BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1323-B, AFSCME, AFL-CIO
on behalf of the
DODGE COUNTY SHERIFF'S DEPARTMENT SWORN EMPLOYEES

and

COUNTY OF DODGE, WISCONSIN

Case 203
No. 57148
MA-10529

(Ron Faust Grievance)

Appearances:

Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 944, Waukesha, Wisconsin 53187-0944, for Local 1323-B, AFSCME, AFL-CIO, on behalf of the Dodge County Sheriff's Department Sworn Employees, referred to below as the Union.

Mr. Roger E. Walsh, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, for County of Dodge, Wisconsin, referred to below as the Employer, or as the County.

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 parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute filed on behalf of Ron Faust, who is referred to below as the Grievant. The Commission appointed Douglas V. Knudson, a member of its staff. After Arbitrator Knudson withdrew from the matter, the parties agreed to submit the grievance to Richard B. McLaughlin, another member of the Commission's staff. Hearing on the matter was held on September 1, 1999, in Juneau, Wisconsin. A transcript of the hearing was filed with the Commission on October 5, 1999. The parties filed briefs and reply briefs by November 19, 1999.

ISSUES

The parties stipulated the following issues for decision:

Did the County violate the collective bargaining agreement in its June 4th, 1998, calculation of vacation payout for the Grievant?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE X
VACATIONS

10.1 Regular full-time Employees shall earn paid vacations based upon their anniversary date of employment in accordance with the following schedule:

After one (1) year of employment – two (2) weeks vacation
After seven (7) years of employment – three (3) weeks vacation
Commencing with the fourteenth (14th) anniversary date of employment, Employees shall earn one (1) additional day of vacation for each additional year of employment up to a maximum of five (5) weeks of vacation after twenty-three (23) years of employment.

. . .

10.7 Employees hired after January 1, 1979 must take all their vacation days off within twelve (12) months of the anniversary date they are earned.

10.8 Although vacation is earned upon an Employee's anniversary date, the present procedure of allowing Employees hired prior to January 1, 1979 to take their vacation between January 1 and December 31 of the year in which it is being earned shall be continued. An Employee who terminates employment prior to their anniversary date shall have unearned vacation prorated and deducted from the Employee's pay.

10.9 If termination occurs prior to one (1) full year of employment, the Employee is not eligible for vacation.

. . .

ARTICLE XIII
TERMINATION BENEFITS

13.1 Employees who properly terminate their employment shall receive pay for all accrued vacation . . . which is due them on the date of termination; provided that at least two (2) weeks written notice is submitted and provided further that the Employees are not terminated for just cause.

BACKGROUND

In a letter dated December 21, 1997 to the County's Personnel Director, Joe Rains, the Grievant asked the following three questions:

#1) Using the numbers found on the enclosed time sheet, if I would (have) retired on January 3rd. 1998, what would my total accumulative time for vacation . . . be?

#2) If I would retire July 3rd. 1998 and assuming that all of the numbers contained on the time sheet did not change between now and then, what would my total accumulative time for vacation . . . be?

#3) If I would retire July 3rd, 1998 and assuming that all of the entries on my time sheet (except for sick leave) would show zero, what would my total accumulative time for vacation . . . be?

Rains responded in a letter to the Grievant dated March 13, 1998, which states:

In response to your inquiries of December 21, 1997, please be advised:

You requested that the following information be used as the basis for calculation:
Vacation 184 Hours

. . .

Other factors considered:
Your date of hire: 1/3/77

The vacation benefit as it applies to Dodge County Sworn Employees hired prior to January 1, 1979 is as follows:

"10.8 Although vacation is earned upon an Employee's anniversary date, the present procedure of allowing Employees hired prior to January 1, 1979 to take their vacation between January 1 and December 31 of the year in which it is being earned shall be continued. An Employee who terminates employment prior to their anniversary date shall have unearned vacation prorated and deducted from the Employee's pay."

Earned vacation and uniform allowance for an employee hired prior to 1979 are pro-rated based on the number of hours worked from January 1 of the year of retirement through the date of retirement. This method of computation has been used consistently throughout the period the above language has been in effect. The following responses are based on this same method of computation.

Your questions:
"#1) Using the numbers found on the enclosed time sheet, if I would (have) retired on January 3rd. 1998, what would my total accumulative time for vacation . . . be?"

EARNED VACATION:
1/1 through 1/3 = 24 hrs. worked divided by 1950 hrs. = 1%
1% x 184 vacation hours = 1.75 pro-rated vacation hrs
1.75 hrs. x $18.369/hr = $ 32.15

. . .

"#2) If I would retire July 3rd. 1998 and assuming that all of the numbers contained on the time sheet did not change between now and then, what would my total accumulative time for vacation . . . be?"

EARNED VACATION:
1/1 through 7/3 = 132 days worked x 8 = 1056 hours worked
1056 hrs. divided by 1950 hrs. = 54%
54% x 184 vacation hours = 99.25 pro-rated vacation hours
99.25 hrs. x $18.369 = $ 1,823.12

. . .

> *"#3) If I would retire July 3rd, 1998 and assuming that all of the entries on my time sheet (except for sick leave) would show zero, what would my total accumulative time for vacation . . . be?"*
>
> EARNED VACATION:
> 184 vacation hrs. used minus 99.25 pro-rated vacation hrs. (as in #2 above) =
> 84.75 hrs owed back to County x $18.369 = -$ 1,556.77
>
> . . .
>
> As I stated previously, I find the above methods of computation to be consistent with the computations of other Sheriff's Department employees who have retired.
>
> . . .

The Grievant retired from the County effective May 29, 1998. In a memo dated June 4, 1998, Rains directed the Accounting Department to calculate the Grievant's vacation benefit thus:

> EARNED VACATION:
> 856/hrs. worked (divided by) 1950 hrs. = 44% x 184//hrs. =
> 81.00/hrs. earned/123 used – owe County 42.00/hrs.
> x $18.369 = $ - 771.50

The Grievant responded by filing grievance no. 98-01.

Grievance form no. 98-01 states the relevant circumstances and governing contract provisions thus:

> (The Grievant) retired on 05-29-98 and did earn five weeks vacation in 1997 that should be paid out in 1998 but the county refuses to pay (the Grievant) the five weeks which he has earned.
>
> . . .
>
> Dodge County did violate Article 10 and to be more specific articles 10.1 and 10.8. Also the County violated Article 13, more specifically 13.1 and any other articles that pertain to this contract that pertain to this particular situation.

John Zuleger filed a similar grievance to the Grievant's, and the parties stipulated that the result of this award "will apply to the terms of Mr. Zuleger's grievance" (Transcript [Tr.] at 13).

The parties disputed at hearing and in their briefs whether the governing language of Article X is clear and unambiguous. Thus, the parties dispute the relevance of evidence of bargaining history and past practice to a determination of the merit of the grievance. An overview of that evidence is necessary to flesh out the parties' arguments.

The Evidence Regarding Bargaining History

Past practice evidence, from the County's perspective, must be viewed against the backdrop of relevant bargaining history. Prior to the formation of a bargaining unit of courthouse employes in 1977, non-represented County employes were on a calendar year system of vacation accrual. Highway Department employes were, at that time, on an anniversary year system. The County wanted all employes to be on the same system, and decided to change courthouse employes to an anniversary year system. Garland Lichtenberg, now employed by the County as the Administrative Secretary to the County Board, testified that the change became "a very sensitive and hot issue" (Tr. at 160). The issue was sufficiently divisive that the County delayed its implementation of the change. Ultimately, the County agreed to keep employes hired prior to January 1, 1977 on a calendar system, and to place employes hired after that date on an anniversary year system. County policy governing non-represented employes has thus included the following language at all times relevant to the grievance:

> Employees hired before January 1, 1977 must take off all vacation days earned before December 31st of the year they are earned.
>
> Employees hired after January 1, 1977 must take all vacation days off within twelve (12) months of the anniversary date they are earned.
>
> If termination occurs prior to one (1) year of employment, the employee is not eligible for vacation.

In 1977, the Sheriff's Department included two bargaining units, one which included traffic officers represented by AFSCME and one which included detectives represented by the Teamsters. On January 1, 1981, these two units were merged into one, represented by AFSCME.

At all times relevant to this grievance, the introductory sentence of what now appears as Section 10.1 has been the introductory sentence of the article governing vacations. Section 9.7 of the labor agreement covering traffic officers for the 1977 calendar year stated:

> Employees must take at least two (2) weeks of vacation in the form of time off with pay. Employees who by reason of their length of service are entitled to more than two (2) weeks of vacation shall have the option to taking either additional time off with pay up to the extent of their entitlement, or receiving payment at the end of the year for any unused vacation days beyond two (2) weeks.

The parties amended Section 9.7 in the labor agreement covering the 1978 calendar year to read thus:

> Employees must take all their vacation days off within twelve (12) months of the anniversary date they are earned.

Jerold Witte, the County's Chief Deputy, testified that the anniversary system established by this provision was not in fact implemented by the County in 1978. Rather, the County continued to administer the calendar year system that preceded it.

In the labor agreement covering the 1979 and 1980 calendar years, the parties amended Section 9.7 to read thus:

> Employees hired after January 1, 1979 must take all their vacation days off within twelve (12) months of the anniversary date they are earned.

The first labor agreement covering the merged units was in effect for the 1981 calendar year. John Zuleger served as President of the Teamsters' bargaining unit and as President of the merged unit. He was a member of the bargaining team that negotiated the 1981 labor agreement. Also included on that negotiating team were Armond Schmidt, Russell Berndt and Jane Steinman. John Cherrier, the then-incumbent Personnel Director, and Lichtenberg served on the County's negotiating team for that agreement. Witte also played a role in those negotiations. In the negotiations that produced the labor agreement covering the 1981 calendar year, the Union and the County agreed to leave Section 9.7 unchanged from the 1979-80 labor agreement. The parties also agreed to insert a new provision, as Section 9.8, which states:

> Although vacation is earned upon an Employee's anniversary date, the present procedure of allowing Employees hired prior to January 1, 1979 to take their vacation between January 1 and December 31 of the year in which it is being earned, shall be continued. An Employee who terminates employment prior to their anniversary date shall have such unearned vacation pro-rated and deducted from the Employee's pay.

Zuleger stated that this provision responded to County difficulty in administering two sets of "books" for vacation use. He also noted that neither party agreed to a waiver of any employe's vacation accrual rights. The parties established the grandfathering system of Section 9.8 to permit the phase-out of unit employes who accrued and used vacation under the calendar year system.

Local 1323-G, AFSCME, AFL-CIO represents a unit of technical and support employes. That unit has been covered by a labor agreement since at least January 1, 1981. The agreement covering the unit at the time of the arbitration hearing included the following provisions:

> 11.5 Employees hired before January 1, 1977 must take all vacation days earned before December 31st of the year they are earned.
>
> 11.51 Employees hired after January 1, 1977 must take all vacation days off within twelve (12) months of the anniversary date they are earned.

These provisions have been essentially unchanged since the labor agreement covering calendar year 1981.

Local 1323-A, AFSCME, AFL-CIO represents a unit of County professional employes. That unit has been covered by a labor agreement since January 1, 1989. Each agreement covering this unit since 1989 has included identical provisions to Sections 11.5 and 11.51 set out in the preceding paragraph.

The Evidence Regarding Past Practice

Past practice, as viewed by the County, covers County employes generally since governing policy or labor agreements similarly distinguish between employes grandfathered on a calendar year system and other employes governed by an anniversary system. County personnel records regarding employe terminations date from October 31, 1984. In the law enforcment unit, prior to the Grievant's retirement, seventeen employes qualified for a vacation benefit payout. In each of those instances, the County calculated the payout, whether it generated a credit or a debit, in the same fashion. That calculation spans at least five different employes acting as, or in the capacity of, Personnel Director. Of the seventeen employes receiving a termination benefit, Russell Berndt, Armond Schmidt, Lester Wackett, Steve Tamminga and Walter Orlandoni served as Union officers.

Berndt began County employment on February 16, 1967, and terminated County service effective January 3, 1996. As Berndt considered his termination, Orlandoni, as Union Steward, discussed the calculation of the vacation benefit with Witte. Orlandoni informed Witte that he thought the County was denying terminating employes hired before January 1, 1979, one year of

vacation benefits. Witte informed Orlandoni that in his view, Section 10.8 of the agreement established that vacation, for employes hired before January 1, 1979, was earned in the year it was taken, not in the prior year. Witte and Orlandoni separately discussed this issue with Rains. The County ultimately calculated Berndt's vacation as Witte and Rains had informed Orlandoni it would. Neither Berndt nor the Union grieved the matter. Orlandoni noted that Berndt did not have time records available for review in 1995, and that the discussions concerning Berndt's situation did not include a mutual review of payroll records. From his perspective, the issue was too confused to support a grievance. At the time of his own retirement, Orlandoni mistakenly believed he had received a vacation benefit for his first year of County employment. The grievance posed here is the first formal challenge in this unit to the County's vacation calculation.

In June of 1986 the County terminated the Grievant's employment. In a memo dated June 12, 1986, Lichtenberg stated the County's calculation of the Grievant's vacation benefit thus:

> (The Grievant's) employment with the Dodge County Sheriff's Department has been terminated effective June 11, 1986.
>
> . . .
>
> January 1 through June 11, 1986 equals 42.5% of full year (832.0 hours worked divided by 1957.5 hours in full year).
>
> Vacation: -$153.31
> .425 x 120.0 hours =
> 51.0 hours earned
> -64.0 hours used
> -13.0 hours @ 11.793/hour
>
> . . .

The Union grieved the termination, and the parties eventually agreed to return the Grievant to work with a suspension. A dispute arose concerning whether the Grievant should be paid benefits for the period of the suspension. The Grievant stated his view of the dispute in a letter to Lichtenberg dated December 21, 1986, which states:

> On June 11, 1986 I was terminated from the Dodge County Sheriff's Department and a termination pay out was ordered and received.
>
> On September 12, 1986 my termination was changed to a suspension without pay.

> During my ten years with the Sheriff's Department a number of individuals have served suspensions without pay. Not one of them resulted in any loss of ben(e)fits. As a matter of fact some individuals were given an opportunity to turn in comp time in lieu of the suspension time allowing them to qualify for overtime pay during the time they were serving the suspension.
>
> I therefore request the return of 24 hrs. of Holiday time, 48 hrs. of sick time, 44 hrs. of Vacation time, $176.32 for clothing allowance, full payment for insurance coverage at a rate of $175.00/month and full payment for 10 years longevity based upon the language in the current Union contract.

This dispute did not result in the filing of a grievance beyond that which challenged the termination.

In February of 1981, Local 1323-G filed a grievance on behalf of Marion Skoy, an employe in the Register of Deeds office. The grievance form states the "applicable violation" thus:

> Management has confirmed . . . that upon a planned retirement date of July 1, 1981, Chief Deputy Marion Skoy will be entitled to only 11 ½ days accumulated vacation leave as per union contract language, cited in Article VII paren. 7.5, which states that employees hired before January 1, 1977, must take off all vacation days earned before December 31st of the year they are earned. Article VII paren. 7.51 states that employees hired after January 1, 1977, will take all vacation days off within twelve months of the anniversary date they are earned. Therefore, the employees are recognized to be in two separate groups, with relation to the accru(al) of vacation leave and the implementation of taking this accrued leave. The grievant recognizes the fact that the Union contrac(t) places her in the group of employees hired prior to 1977. However, she states that since her employment in April of 1955, she has been, in fact, granted vacation in accordance with policy set in Article VII paren 7.51, implementing her first vacation leave on her anniversary date after one year employment, and subsequently thereafter acquiring vacation leave every year on her April anniversary date. Therefore, embracing this policy, she is entitled to twenty-three days accrued vacation as of April, 1981, and she is further entitled to additional vacation accrued in the remaining months of her employ . . . prior to retirement on July 1, 1981.

In a letter dated July 1, 1981, the union representative for Local 1323-G stated: "Due to several factors, the Union has agreed to withdraw without prejudice Ms. Skoy's grievance relating to vacation accumulation." Lichtenberg testified the parties did not reach any agreement settling the grievance or demanding any County payment to the Grievant.

It is undisputed that the County has not granted any employe the use of vacation time during their first year of employment.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the evidence, the Union concludes that the contract and relevant bargaining history support the Grievant's view that:

> We earn the same amount of vacation during the same periods of time. When you can use them is the difference.

More specifically, the Union argues that Sections 10.1 and 10.9 apply to all employes, and state that except for employes terminated prior to completion of one full year of employment, "vacation is credited to all employees via Section 10.1." Significantly, "(n)owhere in the contract is there any language which suggests even slightly that regular full-time employees with a year or more of service do not earn vacation during their first year." Section 10.8 does not modify this entitlement, but does permit certain employes to "realize" their vacation prior to their anniversary date.

Article X, viewed as a whole, is clear and unambiguous. The County's view mistakenly assumes "that these employees were on a vacation system that allowed employees to earn and use vacation in the same year." Only "poor logic" supports the view that "employees 'neither earn nor accrue vacation during their first calendar year of employment." The past practice pointed to by the County establishes no more than the County's failure to abide by the contract. In the absence of mutual understanding, there can be no binding practice, and "the Local disagrees entirely with any suggestion that such action was done based upon any mutual process." That individual Union officials may have mistakenly thought they had used vacation in their first year of employment cannot bind the Union, since this rested on mistaken information.

The length of the asserted practice cannot be doubted, but even the testimony of County

witnesses establishes that the practice rested on inertia, not mutual agreement. More to the point, however, Zuleger's testimony establishes that the Union did not waive any accrued vacation during the consolidation of the traffic and detective's units.

Any doubt on this point is overcome by the "plain language of Section 10.9." That language "indicates that the anniversary year, rather than the calendar year system is to be used for all regular full-time employees." Section 10.9 makes this even clearer, by requiring employes to "work one full year before they are eligible for any vacation at all." Thus, according to the Union, the "entire system is predicated on a system in which employees earn vacation one year and take it in the following year." Practice regarding employes "hired prior to January 1, 1979 only confirms" this conclusion.

Thus, there is no practice, only error. The Union concludes that the grievance should be sustained and the "grievant should be made whole."

The Employer's Initial Brief

The County contends that "since 1981, the Contract has clearly and unambiguously provided for **two separate and distinct methods of earning, taking and paying out vacation** depending on whether the employee was hired prior to or after January 1, 1979." Prior to 1978, the Sheriff's department consisted of separate traffic and detective units, each represented by a different union. Both units were on a calendar year system of earning, taking and paying out vacation. In 1978, the AFSCME unit changed the labor agreement to an anniversary system for vacation benefits, but the change in contract language did not prompt any change in contract administration. In the 1979-80 AFSCME contract, the parties created the language currently stated at Section 10.7. In 1981, the two units merged. The agreement covering the merged units continued the language now stated as Section 10.7, and added the language currently stated as Section 10.8. These provisions stated two distinct methods for earning, taking and paying out vacation.

Significantly, the County has consistently applied this language to the eighteen employes, including the Grievant, who have retired from "the Sheriff's Department Sworn Unit." None of the affected employes, prior to the Grievant, objected to the County's calculation of their vacation benefit. The County states the significance of the absence of objection thus:

> A former Union officer was the first one to terminate/retire after the 1981 contract. A Union Steward had a discussion about the calculation for a member of the 1981 Union Bargaining Committee and was told that the County's calculation was proper, and that same Union Steward also terminated/retired shortly thereafter and received the same method of calculation. No pre-January 1, 1979

employee, including Union Officials or members of the 1981 Union Bargaining Committee who terminated/retired ever filed a grievance over the County's method of calculation prior to Mr. Faust's grievance.

Beyond this, the County notes that it applied the same calculation to the Grievant's vacation benefit when it terminated his employment in June of 1986. The Grievant was reinstated, but did not challenge his vacation payout calculation.

The County then argues that its calculation method is consistent for two other AFSCME represented bargaining units and for non-represented employes. The governing language in the Technical Support and the Professional units is the same as that posed here, with the exception of the cut-off date for the two systems and typographical errors. The County has consistently applied its vacation payout calculations to these units, and has defended that calculation in the face of a subsequently withdrawn grievance. County Personnel Policies mirror the language of the two AFSCME units not covered by this grievance. Those policies reflect the same consistent administration that characterizes the administration of the language posed here.

The County concludes that Sections 10.7 and 10.8 "clearly and unambiguously set out two separate and distinct methods of earning, taking and paying out vacation: a calendar year method and an anniversary year method." Even if the language could be considered unclear, County administration of the sections has an unchallenged fourteen-year history. It follows, according to the County, that "the Arbitrator (should) deny and dismiss the grievance."

The Union's Reply Brief

The Union asserts that the County at hearing asserted the governing language was unclear, only to assert in its brief that the language is unambiguous. This "change of heart on the very nature of their argument in this case can not be overlooked." More specifically, the Union contends that the County's argument fails to analyze the governing language, and offers "absolutely no evidence of mutuality regarding the issue of vacation payout."

A review of the record establishes that the parties never agreed to extend to post-1979 hires a benefit not given to pre-1979 hires. There being no mutual agreement "to deny employees hired prior to January 1, 1979 the right to earn vacation during their first year of employment," there can be no binding practice. In fact, the County's arguments establish a "punitive" position that "can not be condoned."

The Union concludes that "the grievance should be granted and the employee should be made whole."

The Employer's Reply Brief

The County rejects the Union's assertion that Section 10.1 establishes a consistent vacation payout system for all unit employes, which was confirmed in witness testimony. Rather, Section 10.1 establishes "that employees earn vacation 'based' on their anniversary date." The section is not determinative regarding the "method of earning." Sections 10.7 and 10.8 establish two methods of earning, which have been confirmed by consistent past practice. Significantly, "Union Officials knowingly acquiesced in the practices and payouts under these two different methods." It follows, according to the County, that "(t)he Union is bound by this acquiescence."

Nor can the two methods be considered to be punitive regarding pre-1979 hires. Those employes retained the ability to take vacation prior to their anniversary date. This benefit clearly means more to an employe hired in December of a calendar year than to one hired in January, but "all pre-January 1, 1979 employees enjoyed some level of benefit." The "down-side" for such employes "is the payout in the year of termination." That downside, however, fails to establish a forfeiture by pre-1979 hires.

Nor can Union attempts to challenge their officials' knowledge of the two methods be credited. Section 10.9 "clearly states . . . that the employee is not eligible for vacation during the first year of employment." Thus, assertions that such officials thought they had taken vacation in their first year cannot be credited.

Testimony that the 1981 negotiations did not produce a waiver of first-year vacation by pre-1979 hires ignores that the purpose of those negotiations was to merge two units, and do away with the calendar system of vacation benefit. Those negotiations froze the old system at January 1, 1979, to let the new system gradually come into being. This establishes two systems, not a forfeiture of any benefit. The pre-1979 hires retained their benefit, "and nothing was waived."

The County concludes that it "has correctly computed (the Grievant's) vacation payout, and therefore, the grievance must be denied and dismissed."

DISCUSSION

The issue is stipulated, and both parties contend the labor agreement unambiguously supports their position. The interpretive difference between the two parties was aptly stated in the Grievant's testimony thus:

Q The contract provides for two different types of vacation accrual(?)

A I don't believe they have two different methods. When you can use them is

> the difference . . . We earn the same amount of vacation during the same periods of time. It's just when you have access to them. Tr. at 34.

Thus, the Union calculates that as of January 1, 1978, the Grievant was entitled to take 80 hours of vacation earned between his hire on January 3, 1977 and his first employment anniversary in January of 1978 (Union Exhibit 5). The County's calculation would be that the Grievant was, as of January 1, 1978, eligible to use 80 hours of vacation. The County views that vacation to be earned in calendar year 1978, with its usage in 1978 conditional on his serving the entire year. Under the County's view, had the Grievant resigned in calendar year 1978 after his first employment anniversary, he would have been entitled to only that portion of the 80 hours corresponding to the percentage of calendar year 1978 that he worked. The parties agree that if the Grievant had been hired on January 3, 1979, he would have been eligible, effective on his 1980 employment anniversary date, to the unconditional use (or payment in case of a resignation) of 80 hours of vacation. The grievance questions the County's calculation of the Grievant's vacation as of his retirement in 1998, but the above example concerning the parties' calculations of the first year entitlement highlights the difference in their views of Article X.

Arbitral authority is rooted in the parties' agreement. First and foremost, this agreement is the written contract executed by them. Contract language that is clear and unambiguous must be enforced, not interpreted. See, generally, *How Arbitration Works*, Elkouri and Elkouri (BNA, 1997), at chapter 9. To the extent the contract is unclear, the most persuasive guides to the resolution of ambiguity are past practice and bargaining history. Each derives its persuasive force from the agreement manifested by the conduct of the parties whose intent is the source and the goal of contract interpretation.

Resolution of the grievance turns on whether the provisions of Article X can be considered ambiguous. The force of the Union's arguments is that the language of Article X is sufficiently clear that it leaves no room for interpretation. Section 10.1 is the strongest support for the Union's position. That provision mandates that "full-time Employees shall earn paid vacations based upon their anniversary date of employment" and states a schedule of entitlements starting "After" specified years of employment. Applied to the example set forth above, Section 10.1 mandates "two (2) weeks vacation . . . (a)fter one (1) year of employment." The Union contends that this section mandates the unconditional access to eighty hours of vacation as of the Grievant's first employment anniversary date. Beyond this, the Union contends that Section 10.9 establishes the only exception to the clear mandate of Section 10.1 and that Section 10.8 does no more than establish a vacation usage benefit for employes hired prior to January 1, 1979.

By its own terms, however, the relationship of the sections of Article X cannot be considered without ambiguity. On its face, Section 10.8 refers to "the present procedure."

This reference expressly brings practice, dating back at least until 1981, into Article X. The reference to practice is itself an acknowledgement of ambiguity. In any event, the terms of Section 10.8 complicate the reading of Section 10.1. Section 10.1 mandates an anniversary year system of vacation accrual. It is not immediately apparent why such a system should be complicated by the reference in Section 10.8 to a calendar year system of usage. At a minimum, this acknowledges a practice concerning calendar year usage, and any such practice is difficult to read on the face of Section 10.1. Beyond this, it can be noted that Article XIII specifies two conditions to the payment "for all accrued vacation," and thus establishes that Section 10.9 cannot be considered to mandate the sole condition to eligibility for vacation benefits. This does not establish that the Union's reading of those provisions is unpersuasive. It only establishes that the Union's reading of those provisions is not the sole plausible view. Because other plausible views are possible, the language cannot be considered unambiguous.

As noted above, the most reliable guides to the interpretation of ambiguous language are bargaining history and past practice. An arbitrator's view of what is reasonable is defensible where contract language indicates the parties have bargained for that view. Where evidence of the bargaining parties' conduct is available, however, the exercise of arbitral discretion is less defensible. I view the issue of whether the County's calculation of the retirement benefit is preferable, as a policy matter, to the Union's to present a close issue. I do not, however, view this policy matter to be posed here. Evidence of bargaining history and past practice is too strong to permit the interpretation, however reasonable, sought by the Union.

As noted above, Section 10.8 by its terms incorporates past practice, and that practice can only be understood through evidence offered by the County. This evidence makes it unpersuasive to read Section 10.8 as the creation of a benefit unique to employes hired after January 1, 1979. Lichtenberg's testimony about the history of the vacation benefit stands unrebutted. The County's attempt to move from a calendar year to an anniversary year system of vacation usage prompted employe resistance, and survived the parties' attempt in the 1979-80 labor agreement to create Section 9.7 to mandate that transition. Thus, Section 10.8 must be read to preserve the then "present procedure of allowing Employees hired prior to January 1, 1979 to take their vacation between January 1 and December 31 of the year in which it is being earned." This preservation of the calendar system could be read to support either party's reading of Section 10.8, but the practice following its adoption supports only the County's.

Arbitrators have stated in varying ways what constitutes evidence sufficient to establish a binding practice. At root, the evidence must be sufficient to warrant inferring agreement. Arbitrator Jules Justin stated one of the most frequently cited standards. That standard is

appropriate here, since it is a demanding one, and the Union disputes whether its agreement can be inferred:

> In the absence of a written agreement, 'past practice,' to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) 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).

There is no dispute that the County's calculation of the vacation benefit due on termination is unequivocal. Each of the seventeen law enforcement unit members who terminated County service between October of 1984 and May of 1998 received a copy of the memo by which the County calculated the vacation benefit payout (whether a debit or a credit). Each memo details the components of the County's calculation. Nor can there be a dispute whether the County clearly enunciated and acted upon its position. Beyond the memos, Orlandoni, Witte and Rains discussed the County's application of its calculation regarding Berndt.

The seventeen examples occurring over a fourteen-year period are sufficient to meet the third criteria stated by Justin. The Union contends that it cannot be bound by this practice, since it never acknowledged its binding force. However, Berndt, Schmidt, Wackett, Tamminga and Orlandoni all received the vacation benefit calculated by the County, and all are Union officials. Schmidt and Berndt served on the team that negotiated the 1981 labor agreement. The termination benefit is a confusing issue and the Union did not review the calculation in the detail it might have wanted to, but this cannot obscure that the benefit was openly announced to Union representatives and acted upon by the County. Nor can it obscure that the underlying records, even if not saved by the affected employe, were available on demand from the County.

Against this background, the County's view of Sections 10.7 and 10.8 must be accepted. Under this view, separate systems for paying out the vacation benefit exist for employes hired before or after January 1, 1979. The County's payment to the Grievant did no more nor less than the County had done for all other terminating employes entitled to the benefit and covered by Section 10.8.

The Union has forcefully argued its position, and it is appropriate to tie this conclusion more closely to its arguments. The Union contends that the separate systems asserted by the County cannot be traced to any mutual give and take during the bargaining process. This indicates there has never been Union assent to the two systems and that adopting them works an

unbargained forfeiture on employes hired prior to January 1, 1979. Initially, it must be noted that if the Union's view of Article X is accepted, there is no clear basis to explain why employes hired

prior to January 1, 1979 can access their vacation before the anniversary date on which it is earned. No give and take in bargaining can explain this preference of pre-1979 hires to post- 1979 hires. The evidence indicates the parties had difficulty making the transition from a calendar year to an anniversary year system. It is not necessary to conclude pre-1979 employes gave anything up to accept the County's argument. Section 10.8 appears to have done no more than to freeze a calendar year system for certain employes. A grandfather clause inevitably favors one group of employes over another. That post-1979 hires acquired a benefit not previously available does not, standing alone, prove a forfeiture. There is no evidence pre-1979 employes ever had the benefit asserted here. This does not make the County's view more reasonable than the Union's. It does, however, point out the difficulty in forcing that view on the County in the face of the evidence of past practice and bargaining history posed here.

The presence of Section 10.9 does not undercut this conclusion. While the Union correctly notes this provision can be read to indicate pre-1979 hires earn vacation in their first year of employment, it is amenable to another view. This provision did not appear in the parties' labor agreement until 1981, with the creation of what now appears as Section 10.8. Thus, it would appear the provision was unnecessary to the implementation of the vacation benefit afforded pre-1979 hires. Its appearance arguably reflects that post-1979 hires, being subject to the anniversary year system, had secured a new entitlement.

The Union characterizes the creation of the dual system as "an error in the way (the County) has computed vacation payouts for employees hired prior to January 1, 1979." The Union's contention that County practice concerning non-represented employes and concerning represented employes in other bargaining units has no binding force regarding the interpretation of this labor agreement can be accepted. However, that evidence is appropriate to consider in assessing the significance of evidence of bargaining history and in determining whether the County made a mistake. Evidence of bargaining history indicates that this dual system has been part of County calculation of vacation benefits since 1977. Its consistency across represented and non-represented employes is undeniable. Its implementation was apparent and open. Terminating employes in other units received the types of memos supplied employes in the law enforcement unit. The withdrawal of the Skoy grievance in 1981 cannot be considered to bind the Union here, but underscores the openness of County practice. This evidence establishes that the Employer's assertion of dual systems was open and implemented consistently on a county-wide basis. This evidence makes it impossible to conclude this Union, in the absence of express evidence of bargaining history showing otherwise, secured a benefit consistently denied all other County employes. Beyond this, it makes it unpersuasive to conclude that the practice asserted regarding this unit constitutes a mistake.

None of these arguments can detract from the force of the Union's concern with the reasonableness of the dual systems. That force, however, if used to grant the grievance, elevates

arbitral discretion over strong evidence of past practice and bargaining history. Such a result would, in my opinion, constitute an unpersuasive reading of the terms of Article X. Sections 10.1, 10.7, 10.8 and 10.9, read together in light of relevant bargaining history and past practice, favor the County's position over the Union's.

AWARD

The County did not violate the collective bargaining agreement in its June 4th, 1998, calculation of vacation payout for the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 4th day of January, 2000.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/gjc
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