

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BARRON COUNTY HIGHWAY DEPARTMENT
EMPLOYEES LOCAL 518, AFSCME, AFL-CIO

and

BARRON COUNTY

Case 126
No. 53557
MA-9388

Appearances:

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

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Ms. Kathryn J. Prenn, appearing on behalf of the County.

ARBITRATION AWARD

Barron County Highway Department Employees Local 518, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Barron County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Barron, Wisconsin, on March 11, 1996. The hearing was not transcribed and the parties filed post-hearing briefs. The parties reserved the right to file reply briefs. The County filed its reply brief on May 28, 1996, and the Union chose not to file a reply brief and the record was closed on June 26, 1996.

BACKGROUND:

The basic facts underlying the grievance are not in dispute. On August 21, 1995, two seasonal employes, Oren Thompson and Scott Losey, were hired as permanent employes. Both had been seasonal employes since 1991, and pursuant to Section 7.01 D) of the parties' agreement were required to serve a three month probation period from August 21, 1995 to November 21, 1995. During this period neither employe received any paid holidays. On October 3, 1995, the Union filed a grievance alleging the County violated Section 7.01 C) by failing to pay holidays to the employes. The grievance was denied by the County's Highway Committee on November 21, 1995, and appealed to the instant arbitration.

ISSUE:

The parties were unable to agree on a statement of the issue. The Union stated the issue as follows:

Did the County violate the collective bargaining agreement by its failure to pay holidays for seasonal employees during their probationary period?

If so, what is the remedy?

The County stated the issue as follows:

Has the County violated the collective bargaining agreement by not providing paid holidays to probationary employees?

If so, what is the appropriate remedy?

The undersigned frames the issue as follows:

Did the County violate the collective bargaining agreement by not providing paid holidays during the probationary period required for permanent employees who were promoted from seasonal employee status?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

Article 3 - Probationary Period

Section 3.01: Employees beginning employment with the Barron County Highway Department shall serve a probationary period. Said period shall consist of twelve (12) months duration to determine whether or not the employee is suited and qualified for the job. During the probationary period, the employees shall be subject to dismissal without recourse to the grievance procedure.

. . .

Section 3.03: During said probationary period, employees will not be entitled to any of the fringe benefits allowed under this Agreement. Should the probationer be found suited and qualified for the job, his/her rights according to this Agreement shall be computed from his/her original starting date of employment as a regular full-time employee, and he/she shall be entitled to all fringe benefits according to the terms of this Agreement.

. . .

Article 7 - Regular Seasonal Employees

Section 7.01: Regular seasonal employees' rights according to this Agreement shall be subject to the following restrictions:

- A) Regular seasonal employees shall receive no fringe benefits during their first two seasons of employment.
- B) Beginning with their third season of employment, regular seasonal employees accumulate paid sick leave at a rate of one (1) days for each month of employment, accumulative to the maximum one hundred and eighty (180) days; however, regular seasonal employees will not be entitled to any termination pay benefits. Seasonal employees who become permanent employees shall not be allowed to use any paid sick leave days during their probationary period. They shall, however, retain all accumulated sick leave days which they had earned prior to becoming a permanent employee.
- C) Beginning with their second season of employment, regular seasonal employees receive paid holidays that occur during this and all following seasons of employment.
- D) Seasonal employees who become permanent employees shall have their seasonal employment credited toward the twelve (12) month probationary period and shall serve a minimum of an additional three (3) months of probation. For seasonal

employees who become permanent employees and successfully complete their probationary period, seniority shall refer to their original date of hire. If such employees have a break in service as seasonal employees, their seniority shall be based on their most recent hire date of continuous service. Upon successful completion of their probationary periods, the names of such employees shall be added to the official seniority roster.

- E) Upon successful completion of their probationary periods and at least one year's credited work experience as a seasonal employee, such employees shall receive one (1) week of vacation. Thereafter, such employees will receive additional vacations based on their subsequent vacation anniversary dates.

UNION'S POSITION:

The Union points out that in 1992, a grievance was filed over the effect of the conversion of seasonal employees to permanent employees. It observes that the parties reached a Consent Award resolving the matter and the parties incorporated the Consent Award in the 1994-95 agreement. The Union contends that while Article 7 is titled "Regular Seasonal Employees," it speaks to issues of employment after a seasonal changes status to permanent. It notes that Section D) reflects the fact the employees with 12 months of credited service as a seasonal are required to serve a three-month probationary period on being hired as a permanent employee. Section E) provides that upon completion of probation, employees with at least one year of credited service receive one week of vacation. Section B) reflects that although seasonal employees accrue and use sick leave, they are not allowed to use it during the three-month probationary period upon becoming permanent. The Union argues that Article 7, Sections B), D) and E) put limitations on employees as to benefits during the three-month probationary period. It claims that Article 7, Section C) contains no limitation on holiday pay during the probationary period on a change in status. It submits that the parties certainly knew how to draft such limitations on benefits but did not do so with respect to holidays.

The Union alleges that the County's reliance on Article 3 is of no value in this matter because the "probationary period" referenced there applies only to employees beginning employment with the County and not to employees with more than twelve months of credited service. The Union contends that because Article 3 does not apply and Article 7 does not limit holiday pay, the employees are entitled to the holiday pay falling within the three-month probation. It asks that the County make the employees whole and abide by the contract.

COUNTY'S POSITION:

The County contends that the contract language, bargaining history and past practice supports its position. It points out that the agreement states that the bargaining unit is composed of full-time (permanent) employees who are employed more than 6 1/2 months a year, regular seasonal employees, employed less than 6 1/2 months per year and student employees, enrolled in school and employed four months or less. It notes that the agreement provides different benefits based on employee status. It argues that the Union is ignoring the fact that the grievants moved from seasonal employee status to permanent employee status. It submits that Section 3.03 clearly states that employees on probation receive no benefits and as the grievants were on probation, this language must be given effect. The County claims that the Union wants the best of both worlds, i.e. permanent status for employees but the holiday benefits as if the employees were still seasonal. It observes they cannot have both. The County asserts that the Union's reliance on Section 7.01 C) is misplaced as the employees are no longer seasonal.

As to bargaining history, the County alleges that a prior grievance was filed for two seasonal employees who were promoted to permanent employee status. It notes that the issues raised were seniority, vacation days, probationary periods and starting dates; however, holidays were not an issue despite the fact that the employment letters stated they would receive no paid holidays during probation. The County observes that the parties entered into a Consent Award which was later incorporated into the contract but there was no change with respect to paid holidays for probationary employees and the Union never raised the issue in negotiations and the eligibility for paid holidays during the probationary period remained unaffected.

As to past practice, the County reiterates that the prior grievance filed in 1992 did not grieve the lack of holiday pay during the probationary period. It also refers to two prior promotions where seasonal employees who become permanent received no benefits during the probationary period. It asserts the evidence establishes a past practice that seasonal employees promoted to permanent status do not receive paid holidays during their probationary period. The County seeks dismissal of the grievance in its entirety.

COUNTY'S REPLY:

The County claims that the Union's entire argument appears to hinge on its assertion that there is a new or additional probationary period for seasonal employees who become permanent employees. It maintains that there is only one probationary period as provided in Section 3.01 which applies when an employee is hired as a permanent employee. It alleges that neither Section 3.01 nor Section 3.03 were changed when the parties made revisions in Article 7. It argues that employees hired off the street, as well as seasonal employees who become permanent employees, must serve a twelve-month probationary period; however, seasonal employees who become permanent employees can have their seasonal employment credited toward the twelve

months but must serve at least three months probation. The County points out that there is no

probationary period for seasonal employees. Section 3.03 provides that probationary employees, whether they had been seasonal or not, are not entitled to any fringe benefits. It requests the grievance be dismissed.

DISCUSSION:

The issue presented in this case is whether regular seasonal employees who become permanent employees are entitled to paid holidays while serving a probationary period. Section 3.03 provides that employees will not be entitled to any fringe benefits during the probationary period. The Union has relied on Article 7 to support its position. Section 7.01 states that regular seasonal employees' rights shall be subject to the restrictions set forth therein. It would appear by this clear language that it only applies to regular seasonal employees and not permanent employees. Thus, when the grievants became permanent employees, Section 3.03 became applicable.

A review of Section 7.01 reveals a conflict between Section A) and C) in that A) states that regular seasonals receive no fringe benefits the first two seasons, yet C) states that beginning with the second season of employment, seasonal employees receive paid holidays. Section 7.01 B) provides for accumulation of paid sick leave. It also provides that seasonals who become permanent employees do not lose their accumulated sick leave but cannot use it during the probationary period. This is consistent with Section 3.03 and merely provides that there would not be a loss of what was accumulated. Section D) provides that seasonal employment will be credited toward the probationary period but any seasonal who becomes permanent must serve a minimum of three months on probation no matter how much credit they have accumulated. Again, this appears consistent with Section 3.03.

Section C) is silent as to what occurs to holidays when a seasonal employee becomes a permanent employee. The County argues that Section 3.03 applies and the Union asserts that C) applies because no exception is listed. The problem with the Union's argument is that C) applies only to regular seasonal employees and it would supersede the language applicable to permanent employees when all the other provisions make Article 7 consistent with 3.03. Furthermore, the Union's interpretation could have an unusual result. Under the Union's interpretation, a regular seasonal employee who becomes a permanent employee could get paid holidays whereas a permanent employee who worked longer would not. In short, the seasonal employee would be treated better than a permanent employee. Such an unusual result is not logical nor warranted. Rather, Section 3.03 applies unless there is an express exception under Section 7.01. Section C) does not provide any such exception and only applies by its express terms to regular seasonal employees. Inasmuch as the grievants are permanent employees, Section 3.03 applies and they are not entitled to paid holidays during their three-month probationary period.

This interpretation of the language of the contract is supported by bargaining history and

past practice. In the 1992 letters giving rise to the grievance before Arbitrator Greco, it is clearly stated that the employes would receive no holiday pay during the probationary period. 1/ The Consent Award is silent as to holidays. 2/ The tentative settlement between the parties for the 1994-95 agreement does not provide for holidays during probation upon a change in status from seasonal to permanent status. 3/ In 1992-93, there was no change in Article 7 C). 4/ Thus, the bargaining history is consistent with Section 3.03 in that no holidays are paid during the probationary period. As to past practice, the record failed to show any seasonal employe promoted to permanent status received paid holidays during the probationary period, rather the evidence established that they did not. 5/

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The County did not violate the collective bargaining agreement by not providing paid holidays during the probationary period required for permanent employes who were promoted from seasonal employe status, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin, this 29th day of August, 1996.

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- 1/ Ex. 10 and 11.
- 2/ Ex. 5.
- 3/ Ex. 4.
- 4/ Ex. 8.
- 5/ Exs. 6, 7, 10, 11, 13 and 14.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator