BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO

and

FRANKLIN PUBLIC SCHOOLS

Case 68
No. 57979
MA-10796

Appearances:

Mr. Matthew J. Miszewski, Attorney at Law, Podell, Ugent, Haney & Miszewski, appearing on behalf of the Union.

Mr. Mark L. Olson, Attorney at Law, Davis & Kuelthau, appearing on behalf of the District.

ARBITRATION AWARD

The Union and Employer named above are parties to a 1998-2000 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the WERC to appoint an arbitrator to hear and resolve the dispute of Joan Shevey regarding vacation days. The undersigned was appointed and held a hearing on April 6, 2000, in Franklin, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by August 7, 2000.

ISSUE

The issue to be decided is:

> Did the District violate Article 13 of the collective bargaining agreement when it paid the Grievant, Joan Shevey, for 8.5 days of vacation instead of 25 days of vacation when she retired in October of 1999? If so, what is the remedy?

CONTRACT LANGUAGE

13. **VACATIONS:**

A. All employees regularly scheduled four (4) or more hours per day on a full twelve (12) month (fiscal year) basis shall be eligible for vacation with pay on the following schedule:

1) A custodian hired between July 1 and October 31, would be eligible for five (5) days of vacation after six (6) months of employment to be taken by June 30, of that same fiscal year. The following fiscal year this custodian would be eligible for ten (10) days of vacation.

A custodian hired between November 1 and June 30, would be eligible for ten (10) days of vacation after six (6) months of employment to be taken during the fiscal year in which this custodian completes one (1) year of service.

2) Ten (10) days of vacation after one year of service.

3) Fifteen (15) days of vacation after seven (7) years of service.

4) Twenty (20) days of vacation after fifteen (15) years of service.

5) Twenty-five (25) days of vacation after twenty (20) years of service.

. . .

D. All changes from ten (10) days to fifteen (15) days to twenty (20) days to twenty-five (25) days of vacation will occur during the fiscal year in which the seniority date anniversary occurs. There is no proration of vacation days.

BACKGROUND

The Grievant is Joan Shevey, who worked as a custodian in the District from September 24, 1979, until she retired on October 18, 1999. Shevey expected to have earned 25 vacation days after working for the District for 20 years. When she retired, the District paid her for 8.5 vacation days. That's the source of this dispute.

The District's fiscal year starts on July 1st of each year. For the fiscal year of 1999-2000, Shevey worked for four months – July, August, September and October.

Patricia Yunk, the Intergovernmental Affairs and Research Coordinator for Milwaukee District Council 48, testified about the contract's changes regarding vacation language. Yunk maintains a record of all contracts of the affiliated locals and bargaining units. She reviewed the contract provisions of all the contracts between these parties relating to vacations.

Yunk testified that in the initial contract, 1972-74, vacations were to be scheduled normally during the summer months following the year the vacations were earned. The maximum allowed was four weeks after 15 years. In the 1980-82 contract, the parties agreed to five weeks of vacation after 20 years to become effective in July of 1983. Vacations could be taken any time of the year instead of the summer and the District reserved the right to limit the number of vacations during the year. No major changes occurred in the vacation language for several years. In the 1992-95 contract, employees were allowed to use one week of vacation in day increments at the discretion of the building principal. In the 1995-98 contract, the Manager of Buildings and Grounds had the discretion to grant vacation in day increments and requests were to be submitted by December 15th.

The 1998-2000 contract contained several changes. The parties specified amounts of vacation based on when an employee was hired. They agreed that vacations could be taken any time of the year in weeks, days and half-days. Vacations could not be carried over from one fiscal year to the next. The parties also agreed to the language now seen in Article 13(D) that provides for all changes from 10 to 15 days to 20 days to 25 days of vacation will occur during the fiscal year in which the seniority date anniversary occurs and there is no proration of vacation days. Yunk stated that the language provided for the amount of vacation to be given in the fiscal year in which one's seniority date generated that amount of vacation.

Chuck Radish is the head custodian at the Forest Park Middle School. He has worked for the District since January 28, 1980. He became eligible for 25 days of vacation during the 1999-2000 fiscal year. Because he is in his 20th year, he could take the 25 days anytime during the fiscal year. The custodial supervisor sends out vacation forms listing days available and Radish's form shows he is entitled to 25 days.

James Burnham is the Staff Representative for District Council 48, AFSCME, and represents the Local involved in this case. Burnham was involved in the bargaining for the vacation language in the 1998-2000 contract which is at issue here. He recalled that the District proposed language regarding vacation. He understood the language to mean that when an employee completed their 20th year, he or she was eligible for 25 days in that fiscal year, either preceding or following his or her anniversary date. The District agreed that it proposed the language about proration.

Marie Glasgow has been the Director of Human Resources at the District since June 1, 1992. She participates in contract negotiations and keeps employee records and records pertaining to contracts. She helps administrate the contract for this bargaining unit, along with the custodial supervisor, Mike Gagliano, and the Manger of Buildings and Grounds, Mark Cloutier. Glasgow is involved in the third step of the grievance process.

Glasgow testified that when an employee leaves the District, whether for retirement, resignation or termination, the vacation in the last year of employment has always been figured on the basis of what has been earned minus what has been taken. If employees took more than what they earned, the District deducted the amount from their last paycheck.

Glasgow said that the Grievant retired about one month after her anniversary date and was eligible for 25 days of vacation for that fiscal year of 1999-2000. Her eligibility would begin on July 1, 1999, even though she had not reached her anniversary at that point. The Grievant earned four months worth of vacation, according to the District, because she worked during July, August, September and October. The District considered her to have worked the whole month of October, since her retirement was after the 15th of the month. The District divided 25 days by 12 months, then took 2.08 times the four months worked, which equaled 8.33 days. The District rounded that number to 8.5 days and paid her that much.

Glasgow stated that in the past, only people who have completed the vacation year were eligible to receive all those days that were available to them, that one had to earn it in order to use it. Glasgow's understanding of the term "no proration" was that the District gives the employee the benefit of the greater vacation at the start of the vacation year, rather than prorating it before and after the employee's anniversary date.

There have been no grievances in the past regarding vacation accrual or payout. Leonard Musial was the only employee other than the Grievant to retire. The Grievant was the only employee to retire under the 1998-2000 contract.

When Musial retired from a custodial position in 1996, the District notified him that he took more vacation that he earned before his retirement date and allowed him to work an extra five days to pay back the time. The District notified the Local representatives of such action. Musial resigned after completing seven months of work in the current vacation year. The District took the 25 vacation days divided by 12, came up with 2.08, multiplied that number times the seven months worked in that year and determined the number of vacation days for which Musial was eligible. He had taken more than that number and five days had to be paid back in a deduction or time worked. At this time, in 1996, the District was calculating vacations on a calendar year basis.

By 1997, the District was calculating vacations on as fiscal year basis. Vicki Szuta was eligible for ten vacation days when she left the District but had taken five days in the fiscal year. She worked through October 24, 1997, or four months out of the fiscal year, so the District considered her to have earned only 3.32 days and subtracted the remaining 1.68 days from her last paycheck. When the District notified Szuta of its vacation payout, it sent a copy to the Union Chief Steward Chuck Radish as well as to District Council 48 Staff Representative James Burnham.

Eric Doerr was terminated on October 22, 1997, and the District made a similar adjustment on his last paycheck, deducting 2.68 days. The District determined that he had earned 3.32 vacation days but had taken 6 days. Both Radish and Burnham were copied on a letter to Doerr notifying him of such payout.

John Maier did not work the full fiscal year of 1998-99 – he was a new employee entitled to 10 days of vacation but given 1.67 days. Maier had taken 5 days of vacation and the District subtracted 3.34 days of vacation from his last paycheck.

Julie Kumm ended her employment in the District on September 8, 1999. Although she was eligible for ten days of vacation, she had used three. The District deducted 1.3 from her last paycheck because it considered her to be eligible for only 1.67 days based on two months of employment in the fiscal year.

Anna Fox left her job on October 11, 1999, and the District credited her with four months of employment during that fiscal year and vacation year. She had taken 9 days and the District deducted 5.7 days from her last paycheck.

Randy Anderson did not complete the fiscal year of 1997-98, having left the District on November 14, 1997. He was given credit for four months of work, or 3.32 days of vacation. He took 5 days before he resigned and the District deducted 1.68 days from his last paycheck.

Kenneth Kasprzak asked to meet with Glasgow when he was leaving the District and the President of the Local, Dan Ewert, sat in on that meeting along with Cloutier. Glasgow explained in that meeting that vacation can be taken in the year that it is earned and if an employee did not complete the fiscal year, any vacation already taken would be deducted from the last paycheck. Glasgow sent a letter to Kasprzak on July 1, 1998, which states in part:

> Your main concern was to have medical benefits continue through the month of July and you also felt that you were entitled to vacation. Mark and I explained to you and Dan that in our district vacation can be taken in the year that it is being earned. If you do not finish out the entire fiscal year, then the vacation that you had taken but not earned, would be deducted from your last paycheck. Since you had given notice that you would be leaving mid-July, you obviously would not earn any vacation during this fiscal year. It was further suggested that Dan and you consult with Jim Burnham regarding vacation and how it is allocated in the Franklin Public School District. I do believe that we did reach agreement during this meeting that you had not earned any vacation for 1998/99, and therefore, not entitled to additional pay.

Glasgow sent a copy of the above letter to Burnham.

When Jean Schweitzer resigned on September 16, 1996, the District was on a calendar year for vacation. She had worked nine months and the District considered her to be eligible for 15 days of vacation. She had taken 10 and the District considered her to have earned 11.25. The District paid her the 1.25 days not taken.

The term in the current contract regarding "no proration" is in dispute between the parties. Glasgow testified that "no proration" meant that if someone was going from two to three weeks of vacation, he or she would not have so many months at two weeks and then so many months at three weeks, but that the District would give them the benefit of the higher amount of vacation at the start of the vacation year. There was discussion over this language

during bargaining. Cloutier stated in bargaining that the term "no proration" was limited to earnings, not payout. Glasgow did not recall that the Union objected to this interpretation during negotiations.

Glasgow, Cloutier, Custodial Supervisor Mike Gagliano and Associate Principal Janet Barnes represented the District in the negotiations for the current contract. The Union team consisted of Burnham, Radish, Steve Bloomquist, Corey Rynders, Matt Balistreri, Darlene Linnemann, Nate Soloman and Wally Conley. Glasgow testified that it was the District's intent to incorporate existing practices regarding vacations into the contract and the practice for departing employees was that all benefits earned were to be paid out if they had not used them. If they had used more than they earned, those benefits would be deducted.

In the bargaining for the current contract, the Union did not propose any changes regarding vacations. The District proposed to change the time for requests to be submitted and to change the person who could grant vacation time in one-day increments from the Principal to the Manger of Buildings. The Union agreed to both of those proposals. The District proposed the language regarding no proration and that all changes from two to three to four weeks of vacation would occur in the fiscal year in which the seniority date anniversary occurs. That language was ultimately put into the contract.

Burnham did not recall seeing any document that explained the District's interpretation of "proration." He recalled discussions regarding how a newly hired employee would be treated for the vacation schedule, depending on when an employee is hired. Burnham had no recollection of a discussion about the term "proration" during the negotiations. Radish did not recall seeing any document regarding "proration" or having any discussion about it.

THE PARTIES' POSITIONS

The Union

The Union asserts that the language of the collective bargaining agreement is clear and unambiguous and that the past practice replied upon by the District is irrelevant. Even if past practice were allowed in general, the specific past practice relied upon the District should not be allowed as the specific use of the term of art "proration" ended the existing past practice the proper way – through negotiations.

The Union notes that in PEABODY COAL CO., 99 LA 390 (FELDMAN, 1992), the Arbitrator decided upon a similar case regarding vacation benefits and past practice in light of clear contract language. While the decision went against the Union in that case, the principle is that past practice is not binding on an arbitrator where clear contract language is contrary to the practice.

In this case, the Union points out that the Arbitrator is presented with language in the new contract which clearly states that there shall be no proration of benefits. The Employer now tries to twist and contort the language it proposed. Proration of benefits has a specific meaning and the Union testified to its understanding of that term and its application in this case. If the Employer had made the Union aware of its understanding of that term, there would be no grievance.

In PEABODY COAL, the Arbitrator found that because the contract stated that vacation benefits would be prorated, the Union's attempt to show a past practice of providing the entire benefit at retirement was not relevant. The tables are turned here, but the principle is exactly the same, the Union notes. The contract language is unambiguous and calls for no proration. Even the mountain of past practice at hearing cannot overcome the specific language in the contract. The Employer's efforts to redefine the term "proration" are simply unbelievable and incredible.

The Union further submits that any change from the clear collective bargaining language altered in the 1998-2000 bargain would violate the District's duty to bargaining in good faith and such construction must be held invalid. The Union presumes that the Employer would not consciously violate its duty to bargain in good faith. Thus, any argument allowing for an alternate interpretation of the word "proration" must be held invalid as it would represent a clear violation of the Employer's duty to bargain in good faith. In the absence of evidence that the Union understood this term of art to mean something opposite to its plain meaning, it would appear from the testimony at hearing that this was an attempt to get the Union to agree to something it did not intend to. The Union does not assign such motives to the Employer, and thus asks that the argument put forth by the Employer be given no credence.

The Union asks that the grievance be sustained and that the Grievant be made whole.

The District

The District asserts that there is a binding past practice which supports its application of Article 13 of the 1998-2000 collective bargaining agreement. The District has never provided the benefits sought here in over 20 years, going back to the 1980-82 bargaining agreement. The Grievant admitted this at the hearing. The record clearly established that the District has, on numerous occasions, paid vacation to terminating employees based on the identical system used in this matter. Shevey was paid to the portion of her vacation which was earned and not used prior to her termination or retirement. In every past example, whether the employees resigned, retired or were discharged, the vacation payout was identical to that provided to Shevey. The Union provided no evidence of any prior practice to support the Grievant's claim that she should have been given 25 days of vacation payout.

The applicable contract interpretation principle here is well known. The use of past practice to give meaning to ambiguous contract language is so common that no citation to authority is necessary. To be binding, a past practice 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. The District submits that the language in this case is ambiguous and does not address the method by which vacation payout is to be provided to employees who leave the District. Under such circumstances, custom and past practice are to be called upon to clarify the application of the contract.

The District supplied the Arbitrator with numerous examples of employees who terminated their employment and were paid vacation benefits or had benefits deducted from their last payment to reflect their earned and unearned vacation entitlement in their final year of employment. These employees were Musial, Szuta, Maier, Kumm, Fox, Anderson, Kasprzak and Schweitzer. Four of them left under the current contract language.

The District maintains that the past practice must be viewed as binding on the parties – the vacation payout for those leaving during the fiscal year is premised only upon that portion of their vacation entitlement which as been earned during the fiscal year. If an employee has used unearned vacation during this time, the unearned portion of the vacation entitled is to be deducted from the employee's final paycheck.

The Union has never grieved this nor done anything to challenge the past practice before filing this grievance, the District notes. It must be concluded that there has been prior mutual agreement between the parties that employees do not receive full vacation payout at termination. The Union was aware of the past practice. The contract provision which states that there is no proration of vacation days is not clear and unequivocal with regard to the manner in which it has been applied. The term was first introduced into the collective bargaining agreement during the 1998 negotiations. Since then, there have been at least four occasions in which the past practice continued to be pursued by the District without a grievance or objection from the Union.

Moreover, the District adds, both Glasgow and Cloutier testified that the term "no proration" was fully explained to all Union representatives during the 1998 negotiations as not being applied to payout but to entitlement allotment during the transition years between the 5 to 10, 10 to 15, 15 to 20, and 20 to 25 day entitlements. The contract has no statement or direction as to what benefits are to be provided to employees who terminate.

The District contends that the bargaining history does not support the Union. The language regarding vacation was unchanged from the 1980-82 contract until the 1998 negotiations with the sole exception of the 1995 change to reflect a fiscal year rather than a calendar year vacation entitlement. The Union admitted that it was aware that the District paid out only that portion of the vacation entitlement which had been earned by a terminating employee in the final year of his or her employment. The Union never proposed to change anything about vacation payout in either the 1995 or the 1998 contract negotiations. It was incumbent upon the Union to seek changes to reflect its intended interpretation of the vacation payout practice but it did not. Thus, the Union cannot achieve through grievance arbitration a result that it never attempted to achieve in collective bargaining in the first place. Both Glasgow and Cloutier testified that Cloutier explained to the Union bargaining team the meaning of the term "no proration" during the 1998 negotiations.

Finally, the District again states that there is no language in the contract regarding vacation payouts upon termination. The placement of the language regarding no proration was to apply only to the subject matter in that paragraph, namely, the progressive change in vacation entitlement to greater days. The paragraph makes no mention of the term "no proration" being applicable to any other vacation issue and the Union's attempt to extend it to payout and termination issues is hollow and unconvincing.

In replying to the Union's brief, the District asserts that the language cited by the Union is not clear and unambiguous and adds that the language was specifically addressed by the parties during the 1998 contract negotiations. The Union now seeks to superimpose upon the language in question a meaning that it did not seek during contract negotiations. If the Arbitrator were to rule in favor of the Union, she would be setting aside 20 years of past practice, 20 years of Union failure to grieve this practice and 20 years of Union acquiescence to the practice. The arbitration decision cited by the Union is distinguishable on the facts, and that decision specifically exempted past practices from any contract interpretation dispute.

The District asks that the grievance be denied.

DISCUSSION

This is not a case where the contract is ambiguous and the past practice helps interpret it. The vacation entitlement is clear and unambiguous and is based on years of service, not years of service plus the completion of a fiscal year of employment. The past practice is clearly contrary to the contract language and the past practice cannot be used to contradict clear contract language.

One earns vacation by years of service at the District, not by putting in extra time in the fiscal year – that would add several months of service to the contractually agreed upon vacation schedule based on years of service. To require employees to finish a fiscal year in order to be entitled to the complete amount of vacation earned by years of service is contrary to the clear language of the contract, which provides for a certain number of days of vacation after a certain number of years of service.

If the District were to prevail in this case, it would render most of the language regarding vacation entitlement useless. The District contends that an employee earns vacation by working the entire fiscal year in the last year of their employment, but the contract clearly states that one earns vacation by years of service, not by years of service plus completion of the fiscal year. An arbitrator should not add words to the contract that are not there and that is what would have to happen for the District to prevail. Article 8, Section E(5), says that the Arbitrator shall not add to the express terms of the contract.

The District seems to be concerned that because it grants vacation in advance of the entitlement, it is allowed to recover such advance vacation allotments. This award does nothing to change that practice. If employees take more than allowed – that is, allowed due to their years of service, not their completion of a fiscal year – the District may still recoup advanced vacation days.

The fact that the District gives employees an advance on vacation days before they have actually earned them does not allow the District to maintain that one has to work the whole fiscal year to receive the full allotment of vacation which has been bargained for and clearly stated in the contract. After all, a school district generally prefers that custodial employees take vacation in the summer in order to avoid shortages of custodial staff while school is in session. Thus, the District may encourage employees to use up their vacation early in anticipation of earning it later in the year when their anniversary dates occur. But to deny the full allotment of vacation once it is earned upon the requisite years of service violates the contract. It would take away what is granted in Article 13.

While the District has argued that there is no language regarding payout of vacation upon termination, and therefore, its past practice should apply, the payout necessarily follows the entitlement, the amount that has already been earned by years of service, the amount that has accrued to the employee. One of the District's witnesses, Cloutier, stated that in the last year of employment, the vacation earned is calculated based on the number of months worked in that vacation year. This concept and practice of the District's is completely contrary to the contract's premise that vacation earned is based on years of service, not the months worked in a vacation year or fiscal year.

All the parties have to do to determine vacation entitlement is look at the anniversary date and check the contract. The Grievant had more than 20 years of service in the District when she retired. She was entitled to 25 days of vacation because Article 13 in the contract clearly states: "Twenty-five (25) days of vacation after twenty (20) years of service." The contract does not require anyone to complete a fiscal year in order to get his or her full vacation allotment. The years of service is the key – after so many years of service. The Grievant met the requirement – her retirement was after 20 years of service. She was entitled at that point to 25 days of vacation. The District owes her the difference between what it paid to her – 8.5 days – and 25 days.

The dispute here also centers on the sentence in Article 13, Section D, that states: "There is no proration of vacation days." The District interprets this to mean that one has to complete working the fiscal year in order to gain the increased allotment of vacation. However, Glasgow testified that "no proration" meant that the District gave an employee the benefit of the greater vacation at the start of the vacation year, rather than prorating it before and after the employee's anniversary date. In other words, employees could take advances on vacation, assuming they stayed long enough to earn more. And if they did not stay, the District deducted what they had not earned by years of service. However, when someone has earned it and not taken all of it, the District still owes it to that person. The interpretation that the District puts on proration – that it did not want to calculate vacation days before and after an anniversary date – is consistent with this Award. If one takes more than what is earned before the anniversary date and leaves before having earned it by years of service, not by completion of a fiscal year, one may suffer the deduction on the last paycheck. However, where one has earned vacation by years of service and leaves the District, it is an accrued benefit requiring no more than the contractual years of service to fully vest.

Compare, for example, an employee still working, such as Radish, who just became eligible for 25 days of vacation during the 1999-2000 fiscal year. He has reached 20 years of service. He could take the 25 days of vacation anytime during the 1999-2000 fiscal year. Suppose Radish took all the vacation time of 25 days immediately after his 20th anniversary date and continued to be employed. That is perfectly acceptable. Then look at the situation with the Grievant, who also reached her 20th year of service in 1999. Suppose she had chosen to take all her vacation days immediately after her anniversary date of September 24, 1979, and then declined to return to work and submitted her retirement. She would have spent her vacation and none of it would need to be paid out in cash and the District could not deduct it, since she had reached the requisite eligibility threshold to have earned 25 days. In this hypothetical scenario, both Radish and the Grievant would have the same rights to 25 days of vacation. The District would not object to either of them taking it and there would be no dispute if they both kept working. However, the District cannot hold the earned vacation hostage to completion of a fiscal year where it has not bargained for such language. If 25 days of vacation is earned by 20 years of service for one employee, it is also earned by 20 years of service of another employee, even though that employee must leave the District at some point. All employees leave the District at some time and if the District wanted to base the vacation earned during last year of their employment contingent upon completion of a fiscal year, it would need to obtain language to do so.

In sum, the express language of the contract must prevail and a past practice to the contrary cannot be used to alter, modify or amend the plain language of the contract. See WAUSAUKEE SCHOOL DISTRICT, Case 40, MA-10844 (CROWLEY, 12/99). The express language grants 25 days of vacation after 20 years. The Grievant had worked for the District more than 20 years when she retired and had accordingly earned 25 days of vacation. The District violated Article13 of the collective bargaining agreement by not paying her for the full 25 days of vacation that she had earned by her years of service to the District.

AWARD

The grievance is sustained.

The District violated Article 13 of the collective bargaining agreement when it paid the Grievant, Joan Shevey, for 8.5 days of vacation instead of 25 days of vacation. The District is ordered to immediately pay to Joan Shevey the difference for the amount of vacation pay. The Arbitrator will hold jurisdiction until October 31, 2000, for the sole purpose of resolving any disputes over the scope and application of the remedy ordered.

Dated at Elkhorn, Wisconsin, this 6th day of September, 2000.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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