BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between BROWN COUNTY SHERIFF'S DEPARTMENT NON-SUPERVISORY EMPLOYEES ASSOCIATION and BROWN COUNTY	Case 527 No. 50880 MA-8414

Appearances:

Mr. Frederick J. Mohr, Attorney at Law, 414 East Walnut Street, Green Bay, Wisconsin 54301, for the Association.

Godfrey & Kahn, S.C., Suite 600, 333 Main Street, Green Bay, Wisconsin 54301, by Mr. Dennis W. Rader, for the County.

ARBITRATION AWARD

Brown County Sheriff's Department Non-Supervisory Employees ("the Association") and Brown County ("the County"), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on June 1, 1994, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Green Bay, Wisconsin on August 10, 1994. A transcript was taken and received on August 26, 1994. The parties filed briefs and reply briefs, the last of which was received October 14, 1994.

ISSUE

The parties were unable to stipulate to a statement of the issue. The Association frames the issue as follows:

> Do Articles 32 and 33 of the contract allow the County to prorate vacation and personal days in an employee's last year of employment?

The County frames the issue as follows:

> Did the County give proper notice of the discontinuation of the practice of paying full vacation and personal days to employes in their last year of employment? If so, has the practice been discontinued?

The Arbitrator frames the issue as follows:

> Did the County violate the Collective Bargaining Agreement by prorating Gary Bonger's payout for vacation and personal days during his final year of employment? If so, what is the appropriate remedy?

BACKGROUND

Deputy Gary Bongers was employed by the Brown County Sheriff's Department for 27 years prior to his retirement in 1994. He received his last paycheck for the pay period ending March 26, 1994. The pay he received for accrued vacation was pro-rated for the portion of the year prior to his retirement. He grieved that proration, arguing that he was entitled to vacation pay for the entire year. The grievance remained unresolved and is the subject of this award. By their statement of the issue, the parties have included the dispute regarding the personal days.

POSITIONS OF THE PARTIES

The Association

The Association argues that when the disputed language is examined in the light of the standard canons of construction, it is impossible to conclude that the parties intended to imply proration of vacation and personal days for years after the first year of service. In the alternative, if the language should be found to be ambiguous, the parties' application of the language in their past practice and the actions of the County's chief negotiator corroborate the Association's position.

The County

The County acknowledges that it previously had a practice of providing full payout of vacation and personal leave benefits upon retirement regardless of the months in which the employe retired. It states, however, that it had successfully repudiated that practice during the bargaining for the 1993-94 contract. It argues that the letter sent to Mr. Toonen was sufficient notice to the Association of the County's intent to terminate the practice. It argues that no contract language guarantees full payout of vacation for retiring employes who leave in the middle of the calendar year. It rejects the Association's argument that the specific language on this point in the

supervisory contract indicates that the County has not achieved the right to pro-rate the benefit. The County draws arguments from the contracts it has with other bargaining units. It finds no relevance to the fact that the agreement in the Supervisory unit explicitly provides for the disputed proration and it further points out that only two county contracts explicitly provide for retirement benefits, with such benefits being only a practice in the other units. It asserts that the County never made a formal proposal of language regarding proration of retiree benefits and therefor the lack of such language cannot be held against the County.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

> Article 33. VACATIONS
>
> Vacations shall be computed on January 1st of each year based upon the length of service involved. Employees with less than a full year of service at the time of computation shall have their vacation prorated with respect to the amount of time of service as of January 1st.

. . .

DISCUSSION AND ADDITIONAL FACTS

As a starting point for the analysis of the parties' rights and obligations regarding the payout of benefits for retiring employes, it is important to note what the parties are not disputing: the County is not challenging the payout of at least some vacation and personal leave benefits at the time of retirement.

Turning to the contractual language, the undersigned notes that no provision explicitly describes the retirement payout which the County has been paying to retiring employes. The contract does, however, address the question of pro-ration. 1/ The second sentence of the first paragraph of Article 33, provides for proration of vacation time during the first year of employment. This clear statement of proration is crucial in this dispute. The specification of proration to cover one given instance, the first year of employment, indicates the general rule for this contract is that there is no prorating and the contract had to specifically provide for prorating in order to modify that general rule for the first calendar year of employment.

Notwithstanding that reasonable inference supporting a conclusion that the contract does

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1/ The first paragraph of Article 33 is cited above. The remaining portions of the article provide for the amount of entitlement as related to the years of service and procedures for vacation day selection.

not allow proration of retiring employes' vacation payouts, I find the contract sufficiently ambiguous that is appropriate to explore the parties' intent by resorting to extrinsic evidence, here, past practice.

The parties agree that there had a been a past practice of paying out retirement benefits without proration, however the County insists that the practice was terminated by the following letter sent on November 18, 1993 from County Human Resources Director Wayne Pankratz to Association President John Toonen:

> In reviewing the 1992 labor agreement between the Brown County Sheriff's Department Non-Supervisory employees and Brown County, most specifically Article 32. PERSONAL DAYS and Article 33. VACATIONS, it has been brought to our attention that a practice has existed within the Brown County Sheriff's Department, which, effective December 31, 1993 will cease.
>
> The practice of which I am speaking deals specifically with paying out officers upon their retirement for a complete years' unused personal days and vacation days.
>
> > Example: If an officer retired on January 5, 1993, they are paid out for all of their 1993 vacation and for three (3) personal days, but not for their holidays.
>
> Please be advised that after December 31, 1993, all officers will have their personal days and vacation days prorated on the calendar year in which they retire based upon their length of service (excluding overtime) within that calendar year, just as we presently do for holidays. Therefore, if an individual were to retire on June 30 of a calendar year, they would receive a payout for any unused time of 1.5 personal days and the unused time of their vacation leave up to one-half of their total amount for that calendar year.
>
> Please accept this letter as notification of the ceasing of this past practice of payment by Brown County.

. . .

Although the Association asserts its attorney did not receive a copy of the letter, and therefore the Association did not get effective notice of the County's termination of the practice, I conclude that

because Mr. Toonen was the Association President and because he had written to Mr. Pankratz on March 25, 1993, requesting that all correspondence be addressed to himself, the letter gave effective notice to the Association. Consequently, the undersigned makes no finding as to whether the Association's attorney received a copy of the November 18, 1993 letter.

In arguing from these facts that the practice had been terminated, the County correctly cites the rule of contract interpretation that holds that a party can effectively repudiate certain kinds of past practices for a successor contract if it announces that repudiation during bargaining for the successor contract. However, that general rule also holds that only certain kinds of past practices are susceptible to this rule: only those past practices which are not based in the contract. If, on the other hand, the past practice has some basis in the contract language, even though it may be ambiguous language, an attempt to unilaterally terminate a practice cannot be effective and the practice can only be terminated by a change in the contract language. 2/

Pankratz' letter, cited above, does not seek to terminate all aspects of the practice of paying out unused personal days and vacation days, but only that aspect of the practice that measured the amount of payout. In fact, as discussed above, that particular portion of the practice was grounded in the contract, in the sentence regarding proration for first year of the employment which implied no other proration. That aspect of the practice, being contractual, was not susceptible to unilateral repudiation during bargaining for a successor contract. The practice, then, survived the County's attempt to extinguish it by Mr. Pankratz' letter.

Having found the practice of not prorating retirement benefits was still effective at the time of officer Bongers' retirement, that practice corroborates the inference that the parties intended that the retirement and personal leave benefits not be prorated during the last year of employment.

Accordingly, the County violated the contract when it prorated Gary Bongers unpaid vacation and personal days.

2/ Regarding the Association's argument that the County is precluded by the Municipal Employment Relations Act from making any unilateral changes in mandatory subjects, the Arbitrator notes that she is charged with interpreting the parties' contract, not applying the MERA, or any other statute, and therefore the Arbitrator has not considered the Association's arguments regarding unilateral change in the face of statutory duty-to-bargain obligations.

In the light of the record and the above discussion, it is the Arbitrator's

AWARD

1. The County violated the Collective Bargaining Agreement by pro-rating Gary Bongers' payment for vacation and personal days during his final year of employment.

2. The County shall make Gary Bongers whole for all losses resulting from the proration of vacation and personal leave benefits during his final year of employment.

Dated at Madison, Wisconsin this 31st day of January, 1995.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator