BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF PRAIRIE DU CHIEN EMPLOYEES LOCAL 1972-B, WCCME, AFSCME, AFL-CIO	Case 59 No. 49416 MA-7940
and	
CITY OF PRAIRIE DU CHIEN	

Appearances:

Mr. Daniel Pfeiffer, Staff Representative, Route 1, Sparta, Wisconsin 54656, for the Union.

Atty. Thomas F. Peterson, City Attorney, P.O. Box 335, Prairie du Chien, Wisconsin 53821, for the City.

ARBITRATION AWARD

The City of Prairie du Chien Employees Local 1972-B ("the Union") and the City of Prairie du Chien ("the City") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the meaning and interpretation of the terms of the agreement relating to the retention of vacation time. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held on August 11, 1993, in Prairie du Chien, Wisconsin. The parties submitted written arguments by November 8, 1993, and waived their rights to file further replies.

ISSUE:

The Union framed the issue as,

> "Is the grievant entitled to twenty (20) hours of compensation for vacation that he was unable to utilize in 1992?"

The City framed the issue as,

> "Whether the City of Prairie du Chien, due to its conduct should be estopped from enforcing the contractual provisions set forth in Section 14.08 of the contract between the City of Prairie du Chien and City of Prairie du Chien Employees Local 1972-B and thus allow

Mr. Wachuta to carry over twenty (20) hours of excess vacation time into calendar year 1993."

I frame the issue as,

"Did the City violate the terms of the collective bargaining agreement when it denied Charles Wachuta the ability to carry-over into 1993 more than twenty (20) hours of vacation time accrued during 1992? If so, what is the remedy?"

RELEVANT CONTRACTUAL LANGUAGE:

Article 3 - Functions of Management

3.01 Except as herein otherwise provided, the Employer retains the rights as established by law, including the management of the work and the direction of the working forces, including the right to hire, promote, demote, suspend, or discharge, or otherwise discipline for proper cause, or transfer; and the right to determine the table of organization is retained and vested in the Employer.

. . .

Article 14 - Vacations

14.01All regular full-time employees, after one (1) continuous year of employment, shall be entitled to vacation leaves with pay and said vacation shall be taken during each calendar year and shall be based upon continuous service accruing as of their anniversary date of employment occurring during any such calendar year based upon the following schedule:

One (1) year of service - one (1) work week of vacation
Two (2) years of service - two (2) weeks of vacation
Seven (7) years of service - three (3) work weeks of vacation
Twelve (12) years of service - three and one-half (3 1/2) work weeks of vacation
Fifteen (15) years of service - four (4) weeks of vacation
Twenty (20) years of service - five (5) work weeks of vacation

. . .

14.03 Upon termination of employment an employee shall be paid all earned vacation on a prorated basis.

14.04 The vacation work day or work week shall be paid based on each employee's work week, as set forth in Section 13.01.

14.05 Each January 1, employees will qualify for vacation leave during the calendar year in accordance with the above schedule based upon continuous service which will be accrued in that year. However, any vacations taken but not earned shall be paid back at the time of termination of employment.

14.06 The selection of vacation time shall be by seniority. The supervisor shall have authority to limit the number of employees taking vacation at one time.

14.07 When a holiday falls in a vacation week, the employee shall receive an additional day of vacation, or, at the option of the Employer, an additional day's pay.

14.08 Employees shall be allowed to carry over five (5) vacation days from year to year. There shall be no compounding under this provision.

14.09 By February 1st, the City shall post a list of all employees and their vacations earned for that year.

BACKGROUND:

As noted above, the collective bargaining agreement between the parties provides that employes may carry over five (5) days (40 hours) of vacation time from year to year. This grievance raises the issue of whether circumstances may arise under which an employe may carry over more than that amount.

The basic facts are largely undisputed. Charles Wachuta began work at the City's Wastewater Treatment Plant in 1977; on November 4, 1992, he applied for a vacancy in the Water Department. On December 4, 1992, City Administrator Gary Koch informed Wachuta, in writing, that the Common Council had voted on November 10 to award him the position, with a starting date of

December 14. At that time, Wachuta had 72 hours vacation time accrued. In the period of mid-December, Wachuta discussed with Koch scheduling matters relating to his vacation and the City's expectations. Because of the imminent retirement of a senior Water Department employe, the City indicated a desire for Wachuta to be available for training during the last weeks of December. Wachuta explicitly noted that he was still holding vacation hours in excess of the 40 which could be carried over, and asked Koch for direction; Koch, aware that Wachuta's working without vacation for the rest of the year would result in Wachuta's losing a certain number of vacation hours, directed Wachuta that he had to work. Koch did not promise, or otherwise commit to Wachuta, that Wachuta would be able to carry over more than 40 hours of vacation time into 1993.

Based on his seniority, Wachuta would have been in a favorable position to choose vacation days. In 1990 and/or 1991, he took vacation the last three days of the year. Wachuta used eight hours vacation on December 16, 1992 and four hours of vacation on December 30, 1992. The latter usage was for a doctor's appointment.

Wachuta ended 1992 with 60 hours of vacation time. When the City capped Wachuta's carry-over of vacation time into 1993 at 40 hours, Wachuta grieved. The matter was ultimately processed to arbitration.

POSITIONS OF THE PARTIES:

In support of its position that the grievance should be sustained, the union asserts and avers that it was the City Administrator's directive to Wachuta to work the last two weeks of December that caused Wachuta to have excessive vacation left at the end of the year, and that Wachuta should not be penalized for following this clear directive. Noting that Wachuta had used some vacation in the last days of 1990 and/or 1991, the Union states that Wachuta would have drawn his vacation bank down to the 40-hour limit, but for the clear directive from the City Administrator to undergo training for his new position. The Union further states that the Administrator's testimony supports Wachuta's contention that the Administrator knew at the time of his directive that it would cause Wachuta to lose vacation hours.

In support of its position that the grievance should be denied, the City asserts and avers that the clear and unambiguous language of the bargaining agreement allows for only five days of vacation carry-over, and that Wachuta well knew of this provision, as well he also know, throughout the year, of his vacation balance. The City notes that Wachuta had almost the entire year to use his vacation time, and it is not the City's fault that his failure to so allocate his vacation caused him to forfeit the twenty hours at issue. The City further notes that, despite his

contention that he was told by the City not to use any vacation time after December 14, Wachuta did in fact use eight hours on December 16 and four hours on December 30.

DISCUSSION:

Although it is the collective bargaining agreement which provides the basic framework for the relationship between management and labor, the rights and responsibilities under the agreement can be affected through non-contractual aspects. That is, the provisions of the relationship can be enhanced, amended or reduced through such actions as estoppel, laches, waiver and past practice. 1/

But, sometimes, too, arbitrators "decide issues essentially on the basis of estoppel without so stating specifically and without requiring as clear a showing of the elements of estoppel as might be required by a court of law." 2/ In such cases, "emphasis is often placed upon equity, with something like a 'fair and just result' standard being applied." 3/

As noted above, there is little substantive disagreement about the critical facts. The most critical fact, testified to by both Wachuta and Koch, is that Wachuta informed Koch of the potential conflict between the City's expectations/requirements of him and the contractual mandate limiting vacation carry-over, and that Koch directed him to work. Koch was candid and forthright in testifying that Wachuta "did bring up to me that he had vacation time accrued but I told him he had to work." Koch also testified he was aware that, if Wachuta worked without vacation for the last two weeks of December, he would have more than 40 hours of vacation time as of the end of the calendar year. For his part, Wachuta was candid in testifying that he never sought, nor received, an explicit or specific promise from Koch that his vacation time would be protected.

A cardinal rule of the workplace is, "work now, grieve later." The collective bargaining agreement grants to the employer, except as otherwise limited, the rights of "the management of the work and the direction of the working forces." Had Wachuta refused to report as directed by Koch, as a means of preserving his accrued vacation, he very well might have faced disciplinary action. Instead, he reported for work, and grieved.

1/ City of Great Falls, 88 LA 396 (McCurdy, 1986).

2/ Elkouri and Elkouri, How Arbitration Works, 4th ed., BNA Books 1985, p. 400, citing numerous cases.

3/ Id.

He should not suffer for following such a course of action.

The City notes that, notwithstanding his claim of putting work over vacation, Wachuta did in fact take 8 hours of vacation time on December 16 and four hours on December 30. Wachuta testified that he did not receive his direction from Koch until December 17, and that the December 30 vacation time was actually used for a doctor's appointment. That is, the first use came before Wachuta was aware of the directive, while the second showed a good-faith effort to draw down his vacation bank for an absence that legitimately could have been taken under sick leave. 4/ I find the union's analysis of the import of these two vacation uses persuasive.

It is true, as the City notes, that Wachuta could have taken vacation on December 7, 8 or 9. But it is also true that, based on his seniority, he could have felt secure in planning on vacation that final, holiday week of the year -- until his talk with Koch, at which time it became too late.

4/ I note without further comment that, in grievance arbitrations, it is more common to hear of employes using sick leave for vacation purposes than using vacation leave for legitimate sick leave purposes.

Although Koch did not explicitly promise to protect Wachuta's full vacation bank, Wachuta acted reasonably in relying on the assumption that Koch would not place him in a position where his choice was between insubordination and losing vacation time. When an employer raises an employe's reasonable expectations, a reliance may arise which the employes, if it seeks to overcome the expectation must do so in a clear and unmistakable manner. 5/ The employer did not so rebut the expectation and reliance.

Having thus determined to sustain the grievance, I now address the issue of remedy. At hearing, the Union sought either 20 hours of vacation added to 1993 or 20 hours of pay at the 1992 rates. In its brief, the Union sought only the twenty hours of compensation. The City did not address the issue of remedy.

I find nothing in the bargaining agreement which provides for cash valuation of vacation time, other than at termination or, at the employer's option, when a holiday falls during a vacation week. Thus, I believe it would be beyond my authority to direct the employer to put a cash value on the vacation time at issue. Whether the parties choose to pursue agreement on a monetary value of the time in issue is, of course, up to them.

Obviously, the timing of this award makes implementation during calendar year 1993 impractical. Further, the record is silent on Wachuta's current vacation accumulation. I am therefore making the record specific enough so its meaning is clear, but

---

5/ Q & A Electric Cooperative, 67 LA 598,600 (Bowles, 1976).

general enough for the parties to have flexibility in meeting its terms.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

1. That the grievance is sustained.

2. That the employer make Charles Wachuta whole for the twenty (20) hours of vacation time it prevented him from carrying over into 1993.

3. That I shall retain jurisdiction to resolve any disputes arising in the implementation of this Award for not less than thirty (30) days.

Dated at Madison, Wisconsin this 8th day of December, 1993.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator