BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 9 and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139	Case 1 No. 54743 A-5551 Case 2 No. 54744 A-5552

Appearances:

Mr. Jerry L. Ashlock, International Representative, appearing on behalf of Office and Professional Employees International Union, Local 9.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. John J. Brennan, appearing on behalf of International Union of Operating Engineers, Local 139.

ARBITRATION AWARD

Office and Professional Employees International Union, Local 9, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant disputes between the Union and International Union of Operating Engineers, Local 139, hereinafter the Employer, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Employer subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the disputes. A hearing was held before the undersigned on March 5, 1997 in Pewaukee, Wisconsin. There was no stenographic transcript made of the hearing and briefing of the matters was completed by March 24, 1997. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the issues.

The Union would state the issues as follows regarding the two grievances:

> Did Local 139 violate the contract by making a unilateral offer outside of the contract?

Did Local 139 violate its offer which was accepted by Bartholf?

Did Local 139 violate its offer which was accepted by Meinert?

The Employer would state the issues as follows:

Did Local 139 violate the Collective Bargaining Agreement when it denied Bartholf severance pay?

Has Local 139 violated the Collective Bargaining Agreement by refusing to make a vacation payout to Meinert?

The Arbitrator frames the issues to be decided as follows:

1) Did the Employer violate the parties' Collective Bargaining Agreement when it offered its employes severance pay at the July 29, 1996 meeting, and then refused to pay the Grievant, Deborah Bartholf, two weeks' severance pay when she terminated her employment on August 8, 1996? If so, what is the appropriate remedy?

2) Did the Employer violate the parties' Collective Bargaining Agreement when it refused to pay the Grievant, Cindy Meinert, for the unused days of vacation she had remaining when she terminated her employment on August 9, 1996? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE II - RECOGNITION AND REFERRAL

Section 1. The Employer agrees to recognize the Union as the exclusive bargaining representative for all employees in the bargaining unit. The bargaining unit shall include all employees as defined in Article I, Section 3.

. . .

ARTICLE III - VACATIONS

Section 1. Eligibility and the number of vacation days earned by each employee covered by this Agreement shall be determined as of the anniversary date of such employee's employment.

. . .

(D) An employee with six (6) months but less than one (1) year of employment shall be entitled to one (1) week of vacation with pay. After completing her/his first full year of employment, she/he shall be entitled to two (2) weeks' vacation with pay (if one (1) week of vacation after six (6) months has not been taken), after which her/his vacation shall be determined by (A), (B) and (C), as listed.

. . .

Section 4. An employee having one (1) year or more of employment who is terminated for any reason, shall receive pro rata vacation pay in the amount of one fifty-second (1/52) of vacation pay due her/him under the provisions of (A), (B) and (C), as listed for each week worked subsequent to her/his last anniversary date. No vacation pay will be granted if the employee is terminated because of dishonesty.

BACKGROUND

Local 139, hereafter the Employer, is a labor organization which employs a number of clerical and office employes in its Pewaukee, Wisconsin office. Those clerical and office employes are represented by the Union. Dale Miller is the Employer's Business Manager in that office and Cecil Argue is Miller's Administrative Assistant. The Grievants, Cindy Meinert and Deborah Bartholf, were both employed in the Pewaukee office as a Paralegal and as a Bookkeeper, respectively. Meinert began employment in the office on November 18, 1995 and Bartholf started on December 1, 1995. In addition to the Grievants, there were four other employes working in the office who are also represented by the Union, including the Union's local steward, Shirley Piekarski.

Approximately a week before the end of July, 1995, Miller asked Argue to take over

supervision of the office staff due to a concern regarding personality conflicts between the office employes. On July 29, 1996, Argue called a meeting of the office staff to announce his new role as office manager and to discuss the changes he intended to make in the office. Amongst those changes was his decision to move Meinert up front with the rest of the office staff because he felt she had slack time and could help out more being moved to that location. Meinert became upset at that announcement. Argue told Meinert he realized that she had been hired as a paralegal and then not used in that capacity, and that she was therefore unhappy. He also told her that if she wanted to leave, he would give her two weeks' severance pay and would work with her to find another job. Argue extended that offer to the rest of the office staff at that meeting as well, stating in effect, if anyone wanted to leave, they would be given two weeks severance pay because he did not want any anyone working there who was unhappy or who felt that they could not work with him. The afternoon of July 29th, Meinert went to Argue and told him that she wanted to take the afternoon off. Argue granted her request. Several days later, Meinert advised Argue that she had found another job. Although Argue told her that she could leave immediately if she was needed right away in her new job, Meinert offered to stay on and did in fact stay for another week, leaving on August 9, 1996. By letter of that same date, Meinert requested that she be paid the two weeks of severance pay promised at the meeting and also 40 hours of vacation time that she felt she had coming, as well as 12 hours of personal time.

Bartholf had no immediate plans to leave her job following the July 29th meeting. On August 7, 1996, however, Bartholf observed the person she had replaced as the Employer's Bookkeeper speaking to Argue in his office. On August 8, Bartholf advised the Employer's auditor that she was leaving effective immediately and later on that day, came to the office and told Argue that she was leaving and gave him her letter of resignation addressed to Miller. In that letter, Bartholf requested the two weeks of severance pay offered at the meeting on July 29th, as well as 24 hours of vacation time she had on the books and 15 hours of personal time. 1/

Meinert was paid two weeks' severance pay, but was not paid for any vacation time or personal time she had remaining when she left. Bartholf was paid for the vacation time she had on the books, but was not paid two weeks' severance pay or the personal time that she still had on the books. Both Meinert and Bartholf grieved the Employer's refusal to pay them vacation time and the severance pay, respectively. The grievances were denied and the parties ultimately proceeded to arbitration of their disputes before the undersigned.

POSITIONS OF THE PARTIES

Union

1/ The requests for payment of personal time left on the books when the Grievants left were dropped.

With regard to the Meinert grievance, the Union asserts that Article III, Section 1, (D), of the Agreement provides, "An employee with six (6) months but less than one (1) year of employment shall be entitled to one (1) week of vacation with pay." 2/ Meinert had been with the Employer more than six months, but less than one year, and in her resignation letter of August 8, 1996, Meinert requested the two weeks' severance pay that Argue had offered at the July 29 staff meeting and the 40 hours of vacation pay. Argue's letter of August 12th informed Meinert that he was denying her claim for vacation pay and personal time since "the collective bargaining agreement does not provide for either." The Union asserts that the Employer must, however, agree with its interpretation of Article III, Section 1 (D), since in responding to the identical claim from the Grievant Bartholf, Argue advised her in his August 12th letter that she was being paid for the 24 hours of unused vacation she had on the books, although he was denying her claim for severance pay.

The Union asserts that both Grievants' resignations were tendered as a result of the Employer's offer of a "severance pay package" made at the July 29, 1996 meeting. The Union notes that the two Grievants were treated the opposite by the Employer and asserts that Bartholf's decision to resign was based in large part on the severance package offered at the July 29th meeting. The offer contained an element of mutuality, and therefore, an implied mutual agreement was created between the parties upon the issue of severance pay. Argue did not place any conditions, such as advance notice, on the offer when he presented it at the meeting. The Union asserts that its overriding concern is the unilateral action of the Employer with regard to the severance package in violation of the exclusivity clause in the parties' Agreement. Wages, hours and working conditions are mandatory subjects of bargaining and the severance package was not negotiated with the Union, nor was it agreed to by the Union. As is usually the case where management takes unilateral action of an arbitrary and capricious nature, the employes were not treated equally. The Union asserts that the only "equitable outcome" in this case is to award relief in a uniform manner, as equal treatment and the obligation to bargain over such issues were responsibilities that both parties assumed in entering into the Agreement. Thus, Bartholf should be paid the two weeks' severance pay in accord with the July 29th offer, and Meinert is entitled to pay for her unused vacation time in accord with the Employer's payment of same to Bartholf as a result of her accepting the Employer's offer of a severance package.

Employer

The Employer takes the position that both grievances should be denied on the basis that the Agreement does not provide for either benefit. The Arbitrator's function is to interpret the collective bargaining agreement, and even the Union admits that there is no entitlement to severance pay. The Employer cites the parol evidence rule as not permitting the consideration of

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2/ The Employer argued at hearing that the Union's citation is inaccurate in that the word "with" does not appear in that provision, and the Union admits that error.

evidence about promises made outside of the written agreement. Thus, all testimony regarding the July 29th meeting must be ignored. Even if that testimony could be considered, the evidence still supports the conclusion that there was never a "standing offer" of severance pay.

The Employer asserts that the evidence indicates that at the July 29th meeting, Argue advised Meinert that she was being moved from her private office to a cubicle in the front of the building with the rest of the staff, upsetting Meinert visibly. Argue also laid down certain rules and indicated that the staff would have to start getting along and also stated that if anyone could not live with those rules, or was so unhappy that they did not want to stay, they could leave immediately and he would pay them two weeks' severance pay. That offer was first made directly to Meinert and then opened up to everyone. That offer, however, was good on July 29th and was never intended nor stated to be a "standing offer". The Union's steward, Piekarski, testified that there is no contractual entitlement to severance pay and also corroborated Argue's testimony regarding the July 29th meeting, admitting that the offer was viewed as a "one-time, take-it-or-leave-it" offer for anyone who wanted to leave on that date.

With regard to the claim for vacation pay, the Employer asserts that the actual language of the provision cited by the Union states: "vacation with pay", not "vacation pay". The Union admitted to the error in its brief at the hearing. Both Grievants worked for the Employer less than a year, but more than six months, and therefore were entitled to one weeks' vacation with pay. While both had vacation time remaining on the books when they left, neither is entitled to payment in lieu of taking vacation. They were entitled to take vacation with pay, not to a week's vacation pay. That is made more clear by Article III, Section 4, which speaks directly to "a vacation payout" that is available only after one full year of employment. Therefore, neither Grievant was entitled to vacation pay when they quit.

The Employer asserts that it gratuitously gave the Grievants more than they were entitled to and that it should not be punished for its "benevolence". Argue explained the reason that the Grievants were treated differently, i.e., that Meinert gave it the benefit of two weeks' notice and worked very hard that last week that the Employer utilized her, and that she had been misled from the beginning about what her actual duties would be, having been hired as a "paralegal" and utilized basically as a secretary. Conversely, Bartholf provided no notice of her decision to quit, but in an effort to end the relationship on as good as possible terms and to be fair, Bartholf was paid for her unused vacation time. In both cases, the Employer made payments it was not required to make by the Agreement. It concludes that since the Arbitrator is limited to interpreting the labor agreement, and the Agreement does not provide for the benefits claimed, the grievances must be denied.

DISCUSSION

In answering the first issue, it is necessary to address the issue raised by the Union as to whether the offer of two weeks' severance pay made by Argue at the July 29, 1996 staff meeting

violated the parties' Agreement. That question must be answered in the affirmative. While it appears Argue's offer was spontaneous and motivated by good intentions, the Agreement contains no provision for severance pay. The Agreement does, however, state in Article II, Recognition and Referral, Section 1, that, "The Employer agrees to recognize the Union as the exclusive bargaining representative for all employees in the bargaining unit." Severance pay is an economic benefit over which the Employer would be obligated to bargain with the Union before it implemented same. By unilaterally offering the severance pay, the Employer violated its agreement to recognize the Union as the exclusive bargaining representative for these employes.

It does not necessarily follow that the remedy for this violation is to require the Employer to pay Bartholf the severance pay. Bartholf testified that she did not intend to leave her employment after the meeting on July 29th ended, and that it was not until a week later, when she saw the person she had replaced as Bookkeeper talking to Argue in his office, that she decided to quit. The Union's Steward, Piekarski, testified that she was at the July 29th meeting and that she did not take Argue's offer of severance pay to be a "standing offer" to anyone who quit. Bartholf did not accept the offer when it was made, nor did it appear to be the basis for her decision a week later, to leave. Conversely, Meinert, who did receive the severance pay, came to Argue several days after the meeting and gave notice that she was leaving and offered to stay for another week, and did so. Bartholf, on the other hand, gave her notice, effective immediately. Therefore, the circumstances of their terminating their employment are distinguishable.

Also, Bartholf, unlike Meinert, was paid for the vacation time she had on the books when she left, despite the Employer's view that she was not entitled to a vacation payout under the Agreement. As is discussed below, the Employer's view in that regard is correct.

It would seem, then, that Bartholf has little in the way of an "equitable" claim to the severance pay and that the only purpose to be served in awarding her such pay would be to "punish" the Employer for making the unilateral offer. The Arbitrator does not see punishment, by itself, as an appropriate basis for relief, nor is it viewed as necessary in this case to induce the Employer to forego such unilateral offers in the future. Given that Bartholf did not accept the offer when it was made and did not rely on the offer as the basis for her decision to leave, that the offer was not characterized or viewed by others as a standing offer, that the circumstances of Bartholf's leaving are distinguishable from those of Meinert, and that Bartholf received a vacation payout to which she was not entitled by the Agreement, it is concluded that Bartholf is not entitled to more than she has already received as an appropriate remedy for the Employer's violation.

It also follows from the discussion above, that while the Employer violated the Agreement by offering the severance pay, the Employer did not violate the Agreement when it refused to pay Bartholf severance pay when she terminated her employment. 3/

3/ Nor does it appear that the Employer violated its "offer" by such refusal.

With regard to Meinert's grievance, the Union relies upon Article III, Vacations, Section 1 (D), of the Agreement to support its claim that Meinert was entitled to pay for the vacation time she had remaining when she left her employment. As the Employer notes, Section 1, (D), provides for one week of vacation "with pay" for employes with more than six months, but less than one year, of employment. More importantly, there is a specific provision that pertains to payout of vacation upon termination of employment. That provision, Article III, Section 4, is clear that it only applies to employes "having one year or more of employment". As Meinert had been employed for less than a year at the time she left, she was not entitled to pay for the vacation time she had not used by the time she left. To the extent that the Union has asserted that Meinert was entitled to the vacation payout as part of an offered "severance package", there is no evidence that such a payout was part of the Employer's offer.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. The grievance of Deborah Bartholf is denied.

2. The grievance of Cindy Meinert is denied.

Dated at Madison, Wisconsin, this 30th day of July, 1997.

By David E. Shaw /s/
David E. Shaw, Arbitrator