allow employes who had two weeks vacation to take one week of that vacation one day at a time. Arvey stated that he recalled no discussion at that time regarding employes being able to take more than one vacation day in a particular calendar week.

In applying the 1987-88 language, Arvey confirmed that employes had never been allowed to take vacation in two or three day segments during a calendar week. Rather, Arvey stated eligible employes had been allowed to take one week's vacation one day at a time if not used in conjunction with a holiday or a sick day and they had been allowed to take the remainder of their vacation in consecutive days off.

Arvey, who was responsible to approve vacation requests during the relevant period, stated that he did not recall Sutter-Balke's 1989 single vacation day requests. Arvey stated that the County, to his knowledge, had never allowed employes to take more than one day's vacation (at one time), less than five days' vacation, in any calendar week.

During the period 1987 forward, there were perhaps 50 employes at the Maple Lane Center who were entitled to more than two weeks vacation. No evidence was presented regarding how many employe vacation requests of less than five days may have been made by employes and denied by the County since 1987.

POSITIONS OF THE PARTIES:

Union:

The Union contended that its proposal to change vacation scheduling language during negotiations for the 1991-92 labor agreement, does not require that the County's interpretation of the agreement be sustained. Rather, the Union pointed out that because the current vacation scheduling language does not mention regularly scheduled days off employes should therefore be allowed to schedule single vacation days in conjunction with their regular off days. The Union also asserted that the present vacation scheduling language would allow employes to "take either single days of vacation or vacation in

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1/ Ms. Sutter-Balke was not asked and she did not explain exactly which days she had taken vacation and which off days she was referring to. However, from her testimony one could conclude that she may have been allowed to take a Friday vacation day, to have her regular weekend off and her regular Monday off and to take a Tuesday vacation day before her regular off day on Wednesday. Thus, the single vacation day requested by Sutter-Balke may have been in different calendar weeks. It is also possible that Ms. Sutter-Balke's testimony means that in 1989 she was allowed to take single vacation days off on Tuesday and Thursday or Sunday and Tuesday, both days falling in the same calendar week.

2/ The record showed that regular full-time Center employes normally receive one weekday off (as their regular day off) plus every other weekend off.

increments of two or more (days) provided they are not scheduled with a sick day or holiday."

The Union argued that the evidence showed that the parties agreed to change the original vacation scheduling language (which had appeared in the 1986 agreement) due to the County's denial of several employe vacation requests. Grievances filed in 1985 support this argument. Union witness Ms. Sutter-Balke also testified that the amended language placed in the 1987-88 agreement had been proposed by the Union and the Union had made clear in negotiations that it was specifically intended to allow employes to take one vacation day between two regular (scheduled) days off, the Union noted. The Union also urged that Ms. Sutter-Balke stated that there were discussions at the table at this time to the effect that it would be unfair if employes were denied single vacation days off if they occurred adjacent to the employes' regular days off. In consideration of the change in the vacation scheduling language in the 1987-88 agreement, the Union dropped several grievances which had been filed relating to denial of vacation requests.

The Union's witnesses indicated that the reason no grievances were filed/ processed regarding the County's interpretation of the new (1987-88) vacation scheduling language was because no employes sought such filings. In any event, the Union observed, the County's interpretation of the language had been inconsistent because Ms. Sutter-Balke's request to receive vacation days which combined with her days off had been approved on at least one occasion.

The Union asserted that the County did not proffer any evidence to demonstrate its interpretation of the effective disputed language. Furthermore, the Union contended that the County's claimed past practice in applying the language from 1987 forward is neither supported by the facts, the bargaining history, nor the clear language of the contract. The Union urged that the evidence it submitted must overcome the County's assertions so that the proper interpretation of the language must be found to be that "vacation taken one day at a time may be taken in units of more than one day or in conjunction with vacation or other days off."

County:

The County asserted that the language in issue is clear -- that only one week of vacation can be used one day at a time and that all remaining vacation must be used consecutively. This language, the County contended, requires a conclusion that one week's vacation cannot be used in two day or three day periods; that one week may only be taken one day at a time but not in conjunction with a sick day or a holiday. Finally, the County noted that the disputed clause contains the condition precedent that prior County approval of requests must be secured to take "vacation one day at a time." Thus, the County urged that without prior approval a one day at a time vacation request could not be sustained in any event.

The grievance filed in 1985, submitted by the Union indicated, in the County's view, that the 1987-88 contract language was drafted to allow employes to utilize vacation in segments different from two equal parts, as the 1986 contract required. The language relating to taking vacation in two (equal) parts was removed from the 1987-88 contract in negotiations. In this context, the County argued, the 1985 grievances have nothing to do with this case and that that evidence is irrelevant to this case.

The County contended that no evidence was submitted by the Union which contradicts the County's interpretation and application of vacation scheduling language. In this regard, the County observed that Union witnesses admitted that since 1987, no employe had been allowed to take more than one day (but less than one week) of vacation in a week; that the County had denied single

day vacation requests if made in conjunction with days off, holidays or sick days. Also, during the period 1987 until the processing of the instant case, no grievances were filed contesting the County's interpretation/application of the vacation scheduling language. Thus, in the County's view, the County's practice of granting or denying vacation requests since 1987 has become mutually accepted by the parties based upon this record.

The County argued that the Union should not now be allowed to gain through arbitration what it was unable to attain in bargaining during negotiations for the 1991-92 agreement. Notably, the Union's most recent bargaining proposal did not propose to disturb the 1987-88 contract restriction that vacation in one-day-at-time segments could not be taken in conjunction with sick days or holidays. The County therefore urged that the contract must be read to mean that one week's vacation can only be used one day at a time, not in conjunction with other vacation days, sick days, holidays or other days off.

DISCUSSION:

The language of Section IX (F) is clear on its face regarding two points at issue in this case. The language clearly states that vacation, used in single day increments, may not be used "in conjunction with" a sick day or a holiday. The ordinary meaning of the phrase "in conjunction with" is the act of joining or the state of being joined or combined together. 3/ Hence the use of a single vacation day under Section IX (F) means that such a day cannot be joined or combined with the use of a sick day or a holiday. This must mean that the single vacation day cannot be the regular work day before or the regular work day after a holiday or sick day.

Notably, evidence of past practice supports the above interpretation of this language. Thus, the evidence was undisputed that no employe has ever requested or used a single day's vacation in combination with a sick day and that employes have consistently been denied a single day's vacation when it would be taken in combination with a holiday.

The Union raised an issue upon which no specific contract language exists. That point involves the Union's claim that the language of Section IX (F) should allow employes to take vacation in units of more than one day in a particular week -- that is, that an employe's request to use two or three or four days vacation in a calendar week should be granted. Section IX (F) refers only to vacation being taken "one week at a time" or "one day at a time." Periods less than one week or more than one day are not referred to in the contract. Under rules of arbitral construction, this gives rise to a strong implication that the parties intended to exclude from allowable vacation usage under Section IX (F), periods of less than one week or more than one day.

In the absence of specific contract language addressing a point in question, parole evidence may be considered to support either party's interpretation of the contract on the issue. In this regard, I note that no evidence was proffered by the Union to show that employes had ever been allowed to use vacation in blocks of two or three days in a calendar week. Furthermore, I note that County Administrator Arvey confirmed that the County has consistently denied employe requests to use single vacation days in blocks of two or three days. Based upon the evidence here, I conclude that the Union's claims are not supported by the record and that the contract, as fleshed out by (admissible) past practice, means that the County need not grant

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3/ The American Heritage Dictionary, Houghton Mifflin Company (1976).

employe requests to use vacation in blocks of time which are more than one day but less than one week (e.g. two or three days) in any calendar week.

Finally, the Union has urged that employes should be allowed to use the vacation days (described in Section IX (F)) in combination with their regular days off. Again, there is no reference to regular days off in Section IX (F). Given the silence of the agreement on this point, it is permissible to look to the extra-contractual evidence of bargaining history and past practice to determine the parties' intentions on this point.

The evidence relating to bargaining history was contradictory. Indeed, no bargaining notes were submitted by either party on this issue. Ms. Sutter-Balke stated that she understood at the conclusion of bargaining that employes would be allowed to use single vacation days in combination with their regular days off. On the other hand, Mr. Arvey stated that there was no discussion during bargaining regarding employes being allowed to take more than one vacation day (but less than one week) in any calendar week. Florence Withers neither confirmed nor denied these accounts. Rather, Ms. Withers indicated that she did not recall discussions on the one-day-at-a-time vacation usage language except that the County indicated at negotiations that single days of vacation should not be used or joined with sick leave. Thus, the evidence of bargaining history generally supported the County's arguments on the point.

Evidence of past practice showed that as a general rule, the County has denied employe vacation requests for one or more single day's vacation in any calendar week where the employe had a regular day off or a holiday scheduled. The only exceptions to this scheme were the Sutter-Balke requests made in 1989. As noted above, Sutter-Balke was a part-time (four-day) employe in 1989 with Mondays, Wednesdays and every other weekend off. Her testimony (which was not completely clear or specific) indicated that she had been allowed to take vacation days off on either side of her regular days off. This testimony might mean that she took a Friday vacation day during one week and then took a vacation day on the following Tuesday, with her regular off days and a regular weekend off in between. If this were the case, the County's calendar week restriction would not have been violated. On the other hand, Sutter-Balke's testimony could mean that she was allowed to take single vacation days on either Sunday and Tuesday or Tuesday and Thursday, on either side of her regular Monday and Wednesday days off. What impact Sutter-Balke's part-time status may have had on her 1989 vacation requests was not addressed by the parties.

Even assuming that Sutter-Balke's vacation request(s), resulted in her being allowed to take two separate vacation days off in one calendar week on up to two occasions in the Summer of 1989, on this record these were isolated situations which were exceptions to the general rule. Such evidence is insufficient to overcome the otherwise undisputed evidence showing that the County generally denied vacation requests like Sutter-Balke's.

In addition, I note that the County contested Sutter-Balke's testimony. In this regard, Mr. Arvey stated he did not recall Sutter-Balke's requests for such vacation usage in 1989. Arvey also stated that as far as he knew no request for more than one vacation day in any calendar week had ever been granted by the County. In sum, the evidence of past practice as well as bargaining history weighs more heavily in favor of the County's interpretation of Section IX (F). Based upon the evidence presented in this case, I conclude that Section IX (F) vacation days have not been and may not be used in combination with regular days off.

Much argument was heard in this case regarding a Union proposal (made during negotiations for the 1991-92 agreement) which would have allowed

employes to use vacations in increments of more than one day but less than one week. The Union did not succeed in gaining the County's agreement to place its proposed language (quoted above) into the 1991-92 agreement. The County is correct that this uncontroverted evidence also supports its arguments regarding the proper interpretation/application of the existing language of Section IX (F). As a general matter, in the face of evidence such as this, arbitrators will not, through their awards, grant the Union an interpretation of contract language which the Union specifically sought and failed to gain through bargaining. There is no evidence on this record to justify a departure from the above-stated general arbitration rule.

Based upon the relevant evidence and argument herein, I issue the following contract interpretation.

AWARD

Vacation taken one day at a time must be taken in separate days off. Vacation taken one day at a time may not be taken in units of more than one day (per calendar week) and not in conjunction with other vacation or days off.

Dated at Madison, Wisconsin this 6th day of August, 1992.

By _____
Sharon A. Gallagher, Arbitrator