BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MANITOWOC COUNTY SUPPORTIVE SERVICES EMPLOYEES, LOCAL 986-A, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

MANITOWOC COUNTY

Case 364
No. 59412
MA-11284

Appearances:

Mr. Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Mr. Steven J. Rollins, Corporation Counsel, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Manitowoc, Wisconsin, on February 1, 2001, at which time the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed and the parties thereafter filed briefs that were received by March 16, 2001.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Did the County violate Article 3 and/or Article 15 of the contract when it refused to grant grievant Mary Zellner's September 19, 2000 request to take vacation time after her September 6, 2000, anniversary date and, if so, what is the appropriate remedy?

BACKGROUND

The County for a number of years allowed employees to request and/or to use their accrued vacation time after their anniversary date had passed, provided that it was used by the end of that month. If the leave was not used up by the end of the month, it was forfeited.

Grievant Zellner, who has a seniority date of September 6, 1978, thus applied for vacation leave after her anniversary date had passed when she submitted requests on September 10, 1997, September 9, 1998, and September 20, 1999 (Joint Exhibits 10b, 10c, and 10d). She therefore was allowed to use up her vacation time in each of those years.

Based on that past experience, Zellner on September 19, 2000 (unless otherwise stated, all dates herein refer to 2000), asked her supervisor, Clerk of Circuit Court Joe Bauknecht, for permission to use her 22.5 hours of unused vacation by September 30. Bauknecht granted her request on September 19, but that permission was revoked on the same day by Personnel Director Sharon N. Cornils pursuant to the County's policy which requires employees to submit their vacation requests before their anniversary dates. As a result, Zellner was forced to forfeit her 22.5 hours of unused vacation. About eight other employees were forced to forfeit their accrued vacation time for the same reason.

Earlier, Bauknecht on August 29 approved the vacation requests submitted by Roberta Brice and Janet Bonin who had submitted their requests before their anniversary dates and who then asked to take their vacation time after their anniversary dates had passed (Joint Exhibits 8 and 9).

Bauknecht on August 30 told Zellner and other employees at a staff meeting about the County's new policy. Zellner said that she did not then submit a vacation request because she was still under the assumption that she could use her vacation until the end of September as she had in the past.

On August 31, Bauknecht distributed the following memo to all Clerk of Court staff:

. . .

1. Vacation time must be used. (Unless emergency – no extensions.)

2. Overtime must be granted by Supervisor EXCEPT weekends – 1st Supervisor, 2nd Me.

3. Time cards must be initialled by supervisor, then me.

4. Time cards must be filled out daily. Supervisors will inspect time cards. Time cards will be turned in by 12:00 noon on the Friday before payday, unless requested by Payroll Department earlier. Late time cards will be processed in the next pay period. (Emphasis in original). We will not call to remind you.

5. All memos will now include your initials and will be returned to me by date indicated on memo.

Please return this memo to me initialled by September 8, 2000. (Joint Exhibit 3).

Zellner and other employees then initialled the memo and returned it to Bauknecht.

The County Personnel Department's in-house publication, entitled "Benefit News", earlier stated in February, 2000, that employees from then on had to submit their vacation requests before their anniversary dates and that if they did not do so, they would forfeit their vacation time. (Jt. Exhibit 5(b)). The County's Personnel Policy and Procedure Manual (Joint Exhibit 6c) was earlier amended in April, 1998, to the same effect.

Zellner, a Judicial Assistant in the Clerk of Courts' office, testified that she was unable to take her vacation before her September 6 anniversary date because of her work load and because she had to wait for fellow employee Karen Karstaedt to take her vacation before she could take her own. She also said that she was unaware that the County had changed its policy in 2000 to now require employees to submit vacation requests before their anniversary date. She therefore submitted her request after her September 6 anniversary date because she had been told some time ago by someone in the Payroll Department that "vacation time was not taken off the computers until after the end of the month."

Manitowoc County Circuit Court Judge Fred A. Hazlewood corroborated Zellner's testimony by stating that her work load made it impossible for Zellner to have taken her vacation before her September 6 anniversary date. He testified without contradiction:

. . .

"Miss Karstaeadt, as I recall, was planning to take vacation to be in a position to assist one of her sons and his wife with a new baby, and of course when the baby would arrive was somewhat up in the air, but that would be the trigger

event for her vacation, and it was my understanding that Mary put off taking her vacation until that time or that time was known."

. . .

Juvenile Clerk Teresa Shebesta and Civil Clerk Joyce Vnuk both testified that they had not seen the Benefits News that mentioned the County's new policy. Former Payroll Supervisor Peggy Bessert testified about the practice of allowing vacation extensions before 1996 when she left employment. She said that employees regularly were allowed to request vacation extensions after their anniversary dates and to use up all of their accrued vacation by the end of the month. Terri LaViolette, the current Payroll Supervisor and Bessert's successor, testified that employees were granted such vacation extensions from 1997 to 2000 until it was finally changed to reflect the County's new policy. Bauknecht testified that he on September 19 initially approved Zellner's request for a vacation extension, and that it was subsequently denied by Personnel Director Cornils pursuant to the County's new policy. Cornils, in turn, described how that new policy came about and how it was publicized in various County publications.

POSITIONS OF THE PARTIES

The Union contends that the County violated the contract because Zellner "had a clear contractual right to use or extend her vacation based on 'unusual circumstances' that prevented her from using her vacation within one year of its being earned," and because Article 3 guarantees that the past practice surrounding vacation extensions must be continued since the Union has never agreed to change that past practice. As a remedy, the Union asks that the County be ordered to credit Zellner with the 22.5 hours of vacation that she was forced to forfeit.

The County asserts that it did not violate the contract because "the contract expressly requires that an employee's vacation extension be approved by the Employer"; that "The parties have not modified the express language of the contract by past practice"; that its denial of Zellner's request was reasonable; and that she is "not entitled to either a contractual or an equitable remedy."

DISCUSSION

This case turns on the application and interplay between Article 3 of the contract, entitled "Management Rights Reserved", and Article 15, entitled "Vacations".

Article 3 states in pertinent part:

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

Manitowoc County shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject only to the restrictions imposed by this Agreement and the Wisconsin Statutes. In the event the Employer decides to subcontract any work which will result in the layoff of any County employees, said matter shall first be reviewed with the Union.

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its department. The Employer may adopt reasonable work rules except as otherwise provided in this agreement.

The Employer agrees that all amenities and practices in effect for a minimum period of twelve (12) months or more, but not specifically referred to in this Agreement, shall continue for the duration of this agreement. The parties recognize the County's right to implement an Employee Assistance Program. Practices and policies established pursuant to the Employee Assistance Program shall not be considered a past practice, regardless of how long they exist. The County reserves the right to modify or discontinue any portion of the program. The decision of the County to modify or discontinue any portion or all of the program shall not be subject to the grievance procedure. (Emphasis added).

. . .

Article 15 states in pertinent part:

A. Each employee shall earn vacation in the following manner:

One (1) week vacation – upon completion of one (1) year service.
Two (2) weeks vacation – upon completion of two (2) years' service.
Three (3) weeks vacation – upon completion of seven (7) years' service.

Upon completion of nine (9) years of service the employee shall be granted an additional one (1) day per year for each year of continuous service completed from the ninth (9^{th}) year through the eighteenth (18^{th}) year of service so that effective with the completion of the eighteenth (18^{th}) year of service, such employee will be entitled to five (5) weeks vacation.

Upon completion of nineteen (19) years of service, the employee shall be granted an additional one-half (1/2) day per year for each year of continuous service completed from the nineteenth (19^{th}) year through the twenty-second (22^{nd}) year, so that effective with completion of the twenty-second (22^{nd}) year of service, such employee will then be entitled to twenty-seven (27) days of vacation.

B. When a holiday falls within an employee's paid vacation period, the employee shall be granted the paid holiday in lieu of a vacation day.

C. If an employee terminates his or her employment for any reason during the year, he or she shall receive vacation pay at the rate of one-twelfth ($1/12^{th}$) of the total from the anniversary date of his or her employment to the termination date of his or her employment for each month of service during that year.

D. All employees shall be required to use all accumulated vacation time during the year, and each employee shall be obligated to use his or her vacation within one (1) year of its being earned. In the event of unusual circumstances preventing the employee from taking such vacation, he or she must apply to his or her respective Department Head, or the Department Head's designee, subject to the approval of the County Personnel Committee for any deviation from this rule. (Emphasis added).

E. Notice: Each employee shall give a minimum of one (1) week's advance written notice of requested vacation time off. Exceptions may be made by the Department Head, or his or her Designee in the event of emergencies or other urgent and unexpected circumstances. The Employer shall respond and give reasons for any denial in writing within one (1) week of receipt of the employee's request.

These two provisions thus raise the question of whether a past practice has arisen regarding vacation requests under Article 3 and, if so, what effect such a practice has in applying the vacation language of Article 15.

As to the former, the record establishes that a past practice existed which allowed employees to ask for vacation extensions after their anniversary date and to also take such vacations after their anniversary dates, provided only that they were taken by the end of that month. Thus, Zellner herself was granted such vacation extensions in 1997, 1998 and 1999, and Payroll Supervisor LaViolette testified that that was the practice from 1996 until it was changed in 2000. Former Payroll Supervisor Bessert also stated that that was the practice before 1996. Indeed, the record fails to show that any employee before 2000 was ever denied such a vacation extension.

The record also shows that the County unilaterally changed that practice in 2000 without bargaining with the Union and without securing its agreement to any such change. In addition, while there were references to the change in some of the County's publications, there is no proof that any Union officials or Zellner ever read them before Bauknecht told employees at the August 30 staff meeting that the practice had changed and before he distributed a notice to that effect on August 31 (Joint Exhibit 3).

The County claims that this past practice must be disregarded in favor of the language in Article 15, Section D, which states that "each employee shall be obligated to use his or her vacation within one (1) year of its being earned" unless there are "unusual circumstances" in which case a request for a vacation extension must be approved by a department head or his/her designee, after which it must be approved by the County Personnel Committee.

Here, the Union correctly points out that the County's Personnel Committee never reviewed Zellner's extension request, as Cornils testified that that function had been delegated to her by the Personnel Committee. While that may be so, the contract itself does not refer to any such designation. Moreover, since the contract expressly refers to the "Department Head, or the Department Head's designee. . .", when it addresses to whom vacation requests must be submitted, the parties certainly could have referred to the Personnel Committee's "designee" if they had wanted to.

More importantly, Cornils never inquired whether there were any "unusual circumstances" surrounding Zellner's extension request. She was required to conduct such an inquiry because this proviso presupposes that the County will conduct a fair inquiry to determine whether "unusual circumstances" warrant such an extension. Had she done so, she would have learned – as Judge Hazelwood testified - that Zellner's job duties prevented her from taking her vacation earlier. By failing to conduct such a basic inquiry, the County failed to fulfill this important contractual requirement.

In addition, there is no merit to the County's claim that the language of Article 15 trumps Article 3 because the former "clearly and unambiguously states that vacation must be used within one year of its being earned. . ." and because a past practice cannot contradict such clear and unambiguous contract language. For while there is a division of arbitrable opinion on this issue, I believe the best explication of the past practice doctrine was made by Arbitrator Richard Mittenthal who stated:

. . .

> By relying on practice, the burden of the decision may be shifted from the arbitrator back to the parties. For to the extent to which the arbitrator adopts the interpretation given by the parties themselves as shown by their acts, he minimizes his own role in the construction process. The real significance of practice as an interpretive aid lies in the fact that the arbitrator is responsive to the values and standards of the parties. A decision based on past practice emphasizes not the personal viewpoint of the arbitrator but rather the parties' own history, what they have found to be proper and agreeable over the years. Because such a decision is bound to reflect the parties' concept of rightness, it is more likely to resolve the underlying dispute and more likely to be acceptable. A solution created from within is always preferable to one which is imposed from without. (footnote citation omitted) "*Past Practice and the Administration of Collective Bargaining Agreements" from Arbitration and Public Policy, Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators"*, (BNA, 1961), p. 38.

. . .

He added: "The practice, in short, amounts to an amendment of the agreement". Id, at 42. He also observed:

> Thus, the union-management contract includes not just the written provisions stated therein but also the understandings and mutually acceptable practices which have developed over the years. Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was

> entered into upon the assumption that this practice would continue in force. By their silence, the parties have given assent to "existing modes of procedure." In this way, the practices may *by implication* become an integral part of the contract. Id., at 37.

He further stated:

> "Those responsible for the administration of the agreement can no more overlook these practices than they can the express provisions of the agreement. For the established way of doing things is usually the contractually correct way of doing things. And what has become a mutually acceptable interpretation of the agreement is likely to remain so. Hence, the full meaning of the agreement may frequently depend upon how it has been applied in the past." Id., at 37.

The United States Supreme Court also has explained that:

> "the labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the past practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." UNITED STEELWORKERS OF AMERICA V. WARRIOR AND GULF NAVIGATION CO., 363 U.S. 574, 581-582 (1960).

Arbitrator Mittenthal therefore concluded that a "past practice alone" can modify clear contractual language when there has been "mutual agreement to the modification" and when the parties "have evinced a positive acceptance or endorsement of the practice." (Footnote citations omitted). Id, at 42-43.

There is one more principle that must be recognized here:

> "the law abhors a forfeiture. If an agreement is susceptible of two constructions, one of which would work a forfeiture and one of which would not, the arbitrator will be inclined to adopt the interpretation that will prevent forfeiture." *How Arbitration Works*, Elkouri and Elkouri (BNA, 5th Edition, 1997), p. 500. (Footnote citations omitted).

This principle applies here because accrued vacation benefits represent a form of wages that already have been earned and banked. That is why we oftentimes refer to a "vacation bank". As a result, such an important earned benefit cannot be forfeited unless there is the clearest possible mutual agreement to that effect.

The universal past practice here clearly establishes that accrued vacation time is not to be forfeited even if an employee does not request and/or use his/her accrued vacation before his/her anniversary date.

Accordingly, I conclude that the past practice language in Article 3 governs this dispute because the parties over the years mutually agreed that employees could ask for and/or receive vacation extensions after their anniversary dates, provided only that such vacation leave was taken by the end of the month. As a result, this past practice cannot be unilaterally abrogated by the County. Instead, it can only be changed in contract negotiations. The County therefore violated Article 3 when it altered this past practice and when it refused to grant Zellner's vacation extension. She therefore is entitled to have her entire 22.5 hours of vacation restored to her vacation account.

In light of the above, it therefore is my

AWARD

1. That the County violated Article 3 of the contract when it unilaterally altered the past practice surrounding vacation extensions and when it denied grievant Mary Zellner's request for a vacation extension.

2. That to rectify its contract violation, the County shall immediately credit 22.5 hours to grievant Mary Zellner's vacation account and it in the future shall maintain the past practice surrounding vacation extensions until such time as it is changed in contract negotiations.

3. That to resolve any disputes that may arise over application of this Award, I shall retain jurisdiction for at least thirty (30) days.

Dated at Madison, Wisconsin this 5th day of July, 2001.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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