BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF MENOMONIE	Case 76 No. 48273 MA-7563
and	
MENOMONIE CITY EMPLOYEES LOCAL 734 AFSCME, AFL-CIO	

Appearances:
Skinner, Schofield & Higley, Attorneys at Law, by Mr. John K. Higley, Bay View Offices, Suite 100, 700 Wolske Bay Road, Menomonie, Wisconsin 54751.
Mr. Guido Cecchini, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 470 Garfield Avenue, Eau Claire, Wisconsin 54701.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and County respectively, are signatories to a collective bargaining agreement which provides for final and binding arbitration. Pursuant to said agreement, the undersigned was appointed by the Wisconsin Employment Relations Commission to hear the instant dispute. Hearing was held on February 4, 1993, in Menomonie, Wisconsin. No stenographic transcript was made. The parties completed their briefing schedule on February 22, 1993. Based upon the recollection of the undersigned and the arguments of the parties, the undersigned issues the following Award.

ISSUE

The parties stipulated to the framing of the issue:

> Did the City of Menomonie violate the terms of the collective bargaining agreement when it paid the grievant Keith Webb for vacation sell-back at the 1991 rate of pay instead of the 1992 rate?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 13 - VACATION

> Section 13.06 Unused Vacation. Accumulated vacation may be sold back to the employer at the rate of one week annually at the employee's base or classified rate of pay. This would be calculated without longevity. Dispatcher's may sell back any accumulated vacation on a monthly basis at their base or classified rate of pay.

. . .

ARTICLE 17 - DURATION

> Section 17.01 This AGREEMENT shall be in full force

and effect from January 1, 1992 until December 31, 1994.

Section 17.02 Proposals for amending the current bargaining agreement shall be exchanged by the parties no later than September 1, 1994. Negotiations shall begin no later than October 1, 1994.

Section 17.03 Any employee retiring on or after January 1, 1992 and before the execution of the new collective bargaining agreement, shall receive full retroactive wages and benefits based on the new agreement to the date of retirement.

STIPULATED FACTS

The parties were able to stipulate to the facts in the instant dispute. The current collective bargaining agreement covering calendar years 1992, 1993 and 1994 is the second agreement containing the vacation sell-back language provision. The vacation sell-back language provision was first negotiated as part of the predecessor 1990-1991 agreement. On April 20, 1992, the grievant, Keith Webb, requested vacation sell-back pursuant to Section 13.06. At that time the City and the Union were negotiating a 1992-1994 agreement. Webb was paid at the 1990-1991 contract rate. In June of 1992, the current agreement was approved by the City and Union effective January 1, 1992. On June 18, 1992, the City paid retroactive pay differentials to all bargaining unit employees. Retroactive pay was paid to bargaining unit employees for all hours worked including vacation and sick leave hours taken. The City did not, however, pay the grievant the pay differential of $17.60 on his vacation sell-back. The City's refusal to do so is the subject of the instant grievance.

POSITIONS OF THE PARTIES

Union

The Union claims that Section 17.01 is clear and unambiguous. According to the Union, the entire agreement is in full force and effect from January 1, 1992. There are no exceptions. The fact that retroactive pay paid to all bargaining employes on June 18, 1992 included vacation and sick leave pay at the 1992 rate of pay supports the Union's position that the vacation sell-back pay should also be paid at the 1992 rate. It argues that the only exclusions or limitation placed upon vacation sell-back pursuant to Section 13.06 is that vacation sell-back be calculated without longevity. To expressly state certain exceptions is to indicate that there are no other exceptions under the Union's theory.

In response to City arguments that a past practice exists of paying employes at the rate currently in effect when the vacation was sold-back, the Union posits that just because three employes may not have caught an error, no past practice was established. Moreover, in light of the fact that vacation sell-back is a relatively new benefit, it submits that it is not clearly accepted by both parties and has not been ascertainable over a reasonable period of time.

In attempting to dispute the City's claim that Section 17.03 provides that only "retiring employees" are entitled to full retroactive wages and benefits based upon the new agreement, the Union stresses that all employes both current and retired alike received retroactive wages and the aggregated pay paid to both groups included hours not worked but paid for as vacations and sick leave. Under the Union's interpretation, Section 17.03 merely serves as a

reminder that retiring employes are to be treated to retroactivity along with the current employes.

The Union requests that the arbitrator order retroactive pay for vacation sell-back.

City

The City's position is that vacation sell-back is a provision distinguishable from hours worked as to the issue of retroactivity of the contract. It maintains that the City has followed the practice of paying the contract rate in effect at the time of the employee's request. According to the City, the City's practice has been to allow an employe to sell-back vacation at any time of the year - at the employe's discretion. The only limitation is that it be done one time per year and in a forty hour block. The City maintains that this is distinguishable from other benefits paid retroactively such as wages and sick leave. The latter are hours outside the control of the employe as to use whereas the timing of vacation sell-back is entirely within the control of the employe.

In support of its past practice argument, the City points to three individuals who chose to sell-back vacation subsequent to January 1, 1992 and who received the 1991 rate. None of these employes, it asserts, received retroactive differentials or chose to grieve.

Finally the City also cites Section 17.03 of the collective bargaining agreement. The City argues that the timing of retirement is, like the timing of vacation sell-back, a unique situation and one within the control and discretion of the individual employes. The parties to the new contract chose to specifically extend retroactivity on the retirement issue. They did not do so with respect to vacation sell-back. Since the contract is silent on retroactivity with respect to sell-back, in the City's view, a reasonable inference can be made that vacation sell-back does not qualify for retroactivity under the 1992-94 collective bargaining agreement.

DISCUSSION

There are virtually no contested facts in dispute. Article 17, the Duration provision, of the agreement controls and is clear and unambiguous. Section 17.01 provides that "this agreement shall be in full force and effect from January 1, 1992 until December 31, 1994." Normally such language mandates that all economic provisions are to be made retroactive to said date unless there are express provisions for foregoing such retroactivity. These express exceptions are usually stated as such in the agreement. They do not exist in the instant collective bargaining agreement.

The City makes much of Section 17.03 to support its contention that the parties expressly provided for full retroactive wages and benefits for retirees, and, by inference, did not make such provision for current employes. The undersigned cannot adopt such a conclusion from the applicable language. Because Section 17.01 is very broad and all-encompassing as it applies to employes covered by the agreement, i.e. the current bargaining unit employes who continue to work through the term of this agreement, the Union's argument that Section 17.03 was added to insure retroactivity for retiring employes whose status might be unclear appears to be a more probable explanation. Therefore this argument is rejected.

Given the clear and unambiguous language of Section 17.01, it is unnecessary to consider past practice in the instant matter. However, even assuming that it were appropriate to consider past practice, the undersigned is unwilling to consider three instances of alleged acquiescence as sufficient to establish a binding past practice for two reasons. First, there is no evidence that the Union was even aware that the three employes had not received retroactivity on their vacation sell-back, much less acquiesced in the City's action. Second, the disputed provision is a relatively new benefit which has not been in existence for a long period of time. Thus, any alleged practice which may be evolving has not been in existence for a fixed and reasonably long period of time.

Finally, the City retroactively made employes whole for vacation and sick leave hours which they used prior to the execution of the collective bargaining agreement. This action on the City's part suggests that the intent of the parties was to make all benefits retroactive not just certain benefits as the City argues. Had the parties intended to treat sell-back vacation hours differently from those hours used in the course of taking normal vacation leave, they would have expressly so stated in the agreement.

Accordingly, it is my decision and

AWARD

1. The City of Menomonie did violate the collective bargaining agreement when it paid the grievant Keith Webb for vacation sell-back at the 1991 rate of pay instead of the 1992 rate.

2. The City of Menomonie is ordered to make the grievant whole by reimbursing him for the difference between the 1991 and 1992 rates of pay for the vacation which he sold back.

Dated at Madison, Wisconsin this 19th day of March, 1993.

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Arbitrator