BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
STOUGHTON SCHOOL DISTRICT	Case 40 No. 48809 MA-7716
and	
WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO, LOCAL 2506	

Appearances:
Melli, Walker, Pease & Ruhly, S.C., by Mr. Jack D. Walker, on behalf of the School District.
Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the District and the Union respectively, are parties to a collective bargaining agreement providing for final and binding arbitration. Pursuant to said agreement, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was designated by the Commission to hear the matter. Hearing was held on June 9, 1993 in Stoughton, Wisconsin. A stenographic transcript of the proceedings was made and received on June 15, 1993. The parties completed their briefing schedule on July 26, 1993. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE

The parties were unable to frame the issue at the hearing. The Union proposed the following:

> Did the District violate the collective bargaining agreement by failing to grant the grievants their full vacation allotment for the 1992-93 contract year?
>
> If so, what is the appropriate remedy?

The District proposed the following:

> Did the District violate the collective bargaining agreement in its application of the collective bargaining agreement to the five grievants?

The undersigned accordingly frames the issue as follows:

> Did the District violate the collective bargaining agreement by its allotment of vacation to the grievants for the 1992-1993 school year? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

1990-1992 Agreement

ARTICLE IV
ANNUAL PAID VACATIONS

Section 4.01. For all full-time 12-month employees (persons who are scheduled to work forty (40) or more hours per week), a vacation week consists of five (5) days at eight (8) hours per day, totaling forty (40) hours. Part-time and school year or summer employees do not receive vacations.

Section 4.02. Employees shall earn annual paid vacation based on his or her anniversary date of employment as follows:

A. After one (1) year of continuous employment and after completion of each consecutive year through the second year of continuous employment -- one (1) week.

B. After two (2) years of continuous employment and after completion of each consecutive year through the fifth year of continuous employment -- two (2) weeks.

C. After five (5) years of continuous employment and after completion of each consecutive year through the 15th year of continuous employment -- three (3) weeks.

D. After completion of the 15th year of continuous employment and after completion of each consecutive year of continuous employment thereafter -- four (4) weeks.

Each January 1, employees will qualify for vacation leave during the calendar year which will be earned in that year; except that during the first year of employment, the employee will not take vacation until he has reached his first anniversary date.

Section 4.03. Continuous Service. Continuous service shall include all the time an employee has been in continuous employment status in a regular position. The continuous service of an employee eligible for a vacation shall not be considered interrupted if he was absent due to injury or illness.

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Full week vacation eligibility time is calculated on an anniversary to anniversary basis. For employees reaching their first anniversary date and for employees earning an additional week of vacation (e.g. going from two weeks earned vacation to three weeks earned vacation), earned whole days of vacation will be allowed during period between and prior to the next anniversary dates. Calculations will be based on months, thus each month past anniversary will qualify for 1/12 of eligible week, with only earned whole days granted. Illustrative example: an employee who begins on January 1 will on July 1 be eligible for 6/12 of one week, or 2.5 days but will be granted 2 days. This will not change management's right to determine when vacations may be taken.

Section 4.03. Continuous Service. Continuous service shall include all the time an employee has been in continuous employment status in a regular position. Regular part-time employees, who subsequently become 12-month employees (as defined in Section 4.01), will receive service credit for the uninterrupted time spent in a regular part-time position. Credit will be

calculated by dividing total hours worked by 1620 hours and rounded to the nearest year (e.g. 1400 part-time service divided by 1620 = 1 yr.). The continuous service of an employee eligible for a vacation shall not be considered interrupted if he was absent due to injury or illness.

. . .

VACATION POLICY FROM EMPLOYER'S CLASSIFIED HANDBOOK

5. Vacations - Twelve month employees are granted vacation as follows: 1 week after 1 year; 2 weeks after 2 years; 3 weeks after 5 years; and 4 weeks after 15 years. Vacation time cannot be accumulated from year to year and can be taken only with the authorization of the appropriate supervisor. Vacation will be earned during the fiscal year (July to June) and may be taken from January 1 during that same year and up to the next December 30. Accrued vacation days not taken by December 31 will be lost to the employee.

   As a general rule, 12 month employees should not schedule vacations during days when classes are scheduled or when there would be undue hardship to the district. If unusual circumstances make scheduling a vacation day during such time necessary, each employee should only do so with prior approval of the appropriate supervisor.

. . .

BACKGROUND

The District and the Union have been parties to a series of collective bargaining agreements which contained the vacation language set forth in the 1990-1992 collective bargaining agreement. Maintenance employes have been permitted to take their vacations throughout the year. Custodial employes normally have to take their vacation during Christmas and spring breaks and the summer months. Most vacations are taken during the summer months. Moreover, many employes in the bargaining unit have anniversary dates coinciding with the beginning of the school year. It is undisputed that the parties for many years never adhered to the express language contained in the 1990-1992 agreement, but rather followed the Policy set forth in the District's Classified Handbook for its unrepresented employes. This policy or practice provided that vacations be earned on a fiscal year basis rather than on an anniversary date basis as provided in the 1990-1992 agreement and prior contracts. The District, prior to the 1983-84 school year, did not allow employes to take their vacation increments until the summer following the anniversary date upon which such vacation was actually earned. For example, an employe hired on September 1, 1990 would not be permitted to take his second week of vacation until the summer of 1993, although he may have completed two years of service in the fall of 1992.

During the 1983-1984 school year, pursuant to requests from employes, the District's Business Manager was directed by the District's Superintendent to grant employes access to vacation prior to their anniversary date. From that time to the present, the District has permitted the grievants to utilize vacation prior to actually earning it.

Over the past few years, the Union had expressed a concern that the District's past practice as reflected by its policy did not conform with the language of the collective bargaining agreement. The District's position was that a very strong past practice had been established. In the spring of 1992, at the time of commencement of negotiations for the new collective bargaining agreement to succeed the 1990-1992 agreement, the Union notified the District that it was repudiating the past practice with respect to vacation and reverting to the contract language. It also made a bargaining proposal with respect to vacations. On April 14, 1992, the Union proposed the following:

> 4.02 Clarify that notwithstanding any past practices provide that vacations qualified for will be in accordance with the provisions of Section 4.02, provision to be effective for calendar year 1992.

On May 7, 1992, the District made the following proposal to AFSCME:

> 1. Change Section 4.02 by deleting the last paragraph, so that the section will read as follows:
>
> **Section 4.02.** Employees shall earn annual paid vacation based on his or her anniversary date of employment as follows:
>
> A. After one (1) year of continuous employment and after completion of each consecutive year through the second year of continuous employment -- one (1) week.
>
> B. After two (2) years of continuous

employment and after completion of each consecutive year through the fifth year of continuous employment -- two (2) weeks.

C. After five (5) years of continuous employment and after completion of each consecutive year through the 15th year of continuous employment -- three (3) weeks.

D. After completion of the 15th year of continuous employment and after completion of each consecutive year of continuous employment thereafter -- four (4) weeks.

In discussing the vacation language during negotiations, the District's primary concern was that employes not be allowed to use vacation days prior to the date(s) upon which they were actually earned. The Union wanted to make sure that the practice and the language were one and the same. The Union raised a concern that most employes were hired at the beginning of the school year. If the anniversary date were employed as the qualifier, the employes would not have access to summer vacation when they made the transition from one week to two weeks or two weeks to three weeks. A compromise was worked out whereby employes were permitted to use the portion of vacation already earned in the prior year during the summer months. The parties ultimately agreed to the vacation language contained in the 1992-1994 collective bargaining agreement.

In converting from a fiscal vacation date to an anniversary year vacation date system, a question arose as to the computation of vacation entitlement for the five grievants who had been permitted to utilize vacation amounts prior to having earned them. The District seeks to deduct the days utilized from vacation entitlements for the 1992-1993 year. The Union objects, maintaining that the language provides for full allotments for both years. This problem exists only for the 1992 year and will not reoccur. The issue with respect to these employes who had received vacation in advance never arose during negotiations.

POSITIONS OF THE PARTIES

Union

The Union stresses that at the time of the compromise resulting in the new language, there was no discussion about the retroactive application of this provision. Rather, all discussions focused on how the language would be applied in the future. The Union notes that the decision to reduce the vacation of the five affected employes involves the loss of a substantial amount of vacation.

According to the Union, it is undisputed that the 1992-1994 collective bargaining agreement provides that the affected employes are entitled to receive vacation allotments as follows: Christenson-10 days, Deneen-15 days, Kennedy-15 days, Patrinos-15 days, and Saunders-10 days. What is in dispute is whether or not the agreement allows the District to assess against the employes vacation days granted in previous years against the current year allotment. The answer, the Union insists, is no. No provision was made for this type of action. In fact, the current language is the result of a compromise over the interpretation of the old contract language.

The Union stresses that its claim that employes were not being granted enough vacation under the old contract is equally, if not more valid, than the

Employer's claim that employes had been "advanced" vacation previously. Not withstanding the language of the old agreement, the parties elected to implement a new system of allocating vacation. The Union argues that the District had no authority under the new current agreement to reduce the 1992-1993 vacation allotment for certain employes. By virtue of agreeing to modify the language, each party waived its claims against previous years vacation allotments.

The Union maintains that what the District is trying to do is to carry over into the new contract period its disputed practices. Absent a specific agreement or at least prior notice to the parties, this constitutes a violation of the current agreement. It points out that the District as the originator of the language which was incorporated into the current collective bargaining agreement was required to explain any intentions regarding its implementation to the other party. Here, the District did not do so during negotiations. In evaluating the District's compromise proposal, the Union was left only with the clear understanding that vacations for the 1992-1993 school year would be granted according to the new contract language.

As a remedy, the Union requests that the District be ordered to reinstate the vacation days deducted from the affected employes with the employes being granted discretion to take either additional time off or to receive vacation pay in lieu of the time off.

District

The District submits that a curiosity in this case is that the parties negotiated to change contract words which had never been implemented. Rather they had been operating under the District's version of the policy which preceded the parties' initial collective bargaining agreement.

One obvious manifestation of its claim, according to the District, is that the parties continued to treat employes as if they were earning vacation at a two-week level after the conclusion of their first anniversary year. Although the words "through the second (and fifth, and fifteenth) year of continuous employment" appear in every agreement, the parties have never honored this language but adhered to the District's classified policy. Failure to find that the language of the policy differs from that of the contract would be rewriting the words of the contract in the District's opinion.

A second indication that the parties never implemented the contract language is that the parties never implemented the last paragraph of Section 4.02. The paragraph permits an employe to take vacation beginning at the start of the calendar year in which the vacation "will be earned". In this interpretation even though an employe would not earn vacation until the conclusion of the employe's anniversary year, he could take vacation before it was earned (except in their first anniversary year).

According to the District, what the Union was really trying to do was to get rid of the District policy provision under which vacation was earned on a fiscal year basis. The January 1 date from the policy was confused with the January 1 date in the contract. The January 1 date in the contract, the District insists, addresses different issues. Because the Union never filed a grievance over the discrepancy between District policy and contract language, it was in effect, acknowledging that the status quo between the parties was the District's vacation policy.

The District asserts that in the 1992 bargain, the Union terminated the past practice regarding vacation and initially proposed, not a change in language, but to "clarify" that vacations be "allotted in accordance with

Section 4.02". The Union proposed, and the parties agreed upon, a change in language which permitted employes to take their vacation beginning on their anniversary date after they have earned it. It maintains that the change was a benefit to all unit employes, including the grievants as contrasted with the District policy because the employes vacation eligibility period started earlier. It acknowledges that it was also a loss because now employes cannot take vacation prior to having earned it.

The District argues that when the Union repudiated the past practice in favor of the contract language, it is also stuck with the adverse language which controls earning the vacation. It maintains that the Union's selects and recites from portions of the new language favorable to its position; namely, that an employe, as the date of the new agreement was reached, who completed an anniversary year, is entitled to two weeks of vacation for the period before his next anniversary date in 1993, without consideration of how much vacation he has already taken. This position, in the view of the District, ignores the fact that all five grievants were advanced unearned vacation days under the old District policy and that the advances had been carried over from year to year. The Union's proposal, it avers, would result in a windfall for the five grievants.

The District admits that no method of implementing the new language was discussed much less agreed upon. The District's implementation, it asserts, makes all the employes equal; it does not take anything away from anyone. According to the District, its implementation gives all employes the benefit of the "change" from fiscal year vacations in the policy to anniversary year vacations. If the contract, rather then the policy, had been implemented in the past, there would have been no change, and no grievance because the contract already called for anniversary year vacations.

Because the Union is the grieving party, it has the burden of proving that the District violated the 1992-1994 agreement in its application of the agreement to the five grievants. It, the District submits, has failed to meet this burden.

The District requests that the grievance be denied.

DISCUSSION

Record evidence establishes that with one possible exception 1/, the District advanced unearned vacation days to the grievants and carried those advances over from year to year. The parties' assertions to the contrary, the real question presented to the undersigned is whether or not the District may now deduct, pursuant to the newly agreed-upon language in the current contract, vacation advancements which were not earned by the grievants but granted and carried over from year to year. Given the Union's firm repudiation of the District's old policy, it is evident that the newly drafted language controls.

Contrary to the District's assertions, the undersigned does not believe that the vacation allotment schedule under the old policy differs from the vacation allotment set forth in the new contract (or for that matter the old

1/ With respect to Mary Patrinos, the record is not quite as clear. She did take an unearned vacation day in advance on July 8, 1985. However, in 1988, it appears that she only utilized 9 of the 10 vacation days available to her.

contract) for purposes of determining entitlement after varying years of service. Of course, it did differ in the respect that employes were earning on a fiscal year basis rather than on an anniversary date basis. As the undersigned interprets the accrual provision of Article IV, Section 4.02, an employe shall receive one week of vacation after one year of continuous service and thereafter until he reaches the next plateau; two weeks of vacation after two years of continuous service and thereafter for the next consecutive years until he completes the next plateau, five years of continuous service. Any other construction simply would not make sense in light of the subsequent paragraphs.

The new language also makes it clear that full week vacation time is to be calculated on an anniversary to anniversary basis, but for first year employes and those employes reaching any of the threshold plateaus set forth above, earned whole days of vacation will be allowed during the period between and prior to the next anniversary. A means for calculating this is also set forth. Management also retained the right to determine when vacations may be taken.

Both parties acknowledge that they did not contemplate any problems transitioning the employes from fiscal year to anniversary date. The Union argues that because the District proposed the language, any deficiencies should be held against the District's interpretation. Another rule of contract interpretation also comes into play. Generally speaking, arbitrators avoid any interpretation of contract language which results in a windfall or a forfeiture.

The new contract language agreed-upon by both parties emphasizes that vacation is to be earned and sets forth the manner in which vacation is to be earned. It is quite clear that vacation may be taken in advance of the employe's anniversary date under very limited circumstances but that this vacation is also only to be that which is already earned. The record convinces the undersigned that the vacation advanced by the District was never deducted from the employes, with the possible exception of Patrinos, upon its being "earned" under the old system. It is, accordingly, not unreasonable or a violation of the language to permit the District to deduct its "advances" to square vacation "earned" with vacation "granted" in making this switch from fiscal to anniversary year.

This interpretation does not grant a windfall to any employe and does not work a forfeiture upon the District. The District is not penalized for having provided a benefit in advance of the employe having earned it. The affected employes are not being deprived of even a single day of vacation. The grievants who used it in advance, have used it. They are merely being told, in effect, that they cannot enjoy the same days twice just because they chose to avail themselves of the old past practice's "use it before it is earned" feature. The chart attached to the District's brief makes it clear that the grievants are simply being placed on equal footing with those employes hired earlier who never requested advances.

The Union argues that the District is attempting to make employes pay under the current agreement for practices which it employed under previous past practice and old contract language. The employes are still entitled to the same amount of vacation explicitly laid out in Article IV Section 4.02. All that has happened is that each of the employes who used vacation days early has been informed that he/she cannot have the same days twice. The affected employes are being told that they cannot continue to "borrow ahead" on a

continuing basis as some 2/ have apparently done, from year to year, now that the new contract language is in place and the parties are making the transition back to anniversary dates for computational purposes.

Accordingly, it is my decision and

2/ If her utilization of only the 9 days resulted in "paying back" the District for the unearned day advanced, its computation on Employer Exhibit 3 is incorrect, and Patrinos is entitled to her full allotment for the 1992-1993 school year.

AWARD

That the District did not violate the collective bargaining agreement by its allotment of vacation days to the grievants 3/ for the 1992-1993 school year.

That the grievance is denied and dismissed in its entirety.

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

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

3/ With respect to Patrinos, the District is directed to credit her for the unearned day advanced if in fact Patrinos in 1988 only utilized 9 vacation days as Employer Exhibit 8 seems to indicate. This is the case because her failure to take the day in 1988 would be credited against the day she took in advance. She would not be in the same situation as the other grievants who have continued to borrow ahead.