

BEFORE THE ARBITRATOR

-----

In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	
CALUMET COUNTY COURTHOUSE EMPLOYEES	:	Case 79
LOCAL 1362, AFSCME, AFL-CIO	:	No. 48870
	:	MA-7742
and	:	
	:	
CALUMET COUNTY	:	
	:	

-----

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

Mr. Charles Carlson, David M. Griffith & Associates, 315 Wisconsin Avenue, Madison, Wisconsin 53703, appearing on behalf of the County.

ARBITRATION AWARD

Calumet County Courthouse Employees Local 1362, AFSCME, AFL-CIO, hereafter the Union, and Calumet County, hereafter the County or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. On June 24, 1993, the Commission appointed Coleen A. Burns, a member of its staff, as impartial arbitrator. Hearing was held on August 11, 1993 in Chilton, Wisconsin. The hearing was not transcribed and the record was closed on September 13, 1993, upon receipt of post-hearing written argument.

ISSUE

The parties stipulated to the following statement of the issue:

Did the Employer violate the collective bargaining agreement when it failed to pay the grievant, Barb Grube, for vacation accrued in 1992, as a lump sum payment, and deleted her

sick leave balance?

If so, what is the appropriate remedy?

RELATIVE CONTRACT LANGUAGE

**ARTICLE IV - SENIORITY**

4.01 Application - In General

. . .

B. Employees shall lose their seniority only for the following reasons: Retirement, resignation, or discharge, if not reversed through the Grievance Procedure.

. . .

**ARTICLE XIII - VACATIONS**

13.01 For purposes of computing vacation earnings, the first year of employment shall be considered a full year of employment. Employees shall have earned vacation of January 1st of each year. Vacation must be taken by the end of the calendar year following the year in which earned.

. . .

13.03 Vacations shall be taken at a time mutually agreeable to the employee and his Department Head.

. . .

**ARTICLE XV - INSURANCE**

. . .

15.02 At time of retirement (a retired employee is defined as one who is entitled to a Wisconsin Retirement System), disability (a disabled employee is defined as one whom is entitled to disability benefits under Social Security and/or Wisconsin Retirement System) or during periods of special authorized leaves of absence, employees shall be entitled to continue coverage under the group Hospital and Surgical plan at the group rate. The employee shall pay the cost of the single and family

plan premium to the Employer, who shall forward the premium to the insurance carrier.

Also upon retirement an employee shall receive one month's paid insurance for every ten (10) days of unused accumulated sick leave.

COUNTY PERSONNEL POLICY

**SECTION 14 - TERMINATIONS**

**14.01 Resignation Notice** - Employees wishing to resign in good standing shall give written notice to the Administrative Coordinator and Department Head not less than two (2) weeks before such resignation shall be effective. Department Heads, supervisors, managers and professional employees shall give thirty (30) days' resignation notice. Failure to give such notice shall result in forfeiting vacation benefits. Unauthorized absence of an employee for three (3) consecutive work days may be considered by the department as a resignation of such employee. The Department Head shall complete a Termination Notice Form advising the Administrative Coordinator of any resignation in the department as soon as possible.

**14.02 Notification of Termination** - The Department Head shall notify the Administrative Coordinator as soon as he learns that one of his employees is leaving.

**14.03 Pay-out Upon Termination** - Employees who resign or retire shall be paid the balance due them within fifteen (15) working days of their termination day. Employees who are discharged shall be paid the balance due them within three (3) working days. In case of the death of an employee, the full amount of wages due shall, upon demand, be paid to the spouse, children, or other dependent living with such employee at the time of the death.

BACKGROUND

Barb Grube, hereafter Grievant, was hired by the County on November 4, 1987, as a temporary Receptionist/Secretary. On January 26, 1989, she became a regular employe in the position of Child Support Clerk in the Clerk of Courts office. On August 22, 1990, she was reclassified to Deputy Clerk of Courts/Child Support Clerk. In November of 1992, she was elected County Clerk of Courts and took office on January 4, 1993.

On November 18, 1992, the County Salary and Personnel

Committee issued a Committee Action Report on "Pay out of time earned as Deputy Clerk of Courts." The Grievant was provided with a copy of this report, which contained the following comments:

Comp. balance will be paid out at the end of 1992 at the rate of \$8.45 per hour as final payment.

If vacation is to be taken, it will be taken in 1992 for vacation time earned in 1992.

End result - all balances on the status sheet will be brought to zero at year end.

On December 30, 1992, the Union submitted a grievance, on behalf of the Grievant, which stated, inter alia, "pay Barb Grube any wages and benefits she is entitled to and allow Barb Grube benefits accrued under sick leave and any other benefits. Make Barbara Grube whole." On February 5, 1993, John J. Keuler, the County Administrative Coordinator, sent the following letter to Union Representative Helen Isferding:

The Salary and Personnel Committee, at a meeting on February 2, 1993, discussed the grievance of Barb Grube, and responded as follows:

That the sick leave balance will be zeroed out because elected officials automatically continue to receive pay whether they are sick or not, and when Barb takes vacation during 1993 she indicate on a time card when vacation is taken in order to monitor the two weeks she accumulated through 1992.

Thereafter, the grievance was submitted to arbitration.

#### POSITIONS OF THE PARTIES

##### Union

As the testimony of John Keuler establishes, vacation earned in 1992 is required to be used in 1993. The County did not have the contractual right to require the Grievant to use vacation accrued in 1992 prior to the beginning of the 1993 calendar year.

The County personnel policy on terminations addresses payout of accrued vacation. If the Grievant had resigned her bargaining unit position and gone elsewhere, she would have been paid out for her vacation. In November of 1992, it was common knowledge that the Grievant had won the election for County Clerk and, in fact, the Salary and Personnel Committee anticipated that the Grievant

would resign from her bargaining unit position.

The County allowed the prior County Clerk of Courts to maintain her sick leave accumulation. The Grievant has not had a break in employment for purposes of the Wisconsin Retirement System. The sick leave payout for insurance premiums upon retirement is an accrued, negotiated benefit, as is vacation.

The grievance should be sustained. The Grievant should receive her vacation payout and her sick leave balance should be restored for future use.

## Employer

On November 18, 1992, the Salary and Personnel Committee authorized the Grievant to take her accrued vacation prior to the end of the 1992 calendar year. While the Grievant had six weeks to do so, the Grievant chose not to take any of this vacation and did not advise the Salary and Personnel Committee that it would not be possible for her to take this vacation prior to the end of the 1992. By waiting until December 30 to file the grievance and to contest the directive to use her accrued vacation, the Union and the Grievant have waived their right to argue that the County did not have authority to issue the directive.

Under Section 14.03 of the County's personnel and general administrative policies, employees who provide two weeks notice of their resignation are entitled to be paid for accrued vacation. The Grievant's letter of December 30, 1992 did not comply with this notice requirement. Under Sec. 14.01 of the County's personnel and general administrative policies, failure to comply with the two week notice requirement results in a forfeiture of vacation benefits.

As an elected official, the Grievant receives full pay in 1993, regardless of actual hours worked. Thus, the County does not provide sick leave or vacation benefits to elected officials.

To grant the Grievant's claim would provide a windfall to the Grievant.

As County Clerk of Courts, the Grievant is not covered by the Union's collective bargaining agreement. The Grievant may pursue her claim with the County as a non-represented employee, but the Grievant does not have a contractual right to retain the sick leave which she had accrued as a bargaining unit employee. The grievance is without merit and must be denied.

## DISCUSSION

On January 4, 1993, the Grievant assumed the elected position of Calumet County Clerk of Courts. Prior to assuming this position, the Grievant had occupied the position of Deputy Clerk of Courts/Child Support Clerk. The position of Deputy Clerk of Courts/Child Support Clerk, unlike the position of County Clerk of Courts, is in the collective bargaining unit represented by the Union.

At the start of the hearing, the parties agreed that there were no issues of arbitrability. The County's claim that the Union and the Grievant waived the right to contest the vacation issue by waiting until December 30, 1992 to file the grievance raises the issue of procedural arbitrability. Given the parties' agreement, the County is estopped from raising the issue of procedural arbitrability in this proceeding. Accordingly, the



County's waiver argument will not be considered by the undersigned.

### Vacation

In 1992, the Grievant earned 75 hours of vacation. If she had remained in her position as Deputy Clerk of Courts/Child Support Clerk, this vacation would have been available for use on January 1, 1993. It is undisputed that bargaining unit employees are not permitted to use vacation in the year that the vacation is earned.

John Keuler has been the County's Administrative Coordinator since 1983. Keuler's testimony, which was not contradicted by any record evidence, establishes that, during Keuler's tenure as the County's Administrative Coordinator, members of the Union's bargaining unit who terminated employment with the County received a cash payment for all vacation accrued in the year of the termination.

The County argues that entitlement to the termination vacation benefit is conditioned upon fulfillment of the two week notice requirement set forth in Sec. 14.01 of the County's Personnel Policy. However, neither Keuler's testimony, nor any other record evidence, establishes that the County has administered the vacation pay-out in a manner which is consistent with the County's Personnel Policy. Indeed, the record is silent with respect to the issue of whether or not bargaining unit employees who had previously received the termination vacation benefit provided any notice of resignation. Contrary to the argument of the County, the fact that the Grievant's formal written notice of resignation was submitted on December 30, 1992, does not provide a basis for denying the Grievant the termination vacation benefit. 1/

It is true that the Grievant, unlike the other employees who received the termination vacation benefit, maintained a relationship with the County. The Grievant, however, did not continue as an employe of the County, but rather, became an elected official of the County. The undersigned is satisfied that, for the purposes of the administration of the vacation

---

1/ As the Union argues, when the Grievant won election to the Clerk of Courts position in November of 1992, the County knew that the Grievant would be resigning from her position prior to January 4, 1993. As the Union further argues, the County's Committee Action Report, dated November 18, 1992, clearly anticipated that the Grievant would be resigning her bargaining unit position at the end of 1992. It is evident, therefore, that the County had more than two weeks notice of the Grievant's resignation from her bargaining unit position.

provision of the Union's collective bargaining agreement, the Grievant terminated her County employment when she resigned her bargaining unit position, effective December 30, 1992.

The undersigned is satisfied that there is a clear and well-established past practice of administering the vacation benefits of collective bargaining unit employes, i.e., upon resignation from County employment, the bargaining unit employe is entitled to be paid the vacation which that employe accrued in the year in which the employe terminated his/her employment with the County. Giving effect to this practice, the undersigned concludes that upon her resignation from County employment on December 30, 1992, the Grievant was contractually entitled to receive a lump sum payment for her accrued 1992 vacation benefits.

As the County argues, in November of 1992, the Salary and Personnel Committee did advise the Grievant that "if vacation is to be taken, it will be taken in 1992 for vacation time earned in 1992." As discussed above, however, this directive is contrary to the past practice of administering the vacation benefit of the Union's bargaining unit members. Moreover, Sec. 13.03 of the Union's collective bargaining agreement states that "Vacations shall be taken at a time mutually agreeable to the employee and his Department head." Contrary to the argument of the County, the County's Salary and Personnel Committee did not have the contractual authority to unilaterally require the Grievant to take her accrued 1992 vacation prior to the end of the 1992 calendar year.

Contrary to the argument of the County, payment of the termination vacation benefit is not a "windfall" to the Grievant inasmuch as the Grievant had earned the vacation benefit by working throughout calendar year 1992. Moreover, since the Grievant was not an employe of the County in 1993, but rather, was an elected official, it was not possible for the Grievant to use the vacation benefit in 1993. 2/

In summary, at the time of the Grievant's resignation from her bargaining unit position, the Grievant was contractually entitled to receive payment for the vacation which she had accrued in 1992. Thus, the County did not have authority to direct the Grievant to take this accrued vacation in either 1992 or 1993.

#### Sick Leave

---

2/ As an elected official, the Grievant is paid a salary and does not have a defined sick leave or vacation benefit. Rather, the Grievant has discretion to choose what time off, if any, she wishes to take and is fully compensated for any time off which she chooses to take.

The collective bargaining agreement between the Union and the County does not provide for the pay-out of sick leave upon the resignation of a bargaining unit member and the Union does not argue that the Grievant is entitled to such a pay-out. Rather, the Union argues that the Grievant should be entitled to retain the sick leave which she had accumulated as a member of the Union's bargaining unit so that, at retirement, the sick leave would be available to pay for health insurance under Article 15.02 of the collective bargaining agreement between the Union and the County. 3/ At the time that the Grievant resigned from her bargaining unit position, the Grievant had accrued 244.80 hours of sick leave.

The Grievant's right to earn and use the sick leave in dispute is governed by the terms and conditions of the collective bargaining agreement negotiated between the Union and the County.

The Grievant's sick leave balance was available for use by the Grievant as long as she remained in the bargaining unit. However, the Grievant's contractual right to retain or use this sick leave evaporated at the point in time that the Grievant left the bargaining unit. Thus, the County did not violate the collective bargaining agreement when the County deleted the Grievant's sick leave balance at the time that the Grievant resigned from her bargaining unit position.

It is true that, during the period of time that the former Clerk of Courts occupied the position of Clerk of Courts, the paycheck issued by the County indicated that the former Clerk of Courts retained the sick leave balance which she had accumulated during the period of time in which she had been a member of the Union's bargaining unit. It is also true that the County and the former Clerk of Courts entered into a settlement which provided for a cash pay-out of approximately fifty cents on the dollar of accumulated sick leave. However, the County's relationship with the former Clerk of Courts, like its relationship with the Grievant in her position of Clerk of Courts, is not governed by the Union's collective bargaining agreement. Thus, neither the "past practice" of permitting the former Clerk of Courts to retain her accrued sick leave balance, nor the settlement of the former Clerk of Courts' sick leave claim, is relevant to the determination of the Grievant's collective bargaining rights. The Grievant, like the former Clerk of Courts, is free to pursue her sick leave claim with the County, but the resolution of the claim is not governed by the Union's collective bargaining agreement.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

---

3/ As an elected official, the Clerk of Court does not earn sick leave. Rather, the Clerk of Court is automatically paid whether or not she is at work. Thus, when she is absent from work due to illness, she receives her normal salary.

AWARD

1. The Employer did not violate the collective bargaining agreement when the Employer deleted the Grievant's sick leave balance.

2. The Employer violated the collective bargaining agreement when it failed to pay the Grievant a lump sum payment for vacation accrued in 1992.

3. To remedy the Employer's violation of the collective bargaining agreement, the Employer is to immediately pay the Grievant a lump sum payment for the vacation which she had accrued in 1992.

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

By Coleen A. Burns /s/  
Coleen A. Burns, Arbitrator