BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LAFAYETTE MANOR EMPLOYEES' UNION
LOCAL 115, WCCME, AFSCME, AFL-CIO

and

LAFAYETTE COUNTY (LAFAYETTE MANOR)

Case 60
No. 53406
MA-9345

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Brennan, Steil, Basting & MacDougall, S.C., Attorneys at Law, by Mr. Howard Goldberg, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Lafayette Manor Employees' Union Local 115, WCCME, AFSCME, AFL-CIO, herein the Union, and the subsequent concurrence by Lafayette County (Lafayette Manor), herein the County, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on January 8, 1996 pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on January 30, 1996 at Darlington, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on April 21, 1996.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The County initially raises a procedural objection that the instant grievance was not filed in a timely manner.

The parties were unable to jointly agree upon the substantive issue. The Union frames the issue as follows: "Did the Employer violate the collective bargaining agreement by using a "benefit date" instead of length of continuous service for calculation of vacation benefits?" The County, on the other hand, frames the issue in the following manner: "Did the Employer violate the collective bargaining agreement by using a benefit date rather than a date of hire when calculating vacation benefits?" The parties agree that if the substantive issue is answered in the affirmative the Arbitrator should determine the proper remedy.

Having reviewed the entire record, the Arbitrator finds the County's framing of the issues

sufficient to decide the instant dispute.

DISCUSSION:

The grievant, Helene J. Lee, has been continuously employed by Lafayette Manor (Manor) as a Certified Nurse Assistant (CNA) since September 27, 1984. Her benefit date is July 14, 1986. This is the first day of a twelve consecutive week period in which the grievant worked twenty (20) or more hours.

The instant dispute arises from the County's failure to grant the grievant three weeks of vacation that she claims that she is entitled to for completing ten (10) years of continuous employment with the County in September of 1994.

The grievant filed a grievance dated August 17, 1995 wherein she claimed three weeks of vacation for completing ten (10) years of service effective September 27, 1994. In said grievance, the grievant rejected the County's claim that she was not entitled to three weeks of vacation until she completed ten years of service after July 14, 1996 (or after ten years of continuous service from her "benefit date"); and stated that she was entitled to three weeks of vacation after ten (10) years of continuous service from her initial date of hire pursuant to Article 13, Section 1 of the Agreement. As a remedy, the grievant requested vacation, at the ten year rate of three weeks, retroactive to September 27, 1994.

The County initially raises a procedural objection to the Arbitrator's jurisdiction claiming the grievance was not timely filed.

The Agreement on this point provides in Article 8, Section 2, Step 1 that "An employee who has a grievance shall deliver the grievance, in written form, to the Nursing Home Administrator . . . within twenty (20) days of the employee's knowledge of the occurrence of the event causing the grievance, which, in all events, shall not be more than forty (40) days after the event."

Assuming arguendo that the step one time limits commenced when the grievant first learned about the benefit date calculation from Manor Administrator Tim Hendricks in a meeting in February of 1995, the grievant's grievance still must fail. In this regard, the Arbitrator points out that Hendricks testified unrefuted by the Union that when the grievant first asked about this matter in February, he looked up her benefit date in the records and then explained to the grievant why she was not yet eligible for a third week of vacation. He also testified unrefuted by the Union that he explained how the benefit date was calculated. Since the aforesaid contractual provision requires that an employe file a written grievance within twenty (20) days of the employee's knowledge of the occurrence of the event causing the grievance, and since the record is clear as noted above that the grievant first learned in February, 1995, that the County would not be giving her three weeks of vacation after ten (10) years of continuous service from her initial date of hire yet did not file a written grievance until August of the same year, well beyond the twenty (20) day time limit for filing grievances found in the agreement, the Arbitrator finds it reasonable to conclude that the grievance was untimely filed.

The Union argues contrary to the above that this is a continuing violation of the collective bargaining agreement because:

> . . . In this case we are concerned with the Grievant's vacation entitlement for the 1994-95 vacation years which ran from 27 September 1994 through 26 September 1995. Accordingly the "event" that is the vacation year and the amount of vacation the Grievant was to receive was still on-going. The grievance filed on 8-17-95 was within the time limit for challenging the amount of vacation the Grievant was entitled to for the 1994-95 year.

The Union adds that the grievance is timely as to the grievant's vacation entitlement for the 1995-96 vacation year for the same reasons.

The problem with this theory is that it ignores the fact that when the grievant met with Administrator Hendricks in February 1995 and was informed that the County was denying her request for three weeks of vacation she was put on notice that she would not receive that amount of vacation for either the 1994-95 or 1995-96 "vacation year." According to the County, the grievant was not entitled to three weeks of vacation until she had ten (10) years of continuous service from her "benefit date," or in July of 1996. The grievant admits that the "benefit date" policy for accruing vacation was explained to her at the aforesaid meeting. Therefore, although it is true as pointed out by the Union, that the grievant is being denied vacation on a continuous basis for almost two additional years, the "event" or "occurrence" giving rise to this denial occurred in February of 1995 and it is this "event" alone which triggers the timelines of this grievance.

A true continuing violation typically involves an employer's ongoing policy that affects that employe continually. For example, where an agreement provided for filing "within ten working days of the occurrence," it was held that where employes were erroneously denied work, each day lost was to be considered a new "occurrence" and that a grievance presented within ten working days of any such day lost would be timely. 1/ However, in the instant case, the Union is not pointing to any alleged present violation, only at the present effect of an earlier alleged violation, one that occurred at the latest in February, 1995, when the County denied the grievant's request for three weeks of vacation.

The Union also argues that both the grievant and a Union representative attempted to clarify with Administrator Hendricks the grievant's vacation status and only after they were unsuccessful in their attempt to resolve this matter was a grievance filed in August 1995 alleging that the County had improperly calculated the grievant's vacation entitlement for the 1994-95 vacation year. However, the record indicates the grievant did not speak to Administrator Hendricks about the matter from February to July, 1995. There is no persuasive evidence the parties were in negotiations to resolve this dispute during this period of time or that the Union was

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1/ Pacific Mills, 14 LA 387, 388 (Hepburn, 1950).

attempting to clarify the matter. The grievant testified that she was waiting for an answer from Hendricks on the matter, but waiting for over four months, for an explanation of the matter without something else happening i.e. attempting to settle the dispute, is not enough, in the Arbitrator's opinion, to toll the time limits for filing a grievance found in Article 8, Section 2, Step 1. Based on the foregoing, the Arbitrator rejects this argument of the Union as well.

Based on all of the above; namely, one, clear contract language which requires the grievant to file a written grievance with the Administrator within twenty (20) days of her knowledge of the occurrence of the event causing the grievance; two, the fact that the grievant learned of the County's denial of her request for three (3) weeks of vacation in February, 1995; three, the fact that the grievant did not file a written grievance in the matter until over five months after she learned of the County's action denying her vacation request; and four, the absence of any intervening events which would have tolled the contractual time limits for filing a grievance, the Arbitrator finds it reasonable to conclude that the answer to the procedural issue raised by the County is NO, the grievance was not filed within the time limits set forth in the collective bargaining agreement. Such a conclusion is consistent with Article 8, Section 2. Procedure which provides: "Time shall be deemed to be of the essence and failure to comply with the time period set forth herein shall render the grievance void unless the time period is expressly waived in writing by the parties," since no such waiver occurred herein.

In light of the foregoing, it is my

AWARD

That the grievance is denied and the matter dismissed.

Dated at Madison, Wisconsin this 11th day of June, 1996.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator