BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CUMBERLAND CITY EMPLOYEES
ASSOCIATION

and

CITY OF CUMBERLAND

Case 16
No. 53742
MA-9447

Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators, on behalf of the Union.

Mr. William R. Sample, Labor Relations-Consultants, Inc., on behalf of the City.

ARBITRATION AWARD

The above-entitled parties, herein "Union" or "Association" and "City", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Cumberland, Wisconsin, on May 2, 1997. The hearing was not transcribed and both parties filed briefs which were received by June 26, 1997. Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUES

The parties have agreed to the following issues:

1. Is grievant William S. Janssen eligible for 120 hours of vacation in the year following the completion of his ninth year of employment and, if not, when does eligibility for 120 hours of vacation start?

2. How many hours, if any, of accumulated vacation did grievant William S. Janssen have as of September 7, 1995?

DISCUSSION

The parties have had a long term bargaining relationship dating back to at least the 1980s. During that time, they bargained over how many vacation days would be granted to bargaining unit members.

Contracts in effect between 1981-1988 provided:

ARTICLE IX - VACATIONS

A. Each individual employee in a continuing position shall earn vacation with pay. Individuals employed less than full time in a continuing position shall earn vacation proportionately to the time worked. Vacation shall not be earned by employees on a training, student, or intermittent, or temporary basis. Time on layoff, suspension, or leave without pay, except as otherwise provided by these policies, shall not be counted in computing vacation.

B. Each eligible employee shall earn vacation with pay according to the schedule listed below. These requirements and accumulation rates are based on full time, continuous employment.

Years of Service	Rate Per Week
Up to 1 year	1 week
2-9 years	2 weeks
10-15 years	3 weeks
15+ years	4 weeks

C. Vacation may accumulate to a maximum of five weeks.

D. Requests for vacation must be made at least one week in advance of the scheduled vacation period. Vacation must be approved by the Superintendent of Streets and Sewers and be granted recognizing the need to maintain City services.

When vacation is taken, only working days are subtracted from the vacation time which has accrued to the employee's credit.

By letter dated July 13, 1987, Executive Director Alan D. Manson informed City Clerk Dennis Rockow:

Dear Dennis,

This letter is sent to clarify two understandings included in the above agreement. During the negotiations the bargaining teams

agreed that the language dealing with vacations is not as clear as it could be. Specifically, new employees are entitled to vacation after one year of work.

. . .

I do not believe the above understandings require any modification in the printed contract which was previously prepared. Please let me know if you have any questions regarding this matter.

. . .

In negotiations for a successor contract, Executive Director Kenneth J. Berg in 1989 proposed contract language (City Exhibit No. 3) which read:

7. Article IX - Vacations, Part B: Change 10-15 years to 10-14 years and add the following sentence.

   This schedule means that during the first year of employment the employee is entitled to 1 week of vacation, and during the years 2 through 9 the employee is entitled to 2 weeks of vacation in each year, and during years 10 through 14 the employee is entitled to 3 weeks of vacation each year, and during the 15th year and each year thereafter the employee is entitled to 4 weeks of vacation.

The parties at that time agreed to contract language which read:

. . .

B. Each eligible employee shall earn vacation with pay according to the schedule listed below. These requirements and accumulation rates are based on full time, continuous employment.

Years of Service	Rate Per Week
Up to 1 year	1 week
2-9 years	2 weeks
10-14 years	3 weeks
14+ years	4 weeks

C. Vacation may accumulate to a maximum of five weeks.

D. Requests for vacation must be made at least one week in advance of the scheduled vacation period. Vacation must be approved by the Superintendent of Streets and Sewers and be granted recognizing the need to maintain City services.

When vacation is taken, only working days are subtracted from the vacation time which has accrued to the employee's credit.

This schedule means that after the first year of employment the employee is entitled to 1 week of vacation, and during the years 2 through 9, the employee is entitled to 2 weeks of vacation in each year, and during years 10 through 14 the employee is entitled to 3 weeks of vacation each year, and during the 15th year and each year thereafter the employee is entitled to 4 weeks of vacation.

The parties subsequently agreed to the current language in the 1995-1997 bargaining agreement which states:

. . .

B. Each eligible employee shall earn vacation with pay according to the schedule listed below. These requirements and accumulation rates are based on full time, continuous employment.

Years of Service	Rate Per Week
After 1 year	1 week
2-9 years	2 weeks
10-14 years	3 weeks
14+ years	4 weeks

C. Vacation may accumulate to a maximum of five weeks.

D. Requests for vacation must be made at least one week in advance of the scheduled vacation period. Vacation must be approved by the Director of Public Works or in the absence of the Director of Public Works the employee's immediate supervisor and be granted recognizing the need to maintain City services.

> When vacation is taken, only working days are subtracted from the vacation time which has accrued to the employee's credit.
>
> This schedule means that after the first year of employment the employee is entitled to 1 week of vacation, and during the years 2 through 9 the employee is entitled to 2 weeks of vacation in each year, and during years 10 through 14 the employee is entitled to 3 weeks of vacation each year, and during the 15th year and each year thereafter the employee is entitled to 4 weeks of vacation.

Testifying about the parties' bargaining history, Manson said that the Association for the 1989-1990 contract proposed contract language calling for four weeks of vacation during an employes' 14th year of employment and three weeks of vacation during an employes' ninth year; that the Association did not obtain 4 weeks of vacation during the 14th year that, "We were concentrating on the 15 year, but we wanted 3 weeks in the tenth year"; that, "We wanted to make sure that everyone was treated the same"; that, "We made the mistake of not looking at the first part of the sentence" of its proposal, which is why it stated that employees would get two weeks of vacation in their second year; that the Association made that error because all bargaining unit employes already had one or two years of employment; and that he agrees employes only receive one week of vacation in the second year of employment, as opposed to two weeks "during" their second year, which is what the face of Article IX, part B, provides. He also said that the Association used the word "entitled" rather than "earned" in its contract proposal so that employes could use the third week of vacation in their tenth year and that the City then agreed to this interpretation. However, Manson was unable to identify the City negotiator who expressed such agreement.

On cross-examination, Manson acknowledged, "When we drafted this language, the phrase '2 years' should have been '3 years'", but he added that numbers "10 through 14" as written is correct. He said that some employes at that time received three weeks of vacation in their tenth year; that, "We had conflicting reports on how employes were treated"; and that, "We wanted to make sure everyone was treated the same."

Manson's testimony was directly challenged by City Clerk Rockow who has sat in the City's prior negotiations. He testified that the City in prior negotiations never agreed to the Union's interpretation that employes would receive three weeks of vacation in their tenth year because the new contract language did not make any changes as to when three weeks of vacation would be granted. Rockow admitted the "record is not clear why" employes in recent years have been allowed to use their vacation before receiving it on their anniversary dates. He also said that the City never informed the Union about the vacation changes caused by its computer program; that the City's own internal records were always kept on an anniversary basis; and that the City

has discontinued using its computer for keeping track of vacation time.

Grievant Janssen, whose hire date is September 8, 1986, had 69 hours of accumulated vacation time carried over for 1991; 51 1/2 hours carried over for 1992; 24 1/2 hours carried over for 1993; 2 1/2 hours carried over for 1994; and 8 1/2 hours carried over for 1995. Because of questions over his vacation accumulation, Janssen sometimes asked for clarification of how much vacation time he had, at which point a payroll employe would provide him with handwritten confirmations. Janssen testified that he is entitled to an additional .5 hours of vacation for 1995, while the City asserts that he owes the City about 60.5 hours because of a deficit balance. 1/

Part of this disagreement stems from the City's 1992 switch to a computerized method of keeping track of employe vacation time which caused some confusion over this issue. Hence, the City's computer program generated vacation leave information which, at times, varied from the information given to Janssen.

In this connection, employe Michael Skinner testified that he received three weeks of vacation in his tenth year of employment. He also said that a payroll employe told him that he would get 4 weeks of vacation "at the start of his 15th year" of employment.

POSITIONS OF THE PARTIES

The Union acknowledges, "There is an apparent internal conflict, or contradictory positions, in the language in Article IX", dealing with vacations, i.e., the fact that it uses the word "after" and then uses the word "during" in describing how many weeks of vacation are granted to employes in their second year of employment. The Union thus argues that its interpretation should be adopted because it is consistent with how the City in the past treated employe Skinner and because the City itself is responsible for any confusion over this issue. The Union also argues that grievant Janssen had .5 hours of vacation available because that is the figure supplied to him by the City (Union Exhibit 1). As a remedy, the Union requests that Janssen be given access to 120 hours of vacation during his 10th year of employment (from September 28, 1995, through September 7, 1996) and that he be credited with a vacation balance of .5 hours as of September 7, 1995.

The City, in turn, asserts that the issue relating to when three weeks of vacation are accorded hinges on the words "during" and "entitled" and claims that its interpretation should be adopted because the City "is following a practice that goes back to before the Union was certified", one in which a third week of vacation is only given in the eleventh year. It further maintains that Janssen, in fact, had a negative balance of 60.5 hours in 1995 and that his contrary

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1/ Janssen agreed that the City's calculation is correct if its interpretation of the contract is followed.

claim has no merit.

DISCUSSION

This case is a mess.

The first mess stems from the fact that Article IX, Section D, on its face contains an internal inconsistency (which both parties recognize) by first stating that an employe is entitled to one week of vacation "after the first year of employment" and by immediately thereafter stating that "during the years 2 through 9 the employe is entitled to 2 weeks of vacation in each year. . ." The terms "after" and "during" are thus contradictory because it is impossible to have one week of vacation "after" one's first year of employment, i.e., in the second year, while at the same time providing for two weeks of vacation "during" one's second year of employment.

The parties have worked out a partial resolution of this confusion by agreeing some time ago that employes only get one week of vacation "during" their second year of employment even though part of the contract states that they are entitled to two weeks. 2/

This resolution is important because it shows that at least one part of Article IX, Section D, i.e., that part calling for two weeks of vacation "during" one's second year of employment, has not been applied as written. This confusion and rejection of the plain text hence raises the question of whether employes receive three weeks of vacation "during" years 10 through 14, as claimed by the Union, and denied by the City.

Normally, the word "during" must be given its plain meaning, one which supports the Union's claim here. However, since the word "during" has not been accorded its plain meaning when used elsewhere in this very same sentence, I find that this proviso read in its entirety is ambiguous on its face. Hence, it becomes necessary to consider parol evidence.

As to that, Manson stated that negotiators agreed in prior contract negotiations that employes would get three weeks of vacation "during" their tenth year of employment. But, when asked to do so, he was unable to identify which specific City negotiator ever expressed that agreement. Manson's testimony is also undercut by the fact that City Clerk Rockow testified that the City never agreed to the Union's interpretation. Absent any objective evidence supporting either side, it simply is impossible to now determine whether Manson's testimony should be credited over Rockow's.

The only other parol evidence is employe Skinner's testimony that he received three weeks of vacation during his tenth year of employment and that he was told by payroll that there would be "four (4) weeks coming [to him] at the start of his 15th year" of employment. The City, in

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2/ Manson by letter dated October 5, 1995, pointed out to Rockow how the contract language could be reasonably changed to cure this problem.

turn, challenges Skinner's testimony by asserting that Skinner received credit for his prior part-time employment with the City.

Given the confusion in this record, I am unable to determine exactly why Skinner received whatever vacation he did. At best, then, there is no clear, consistent past practice as to how this language has been applied in the past.

Nevertheless, the Association proposed the language in dispute. That being so, arbitral law holds that contract language is to be construed against the party who proposed it when all other rules of contract interpretation have been exhausted. 3/ Applying that principle here, it follows that the disputed language in Article IX, Section D, must be construed against the Union and in the City's favor since the Association proposed it and since it was in the best position to make sure that the confusion here did not occur in the first place. Indeed, Manson himself acknowledged "we made the mistake of not looking at the first part of the sentence."

As a result, and in accord with the City's position, I find that employes do not accrue their third week of vacation until their tenth year of employment and they cannot use it until their eleventh year of employment.

The second mess in this case centers on how many accumulated hours of vacation, if any, Janssen had on September 7, 1995. Normally, this would be a simple thing to figure out and it, indeed, once was simple before the City began to use a computer to keep track of an employe's vacation use. Once the computer came on the scene, confusion reigned supreme because the City's records differed from the information given to Janssen (and perhaps other employes). In addition, Rockow admitted that the City allowed employes to use their vacation days early, but, in his words, "the record is not clear why". Now that the computer is no longer used for this purpose, the parties are left with trying to determine how much vacation Janssen had on September 7, 1995.

As to that, I find that the City's official figures, gleaned from its computer, are the ones that must be followed here. Hence, employes are only entitled to that vacation usage which is based on the City's records, rather than the informal, hand-written information given out. The City therefore is correct in stating that Janssen, in fact, had a negative balance of 60.5 hours through September 7, 1995.

However, it is inequitable to now charge Janssen with that negative balance after Janssen relied upon the City's earlier mistaken information since the City itself was responsible for bringing about the confusion in the first place. Hence, he is to be credited with a balance of .5

3/ See How Arbitration Works, Elkouri and Elkouri, pp. 509-510 (BNA, 5th Ed., 1997).

hours of vacation as of September 7, 1995.

In light of the above, it is my

AWARD

1. That grievant William S. Janssen is not eligible for 120 hours vacation in the year following the completion of his ninth year of employment; employes, instead, are entitled to 120 hours vacation in the year following the completion of their tenth year of employment, i.e., during their eleventh year.

2. That grievant William S. Janssen is to be credited with .5 hours of accumulated vacation as of September 7, 1995.

Dated at Madison, Wisconsin, this 25th day of July, 1997.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator