

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:
of a Dispute Between	:
	:
CEDAR CREST EMPLOYEES UNION,	: Case 4
AFSCME, AFL-CIO	: No. 48989
	: A-5053
and	:
	:
CEDAR CREST, INC.	:
	:

Appearances:

Mr. Thomas Larsen, Staff Representative, on behalf of the Union.
Brennan, Steil, Basting & MacDougall, S.C., by Mr. Dennis M. White, on behalf of the Employer.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Employer", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Janesville, Wisconsin on June 17, 1993. The hearing was not transcribed and the parties filed briefs which were received by August 3, 1993.

Based upon the entire record, I issue the following Award.

ISSUE

Did the Employer violate Article 16 of the contract by not paying grievant Carl Simmons added vacation benefits upon his December 23, 1992, retirement and, if so, what is the appropriate remedy?

DISCUSSION

The parties entered into an initial collective bargaining agreement in 1992. One of the major issues discussed in negotiations leading up to the agreement centered upon vacation benefits and the Employer's wish to change its then-existing vacation policy which was based upon a June 1 - May 31 vacation year and which enabled employes to use their vacations based upon a running total of how many hours they worked. The parties ultimately agreed to base vacations on a January 1 - December 31 calendar year without regard to an employe's anniversary date and to calculate vacations upon whether employes worked a minimum of 1800 hours. Employes who work less than 1800 hours also were to have their vacation benefits prorated.

The parties thus agreed to Article 16 of the contract which provides:

(a) Schedule: Employees who are regularly scheduled to work forty (40) hours per week, and who have 1800 paid hours or more in the vacation year, shall be eligible for vacation on the following basis:

<u>Length of Service</u>	<u>Length of Vacation</u>
After 1 year	one week (40 hours)
During 2 years through 4 years	two weeks (80 hours)
During 5 years through 9 years	three weeks (120 hours)
10 years and over	four weeks (160 hours)

(b) Eligibility: Eligibility for the first week of vacation shall be based upon the employee's anniversary date. Thereafter, eligibility will be based upon being employed at the start of the vacation year. Employees will be eligible for any increment in vacation years as of January 1 of the vacation year. Employees who quit before their anniversary date and who have used vacation time not yet earned will have the extra vacation pay withheld from their last paycheck for reimbursement to the Employer.

(c) Placement: Employees hired between July 1, 1991 to July 1, 1992 will be placed at the two year level as of January 1, 1993. Employees hired after July 1, 1992 will have the schedule applied to them in its entirety.

16.02 Pro-ration: Part-time employees who have passed probation and who are regularly scheduled to work twenty-four (24) or more hours per week or full-time employees who are paid for less than eighteen-hundred (1800) hours in the vacation shall receive pro rata vacation pay based upon the above schedule and their ratio of hours paid per year to two-thousand eighty (2080). Employees who are not regularly scheduled to work twenty-four hours per week shall not receive vacation pay.

. . .

It is undisputed that the parties in negotiations never discussed what was to happen for vacation purposes to employees terminating employment before January 1 of any given year.

Grievant Simmons - who had been on medical leave because of an on-the-job injury and who was scheduled to return to work at about that time - retired on December 23, 1992. 1/ He did not receive any credit for vacation purposes from August 7 - December 23 and he did not receive payment for the Christmas and New Year's holidays. The Employer never told either Simmons or the Union that employees terminating their employment in that fashion before January 1 would lose the vacation benefits scheduled for January 1. The Employer further acknowledges that Simmons would have received added vacation if he did not quit before January 1.

In support of Simmons' grievance, the Union primarily contends that it is unfair to deny Simmons added vacation because part-time employees earned vacation from the August-December period and because the Employer failed to tell him that if he retired before January 1 he would forfeit the vacation he otherwise would have earned if he stayed past that date. The Union therefore asks that Simmons be paid for the vacation he would have accrued from August 7 - December 23.

The Employer, in turn, asserts that the contract is ambiguous and that it therefore is necessary to examine bargaining history which shows that the Union never negotiated the specific benefit sought here - one which would have to be given to all other employees and thereby, in the Employer's words, "deny the Employer the benefit of its bargain by granting an award to the grievant."

The Employer is correct in pointing out that Article 16 is ambiguous, as nothing therein expressly refers to what is to happen for vacation purposes

1/ Unless otherwise stated, all dates hereinafter refer to 1992.

when an employe terminates employment before January 1. But bargaining history is not much help since the parties in negotiations never addressed this specific issue.

Nevertheless, the fact remains that the Employer never forewarned Simmons he would lose additional vacation if he quit before January 1. Had such information been given, it is safe to assume that Simmons in all probability would have postponed his retirement by about a week until past January 1, so that he could get paid for another four weeks' vacation. While employers are not usually required to explain such matters to their employes because it is an employe's own responsibility to learn what a collective bargaining agreement provides, such notification was required here because this marks the first time that the Employer has announced this position and because there was some confusion over converting to a new vacation year. 2/ That being so, fairness dictates that Simmons not be penalized when he was never told beforehand the consequences of what would happen for vacation purposes if he retired before January 1.

In such circumstances, Simmons is entitled to the added vacation benefit sought - i.e., one which accrued from August 7 - December 23. The Employer therefore is required to pay him a sum of money representing that pro-ration. In order to resolve any questions which may arise over application of this Award, I shall retain my jurisdiction for at least thirty (30) days.

However, it must be noted that this ruling is limited to the unique facts of this case which turn on lack of proper notice as to what the consequences would be when Simmons retired on December 23 and that nothing herein should be construed to mean that any other employes are entitled to such accrued vacation benefits between August - December. To the contrary, since this record establishes that the parties in negotiations never discussed this latter issue, employes in fact are not entitled to such accrued benefits until and unless the Union secures express contract language providing for same. 3/ For as the Employer correctly points out, it made a number of generous changes in its vacation policy which make it inappropriate for an arbitrator to create additional vacation rights which had not been bargained for.

In light of the above, it is my

AWARD

1. That because of its lack of notice, the Employer violated Article 16 of the contract by not paying grievant Carl Simmons accrued vacation benefits between August 7 and December 23.

2. That as a remedy, it shall take the action stated above.

3. That I shall retain my jurisdiction for at least thirty (30) days.

Dated at Madison, Wisconsin this 23rd day of August, 1993.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator

2/ In an April 9, 1992, memo to all employes, the Employer acknowledged, "We are aware that considerable confusion continues regarding our Cedar Crest vacation policy."

3/ Thus, it is immaterial that part-time employes earn accrued vacation benefits since the parties themselves agreed to treat them differently because, unlike regular full-time employes, their vacations do not vest ahead of time.

