BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between CITY OF MANITOWOC WASTEWATER TREATMENT FACILITY EMPLOYEES, LOCAL 731, AFSCME, AFL-CIO and CITY OF MANITOWOC	Case 129 No. 54730 MA-9771

Appearances:

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

Mr. Patrick Willis, City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on April 16, 1997, in Manitowoc, Wisconsin. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on June 30, 1997. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

> Did the Employer violate the collective bargaining agreement when it denied employees using vacation accrued, prior to the employee's anniversary date? If so, what is the remedy?

The City framed the issue as follows:

> Does Article X of the collective bargaining agreement authorize employees to utilize accrued but unearned vacation on the same basis as earned vacation?

Having reviewed the record and arguments in this case, the undersigned finds the

following issues appropriate for purposes of deciding this dispute:

1. Does Article X, Section 1 of the collective bargaining agreement require that the Employer grant employe requests to use accrued but unearned vacation?

2. By granting past employe requests to use accrued but unearned vacation, has the Employer created a unilateral right on the part of employes to use accrued but unearned vacation?

PERTINENT CONTRACT PROVISIONS

The parties' 1995 collective bargaining agreement contained the following pertinent provisions:

ARTICLE X

VACATION, SICK LEAVE, HOLIDAYS, AND LEAVE OF ABSENCE

Section 1. Vacations.

(a) Vacation Schedule. Employees shall earn vacations with pay as follows:

After one (1) year of service-five (5) days (1 week)
After two (2) years of service-two weeks (10 days)
After five (5) years of service-two (2) weeks (2) days (12 days).
After eight (8) years of service-three (3) weeks (15 days).
After eleven (11) years of service-three (3) weeks and one (1) day (16 days).
After twelve (12) years of service-three (3) weeks and (2) days (17 days).
After thirteen (13) years of service-three (3) weeks and three (3) days (18 days).
After fourteen (14) years of service-three (3) weeks and four (4) days (19 days).
After fifteen (15) years of service-four weeks (20 days).

After twenty (20) years of service-five weeks (25 days).

(b) Part Time Employees. Part-time employees shall earn vacation and all other benefits on a pro-rata basis.

(c) Vacations Not Cumulative. Vacations shall not be cumulative. All vacations must be used in the twelve (12) months following the employee's anniversary date. Vacations not used in the twelve (12) month period after being earned shall be forfeited.

(d) Terminating Employees. Employees who terminate and have worked less than the full year shall have their vacation pay prorated on the basis of one-twelfth (1/12) of their normal vacation for each month's work past their anniversary date.

FACTS

Bargaining unit employes who have used up all their vacation for the year periodically ask management if they can borrow from their next year's vacation. The parties refer to this as using accrued but unearned vacation. In those instances, the employe who had used up all their vacation for the year went to the person who schedules and approves vacation at the wastewater treatment facility, Administrative Assistant Chet Tadych, and asked him if they could use some of next year's vacation. The Employer's records indicate this happened at least 22 times during the 11 year period between 1985 and 1996 (i.e., about twice a year). On each of these occasions, the employe's request to use the next year's accrued vacation was granted. In no instance was the request to use accrued but unearned vacation denied. Insofar as the record shows, none of the prior requests to use accrued vacation created the need for overtime or generated other staffing problems.

In June, 1996, the Employer's Personnel and Safety Coordinator, Sue Borowski, wrote a memo to City Attorney Patrick Willis wherein she apparently reported that wastewater treatment facility employes were using accrued vacation on the same basis as earned vacation (specifically, taking it without the permission of management). Willis responded with the following memo to Borowski:

Re: WWTF Vacation Practice

Dear Sue:

I'm writing in response to your Memo of June 4, 1996. If Wastewater Treatment employees have been using unearned

> vacation in the past, they have been doing it in clear violation of the language in their collective bargaining agreement. As you note in your Memo, the contract clearly says that vacations are used in the 12 months "following the employee's anniversary date."
>
> The clear language in the contract governs over a past practice which was apparently allowed in error.
>
> I'm sending a copy of this Memo along with your Memo to Ron Clish so that this matter can be addressed.

This memo prompted the instant grievance. The Union reads Willis' memo to say that henceforth employes will not be allowed to use accrued vacation. As the Union sees it, Willis' memo ends the current "practice".

Willis indicated at the hearing that when he wrote the above-referenced memo to Borowski, he was under the impression that employes were taking accrued vacation without the knowledge of management. He indicated he later learned that impression was inaccurate because, as noted above, employes who have taken accrued vacation did so with management permission.

POSITIONS OF THE PARTIES

The Union views this as a past practice case. Consequently, it makes the arguments traditionally made in such cases, namely that a binding past practice exists which the Employer unilaterally changed. It makes the following arguments concerning the practice. First, with regard to its scope, the Union contends that employes have previously been allowed to use accrued vacation. According to the Union, employes do not have to wait until their anniversary date in order to use next year's vacation; they could use it prior to their anniversary date. The Union asserts that when this occurred, vacation was scheduled and taken on the same basis as the vacation available after the employe's anniversary date. With regard to its length, the Union contends this has been the practice for 15 to 20 years, maybe more. The Union notes that according to the City's own records, this has occurred 22 times in the 11 year period between 1985 and 1996. The Union avers that during that time frame, the Employer never denied any employe's request to use accrued vacation prior to the employe's anniversary date. Third, with respect to its knowledge, the Union submits that both bargaining unit employes and management representatives (including two plant superintendents) were aware of this practice. Given the foregoing, the Union believes that a practice exists which is entitled to contractual enforcement. The Union characterizes this practice as an "amenity of work" which should be retained. Next, the Union asserts this practice is not precluded by the vacation language of Article X, Section 1, (c). In the Union's view, the practice is consistent with the contract language and the arbitrator should not find otherwise. However, in the event the arbitrator does find otherwise, and find that the language precludes employes from taking vacation prior to their anniversary date, the Union

contends the parties' lengthy practice has modified that language to allow employes to use their vacation as it accrued. The Union argues that Willis' memo to Borowski changed this practice. The Union notes that before the City changed this practice, it neither notified the Union of same nor proposed any change in the contractual language. The Union argues that if the City wants to change this practice, it must do more than issue a memo; specifically, the Union believes it must raise it in bargaining. The Union therefore contends that the City's elimination of the previous practice violates the collective bargaining agreement. In order to remedy this alleged (contractual) breach, the Union asks that the arbitrator find in the Union's favor, order the previous practice restored, and make whole any affected employes.

The Employer argues that the Union's contention that employes have acquired a right to use accrued but unearned vacation in conditions over and beyond those set forth in the labor agreement must fail for two reasons. First, the Employer relies on the contract language contained in Article X. As the City sees it, Article X, Section 1 is clear and unambiguous in specifying that employes are entitled to use only earned and not accrued vacation. To support this premise, it notes that Section 1(a) states that employes earn vacation only "after" the years of service listed on the vacation schedule. The City submits that "after" means just that (i.e., after). It avers that if the parties had meant to permit employes to use their vacation during the year in which it is accrued, they would have used the word "during" instead of the word "after". The City also notes Section 1(c) provides that "all vacations must be used in the twelve (12) months following the employee's anniversary date." The City reads this sentence to provide that an employe must use earned vacation during the following twelve months. The Employer asks the arbitrator to give these words their intended meaning and find that the contract provides that vacation be granted only after it has been earned. Next, responding to the Union's past practice contention, the City concedes it has granted exceptions to this clear contract language and allowed employes to use their accrued but unearned vacation. The City asserts that just because it has allowed the use of accrued vacation in the past when it was consistent with department staffing does not somehow create an automatic right for employes to use accrued vacation in all circumstances in the future. According to the City, it never "relinquished its right to deny the use of vacation in circumstances beyond those required in the contract." It emphasizes however that it will still entertain requests from employes who want to use accrued vacation before they would otherwise be entitled to use it under the contract. In the Employer's view, the Union in this case seeks not only to trump clear contract language with a past practice, but also seeks to expand on the scope of the past practice itself. The City argues that the Union should not be allowed to use the Employer's generosity in past cases which did not create overtime or staffing problems as a reason for requiring the Employer to grant the use of accrued vacation in all cases. The City urges the arbitrator to reject the Union's attempt to extend the contract beyond its clear terms. It therefore asks that the grievance be denied.

DISCUSSION

Normally in vacation use grievances the Employer has denied a specific vacation request

and that denial is grieved. This particular vacation use grievance though does not involve the denial of a specific vacation request. Thus, no specific vacation request is involved herein. In this case, the parties seek an arbitral ruling concerning whether employes have a contractual right to use accrued vacation. The parties use the phrase "accrued vacation" to refer to the vacation which an employe accrues prior to their (employment) anniversary date. The parties use the phrase "earned vacation" to refer to the vacation which an employe has earned after their (employment) anniversary date. What separates accrued vacation from earned vacation is the (employment) anniversary date. Vacation before the (employment) anniversary date is considered to be accrued while vacation after the anniversary date is considered to be earned. It is undisputed that employes have a contractual right to use earned vacation. As previously noted, what is disputed here is whether employes also have a contractual right to use accrued vacation.

In deciding this contract dispute, attention will be focused first on the applicable contract language. If that language does not resolve the matter, attention will be given to evidence external to the agreement, namely an alleged past practice.

Both sides agree that the contract language applicable here is Article X, Section 1 (the vacation provision). An analysis of that provision follows. Section (a) provides that employes earn vacation "after" the years of service which are listed on the vacation schedule. Section (c) then goes on to provide vacation must be used in the twelve months "following the employe's anniversary date" or they will lose it. This section establishes that an employe must use their vacation during the following twelve months. In the context of this case, the key words in Sections (a) and (c) are "after" and "following". Giving these key words their plain meaning and reading them in context, Sections (a) and (c) establish that employes have to earn vacation before they can take it. In other words, employes can use vacation only after it is earned; they cannot use vacation before it is earned. In my view, Sections (a) and (c) cannot reasonably be interpreted to allow employes to use vacation before they earn it. The language simply does not say that. Consequently, employes are not contractually entitled to borrow from their next year's vacation prior to their (employment) anniversary date. It follows from this that the labor agreement does not require that the Employer grant employe requests to use accrued but unearned vacation (i.e., to borrow from their next year's vacation prior to their (employment) anniversary date).

In a contract interpretation case such as this, a finding that the contract language is clear and unambiguous would normally be the end of the case because there would be no need to look outside the contract for assistance in interpreting the contract language. Thus, if the contract language is found to be clear and unambiguous, as is the case here, it is generally unnecessary to look at an alleged past practice for guidance in resolving the dispute. The problem with this approach in this particular case is that the Union sees this case primarily as a past practice case. If I were to decide this case without any reference whatsoever to the alleged past practice, I would not be addressing the Union's main contention. I have therefore decided to review the Union's past practice contention in order to complete the record.

Past practice is a form of evidence commonly used to fill contractual gaps. It is often used to clarify ambiguous contract language, to implement general contract language, or amend unambiguous contract language. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the contract. In order to be binding on both sides, an alleged past practice must be the mutually understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered as the type of mutually agreeable item that is entitled to arbitral enforcement.

That said, the focus turns to whether the Union established the existence of a practice concerning the use of accrued vacation. It is undisputed that for many years the Employer has allowed employes to use vacation before it is actually earned. Thus, employes have been allowed to borrow from next year's vacation (i.e., to use accrued vacation) prior to their (employment) anniversary date. The Union contends this action established a binding past practice which the Employer is obligated to continue.

Based on the following rationale, I find that just because the Employer has allowed employes to use accrued vacation does not make it a past practice which is entitled to contractual enforcement. The Union's underlying premise that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a binding past practice. Such is the case here. It has already been held that employes do not have a contractual right to use vacation before it is earned. Said another way, the contract does not require that the Employer grant employe requests to use accrued but unearned vacation. Be that as it may, there is no question that the Employer has allowed employes to do so. Specifically, the Employer has allowed employes to use accrued vacation even though the contract language does not permit it. In my view, the key word in the previous sentence is "allowed". When someone "allows" something to happen, they obviously control whether it will or will not happen. That is what has previously happened here regarding the use of accrued vacation. No employe has ever taken unearned (i.e., accrued) vacation without management approval. In each instance where the Employer allowed the employe to use accrued vacation, the employe requested and obtained permission from the Employer to do so. If that had not been the case, and employes had just up and taken unearned vacation without management knowledge or approval, there would be an enforceable past practice because the Employer would have surrendered its right to control the usage of accrued vacation. Here, though, the Employer never surrendered its right to control the use of accrued vacation. In other words, the Employer never relinquished its right to deny the use of vacation in circumstances beyond what is required in the contract. As a result, no enforceable past practice concerning same is found to exist.

The Union is attempting to turn the fact that the Employer has granted past employe requests to use accrued vacation into a contractual right. I find that employes have not acquired a right to use accrued but unearned vacation in conditions above and beyond those set in the

contract. Just because the Employer has previously allowed employes to use accrued vacation when it was consistent with department staffing does not give employes an automatic unilateral right to use accrued vacation in all circumstances in the future.

In so finding, the undersigned believes this decision essentially changes nothing in the parties' relationship. The employes who have used up all their vacation before their anniversary date may still request to use accrued vacation. If that happens, the Employer will still have the discretion, as it always has, to respond to the request as it sees fit.

In light of the above, I issue the following

AWARD

1. That Article X, Section 1 of the collective bargaining agreement does not require that the Employer grant employe requests to use accrued but unearned vacation; and

2. That by granting past employe requests to use accrued but unearned vacation, the Employer has not created a unilateral right on the part of employes to use accrued but unearned vacation. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 16th day of September, 1997.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator