BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
KENOSHA COUNTY	Case 133 No. 48923 MA-7762
and	
KENOSHA COUNTY INSTITUTIONS EMPLOYES, LOCAL 1392, AFSCME, AFL-CIO	

Appearances:

Mr. Frank Volpintesta, Corporation Counsel, Kenosha County, 912 - 56th Street, Kenosha, Wisconsin 53140, appearing on behalf of the County.

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, appearing on behalf of the Union.

ARBITRATION AWARD

Kenosha County, hereinafter referred to as the County, and Kenosha County Institutions Employes, Local 1392, 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 to initiate arbitration the undersigned was appointed by the Wisconsin Employment Relations Commission to arbitrate a dispute over the use of casual and emergency vacation days. Hearing on the matter was held in Kenosha, Wisconsin on June 4, 1993. During the course of the hearing the parties presented oral arguments. Full consideration had been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties were unable to agree on the framing of the issue and 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 directed employes to use earned casual days prior to using emergency vacation days?"
>
> "If so, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE X - Vacations

. . .

Section 10.7. Emergency Vacation Week. Employees can use one (1) week of their vacation for emergencies. This week can be used either one (1) day at a time or as an entire week. Such an emergency cannot include a holiday, as designated in this agreement. Moreover, an emergency day shall not be granted on a weekend work day or on a scheduled holiday on which an employee is scheduled to work.

. . .

Article XII - Accident and Sickness Pay Maintenance Plan

. . .

Section 12.2. Floating Casual Days. Except as otherwise provided below, every employee, in addition to the Accident and Sickness coverage, will be entitled to five (5) casual days off if employed on January 1 of any calendar year which may be used for any purpose. Such casual days are retroactive to January 1, 1992. Any day taken as paid casual day thus far in 1992 will be charged against the five (5) per year for 1992.

There will be no use of casual days between December 15 and December 31 of any year.

Any 1991 casual days carried over pursuant to Section 12.2 of the 1989-1991 Agreement shall be paid in cash as soon as possible following mutual ratification.

Employees hired after January 1 of any calendar year will earn casual days in accordance with the following schedule, during the first calendar year in which they are employed:

During the first ninety (90) days of service in the calendar year - none.

During the two (2) months in the calendar year hired immediately after the probationary period -One (1) Casual Day.

During the next two (2) succeeding months in the calendar year hired - One (1) additional Casual Day.

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During the next two (2) succeeding months in the calendar year hired - One (1) additional Casual Day.

Provided that, in each of the above instances, an employee must work fifty percent (50%) or more of the workdays in order to be credited with a month of service.

This provision shall not affect any employee hired prior to January 1, 1992.

(a) Time off without pay shall not be granted if an employee has unused vacation days, except in case of illness, or unused casual days.

(b) Casual days will be granted if written notice of the employee's intent to take such days is received by his/her department head at least twenty-four (24) hours prior to the scheduled date of such time off. The employee need not give any reason for the casual day taken under this subsection. In the event of an emergency, shorter advance notice will be acceptable and a casual day will be granted by the department head.

(c) If an employee is unable to report to work due to sickness, the employee must notify his or her department head not later than one-half (1/2) hour before his scheduled starting time. The employee shall state the reason for his absence and the expected leave of absence. Any days taken under this section shall be charged to an employee's remaining casual days.

(d) Any casual days not used during a year will be paid to the employee on or before March 1st following the end of the calendar year, however, an employee who voluntarily terminates during a calendar year will not be paid for unused casual days.

(e) Casual days may be used in less than full day or less than half (1/2) day increments for personal business, doctor or dental appointments.

(f) If an accident occurs while an employee is on a casual day, the employee will not be charged for the casual day if the accident occurs before noon.

BACKGROUND

The County operates a seven (7) days a week, twenty-four (24) hours per day health care facility in Kenosha, Wisconsin. The Union and the County have been parties to a successive series of collective bargaining agreements. The 1987-1988 collective bargaining agreement contained the following provision:

> "Section 10.5 Emergency Leave. Up to five (5) days' emergency leave may be granted to each employee, provided the employee notifies the department head before taking the time off. Such leave shall be charged against vacation time."

Under this provision the County could grant to an employe an emergency vacation day. Emergencies were generally viewed as matters beyond the employe's control. This provision was eliminated from the 1989-1991 collective bargaining agreement.

Bernice Wikstrom, Administrator for the Health Care Facility, who was the County's Director of Nursing until 1987 when she left to take a position elsewhere, testified that in 1987 in the Nursing Department when employes requested to use emergency vacation the practice was to ask employes if they had casual days, and if they did, they were requested to use those days first. Employes were not questioned as to the nature of what the emergency was because the County did not want to have arguments over what an emergency was. Wikstrom also testified that she returned to the County as Administrator in 1989 and participated in the negotiations which culminated into the 1992-1994 collective bargaining agreement. During those negotiations the Union sought and obtained the current emergency vacation language. Wikstrom further testified that the County must meet certain staffing needs and that the use of casual days, particularly on weekends, causes the County difficulty in meeting the staffing needs. Because of this difficulty and to assist in keeping track of the use of casual and emergency vacation days Wikstrom issued a memo to all employes requiring casual days be used prior to the use of emergency vacation days. Wikstrom also acknowledged during cross examination that there was not a provision in the collective bargaining agreement which addressed the use of casual days prior to the use of emergency vacation day. Wikstrom further testified that employes used 204 casual days, during Mondays through Fridays, between January 1, 1993 and May 15, 1993. Wikstrom raised the concern that had the employes been allowed to use emergency vacation there would of been a much greater opportunity for employes to use casual days on weekends.

During the 1989-1991 negotiations the Union did agree to give up emergency vacation days. Yvonne Klemm, former Union steward, vice-president and treasurer, testified that during negotiations which led to the current collective bargaining agreement the Union got back emergency vacation days with restrictions on when you can use them, not on weekends or holidays. Klemm also testified that no restrictions were raised concerning the use of casual days during the negotiations except that employes would not be allowed an unpaid leave of absence if they have accrued vacation or casual time. Klemm further testified that during negotiations a major change made between the language that existed in the 1987-1989 collective bargaining agreement is a change from the word "may" to the word "can" in the current language. Klemm testified that it was the Union's intent to take away discretion as to when emergency vacation would be granted. Klemm, who has worked in the Nursing Department, also testified that prior to 1989 she had used an emergency vacation day when she had accumulated casual days.

At the hearing the Union argued that any practice concerning the use of emergency vacation days ended in 1989 when the provision was deleted from the 1989-1991 collective bargaining agreement. The Union asserts that the current

collective bargaining agreement specifies when emergency vacation days "can" be used and when casual days can be used. The Union contends the County's policy of forcing employes to use casual days instead of emergency vacation days is in violation of the clear and unambiguous terms of the collective bargaining agreement.

At the hearing the County argued that the Union wants it both ways. One, to forget the past practice concerning using casual days prior to emergency vacation days, while two, preserving the past practice concerning no questioning from the County as to the nature of an employe's emergency. The County also argued one example of the use of an emergency vacation day while an employe had accumulated casual days does not eliminate Wikstrom's testimony that a practice existed in the Nursing Department that required employes to use casual days prior to emergency vacation days. The County also asserted it has merely adopted a reasonable rule and regulation to address the very real concern of manning the operation in the Health Care Facility. The County points out the use of 204 casual days between January 1 and May 15, 1993 is a significant number of days. The County asserts the adoption of its rule concerning the use of casual days prior to the use of emergency vacation days is reasonable, safety oriented and based upon a concern for resident welfare.

DISCUSSION

The record demonstrates that in reaching agreement on the 1992-1994 collective bargaining agreement the parties agreed upon a provision which granted employes the use of vacation days in emergency situations. Both parties have presented evidence and testimony concerning what the practice was concerning the application of the provision on emergency vacation days which existed in the 1987-1988 collective bargaining agreement. However, when the parties agreed to the 1989-1991 collective bargaining agreement they eliminated the provision concerning emergency vacation days. In order for a practice to be binding a practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time. The parties voluntarily eliminated the emergency vacation provision in 1989. Any attendant practices concerning the use of the emergency vacation provision were eliminated as well. When the parties reached agreement on the 1992-1994 they again agreed voluntarily to include a provision concerning emergency vacation days. The 1992-1994 provision differs from the 1987-1988 provision. The current provision, as the Union has pointed out, contains the term "can" in place of the term "may". Further, the current provision restricts the use of emergency vacation to days other than weekends or holidays. Given the above differences between the 1987-1988 and 1992-1994 provisions and the length of time that elapsed when no such provision existed the undersigned finds the practices, if any, which existed under the 1987-1988 provision are irrelevant. Had the parties adopted the same provision as existed in 1987-1988 any of that provision's attendant practices may have a bearing on how such a provision would be interpreted by the parties in the current collective bargaining agreement. However, in reaching agreement on the 1992-1994 collective bargaining agreement the parties changed the language of the provision. Absent a specific understanding that the parties intended to re-establish any attendant practices of the 1987-1988 agreement into the 1992-1994 agreement any practices concerning the 1987-1988 have no bearing on the instant matter.

Article XII, Section 12.2, grants employes five (5) casual days per year. This provision also requires employes to give the County twenty-four (24) hours advance written notice prior to the use of casual days. The language of this provision also allows the County the discretion to waive the twenty-four (24) hour written notice requirement. Unlike emergency vacation, this provision contains no limitation on what day or days it can be used except they may not be used between December 15 and December 31 of any year.

Article X, Section 10.7, allows employes to use one (1) week of their accumulated vacation time for emergencies. Use is allowed at one (1) day at a time or for the whole week. Use is not allowed when an employe is scheduled to work a holiday or a weekend.

Neither Article XII nor Article X require employes to use casual days prior to the use of an emergency vacation day.

Herein, the County has unilaterally implemented a policy where employes who request an emergency vacation day are required to use any accumulated casual days first. The County has asserted such a policy is reasonable given its staffing needs and concern for the residents it services. However, the County's actions can effectively eliminate an employes opportunity to use the provisions of Article X. Clearly the County is attempting to reduce an employe's opportunity to use casual days on weekends or holidays by forcing employes to use their casual days prior to any use of emergency vacation days. Article XII clearly allows employes to decide when they desire to use their casual days with the specific requirement that requests be in writing and with twenty-four (24) hour notice. The undersigned finds the County's actions would render portions of Article X and Article XII meaningless. While the County's concerns about staffing needs and resident care are laudable, the County has entered into an agreement with the Union on use of casual days and use of emergency vacation days. If the County desires to have employes use their casual days prior to use of vacation days, the County may request employes to do so but it can not mandate such an option without rendering meaningless the bargain it has enter. Therefore, based upon the above and foregoing and the testimony, evidence and arguments presented, the undersigned concludes the County's actions have violated the parties' collective bargaining agreement. The County is directed to cease directing employes to use earned casual days prior to allowing employes to use emergency vacation days. The County is also directed to make employes whole whom it has directed to use earned casual days when the employe had requested emergency vacation days by allowing employes who have accrued vacation to substitute the accrued vacation for casual days.

AWARD

The County violated the parties collective bargaining agreement when it directed employes to use earned casual days prior to allowing employes to use emergency vacation days. The County is directed to make employes whole whom it had directed to use earned casual days prior to allowing the use of emergency vacation days by allowing employes who have accrued vacation to substitute the accrued vacation for casual days.

Dated at Madison, Wisconsin this 16th day of August, 1993.

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