BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN COUNTY SUPPORTIVE SERVICES EMPLOYEES LOCAL 110, AFSCME, AFL-CIO

and

SHEBOYGAN COUNTY

Case 315
No. 55956
MA-10129

(Vacation Time Change)

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin 53083, appearing on behalf of the Union.

Ms. Louella Conway, Personnel Director, Sheboygan County, Sheboygan County Courthouse, 615 North Sixth Street, Sheboygan, Wisconsin 53081, appearing on behalf of the County.

ARBITRATION AWARD

Sheboygan County Supportive Services Employees Local 110, AFSCME, AFL-CIO ("the Union,") and Sheboygan County ("the County,") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, that the WERC appoint a member of its staff to hear and decide a grievance regarding the interpretation and application of the terms of the collective bargaining agreement concerning vacation. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Sheboygan, Wisconsin, on June 3, 1998; it was not stenographically recorded. The parties submitted written arguments and replies in the period July 2, 1998 – July 17, 1998. On September 15, 1998, I wrote to the parties requesting further information regarding the application of language in the collective bargaining agreement relating to the payment of accrued vacation benefits upon termination. On October 23, the parties submitted a joint stipulation describing the practice used for vacation payout.

ISSUE

The Union frames the issue as follows:

Did the Employer violate the contract when it did not grant vacation for use in 1997 according to Article 19 Eligibility to Employees of the Child Support Office and the Clerk of Courts Department? If so, what is the appropriate remedy?

The County frames the issue as follows:

Did the Employer violate the contract and past practice when the employees of the Clerk of Courts and Child Support Offices were only allowed to use the vacation in the bank on January 1, 1997, when the negotiated contract changed these employees to a 40 hour week as of January 1, 1997 and if so what is the appropriate remedy?

I frame the issue as follows:

Did the employer violate the collective bargaining agreement when it credited employees of the Child Support Office and Clerk of Courts Department with vacation accrued prior to January 1, 1997 on the basis of 7.5 hours per day? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE

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ARTICLE 8

WORK WEEK

The work week shall consist of five (5) consecutive work days, Monday through Friday in a pre-established work schedule. The work day shall be seven and one-half (7 ½) hours per day, except for the Maintenance Man I, Maintenance Man II, Electrician, Soil Conservation Technician, Watershed Technician, Watershed Planner, Farmland Preservation Technician, Systems Analyst, Programmer Analyst, Programmer II, Programmer I, Control Clerk II, Control Clerk I, Computer Operator II, Computer Operator I, Printers Assistant, **Land Information Specialist**, Code Administrator, and employees of the **Child Support Office and Clerk of Courts Department,** whose work shall be eight (8) hours. (Emphasis in original).

Employees scheduled to work thirty-seven and one-half (37 ½) hours shall continue to have a minimum of thirty-seven and one-half (37 ½) hours, and Maintenance Man I, Maintenance Man II, Electrician, Soil Conservation Technician, Watershed Technician, Watershed Planner, Farmland Preservation Technician, Systems Analyst, Programmer Analyst, Programmer II, Programmer I, Control Clerk II, Control Clerk I, Computer Operator II, Computer Operator I, Printers Assistant, **Land Information Specialist,** Code Administrator, and **employees of the Child Support Office and Clerk of Courts Department,** shall continue to be scheduled for a minimum of forty (40) hours in every normal work week. All full-time employees shall be guaranteed the full work schedule. (Emphasis in original).

Each office's work schedule shall be determined by the department head upon approval of the Personnel Committee. The employer shall have the greatest degree of flexibility in scheduling hours as it determines necessary.

Work schedules for each office setting forth the work days and hours shall be established as above and assigned on the basis of seniority within the department with the most senior employee qualified to do the work being entitled to select the shift schedule desired. In the event of a change in the schedule from the established schedule to a new regular schedule the shift preference again shall be awarded on the basis of seniority so long as the selecting employee is qualified to carry out the work responsibilities. The work schedule shall be posted in each office and shall not be changed, except for emergency situations, without three (3) working days prior notice to the employees affected thereby. Voluntary temporary exchanges of shifts that in the determination of the department head are not disruptive of office procedures may be permitted on an occasional basis to accommodate the personal needs of employees. If a temporary shift change is requested it will be the employee's responsibility to seek approval, research and attempt to arrange.

Overtime may be scheduled at any time as deemed necessary by the Employer. Overtime shall be distributed as equitably as possible among the qualified employees within the department. The first consideration for overtime shall be given to those employees who are permanently assigned to the job involved. Employees assigned to work the overtime shall be required to carry out such assignments, except that an employee may upon request be released from an overtime assignment if a qualified replacement is available and willing to work.

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ARTICLE 19

VACATIONS

1. Employees Who Earn Vacation: All employees shall earn vacation, except temporary employees.

2. Continuous Service: Continuous service shall include all the time the employee has been in continuous employment status in permanent position. The continuous service of an eligible employee for vacation shall not be considered interrupted if he/she:

a. Was absent for less than thirty (30) calendar consecutive days;
b. Was absent on an approved leave of absence;
c. Was absent on military leave;
d. Was absent due to injury or illness.

3. Computing Years of Service: In determining the number of full years of service completed, credit shall be given for all time employed by Sheboygan County in a permanent position. Any absence of more than thirty (30) calendar days except for military leave and absence due to injury or illness arising out of county employment and covered by the Worker's Compensation Act shall not be counted. Only the most recent period of continuous service may be counted in determining an employee's length of service.

4. Eligibility: After completion of the first twelve (12) months in a permanent position, employees shall be granted non-cumulative vacation based on accumulated continuous service as follows:

Years of Service	No. of Vacation Days
1 year	12 days
2 years	15 days
8 years	21 days
13 years	22 days
14 years	23 days
15 years	24 days
16 years	25 days
17 years	26 days
18 years	27 days

a. Part-Time Employees: Employees who are regularly employed for less than twelve (12) months out of the year in continuous county employment shall be granted pro-rata vacation.

5. Computing Vacation:

a. Vacation credits in any given year shall not be earned for any period of absence without pay except that for administrative purposes any approved leave or leaves of absence totaling thirty (30) calendar days or less in a calendar year may be disregarded.

b. Upon termination of employment vacation shall be pro-rated and paid.

c. Effective January 1, 1981, the vacation year will be on a calendar year basis.

6. When Vacation May Be Taken: In determining vacation schedules the head of the department shall respect the wishes of the eligible employees as to the time of taking their vacation insofar as the needs of the county will permit. Vacation allowances shall be taken during the vacation year except that employees who are required by their department head to defer all or a part of their vacation for a given vacation period may be permitted to take it within the first six (6) months of the ensuing vacation year, after which it will be lost.

7. Vacation on Holidays and Days of Work Suspension: In the event that a holiday falls on a regular workday within the week or weeks taken as vacation or sick leave, such holiday shall not be charged as vacation or sick leave. For any day on which work is suspended, such suspension shall not be construed to extend any vacation to an employee in such status at the time. No sick leave shall be granted while an employee is on vacation.

8. Minimum Vacation Time: Vacation must be taken not less than one-half (1/2) day at a time, except that eligible employees may utilize vacation time in one (1) hour increments to a maximum of fifteen (15) hours in a calendar year.

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ARTICLE 20

SICK LEAVE

1. Employees Who Earn Sick Leave: All permanent employees shall earn sick leave.

2. Accrual of Sick Leave: Sick leave shall hereafter accrue at the rate of eight (8) hours of sick leave for each calendar month of service for each employee working a regular shift of forty (40) hours and employees working a regular shift of thirty-seven and one-half (37 ½) hours shall earn seven and one-half (7 ½) hours of sick leave for each month of service.

a. Sick leave allowance shall be accumulated in the employee's sick leave account until a maximum of nine hundred (900) hours has been accrued, except for Maintenance Man I, Maintenance Man II, Electrician, Soil Conservation Technician, Watershed Technician, Watershed Planner, Farmland Preservation Technician, Systems Analyst, Programmer Analyst, Programmer II, Programmer I, Control Clerk II, Control Clerk I, Computer Operator II, Computer Operator I, Printers Assistant, Code Administrator, **Land Information Specialist, employees of the Child Support Office, and the Clerk of Courts Department positions,** whose maximum shall be nine hundred sixty (960) hours.

b. Sick leave credits in any given year shall not be earned for any period of absence without pay or time otherwise not worked or paid for, except that for administrative purposes any approved absence or absences totaling thirty (30) calendar days or less in a calendar year may be disregarded.

c. All sick leave in excess of the maximum hours specified in (a) above accumulated during any calendar year shall on the first payday in the following January be paid to the employee at the rate of one hundred percent (100%) of the employee's previous year's hourly wage.

d. Sick leave shall not be used until it has been accrued.

e. Part-time employees shall accrue sick leave pro-rated on the basis of time worked.

f. For new or returning employees, seven and one-half (7 ½) or eight (8) (as applicable) hours of sick leave shall be added if the employment commences before the 16th day of the month, and if the employee commences work on the 16th day or thereafter, no sick leave shall be added for that period.

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BACKGROUND

Over the past two decades, the parties have made various changes to the administration of the provisions in their collective bargaining agreements regarding the accrual and use of vacation credits. This dispute concerns the accrual of vacation for certain employes whose workday was increased from 7.5 hours to 8 hours in the 1997-1999 collective bargaining agreement.

Prior to 1980, the parties computed vacation based on an employe's anniversary date. In the 1980-1981 collective bargaining agreement, the parties changed to a computation based on a calendar-year basis. That collective bargaining agreement contained an appendix which reflected a conversion schedule of "eligible vacation hours in 1980."

The 1980-81 collective bargaining agreement provided for an 8-hour workday "for the custodian, maintenance man and assistant building superintendent," and a 7.5-hour workday for all other unit employes. In the 1983-84 collective bargaining agreement, the soil conservation technician was added to the list of 8-hour employes. In the 1985-86 collective bargaining agreement, the list of 8-hour employes was amended to include seven named positions in the data processing department. Testimony at hearing indicated that employes whose workweek was increased in 1985 earned vacation at the same rate as they had when their workweek was 37.5 hours.

At all times prior to the 1992-94 collective bargaining agreement, minimum vacation time was specified as "not less than one-half day at a time." The 1992-94 collective bargaining agreement amended that provision to allow for "use of vacation in one hour increments up to 15 hours per calendar year," which provision remained in effect thereafter.

At all times material to this proceeding, the collective bargaining agreement in force has provided for non-cumulative vacation to an employe "after completion of the first twelve months in a permanent position."

On at least three occasions over the past several years, employes who transferred between 8-hour jobs and 7.5-hour jobs were had their vacation accrual stay constant, neither increasing nor decreasing immediately following their transfer.

At all times material to this proceeding, the collective bargaining agreement in force has provided for vacation to be pro-rated and paid upon termination of employment. The parties mutually understand and have administered this aspect to require the pay-out at the pay rate at the time of the employe's separation.

The 1997-99 collective bargaining agreement added the employes of the Child Support Office and the Clerk of Courts to the roster of employes working an eight-hour day. In the computations for vacation available in 1997, the County credited these employes with the requisite number of days based on a work-day of 7.5 hours.

On March 7, 1997 the Union filed a grievance over the calculation of vacation time and a provision relating to a floating holiday. The Clerk of Courts denied the grievance on that date. Following the Union appeal to step two, Personnel Director Luella Conway wrote on March 24, 1997 as follows:

> I am in receipt of your step two grievance with regard to the change of vacation and holiday hours for those employees presently working a 40 hour work week.
>
> Upon review of previous situations, the vacation hours are earned in the previous year for use in the new year. Therefore, the vacation hours in the bank will remain as added at the beginning of the year for use during 1997. In 1997 the employees will earn vacation at the 8 hours worked per day and in 1998 will have those vacation hours placed in the bank.
>
> The holiday and floating holiday hours will be granted at 8 hours per day. The time banks of the individuals will be adjusted to reflect the 16 hours for floating holiday time. The holidays that occur will be paid at the eight hour day.
>
> This is deemed to be settlement since this has been the past practice and is based on the provisions of the labor agreement.
>
> If you have any questions, feel free to contact me.

Conway again wrote on June 26, 1997 as follows:

> The above mentioned grievance was heard at the Personnel Directors Step on Tuesday, June 10, 1997.

In my letter of March 24, 1997 I responded to this grievance indicating that the holidays and floating holiday hours will be granted at 8 hours per day. This has been accomplished. The amount of vacation in the bank is based on that earned in the previous year. Since the individuals are allowed to use vacation on an hour for hour basis for up to sixteen hours per year any difference in the accumulation will be allowed use under those provisions. The vacation accumulation is appropriate based on the earned of the previous year.

There is no violation of the labor agreement. The grievance is denied.

If you have any questions, feel free to contact me.

The Union thereafter took the grievance to the Personnel Committee, which denied the grievance on September 18, 1997. The Union thereafter filed with the Wisconsin Employment Relations Commission a request for grievance arbitration.

POSITIONS OF THE PARTIES

In support of the grievance, the Union asserts and avers as follows:

The language of the contract is clear – an employee gets days of vacations, not hours. The Employer's argument that the recording or use of vacation in hourly increments is relevant is in error. The Employer further erred in not taking into effect the current length of the day for contract year 1997. The 6.6% increase in wages and benefits for the employes who went from 37.5 to 40 hours per week should be matched by a similar increase in vacation.

The parties could well have written language to support the system the Employer contends is in place. The language administering sick leave specifically provides for different accumulation based on number of hours worked in a week. Similarly, if the parties had intended to tie the amount of vacation to hours worked they could have done so, but they did not. The vacation language does not have a definition of the length of a day, only that employees are entitled to vacation of whole days based on their years of service.

The contract specifically provides for vacation pro-ration when an employe is part-time and works less than 12 months per year, or has extensive absence. None of the grievants fits those terms.

When the length of the work week varies, arbitrators have said the length of the

work week in effect at the time the vacation is taken is the proper one. When the grievants' days were increased the hours of vacation increased to what they were working at the time.

The employe has further failed to prove a past practice existed to support its action. The Employer's exhibits and testimony failed to support its contention.

The purpose of vacation is to give employees time off with pay. The Employer is shorting employees in time off and pay. It gives fractions of days vacation time. The language of the contract is clear. The contract grants "days" of vacation for years of service, not hours of vacation; if the parties had mean that vacation is credited in hours, they would have written the language like sick leave; the contract is specific in when an employee can be prorated; the Employer has failed to prove a past practice exists to support its action.

Accordingly, the grievance should be sustained.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

The County's ongoing practice has been to grant vacation after completion of one year of employment, with vacation hours being placed in the bank for use in the subsequent year. Other departments, especially including the data processing department, have gone from a 37.5-hour week to a 40-hour week, with no change in the bank that was allocated at the time of the change. When the data processing department changed its work week in 1985, there was no change in the vacation treatment until employes had worked a year at the new, 8-hour day.

Further, when employes transferred to different positions with different hours, the vacation bank did not change; there were no additional hours for individuals going from 7.5 hours to 8 hours daily, nor reduction for those whose work-day went from 8 hours to 7.5 hours.

Since at least 1980, vacation has been accumulated and used on an hourly basis, and when the parties negotiated the contract that changed the vacation year from the anniversary year to the calendar year, the necessary adjustment was also made in hours. Further, the collective bargaining agreement allows employes to use up to 15 hours of vacation in hourly increments, supporting the fact that the term "days" has not been given true meaning and the concept of hours in the bank has been accepted by both parties when calculating vacation earned and used.

The specific language of the collective bargaining agreement states that employes earn vacation after the completion of one year, supporting the fact that employes

earn vacation before they can use it. The past practice supports the fact that no change was made in the vacation hours for employes changing work-days. The calculation of the 1997 vacation for employes of the Clerk of Courts Department and Child Support Department was correctly calculated based on hours worked in 1996.

The employer's actions were consistent with the collective bargaining agreement and past practice. The grievance must be denied.

In further support of its position, the Union responds as follows:

The Union does not recall any testimony about vacation bank adjustments as a result of a change in work hours, but does recall a witness from the affected department testifying that she could not recall that happening.

The employer's documents are not pertinent. The document dated 1987 does not deal with a year in which employes changed workweeks, and the exhibits dated 1980 were both prior to the relevant arbitration case and concerned with vacation increases.

The Union further does not recall any testimony concerning what happened to employes who switched to an 8-hour day in 1995. There were no payroll records or testimony produced, and even if it did happen, the employer cannot prove that the Union knew that it did. This alleged instance does not make a past practice. The theory of past practice also faces the barrier of the clear language of the collective bargaining agreement which entitles employes to "days" of vacation. The collective bargaining agreement even allows half days, with no delineation of what the number of hours is for a half day.

Also, if the parties had intended to pro-rate vacation based on hours worked, they would have written the language as in the sick leave provisions. If the employe's vacation was based on hours worked in the year before the vacation use year, they would have said that.

Employes are granted under the collective bargaining agreement "full days of vacation." The arbitrator should grant the grievance.

In further support of its position, the County responds as follows:

The employer agrees with the union's statement that the contract language is of great importance, especially the section on eligibility, which states that employees

are to be granted non-cumulative vacation based on accumulated service. The employees at issue accumulated service based on 7.5 hours per day, which was the vacation granted them.

The reasoning for the adjustment of floating holiday hours had nothing to do with the accrual of earned time for vacation and is not a proper comparison and must be ignored. The reference to pro-rated vacation for part time employees supports the fact that vacation is earned in the year prior to its use.

The reference to the case before Arbitrator Michelstetter is not applicable. That case dealt with an adjustment in the vacation schedule effective with a new labor agreement, not a change in vacation schedule or accrual based on a changed work week.

The reference to the *General Controls* case supports the conclusion that the workweek in effect at the time the vacation is taken is not always the proper calculation. The County has not reduced vacation hours when an employee went from 40 hours per week to 37.5 hours per week. The county has been consistent in its application of granting vacation based on hours in the bank as of the new year when an employee changes from one schedule to another.

The country disagrees with the union's contention that it has failed to prove past practice; the exhibits support the fact that numerous employees had changes in their workweek and the vacation banks were not adjusted for such change. Further, the negotiated contract which changed the hours for data processing personnel did not reflect an adjustment in the vacation hours, and there were no resulting grievances. This lack of response can only be inferred to mean the bargaining unit agreed with the application of vacation usage and establishes an accepted practice.

The language of the collective bargaining agreement and the past practice support the conclusion that the county acted correctly in the accrual of vacation for the affected employes in 1997. There is no violation of the labor agreement, and the arbitrator should deny the grievance.

DISCUSSION

There is no dispute that the collective bargaining agreement makes vacation time available to unit members the year after it is earned. The dispute concerns how that vacation time, which is defined in the collective bargaining agreement as "days," is calculated – as the

days in effect at the time the time was earned, or as the days in effect at the time the benefit was taken.

Several employes went from a workday of 7.5 hours to one of 8 hours, effective January 1, 1997. The number of vacation days they were entitled to in 1997 was based on their tenure as of December 31, 1996. The union contends these employes are entitled to eight hours of vacation for each days' vacation benefit; the employer disagrees, and contends the employes' vacation is measured in terms of the days which the employes worked, or 7.5 hours.

The employer raises several defenses to the grievance – that its actions are consistent with the "work now, receive benefit later" concept inherent in the way the benefit is structured; that its actions are supported by past practice, and that the parties agree that vacation is accrued in hours, not days.

As to past practice, it is well accepted that custom can be an important aspect in interpreting collective bargaining agreements. But it is equally accepted that, to be binding on both parties, such custom must be "unequivocal; clearly enunciated and acted upon; readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties." *Celanese Corp. of America*, 24 LA 168, 172 (Justin, 1954).

The county made a very detailed presentation, complete with personnel records stretching almost twenty years, in an attempt to establish past practice. The county has convinced me that it is seeking to administer the collective bargaining agreement in this instance in a manner consistent with the way it has administered this provision in the past.

But that is not the same as convincing me that its prior administration constitutes a past practice. A change in the work day for identified positions, the underlying transaction, is a relatively isolated and occasional occurrence. The record of the way the county administered the benefits for the employes of the data processing department in 1985-86, or the affect on three employes who transferred between 7.5 and eight-hour days over the past several years, just does not lend itself to the kind of record – unequivocal, clear, readily ascertainable and mutually accepted – needed to establish a binding past practice.

Nor do I find lasting merit in the county's argument that vacation is accrued in hours. The collective bargaining agreement's schedule of vacation benefits clearly and explicitly identifies the benefit in terms of "days." There is nothing ambiguous about the benefit being calculated in days.

The county also finds support in the contractual provision allowing eligible employes to utilize vacation time in one hour increments to a maximum of fifteen hours in a calendar year. This provision, the county asserts, supports its interpretation that the term "days" has not been

given true meaning while the concept of banked hours has been mutually accepted in calculating the accrual and use of vacation. I find that this clause provides flexibility in using accrued vacation time, but does not establish the interpretation the county posits.

There are both practical and policy considerations which argue against the county's interpretation. The purpose of vacation is to give employes a time off from work that corresponds to their work day and work week. Under the county's theory, an affected employe using in 1997 one day of vacation benefit based on the 1996 workday would have .5 hours of work remaining on a "layoff"; and an employe with 15 days vacation would be required to return to work Friday afternoon of their third week off. This certainly is contrary to the generally accepted administration of such a standard benefit.

There are two other aspects of the collective bargaining agreement that I find highly relevant. In Article 20, Section 2, Accrual of Sick Leave, the parties clearly and explicitly differentiated between the two sets of employes. The parties have adopted a collective bargaining agreement under which sick leave accrues at eight hours monthly for those employes working a regular shift of 40 hours, and seven and one-half hours monthly for those workinga regular shift of 37.5 hours. The parties thus not only recognized the difference in hours worked, but demonstrated their ability to tailor specific benefit levels to meet that difference. The presence of this provision, and the absence of a corresponding one in the article on vacation benefits, argues strongly in support of the Union's position.

The Union is also supported by the contractual provision relating to the pay-out at termination of accrued vacation benefits. The parties have stipulated that the economic value of the accrued vacation is calculated in terms of the rate of pay at the time of termination. Thus, any employe with vested vacation benefits earned in 1996 who terminated in 1997 would receive a pay-out which valued the vacation time under the 1997 standard. It is hard to see how the economic value of the vacation time could be in 1997 terms, as both parties agree, while the vacation time itself was counted in 1996 hours, as the county argues.

Finally, I disagree with the employer's statement in its brief that vacation in one year is "based on the hours worked" the prior year. The collective bargaining agreement sets as an eligibility threshold the completion of twelve months in a permanent position; it thereafter correlates accumulated continuous years of service with "number of vacation days." It is only part-time employes regularly employed for less than twelve months whose benefit is based on the hours worked, by virtue of their vacation pro-ration provision. Permanent, full-time employes with more than 12 months continuous service are entitled to the specified number of vacation days calculated in terms of the length of their work-day in the year the vacation is taken.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is sustained. The county shall recalculate the vacation benefit so that unit personnel who moved from a 7.5-hour workday in 1996 to an 8-hour workday in 1997 are credited with the appropriate number of days calculated at eight hours per day.

Dated at Madison, Wisconsin this 28th day of January, 1999.

Stuart Levitan /s/

Stuart Levitan, Arbitrator

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