

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

WISCONSIN COUNCIL LOCAL 728-B, AFSCME,  
AFL-CIO

and

HURLEY SCHOOL DISTRICT

Case 37  
No. 54558  
MA-9718

Appearances:

Mr. James Mattson, Staff Representative, Wisconsin Council 40, Local 728-B, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Roger A. Mycon, District Administrator, appearing on behalf of the District.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a dispute reflected in a grievance filed on behalf of Marianne Cunico, referred to below as the Grievant. The Commission appointed James Meier, a Commissioner. A hearing was held in Hurley, Wisconsin, and it was not transcribed. The parties waived the filing of briefs.

BACKGROUND:

The facts are not in dispute. For many years job classifications of cooks and part-time cooks have existed. Neither have received vacation benefits but cooks have received other benefits and those benefits have been prorated for part-time cooks. The grievant started in 1991 as a part-time cook.

The Board's representative stated that in preparation for negotiations for the 93-96 labor contract the School Board considered that the District would benefit by having the classification of part-time cleaner to assist the custodians. They considered that the position would receive the same benefits as the part-time cooks.

In negotiations the Board made its proposal without detailing its expectation regarding benefits. The concern of the Union was to protect the job security of the custodians. A member of the union who was on the negotiating committee testified that he asked the Board's spokesperson if benefits would be prorated for part-time cleaners and the Board's spokesperson responded with a "yes". There was no specific discussion of vacation for part-time cleaners.

The parties agreed to add the classification of Part-Time Cleaner under the position of Custodian under the heading of Building Care, after reaching agreement that full-time custodial employes as of 7-1-94 will not be laid off or reduced to part-time cleaners as a result of that change.

In September, 1995, the Grievant applied for and was hired as a part-time cleaner in addition to her hours as a part-time cook. Her total hours remained less than full-time.

In the spring of 1995, the Board decided to offer the part-time cleaners hours in the summer of '95 to assist the custodians. The Grievant worked the summer of 1995.

In September, 1995, after the Grievant had worked a year as a part-time cleaner she concluded that she might be eligible for paid vacation since custodians received paid vacation and her position was listed under Custodians in the Building Care classification. She inquired of the aforementioned union negotiating team member who read the contract and opined that she was entitled to vacation.

In February, 1996, the Grievant requested the use of paid vacation and the request was denied. Other facts will be referenced in the discussion.

#### ISSUE:

The parties were unable to agree on the issue. The Union submitted the issue and proposed remedy as follows:

Did the Employer violate the terms of the collective bargaining agreement by denying part-time cleaners prorated vacation benefits as per Article 12 of the Agreement? And if so; the appropriate remedy is for the Employer to grant all part-time cleaners all prorated vacation benefits.

The Employer did not submit a statement of the issue.

The Arbitrator accepts the statement of the issue as submitted by the Union.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 12 -- VACATIONS

1. All Employees will receive Vacations with pay according to the following schedules:
  - A. Completion of one (1) year of service - One (1) Week Vacation.
  - B. Completion of two (2) years of service - Two (2) Weeks Vacation.
  - C. Completion of seven (7) years of service - Three (3) Weeks Vacation.
  - D. Beginning with the completion of the eleventh (11th) year of service, Employees shall receive one (1) additional day of vacation for each additional year of service completed through the fifteenth (15th) year. This will provide four (4) Weeks of Vacation upon completion of fifteen (15) years of service.
2. Absence from duty due to injury, sickness, death or critical illness in the "immediate family", or "death of a relative", as provided for under Article 18 - Leaves, will be considered as days worked when computing Vacation time. The Vacation period days are also considered as days worked.
3. Vacation Week will consist of the five (5) day work week. Holidays occurring during an "Employee's scheduled Vacation" will not be charged against Vacation time.
4. Custodians.
  - A. Vacations for custodians normally will be scheduled during summer months when school is not in session. All Employees with one (1) or more weeks Vacation may elect to take their Vacation during the school year when students are not in session, such as: Thanksgiving, Christmas and Spring School

Recess periods. All vacations will be granted, insofar as practicable, on the dates requested by Custodians provided that not more than approximately fifty percent (50%) of the Custodians are on Vacation at one time, and, when necessary, Seniority will be used to determine application of this provision.

B. Custodians shall take all Vacation earned. The earned Vacation periods are not cumulative. No Compensation will be paid in lieu of Vacation.

5. Office Staff.

A. Vacations for office staff will be scheduled upon a mutually agreed time between the Members of Office Staff, Supervisor or District Administrator.

B. Any Employee having in excess of thirty (30) days of accumulated Vacation on their Anniversary Date shall lose all excess days and their balance shall revert to thirty (30) days.

6. Upon retirement, termination or death, an Employee who has worked one hundred twenty-five (125) days or more within the period of July 1 through June 30, shall be granted credit for a full year of service and shall receive full paid Vacation as provided for under Section 1, Article 12 - Vacations. Upon retirement, termination or death, any Employee who has worked less than one hundred twenty-five (125) days within their period of July 1 through June 30, shall have his/her Vacation pay prorated according to the actual days worked.

7. Upon the death of an Employee, Vacation time plus earned salary will be paid to the next of kin. Vacation time will be computed and treated the same as it would be for retirement.

UNION'S POSITION:

The Union contends that the contract is clear that all employees are to receive vacations with

pay and that there is no exception in Article 12 for part-time cleaners. The Union further contends that the reason Article 12 does not apply to part-time cooks is buried in history and that Article 12 should apply to part-time cleaners since the classification is newly agreed to and the Union has consistently demanded a pro rata vacation benefit since the creation of the classification.

#### EMPLOYER'S POSITION:

The Employer contends that there is an agreed upon long-standing past practice relative to benefits for part-time employees. That the established past practice is to prorate benefits other than vacation for part-time employees and that part-time employees have never received said vacation and the bargaining history and past practice should control this grievance.

#### DISCUSSION:

From the record, it is clear that only Article 14 - Holidays - reflects any aspect of the parties actual practice regarding a benefit for part-time employees. It provides that part-time employees shall be paid holidays on a pro rata basis. Even though other benefits are paid to part-time employees on a pro rata basis, no mention of that agreement can be found in the contract. It is clear that heretofore the parties have agreed that Article 12 is to be applied literally only to regular full-time employees. Not even the request for relief offered as part of the issue statement by the Union seeks its literal application.

Having determined that the parties have interpreted Article 12 as not applying to part-time employees, the question becomes whether the intent of the parties relative to vacation benefits for part-time cleaners can be otherwise ascertained.

#### PAST PRACTICE:

At the beginning of the hearing, on query from the Employer, the Union representative stipulated that it would not expect the result of the case, if the Union were successful, to apply to the cooks and part-time cooks. The parties agree that there is a long-standing practice that part-time cooks do not receive a vacation benefit.

#### BARGAINING HISTORY:

The closest this matter came to being discussed during negotiations was when, as stated in the facts, a question was asked by a union member of the negotiating committee, whether benefits would be pro rated for the part-time cleaners. The question was answered in the affirmative. The

questioner may have intended the word "benefits" to include vacation even though no part-time employees received vacation. However, the affirmative response also makes sense if one is talking about the benefits prorated for other part-time employees at the time of the discussion. The bargaining history does not improve upon the contract in terms of defining the vacation benefit, if any, for part-time cleaners.

In this case the Arbitrator is satisfied that a literal interpretation of the parties' contract language is not the best guide to their mutual intentions as regards the scope and nature of benefits for part-time employees. The parties have expressed their intentions in that regard with respect to only one fringe benefit --Holiday-- stating in Article 14.1 that it is available to part-time employees on a pro rata basis. Yet, their practice has been clear, long-standing, uniform and mutually understood that part-time cooks' benefits are prorated and that the contractual vacation provisions do not apply to those part-time employees.

The bargaining history evidence does not persuasively reflect an intention to expand the scope of part-time employee benefits in the case of the part-time cleaners. It more readily supports the impression that the parties intended the same fringe benefit arrangements to apply to the part-time cleaners as applied to the part-time cooks.

For those reasons, the Arbitrator finds the long-standing practice of the parties to control in this case. The parties agree that a literal application of the Agreement does not reflect their mutual understanding in various respects regarding part-time employees. In those circumstances, absent clear and ambiguous bargaining history to the contrary, the Arbitrator finds it appropriate to rely on the same practice they have followed regarding benefits and vacations for other part-time employees.

Accordingly, the grievance is denied.

Dated at Madison, Wisconsin, this 9th day of July, 1997.

By James R. Meier /s/  
James R. Meier, Arbitrator