BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

IOWA COUNTY HIGHWAY EMPLOYEES' UNION, LOCAL 1266, AFSCME, AFL-CIO

and

IOWA COUNTY (HIGHWAY DEPARTMENT)

Case 101
No. 57817
MA-10756

(Wesley Gratz Grievance)

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, appearing on behalf of the Union.

Mr. Kirk Strang, Attorney, Davis & Kuelthau, S.C., appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Union and the County, respectively, were parties to a collective bargaining agreement that provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on May 9, 2001 in Dodgeville, Wisconsin. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on September 20, 2001. Based on the entire record, the undersigned issues the following Award.

ISSUE

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

Did the Employer violate the collective bargaining agreement, settlement agreement, and/or past practice in the manner in which it paid out vacation of Mr. Wesley Gratz at his retirement?

If so, what is the appropriate remedy?

The County frames the issue as follows:

Did the County violate the collective bargaining agreement? If so, what is the appropriate remedy?

The undersigned adopts the following statement of the issue:

Has the County denied Wesley Gratz any vacation pay that was due Gratz under a grievance settlement agreement or the collective bargaining agreement?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The following provisions are contained in the parties' 1998-2000 collective bargaining agreement:

ARTICLE 5 – GRIEVANCE PROCEDURE

5.01 Definition: A grievance shall mean any dispute concerning the interpretation or application of a provision of this Contract . . .

. . .

ARTICLE 9 – VACATIONS

9.01 Entitlement Schedule: Each regular employee shall receive vacation with pay at their current hourly rate each year as follows:

a)	After one (1) year	- one (1) week;
b)	After two (2) years	- two (2) weeks;
c)	After eight (8) years	- three (3) weeks;
d)	After sixteen (16) years	- four (4) weeks.

9.02 Notice: Employees shall give the Highway Commissioner, or his/her designee, at least ten (10) working days advance notice of the desired vacation time except in cases of emergency. This notice requirement may be waived at the Commissioner's discretion. Choice of vacation time within a given classification shall be by seniority.

. . .

9.04 Payout at Termination: Employees who give at least two (2) weeks prior notice to quitting and employees whose service is being terminated due to discharge or death or retirement, shall receive all earned vacation based upon actual months of service. If an employee's service is terminated before the sixteenth (16^{th}) of the month, he/she shall not receive credit for such month; however, if the termination occurs on or after the sixteenth (16^{th}) of the month, credit for a full month shall be credited toward the prorated vacation allowance.

. . .

9.06 Carryover: Employees will be permitted to carry unused vacation for up to ninety (90) days beyond January 1^{st} of each year.

. . .

ARTICLE 18 – ENTIRE AGREEMENT

18.01 This Agreement constitutes the entire Agreement between the parties and no verbal statements shall supersede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

. . .

BACKGROUND

The Union and the County are parties to a collective bargaining agreement that, by its terms, was effective from January 1, 1998 through December 31, 2000. This collective bargaining agreement covers certain employees of the County's Highway Department.

On April 16, 1999, after twenty-two (22) years of County employment, Wesley Gratz, hereafter Gratz, retired from the Highway Department. At the time of his retirement, Gratz was a member of the highway bargaining unit represented by the Union. From January 1, 1999 through April 16, 1999, Gratz used 160 hours, i.e., four weeks, of vacation.

On April 28, 1999, Gratz received the following memo:

Date: 4/27/99

To: Wesley Gratz

Cc: Leo Klosterman, Highway Commissioner; Highway Payroll Clerks, Jan Hollaway-Falk, Personnel Director; & Personnel File

From: Roxie Hamilton, Finance Director

RE: Vacation, Sick Leave, and Personal Holiday Pay-out at Termination

I have calculated your vacation pay-out as follows:

Vacation accrued January 1, 1999	160 hours
these accrued vacation hours are earned based on actual months of service 10/17/98-10/17/99	
Number of vacation hours earned for actual months of service 10/17/98-4/16/99 equals 6 months	80 hours
Less Vacation hours used in 1999 from the 1/1/99	(160) hours
Number of Vacation hours that were taken in excess of the amount earned on actual months of service	(80) hours

Wesley, you have only earned 80 hours of the accrued 160 vacation hours based on your full months of service from October 17, 1998 to your retirement date of April 16, 1999. Please see the calculation above. You owe the county for these 80 vacation hours that you have taken in excess of the amount you had earned for your months of service from October 17, 1998 to April 16, 1999 per the union contract section 9.04 Payout at Termination. To aid you in repaying these excess vacation hours taken, I have applied the 20 hours of regular time you worked from April 12 through April 16, 1999 toward the 80 hours of vacation that you owe the County. You will not be paid for these 20 hours on your paycheck dated 4/28/99. Your last day worked was 4/16/99 and I have accrued 8 hours of sick leave on this paycheck for sick leave you have earned for the month of April. I have also applied these 8 hours of sick leave toward the

amount you owe the County for vacation you took in excess of the amount earned. This leaves you with a balance of zero sick leave hours. After the 20 regular hours and 8 sick leave hours are applied to the excess vacation hours taken, you have a remaining balance of 52 hours, which equals $685.36 that is owed to the County by you. Please see calculation below:

Vacation hours taken in excess of amount earned	(80) hours
Regular hours applied from 4/12/99-4/16/99 pay period	20 hours
Sick leave hours accrued for April and applied	8 hours
Remaining balance of vacation hours taken in excess of amount earned	(52) hours
Current hourly rate of pay	$13.18
Amount owed to the County for vacation hours taken before earned	$685.36

Wesley, you accrued 8 hours of personal holiday hours on 1/1/99 and you have taken these hours before your last day of work which leaves you a balance of zero personal holiday hours. You will not receive any payout for personal holiday hours.

Wesley, you can make your payment for the $685.36 you owe the County for the 52 vacation hours taken in excess of the amount earned to the Iowa County Finance Department. You can either drop off your payment at the finance office in the Courthouse or you can mail your payment to the Iowa County Finance Department, 222 North Iowa Street, Dodgeville, Wisconsin, 53533. Please make the check payable to the Iowa County Treasurer.

If you have any questions, concerning the calculation of your final paycheck, you may contact me by telephone at (608) 935-0303.

. . .

On or about May 3, 1999, Gratz filed the instant grievance, which includes the following:

Statement of Grievance:

(Circumstances of Facts): (Briefly, what happened) Employee thought he had 160 hrs. vac. Jan. 1 1999. Used time and then retired in April 16, 1999. Received last pay check April 28, 1999 with letter stating he owes County 80 hrs. of vacation time back to them.

. . .

(The Request for Settlement or corrective action desired): Wants Whats Coming to Him.

Thereafter, following grievance settlement discussions, the following document was prepared:

SETTLEMENT AGREEMENT CONCERNING
THE GRIEVANCE
OF
WESLEY GRATZ
AND
IOWA COUNTY HIGHWAY DEPARTMENT EMPLOYEES

WHEREAS, Wesley Gratz, an employee of the Iowa County Transportation Department, has filed a grievance concerning the accrual of his vacation time; and

WHEREAS, both parties have decided that it is in their present best interests to resolve and compromise the agreement without setting any precedent by doing so; and

WHEREAS, it appears that the appropriate resolution of this matter is to grant Mr. Gratz the relief requested in his grievance on a nonprecedential basis;

THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:

1. The County shall grant the relief requested in the grievance of Wesley Gratz, insofar as the grievance requests that vacation be accrued on a anniversary date basis after the employee's first year of employment, and a calendar year basis commencing on the January 1st of the year following the employee's first anniversary date.

2. Wesley Gratz shall be allowed to use vacation which has accrued under the terms of this grievance settlement, but which was previously denied him by the County. There shall be no further consideration of any kind for this agreement.

3. This is a complete and total resolution of the grievance, and may not be cited as evidence of the grievance of the parties except for the purpose of enforcing its terms and conditions.

Dated this ____ day of ____, 1999.

IOWA COUNTY

By: _____
Jan Holloway-Falk

By: _____
Neil Jefferson,
Personnel Committee Chairperson

_____
Wesley Gratz, Grievant

_____
David White, AFSCME

After this settlement agreement was prepared, White signed the agreement and then Holloway-Falk and Jefferson signed the agreement. Union President Olson then took this settlement agreement to be signed by Gratz.

When Olson returned the settlement agreement, it had been signed by Gratz, but included the following attachment:

TO WHOM IT MAY CONCERN:

"Settlement or corrective action desired" on grievance #3-99 filed by Wesley Gratz regarding vacation upon retirement states: wants what is coming to him.

It is our contention that "what is due to him" is as follows:

January 1, 1999 he was due 4 weeks (160 hours) of vacation
earned in 1998.
Earned vacation from January 1, 1999 thru April 16, 1999.
Computed, this is for 4 months.
160 hours divided by 12 months is = to 13.33 hours of vacation
per month x 4 months is = to 53.32 hours of
earned vacation for 1999.

53.32 hours at 13.18 = 702.76
28 hours at 13.18 = 369.04 (withheld from final check) (20 work hours
_____ and 8 sick)
1,071.80 due to Wesley Gratz

Balance due County 685.36 to be cleared.

If this is to be the complete resolution of the grievance, then we would agree to the settlement of said grievance.

Wesley Gratz /s/
Wesley Gratz, Grievant

J.C. Olson /s/
J.C. Olson, President Local 1266

Holloway-Falk inserted the date "October 25, 1999" on the document that had been signed by all four individuals.

Holloway-Falk, who had not previously seen the "TO WHOM IT MAY CONCERN" document, issued a letter of November 3, 1999, that states as follows:

RE: Settlement Agreement for Grievance No. 3-99

Dear Wesley:

Iowa County acknowledges the receipt and acceptance of the four signed copies of the "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees." Consistent with the terms of the original signed settlement agreements, Iowa County has repaid you the 28 hours of pay withheld from your last paycheck (see enclosed check). As you recall from the memo dated 4/27/99 (copy included) these hours were applied

for the partial payment of the accrued vacation balance taken by you before it was earned. Furthermore, Iowa County forgives the amount owed by you of $685.36, which was also listed in the 4/27/99 memo. Iowa County does not agree with the comments that were attached to the signed original four copies of the settlement agreements that the Personnel Office received on October 25, 1999. These comments do not modify the agreement.

Sincerely,

Jan Holloway-Falk
Personnel Director

Enclosures: 4/27/99 memo copy
Check

cc: Neil Jefferson, Committee Chair of Salary and Personnel
Dale Theobald, Committee Chair of Transportation
Roxanne Hamilton, Finance Director
Leo Klosterman, Highway Commissioner
Mark Hazelbaker, Iowa County Labor Attorney
David White, AFSCME Rep.
Jerry C. Olson, Local 1266 President

POSITIONS OF THE PARTIES

Union

The Union contends that the County did not properly calculate Gratz's vacation payout at retirement. The Union begins its analysis with the premise that Article 9 of the parties' labor contract does not specify the exact manner in which vacation payout upon termination from employment is to be calculated. The Union asserts, therefore, that the language of the contract is susceptible to alternative interpretations and must be considered to be ambiguous.

The Union maintains that, given this ambiguity and the fact that there has been no relevant change in the applicable contract language, that this language must be construed in a manner that is consistent with the past practice of the parties. The Union asserts that inasmuch as the practice of the parties is 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties, this practice is binding upon the parties.

According to the Union, this binding past practice is as follows: when an employee leaves the service of the County, the employee receives a payout for the vacation that he/she received on January 1, and, in addition, receives a pro-rated amount of the vacation that he/she would have received on the subsequent January 1, based upon the proportion of the calendar year that the employee worked. The Union asserts that this binding past practice is established by the uncontradicted testimony of Highway Account Clerk (and Union witness) Bettye Toman, as well as the Highway Department print outs regarding employees who had left County employment in 1996.

The Union contends that, inasmuch as the Highway Commissioner reviews the payroll sheets, the County may not reasonably claim that it was not aware of the practice. The Union further contends that the County's claim that the practice was not mutual is absurd.

The Union maintains that the County's evidence concerning four employees who have recently been terminated and who have received a payout consistent with the County's view of the vacation payout calculation is suspect. The Union further maintains that the Union was never notified of any deviations to the practice that occurred prior to Gratz's retirement.

The Union notes that the Union prevailed on the grievance regarding Brian Steffes' termination and the parties reached a settlement on the termination of Dennis McKernan. The Union asserts, therefore, that, in each of these cases, the particular method of payout of vacation benefits is a moot point. With regard to Kevin Russell and Robert Trace, the Union contends that it is unclear from the record evidence whether there is any practical difference between the Union's and the County's view of the calculation of vacation payout. Additionally, the Union notes that the record does not contain sufficient documentation to determine what was actually received by these two employees.

Building upon the premise that a binding past practice exists, the Union contends that the County did not follow this practice when it calculated Gratz's vacation payout. The Union contends that the County did not treat the vacation that Gratz received on January 1 as vacation that was "owed", but rather, as vacation that was being earned.

According to the Union, the County's method of calculating Gratz' vacation payout is not only inconsistent with the parties' binding past practice, but also is inconsistent with the language of Sec. 9.06 of the labor contract. The Union maintains that Sec. 9.06 recognizes that vacation is based on the calendar year and that the County is treating vacation as if it were based on the employee's anniversary year. In the Union's view, carryover of vacation for a maximum of 90 days after January 1st makes no sense if vacation is based on the anniversary date.

The Union argues that the County has introduced a formula for calculating vacation payout that is at variance with the contract language and the past practice that is embodied in the contract language. The Union asks the arbitrator to reject the County's formula and enforce the practice that is binding upon both parties. As remedy for this breach of contract, the Union asks that the arbitrator award Gratz the pay for 53.32 hours, which number is obtained from pro-rating four weeks of vacation from January 1, 1999 through the end of April of 1999.

County

The County asserts that the Union has not offered a coherent explanation of how employees earn vacation under the alleged practice or of how the proffered practice is derived from, and is consistent with, the contract language. The County maintains that Sections 9.01 and 9.04 of the labor contract support the County's method of computing vacation payout.

The County notes that Sec. 9.01 specifies how vacation pay is earned. The County asserts that this section establishes that an employee's "anniversary date" is the basis for computing vacation entitlements because an employee does not earn their first week of vacation, nor any additional week of vacation in a plateau year, until the employee has passed his or her anniversary date. Thus, in the County's view, the plain language establishes that an employee earns a particular amount of vacation "after" working a specified number of years. Building on that point, the County submits that employees can reach new levels of vacation entitlement only after serving the full number of years that appear on the vacation entitlement schedule, and that full year's service is calculated based on the anniversary date.

The County contends that Sec. 9.04 is consistent with the years of service requirement of Sec. 9.01, and requires the payout of *earned* vacation, with vacation being earned for work actually performed. According to the County, vacation must be "earned" to be due and owing under this provision and vacation payout is based upon the "actual . . .service."

The County maintains that, giving effect to Sections 9.01 and 9.04, requires the conclusion that vacation payouts are based on the exact amount of vacation earned, down to the years and months served. The County denies that vacation payout is determined by the system of employees selecting vacation times on a calendar year basis in order to schedule time off for all continuing employees, as the Union appears to be arguing.

Responding to the Union's past practice argument, the County contends that the language of Article 9 is clear and, thus, any evidence of an alleged past practice should not be considered. The County further contends that the parties' agreement contains an "entire agreement" provision in Article 18 and, thus, any unwritten practice that would modify the agreement is non-binding.

The County denies that the "past practice" relied upon by the Union is unequivocal, clear or mutual. The County notes that Toman and the other accounting clerk who performed the vacation payout calculations relied upon by the Union are bargaining unit personnel, as is the office manager who initials payroll calculations (including payouts). The County asserts that no management employee was ever specifically notified of the vacation payout calculation used by these bargaining unit members. The County notes that the standard payroll submission is the only information provided to County management and this submission is devoid of information on how the payout is calculated.

The County maintains that it believed that the highway unit was calculating vacation payouts in the same manner as the other County AFSCME units. The County further maintains that, once it discovered the method of calculation being used in the Highway Department, the County objected to this method of calculation and, thereafter, consistently employed the calculation that was used in Gratz's vacation payout.

The County avers that, even if the arbitrator accepts the Union's view of the vacation payouts made to four employees in 1996, the Union overstates the significance of these payouts. The reason being that any past practice established by these payouts was terminated by County in 1997, when the County protested this method of calculating vacation payouts to the Union.

The County asserts that the Union's method of calculating vacation payout not only corrupts the contract mandate that vacation be earned on an anniversary date basis, but also, produces unfair and inequitable results. The County maintains that its method of calculating vacation payout, unlike the Union method, does not entitle employees to earn vacation when no corresponding service has been performed and provides the same benefit to employees with the same level of seniority. The County further maintains that the Union's method of calculating vacation payouts does not serve the obvious purpose of the pro-ration clause of Section 9.04, which ensures that the payout corresponds to the employees exact length of service.

The County requests that the grievance be denied.

DISCUSSION

Issue

The parties were unable to agree upon a statement of the issue. The Union has framed the issue by requesting that the arbitrator make a determination as to whether or not there has been a violation of a settlement agreement, the collective bargaining agreement and/or past practice. The County has framed the issue by requesting that the arbitrator make a determination as to whether or not there has been a violation of the collective bargaining agreement.

Article 5 of the parties' collective bargaining agreement defines a grievance as a "dispute concerning the interpretation or application of a provision of this Contract . . ." Thus, absent an agreement of the parties, it would not be appropriate for the arbitrator to determine whether or not there had been a violation of either a settlement agreement or a past practice, unless the past practice was of the type that gave meaning to a provision of the contract.

The "settlement agreement" that the Union has placed before the arbitrator is a grievance settlement entitled "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees." Given the fact that, at hearing, the County also requested that the arbitrator determine whether or not there has been a violation of this settlement agreement, the parties have agreed to provide the arbitrator with jurisdiction to determine whether or not there has been a violation of this settlement agreement.

The County and the Union did not reach any agreement with respect to the arbitrator's jurisdiction to determine past practice, other than that which is reflected in the parties' collective bargaining agreement. Accordingly, the only past practice that may be considered by the arbitrator is one which may give meaning to an ambiguous contract provision.

As set forth in Holloway-Falk's letter of November 3, 1999, the County has repaid the 28 hours of pay that was withheld from Gratz' last pay check and has forgiven the remaining balance of the vacation that it had sought to recoup from Gratz. Thus, the Grievant's challenges to these actions are now moot.

Upon consideration of the relevant contract language and the agreement of the parties, the undersigned considers the following statement of the issue to be appropriate:

> Has the County denied Wesley Gratz any vacation pay that was due Gratz under a grievance settlement agreement or the collective bargaining agreement?
>
> If so, what is the appropriate remedy?

Settlement Agreement

The "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees" that is dated October 25, 1999, purports to be a resolution of the Gratz grievance "concerning the accrual of vacation time." By entering into a valid settlement agreement, each party to the agreement would waive its right to have this Gratz grievance decided on its merits and would be bound by the grievance resolution that is contained in the settlement agreement. Thus, prior to addressing the parties' arguments regarding contractual rights, the undersigned must first decide whether or not there is a valid grievance settlement agreement.

By signing the document entitled "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees", Union Representative David White, County Representative Holloway-Falk, and County Representative Neil Jefferson agreed to be bound by the terms of this settlement agreement. By placing Gratz' signature line on the "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees," the Union and the County have demonstrated that Gratz' agreement is necessary in order to effectuate this grievance settlement.

Gratz signed the "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees", but attached the "TO WHOM IT MAY CONCERN" document to this settlement agreement. This "TO WHOM IT MAY CONCERN" document states that Gratz' agreement to the "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees" is contingent upon Gratz receiving certain "corrective action" specified therein.

After Holloway-Falk received the "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees," that had been signed by Gratz, she issued the letter of November 3, 1999, advising Gratz and other interested parties that the County did not agree with the comments contained in the "TO WHOM IT MAY CONCERN" document and that these comments did not modify this settlement agreement.

As her letter of November 3, 1999 reveals, Holloway-Falk took issue with only one of the specified "corrective actions", i.e., that Gratz is entitled to receive 53.32 hours of vacation accrued from January 1, 1999 through April 16, 1999. If the County is correct in its assertion that the "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees" does not provide Gratz with a right to these 53.32 hours, then Gratz has not agreed to the "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees" that was signed by White, Holloway-Falk and Jefferson and there would be no valid settlement agreement on the Gratz grievance.

Neither party offered any evidence with respect to the discussions that lead to the "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees." Thus, the parties' intent must be gleaned from the plain language of this document.

Paragraph Three of the "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees" expressly recognizes that the appropriate resolution of the grievance is "to grant Mr. Gratz the relief requested in his grievance on a nonprecedential basis." This "intent" is confirmed in Item 1 of the settlement agreement, which states as follows:

> The County shall grant the relief requested in the grievance of Wesley Gratz, insofar as the grievance requests that vacation be accrued on a (sic) anniversary date basis after the employee's first year of employment, and a calendar year basis commencing on the January 1st of the year following the employee's first anniversary date.

The Gratz grievance, on its face does not address the issue of how employees accrue vacation. It only states that Gratz believed that he had 160 vacation hours on January 1, 1999 and when he received his last paycheck, he received a letter stating that he owed 80 hours of vacation back to the County.

This letter, which is dated April 27, 1999, is from County Finance Director Hamilton. In this letter, Hamilton states that the vacation available to Gratz on January 1, 1999 is eighty days of vacation, earned by working from Gratz' anniversary date of October 17, 1998 until his retirement date of April 16, 1999. Hamilton further states that, to earn 160 days, Gratz would have to work from October 17, 1998 until October 17, 1999.

The letter of April 27, 1999 gives context to the grievance. This letter, as well as the plain language of the grievance, indicates that Gratz was contesting the County's decision that, on January 1, 1999, Gratz was not owed 160 hours of vacation, but rather, was owed 80 hours of vacation. Thus, the relief requested in the grievance, i.e., "what's coming to him", is the additional eighty hours of vacation that Gratz took prior to his retirement and that the County was seeking to recoup in its letter of April 27, 1999.

The letter of April 27, 1999 provides an explanation for the reference to anniversary dates and calendar years contained in Item 1 of the settlement agreement. At the time of the grievance, Gratz had passed his first anniversary date. Thus, the relief provided in Item 1 of the settlement agreement is the vacation that the Gratz grievance claims is due Gratz on January 1, 1999, i.e., 160 hours.

Item 2 states as follows:

> Wesley Gratz shall be allowed to use vacation which has accrued under the terms of this grievance settlement, but which was previously denied him by the County. There shall be no further consideration of any kind for this agreement.

For the reasons discussed above, the vacation that accrued to Gratz under the terms of the grievance settlement was 160 days on January 1, 1999. As set forth in the grievance and the letter of April 27, 1999, the portion of this accrued vacation that had previously been denied by the County is 80 hours.

Gratz' written grievance does not request 53.32 hours for vacation earned from January 1, 1999 through April 16, 1999. Nor does it raise any issue with respect to vacation earned from January 1, 1999 through April 16, 1999. It is not evident that, prior to the time that White, Holloway-Falk, and Jefferson signed the "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees," this written grievance was modified to include a request for these 53.32 hours of vacation.

In summary, the record fails to establish that the "Settlement Agreement Concerning the Grievance of Wesley Gratz and Iowa County Highway Department Employees," that was signed by White, Holloway-Falk, and Jefferson includes an agreement to pay Gratz the 53.32 hours of vacation claimed by Gratz in his "TO WHOM IT MAY CONCERN" document. Accordingly, the grievance settlement agreement signed by Gratz is not the grievance settlement agreement that was signed by White, Holloway-Falk, and Jefferson.

Inasmuch as Gratz did not sign the settlement agreement that had been agreed to by the County, but rather, signed a modified settlement agreement that had not been agreed to by the County, there is no valid settlement agreement on the Gratz vacation accrual grievance. Accordingly, there is no merit to the Union's claim that the County has violated a grievance settlement agreement.

Collective Bargaining Agreement

As the April 27, 1999 letter from County Finance Director Hamilton demonstrates, the County believes that, under the language of the collective bargaining agreement, Gratz is entitled to a retirement payout of eighty (80) hours of vacation. The Union argues that, under the language of the parties' collective bargaining agreement and the parties' past practices, Gratz is entitled to a retirement payout of 160 hours of vacation earned on January 1, 1999 and an additional 53.32 hours of vacation earned by working from January 1, 1999 to April 16, 1999.

Prior to considering the Union's arguments with respect to past practice, the undersigned must first consider the contract language. In making their respective arguments, each party relies upon language contained in Article 9 of the parties' collective bargaining agreement.

Section 9.01 of the collective bargaining agreement states as follows:

> Entitlement Schedule: Each regular employee shall receive vacation with pay at their current hourly rate each year as follows:

a)	After one (1) year	-	one (1) week;
b)	After two (2) years	-	two (2) weeks;
c)	After eight (8) years	-	three (3) weeks;
d)	After sixteen (16) years	-	four (4) weeks.

Under the plain language of Section 9.01, a defined amount of vacation is to be "received" each "year." This section, however, does not define "year." Inasmuch as vacations may be "received" on either an anniversary year or a calendar year, the undersigned consider this language to be ambiguous.

Section 9.04 of the collective bargaining agreement states as follows:

> 9.04 Payout at Termination: Employees who give at least two (2) weeks prior notice to quitting and employees whose service is being terminated due to discharge or death or retirement, shall receive all earned vacation based upon actual months of service. If an employee's service is terminated before the sixteenth (16^{th}) of the month, he/she shall not receive credit for such month; however, if the termination occurs on or after the sixteenth (16^{th}) of the month, credit for a full month shall be credited toward the prorated vacation allowance.

Under the plain language of the first sentence of Sec. 9.04, Gratz is entitled to a vacation benefit upon his retirement, i.e., "all earned vacation based upon actual months of service." Earning vacation based upon "actual months of service" is as applicable to vacation earned on an anniversary year basis, as it is to vacation earned on a calendar year basis.

In summary, the language of Article 9, relied upon by the parties, does not define whether vacation is earned on a calendar or anniversary year basis. Thus, the language of the collective bargaining is unclear and ambiguous with respect to the calculation of the vacation benefit due Gratz under Sec. 9.04.

Arbitrators generally recognize that ambiguous contract language may be clarified by evidence that is extrinsic to the contract, such as past practice. Article 18 precludes an arbitrator from giving effect to an unwritten practice that "supersedes" a provision of the contract, or is a supplemental amendment to the contract. It does not preclude the undersigned from considering evidence of past practice that is being used for the purpose of giving meaning to an ambiguous provision of the parties' agreement.

Past Practice

It is generally accepted by arbitrators that, for a practice to be considered indicative of the parties' mutual intent, the conduct must be clear and consistent, of long duration and

accepted by both sides. The Union, contrary to the County, asserts that the evidence of past practice meets all of these criteria and, thus, is entitled to be given effect herein.

Bettye Toman was employed as an Account Clerk in the Highway Department from 1975 to January of 2001. During her employment, Toman was responsible for calculating the vacation benefits of Highway Department employees. According to Toman, all the Highway Department Clerks that calculated these vacation benefits used the same procedure for calculating vacation benefits. The record does not demonstrate otherwise.

The procedure described by Toman is as follows: A Highway Department employee had to work one year in order to be eligible for vacation. On the employee's first anniversary date, the employee was provided with one week of vacation to be used prior to the end of the calendar year. On the January 1st that follows the first anniversary date, the employee would be provided with one week of vacation to be used prior to the end of the calendar year. On the employee's second anniversary date, the employee would be provided with two weeks to be used prior to the end of the calendar year. On the January 1st that follows the second anniversary date, the employee would be provided with two weeks to be used prior to the end of the calendar year. On January 1st of each succeeding year, the employee would be provided with two weeks of vacation to be taken by the end of the calendar year. In the year in which the employee had his/her eighth anniversary date, an additional three weeks of vacation would be provided to the employee on his/her eighth anniversary date, to be taken by the end of the calendar year. On January 1st of each succeeding year, the employee would be provided with three weeks of vacation to be taken by the end of the calendar year. In the year in which the employee had his/her sixteenth anniversary date, an additional four weeks of vacation would be provided to the employee on his/her sixteenth anniversary date, to be taken by the end of the calendar year. On each succeeding January 1st, the employee would be provided with four weeks of vacation to be taken by the end of the calendar year.

As a result of the adoption of Sec. 9.06, vacation was not required to be used by the end of the calendar year, but rather, employees were permitted to carry unused vacation into the new year. There was no other change to the vacation provision and the change in Sec. 9.06 did not alter the manner in which the Highway Department Clerks calculated the vacation benefit.

All Highway Department employees are required to request vacation days on a form provided by the Highway Department. This form contains the employee's name, the number of vacation days requested, the dates on which the vacation days are requested, and the employee's anniversary date. Vacation requests submitted on these forms are approved by the Department Head.

A review of these vacation requests would provide County management with the information necessary to determine the amount of vacation that was taken by an employee during any calendar year, or during any anniversary year. Thus, at the time that employees reached their first, second, eight and sixteenth anniversary date, County management knew, or should have known, that the vacation provision was being applied in the manner described by Toman.

By approving the vacation requests of the Highway Department employees, the Department Head has acquiesced to the vacation calculations that were made by the Highway Department Clerks. Accordingly, at the time that parties entered into their 1998-2000 collective bargaining agreement, the method for calculating vacation benefits described by Toman was clear and consistent, of long duration and accepted by both sides. Notwithstanding the County's argument to the contrary, the procedure described by Toman is a past practice that may be considered when giving meaning to the ambiguous language contained in Sec. 9.01 of the parties' labor contract.

Toman also gave testimony with respect to the procedure for paying out vacation under Sec. 9.04 of the collective bargaining agreement. Toman's testimony demonstrates that, for at least twenty years prior to the 1998-2000 agreement, when an employee retired or left the department, the employee received a payout for vacation that had been provided to the employee on January 1, but had not been used by the employee. Additionally, the employee received a pro-rated amount of the vacation that he/she would have received on the subsequent January 1, based on the proportion of the calendar year that the employee had worked.

In support of Toman's testimony, the Union offered Highway Department documents demonstrating the 1996 vacation usage of Martin Connell, Walter Lindeman, Gordon Rundle and Cecil Sickels, each of who left County employment in a manner that would have entitled the employee to receive a Sec. 9.04 vacation payout of "earned" vacation. These documents demonstrate that, in the calendar year in which these employees left County employment, the employees were paid, and thus were considered to have "earned", vacation in an amount equivalent to that which they would have received on January 1, under the Highway Department Clerks' method of calculating vacation benefits. Additionally, each of these employees were paid, and thus were considered to have "earned, vacation in an amount that is equivalent to that which they would have received on the subsequent January 1, based on the proportion of the 1996 calendar year that the employee had worked.

Apparently, this 1996 vacation usage was made prior to the point in time that employees were allowed to carryover vacation into the subsequent calendar year. Thus, the evidence of the 1996 Highway Department documents is consistent with Toman's testimony that, in the year that the employee becomes eligible for vacation payout under Sec. 9.04, the employee "earns" the vacation that is provided to the employee on January 1, as well as the

vacation that the employee would have been provided with on the subsequent January 1, based upon the proportion of the calendar year that had been worked by the employee. Given the failure of the County to provide any evidence to rebut Toman's testimony, as well as County Finance Director Hamilton's admission that she had no reason to believe that the vacation payouts were not as Toman testified, Toman's testimony concerning this practice is entitled to be credited.

Lindeman and Rundle were paid vacation after their retirement date. Thus, it appears that they did receive a vacation payout. As the County argues, it is not evident that the documentation supplied to the Finance Department when vacation is "paid out" is sufficient, in and of itself, to provide County management with notice of the method in which these payouts were calculated.

However, Connell retired on April 19, 1996. Inasmuch as he was paid his "earned" vacation prior to that date, it appears that he did not receive a vacation payout under Sec. 9.04, but rather, used his vacation prior to his retirement. The same is true of Sickels. The Department Head would have approved and, thus acquiesced, in this vacation usage.

The instant grievance arose during the term of the parties' 1998-2000 collective bargaining agreement. Notwithstanding the County's argument to the contrary, the record does not demonstrate that, in 1997, the County engaged in any conduct that was sufficient to terminate the vacation payout practice.

To be sure, on several occasions in 1998, Finance Director Hamilton calculated vacation payout in a manner that differed from the Highway Department Clerks. However, inasmuch as these calculations were done during the term of the agreement, this conduct is irrelevant to the determination of the parties' mutual intent at the time that they agreed upon the 1998-2000 collective bargaining agreement.

With respect to the vacation payout calculations involving Brian Steffes, it is not evident that the County provided the Union with any information that would place the Union on notice that Hamilton had calculated vacation payouts in a manner that differed from the Highway Department Clerks. Moreover, Steffes termination was grieved and overturned in arbitration, thereby rendering moot any County conduct with regard to his vacation payout.

Notwithstanding the Union's argument to the contrary, the record fails to demonstrate that the discharge of Dennis McKernan was grieved and settled by the parties. Thus, the undersigned cannot conclude that Hamilton's calculation of McKernan's vacation payout has been rendered moot.

In a letter dated August 5, 1998, Hamilton advised Office Manager Shirley Quincy of the following:

RE: Vacation Pay-out and Personal Holiday Pay-out at Termination

I had a discussion with a Highway Payroll Clerk on Thursday and Friday of last week on the calculation of vacation payout, sick leave payout and personal holiday payout for Kevin Russell and Dennis McKernan.

I wanted to make sure you aware (sic) of how I calculated the payouts. I have come to the conclusion that anniversary dates are being used to calculate earned vacation since Dennis received his fourth week of vacation on 1/1/96. Although, he had not completed his 16th year of employment until November 3, 1996. If the calendar year (1/1 through 12/31) was used to calculate earned vacation then he would not have received his 4th week of vacation until 1/1/97. He would have accrued 120 hours of vacation on 1/1/96 that he had earned from 1/1/95-12/31/95 and the vacation he earned from 1/1/96-12/31/96 (four weeks) would not have been accrued until 1/1/97. I also took into consideration the procedure used to accrue vacations for the new highway employees that were hired during 1996. These employees also earned vacation based on their anniversary date; they did not receive their first week of vacation until after they had completed one full year of service, which was on their anniversary dates in 1997.

I have calculated Dennis McKernan's vacation pay-out as follows:

Vacation accrued January 1, 1998	160 hours
These accrued vacation hours are earned from 11/3/97 – 11/3/98	
# of vacation hours earned from 11/3/97-7/31/98	
9 months/12 months per year*160 hours	120 hours
Less Vacation hours used in 98 from 1/1/98 accrual	(80) hours
Equals number of vacation hours to be paid out with his 8/5/98 payroll check	40 hours

Dennis will also be paid any 1998 unused personal holiday hours. He accrued 8 hours of personal holiday on 1/1/98 and did not use any of these hours. Payment for these 8 hours of personal holiday are included in his payroll check date August 5, 1998.

Per the union contract he will not receive any payment for sick hours accrued and not used.

Kevin Russell's Estate will also receive a payout for vacation and sick leave. This vacation payout is calculated with the same principal as Dennis McKernan's.

Vacation accrued 1/1/98	80.00 hours
Vacation earned from 9/30/97 – 7/29/98 (10/12*80 hrs)	66.64 hours
Vacation to be paid out	66.64 hours

He had not used any of the vacation hours that were accrued at 1/1/98.

He had already used his personal holiday that was accrued at 1/1/98.

He had an accrued sick leave balance at 7/19/98 of	11.78 hours
Sick leave accrued from 7/20/98-7/28/98 9/14 *3.69 hrs	2.22 hours
Number of sick leave hours to be paid with final check	14.00 hours

He had not used any sick leave from 7/20/98 through 7/28/98.

Please convey the procedures used to calculate vacation payout, sick leave payout, and personal holiday payout to the Highway Payroll Clerks, so they may utilize these procedures in the future.

If you have any questions, please feel free to contact me at 935-0303.

. . .

Copies of this letter were sent to "Leo Klosterman, Highway Commissioner; Jan Hollaway-Falk, Personnel Coordinator; & Personnel File."

Quincy was a member of the Union's bargaining unit, as were Toman and the other Clerk that calculated vacation benefits in the Highway Department. Additionally, Toman was an Officer in the Union. Hamilton's letter to Quincy is sufficient to establish that, in August of 1998, the Union knew, or should have known, that the County believed that the collective bargaining agreement provided for a method of calculating vacation payout that differed from the method that had been used by the Highway Department Clerks. It is not evident that, thereafter, the vacation payout in the Highway Department was calculated in any manner other than the calculation used by Hamilton.

In summary, at the time that parties entered into their 1998-2000 collective bargaining agreement, the method for calculating vacation payout benefits described by Toman was clear and consistent, of long duration and accepted by both sides. Accordingly, the procedure described by Toman is a past practice that may be considered when giving meaning to ambiguous language contained in Sec. 9.04 of the parties' labor contract.

The evidence of the County's conduct is not sufficient to demonstrate that the County effectively terminated the vacation payout practice prior to the time that the parties entered into their 1998-2000 collective bargaining agreement. However, the evidence of Hamilton's conduct in 1998 is sufficient to place that Union on notice that the County did not agree with the "past practice" of calculating vacation payout and that, henceforth, the County would require vacation payouts to be made in accordance with Hamilton's calculations.

Conclusion

At the time that the parties entered into their 1998-2000 collective bargaining agreement, the parties had a practice of "receiving" the vacation provided for in Sec. 9.01 on the following anniversary dates: first, second, eighth, and sixteenth. Thus, under the practice of the parties, an employee earns vacation based upon his/her anniversary year.

Although, under the practice of the parties, vacation is earned on an anniversary year basis, it is taken on a calendar year basis, subject to the Sec. 9.06 carry over provision. Inasmuch as the full amount of vacation that is earned on the first, second, eighth, and sixteenth anniversary date is used before the succeeding January 1st, the vacation that is provided to employees on the succeeding January 1st is not "earned" by that employee until the employee reaches his/her next anniversary date.

Sec. 9.04 provides Gratz with a right to "earned vacation." Under the "past practice" used by the Highway Department Clerks, on January 1, 1999, Gratz would have been considered to have "earned" 160 days of vacation to be taken during the calendar year 1999. Also, Gratz would have been considered to have "earned" 53.32 hours of vacation for working from January 1, 1999 through April 16, 1999. However, at the time of his retirement, neither of these vacation amounts, in fact, had been "earned" by Gratz. Rather, as the County argues, Gratz would not have "earned" the 160 days that he was provided on January 1, 1999 until he had reached his October 17, 1999 anniversary date. To have earned an additional 53.32 hours of vacation, Gratz would have had to work past his October 17, 1999 anniversary date.

As discussed above, the ambiguity contained in the Sec. 9.04 language is the lack of definition with respect to when vacation is "earned." This ambiguity is clarified by the evidence of the parties' past practice, i.e., vacation is "earned" on an anniversary year basis. There is no ambiguity with respect to the language in Sec. 9.04 that mandates the payment of

"earned" vacation.

The "past practice" of calculating vacation payouts that was used by the Highway Department Clerks resulted in the payout of "unearned" vacation. Thus, this past practice is contrary to the clear contract language that provides Gratz with the right to "receive all earned vacation." It is generally recognized that where, as here, a past practice conflicts with clear contract language, the past practice is not entitled to be given effect.

When Hamilton issued her letter of August 4, 1998, she clearly placed the Union on notice that the County was no longer acceding to this past practice. Given this notice, the County preserved its right to calculate Gratz' vacation payout in accordance with the language of Sec. 9.04, rather than in accordance with a past practice that was contrary to this language.

By working six months of his 1998-99 anniversary year, Gratz earned one-half of the vacation that he would have been entitled to if he had worked his entire anniversary year. Thus, the County is correct when it argues that, when Gratz retired on April 16, 1999, he had earned eighty (80) hours of vacation. Inasmuch as Gratz used more than these eighty (80) days of vacation prior to retiring, the County does not owe Gratz any vacation payout under Sec. 9.04 of the collective bargaining agreement.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. The County has not denied Wesley Gratz any vacation pay that was due Gratz under a grievance settlement agreement or the collective bargaining agreement.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 30th day of April, 2002.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

CAB/gjc
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