BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between LOCAL 2427, AFSCME, AFL-CIO and SHEBOYGAN COUNTY	Case 216 No. 49595 MA-8001

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFL-CIO, appearing on behalf of the Union.

Ms. Louella Conway, Personnel Director, Sheboygan County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a 1992-94 collective bargaining agreement which provides for and binding arbitration of certain disputes. The Union requested, with the concurrence of the County, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance concerning vacation eligibility. The undersigned was appointed and held a hearing in Sheboygan, Wisconsin, on November 17, 1993. The parties completed filing briefs by February 8, 1994.

ISSUE:

The Arbitrator will address the following issue:

> Did the Employer violate the collective bargaining agreement when it refused to give Linda Glanert a third week of vacation after November 19, 1992, and gave her the third week of vacation after April 1, 1993? If so, what is the appropriate remedy?

The parties stipulated that the grievances of T. Ganering (#35), S. Doro (#57), M. Riese (#58), L. Wilsing (#70), and M. Niedfeldt will be determined and settled with the Award of this grievance.

CONTRACT LANGUAGE:

ARTICLE 10

PROBATIONARY PERIOD, DEFINITIONS, AND GENERAL CONDITIONS

. . .

2. Definitions

The following definitions shall apply to this contract:

a. Full-Time Employee is a person hired to fill a regular full-time position.

b. Part-Time Employee is a person hired to fill a regular part-time position.

c. Temporary Employee is a person hired for a specific period of time and who will be separated from the payroll at the end of such period. (This includes seasonal employees, i.e., those on the active payroll only during the season :Ln which their services are required.)

d. Student Employee is a person who is attending school and works less than thirty (30) hours a week during the school year. The time, limitations shall not apply during vacation periods, but student employees shall not be used to displace regular employees.

3. General Conditions

a. Fringe Benefit Limitations: The following employees shall not be entitled to fringe benefits such as sick leave, vacations, insurance, paid holidays, pensions and etc.

1. Part-time employees hired before 01-01-83 must work a minimum of six hundred (600) hours or more to be eligible for pro-rated fringe benefits.

2. Part-time employees hired on 01-01-83 or after must work a minimum of nine-hundred thirty-six (936) hours or more per year to

be eligible for pro-rated fringe benefits.

3. Student employees shall receive two (2) pro-rated floating holidays per year. Students are not eligible for any other fringe benefits.

4. Temporary and seasonal employees shall not be entitled to any fringe benefits such as sick leave, vacations, insurance, paid holidays, pensions and so on.

5. Such employees shall not be used to displace regular employees.

4. Eligibility Date for Full Time Employee Fringe Benefits

Student employees, upon completion of school or temporary or seasonal employees who become regular employees (and have worked for the preceding six (6) months or longer on a continuous basis) shall be eligible for all fringe benefits starting at the time they become such regular employees.

. . .

ARTICLE 21

VACATIONS

1. Employees Who Earn Vacation. All full and part time employees shall earn vacation, (except those subject to the limitations of Article X).

2. Continuous Service. Continuous service shall include all the time the employee has been in continuous employment status in a permanent position. The continuous service of an employee eligible for a vacation shall not be considered interrupted if he/she:

(a) Was absent for less than thirty (30) calendar consecutive days.
(b) Was on an approved leave of absence.
(c) Was absent on military leave.
(d) Was absent due to injury or illness.

3. Computing Years of Service. In determining the number of full years of service completed, credit shall be given for all time employed by Sheboygan County in a permanent position. Any absence of more than thirty (30) calendar days except for military leave and absence due to injury or illness arising out of county employment and covered by the Worker's Compensation Act shall not be counted. Only the most recent period of continuous service may be counted in determining an employee's length of service.

4. Eligibility. After completion of the first twelve (12) months in a permanent position, employees shall be granted non cumulative vacation based on accumulated continuous service as follows:

YEARS OF SERVICE	NUMBER OF VACATION DAYS
1 Year	10 Days
7 Years	15 Days
13 Years	18 Days
15 Years	20 Days
20 Years	22 Days
25 Years	25 Days

. . .

9. Prorating Benefits. Part-time employees who qualify therefor shall receive vacation benefits on a prorated basis.

BACKGROUND:

This dispute centers around the starting date for purposes of figuring when employees become eligible for vacation and increased vacation days. For example, the Grievant, Linda Glanert, is a certified nursing assistant at Sunny Ridge Home, which is a skilled care facility operated by the County. She was first employed by the County on November 19, 1985, as a part-time CNA arid regularly scheduled for three days a week, but often picking up more days. On April 1, 1986, she took a full-time night shift position. She believes she should be eligible for 15 days of vacation as of November 19, 1992. The County says she is eligible for 15 days of vacation as of April 1, 1993.

There is no dispute between the parties that the longevity in the bargaining agreement is based on date of hire, according to the language of Article 12 which states that the continuous years of service shall be calculated from the last date of hire. The parties also do not dispute that Glanert (and others similarly situated) have had no breaks in service.

The County claims that it has regular benefit positions and no-benefit positions. When a regular benefit position opens up and a person holding a no-benefit position receives it, he or she is directed to notify the Personnel office at the Courthouse.

The County's practice has been to start counting the eligibility period for all benefits except longevity on the date that an employee attains a regular benefit position. No credit has been given for past employment, even if there has been no break in service, for employees holding no-benefit (part-time) positions. If an employee reached the threshold of 936 hours, benefits are pro-rated according to the contract. 1/ An employee who works in a part-time position may hit the threshold of 936 hours and gain benefit status, but then have to start all over the next year and receive no benefits until that threshold of 936 hours is worked. Glanert did not work 936 hours between her November 19th start date and April 1, the date she started as a regular fulltime employee, but worked just over 400 hours while employed part-time.

THE PARTIES' POSITIONS

The Union asserts that Article 21, Section 2, which defines continuous service for computing vacation eligibility, includes a non-benefit earning position. The Union finds nothing indicating that an employee must be in a benefit position to have time counted toward continuous service. In order to have time count, it must be time in a permanent position, not a temporary position. Glanert was in a permanent position when hired on November 19, 1985. The County's records show that she was hired as a regular, part-time employee with no benefits.

The Union points out that under the employee classifications in the contract, there is no classification as a part-time no-benefit employee. There is only part-time, with or without benefits according to the 936 hour minimum. So the question is whether Glanert was permanent, and the Union contends that g that she was a permanent, regular part-time employee, but hired knowing that she would not meet the 936 hour threshold for benefits.

The Union argues that Glanert met all of the contractual criteria for vacation eligibility. The language also states that in computing years of service, all time in a permanent position is to be counted, and it does not say that non-benefit time working does not count. The Union finds the language to be clear and unambiguous.

The County notes that the Union and the County had agreed to limit benefits for some time, where part-time employees working less than 600 hours were not entitled to vacations or other benefits in the 1981-82 labor contract, and part-time employees hired after January 1, 1983 had to work 936 hours to be eligible for pro-rated benefits. The County has followed the eligibility date in the contract as starting at the time they become regular employees.

1/ The figure of 936 hours was bargained in the 1983-84 labor contract.

The County contends that its practice regarding benefit limitations has been in place for some time. The County believes the contract language is clear, that employees who do not work 936 hours are not eligible for benefits. Glanert did not work 936 hours and was in a no-benefit position. The contract addresses how to handle employees who move to a benefit position, starting at the time they become regular employees. The County believes it would be ludicrous to have an employee in a no-benefit position for 10 years, then move to a benefit position and accrue 15 days of vacation the first year in a benefit position.

The County asserts that it has a past practice of using a start date based on the beginning date of employment and a different benefit date based on the date of eligibility for benefits. Numerous exhibits confirmed this practice. The practice has been in effect since at least 1979, according to testimony, and has been accepted by both parties.

DISCUSSION:

Several portions of the contract need to be considered together to determine the issue presented by this case. First and foremost is Article 21, Sections 1, 2, and 3. Section 1 states that all full and part-time employees shall earn vacation, subject to the limitations of Article 10, the 936 threshold for pro-rating benefits for part-timers. Section 2 of Article 21 defines continuous service as all the time the employee has been in continuous employment status in a permanent position. Section 3 also uses the term "permanent position" in computing years of service -- credit is given for all time in a permanent position.

The problem presented is what did the parties mean by a permanent position? The County believes that a permanent position is a full-time position. The Union says a permanent position includes the regular part-time positions.

The recognition clause of the labor contract recognizes the Union as the bargaining agent for employees, with certain named exclusions. Article 8 guarantees 40 hours per week for full-time employees and states that part-time employees with benefits shall work a regular schedule of hours as far as possible. Article 10, Section 2(b) defines a part-time employee as a person hired to fill a regular part-time position. Article 10, Section 2(c) defines temporary employees as those hired for a specific period of time, and temporary employees include seasonal employees. Article 10, Section 3(a)2, provides that part-time employees hired after the beginning of 1983 must work 936 hours or more per year to be eligible for pro-rated fringe benefits. Section 4 of Article 10 gives the eligibility date for full-time employee fringe benefits as the time employees become regular employees, following completion of school or temporary or seasonal employment.

While there is a strong past practice, which is unequivocal and of sufficient duration (at least 15 years), and which supports the County's position in this case, the contract language must control over a past practice where the practice is in conflict with the language.

The parties have already defined what they mean by temporary employees. The County now seeks to restrict the meaning of "permanent" employees, as used in Article 21, to mean only full-time employees. While the County may exclude temporary employees from the benefits of Article 21, it may not exclude regular part-time employees who are not temporary employees but are permanent employees, just as regular full-time employees are permanent employees.

Glanert was hired as a regular part-time employee. Her date of hire for regular part-time work was November 19, 1985. Four and a half months later, she took a regular full-time position. County Exhibit #6 shows that at all times, she was a regular employee, either part-time or full-time. She was never a student, seasonal, temporary, or casual employee. There is no evidence that Glanert's position was not a permanent position. It was not a temporary parttime position, but a regular part-time position. Such a regular position is a permanent position.

Article 21, Section 3, states that: "In determining the number of full years of service completed, credit shall be given for all time employed by Sheboygan County in a permanent position." If the parties mean to give credit for only the time spent in a full-time position, they could have stated so, knowing that part-time employment is common in their institutions. The parttime positions offered by the County are permanent, as well as the full-time positions, since the exclusions to permanent positions are temporary or student or seasonal or casual. Further, Article 21, Section 1, states that all full and part-time employees earn vacation, noting the exception to Article 10 which puts the 600 and 936 hour thresholds on benefits. Section 2 of Article 21 is not in dispute since the parties agree that Glanert has continuous service with the County.

The County does not claim that Glanert's part-time position was temporary or seasonal. Her part-time position was a permanent position and her service with the County should be counted from November 19, 1985, rather than April 1, 1986.

The County claims that an adverse ruling in this case could result in an absurd result, with part-timers working 10 years without benefits, and then upon attaining a posting for a full-time position, they could receive three weeks of vacation in their first year as full-time employees. However, if part-timers worked over the threshold of 936 hours and attained pro-rated vacation benefits, posting into a full-time position could result in a loss of vacation if they had to start over and not be given credit for any time spent with the County. If either of these scenarios is an ongoing problem, the parties can negotiate a better solution in their bargaining talks. Furthermore, a part-timer would have to work less than half time to get no benefits, even under the increased 936 threshold level.

The County claims to have a "no-benefit" position, and that Glanert took such a no-benefit position. However, this is not quite accurate. Temporary and seasonal employees receive no benefits, student employees receive two floating holidays, and part-time employees receive benefits after working a specified number of hours -- 600 hours for those hired before January 1, 1983,

and 936 hours for those hired after January 1, 1983. The County's determination of a "no-benefit" position may be an administrative convenience for its internal purposes, but the contract sets out the categories as regular full-time, regular part-tine, temporary and seasonal, and student.

The Arbitrator finds that the County violated the collective bargaining agreement by not giving Glanert credit for all time employed in a permanent position, pursuant to Article 21, and accordingly, will sustain the grievance.

AWARD

The grievance is sustained.

The County is ordered to credit Linda Glanert with vacation time pursuant to Article 21, and to give credit to her service with the County fran her starting date as a regular part-time employee on November 19, 1985.

Dated at Elkhorn, Wisconsin this 15th day of April, 1994.

By _____
Karen J. Mawhinney, Arbitrator