BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MONROE COUNTY HIGHWAY EMPLOYEES UNION
LOCAL 2470, AFSCME, AFL-CIO

and

MONROE COUNTY

Case 153
No. 60733
MA-11705

(Vacation Grievance)

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 18990 Ibsen Road, Sparta, Wisconsin 54656, appearing on behalf of the Union.

Mr. Ken Kittleson, Personnel Director, Monroe County, 14345 County Highway B, Room 3, Sparta, Wisconsin 54656, appearing on behalf of the County.

ARBITRATION AWARD

Monroe County Highway Employees Union, Local 2470, AFSCME, AFL-CIO, hereinafter the Union, with the concurrence of Monroe County, hereinafter the County, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to serve as Arbitrator to hear and decide the instant dispute involving the computation and implementation of negotiated vacation increases and in accordance with the grievance and arbitration procedures contained in the parties' collective bargaining agreement, hereinafter the Agreement. The undersigned, Stephen G. Bohrer, was so designated. On April 12, 2002, a hearing was held in Sparta, Wisconsin. The hearing was not transcribed. On June 13, 2002, and upon having received the parties' briefs, the record was closed. The parties waived reply briefs at the hearing.

ISSUES

The parties stipulated to the following issues:

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1. Did the County violate the collective bargaining agreement by the manner in which it granted vacation to the Highway Department employees for the 2001-2002 collective bargaining agreement?

2. If so, what is the appropriate remedy?

PERTINENT PROVISIONS

Predecessor agreement

The parties' predecessor 1999-2000 agreement, at Article 10, Section 1, states, in pertinent part, as follows:

> . . . Each regular full-time employee having a continuous service record of one (1) year or more is entitled to the following vacation with pay, after the first year of employment:
>
> A. After one (1) year of employment – One (1) week (five (5) work days).
> B. From two (2) years, but less than eight (8) years of employment – Two (2) weeks (ten (10) work days).
> C. From eight (8) years but less than fifteen (15) years of employment – Three (3) weeks (fifteen (15) work days).
> D. More than fifteen (15) years of employment – Four (4) weeks (twenty (20) work days).
>
> Each full-time employee must take his/her vacation in the year following completion of his/her year of employment or lose his/her vacation rights for the year unless his/her vacation time has been denied by management. All vacation benefits shall be credited and used based on anniversary date of hire date. . . .
>
> . . .

Current Agreement

The parties' current 2001-2002 Agreement, at Article 10, Section 1, states, in pertinent part, as follows:

> . . . Each regular full-time employee having a continuous service record of one (1) year or more is entitled to the following vacation with pay, after the first year of employment:

A. After one (1) year, but less than six (6) years of employment - Two (2) weeks (ten (10) workdays).
B. From six (6) years, but less than fourteen (14) years of employment – Three (3) weeks (fifteen (15) workdays).
C. After fourteen (14) years, but less than twenty-two (22) years of employment – Four (4) weeks (twenty (20) workdays).
D. More than twenty-two (22) years of employment – twenty-three (23) workdays.

Each full-time employee must take his/her vacation in the year following completion of his/her year of employment or lose his/her vacation rights for the year unless his/her vacation time has been denied by management. All vacation benefits shall be credited and used based on anniversary date of hire date. . . .

. . .

BACKGROUND

The County is a municipal employer and operates a Highway Department in Monroe County. The Union represents various employees in the Department, including the Grievant, Hugh Zwiefel. Grievant is an Equipment Operator II in the Department and has been employed there since December 4, 1978.

On May 10, 2001, the parties executed the current Agreement, effective January 1, 2001. The duration of the Agreement is from January 1, 2001, through December 31, 2002. Article 10, Section 1, of the Agreement increases the amount of vacation from the prior agreement for various employees, including the Grievant, due to their years of employment with the County. With regard to the Grievant, the County implemented the following increase in vacation: For the period of January 1, 2001, to December 3, 2001, no increase in vacation; for the period of December 4, 2001, to December 3, 2002, .923% of three additional days of vacation; and for the period of December 4, 2002, to December 3, 2003, three additional days of vacation.

On June 6, 2001, the Grievant filed a grievance asserting that he was entitled to three additional days of vacation as of January 1, 2001. The grievance also requests that any other union member similarly affected immediately receive their increase in vacation days. The grievance was denied at all steps by the County and the Union advanced the matter to arbitration.

Additional background information is set forth in the Positions of the Parties and in the Discussion below.

POSITIONS OF THE PARTIES

The Union

Article 10, Section 1, of the Agreement states that employees with "more than 22 years" are "entitled" to four weeks, plus three days of vacation. The Grievant has been employed more than 22 years. Since the Agreement became effective January 1, 2001, then the Grievant is entitled to additional vacation beginning on January 1, 2001.

Highway Department employees receive their vacation on their anniversary date and are required to use that vacation by their next anniversary date, with some exceptions that do not apply here. Thus, the Grievant should have received a prorated amount of the increase in vacation for the period of January 1, 2001, to the Grievant's anniversary date of December 4, 2001. The Grievant also should have received three full days of vacation on December 4, 2001, to be used by December 4, 2002. Finally, the Grievant should receive an additional three days of vacation on December 4, 2002, to be used by December 4, 2003.

The County's calculations are incorrect. According to the County, the Grievant should receive no increase in vacation for the period of January 1, 2001, to his anniversary date of December 4, 2001. Rather, he accrues a prorated portion of the increase in vacation during the period of January 1, 2001, to December 4, 2001, and is allowed to use that prorated increase from December 4, 2001, to December 4, 2002. Further, and according to the County, the Grievant accrues three additional vacation days for the period of December 4, 2001, to December 4, 2002, but he would have to wait to use those three days until the period from December 4, 2002, to December 4, 2003.

The unreasonableness of the County's position is apparent when considering Highway Department employee Randy Luther. Luther began employment on July 2, 1975, which will make the calculations and comparisons simpler. Luther has "more than 22 years" of employment under the Agreement. However, and according to the County, Luther would receive no additional vacation days for the period of January 1, 2001, to July 2, 2001; he would accrue one and one-half additional vacation days for the prorated period of January 1, 2001 to July 2, 2001, and to be used during the period of July 2, 2001 to July 2, 2002; and he would accrue three additional vacation days for the period of July 2, 2001 to July 2, 2002, and to be used during the period of July 2, 2002 to July 2, 2003. This means that Luther would only receive four and one-half additional vacation days over a two and one-half year period. This also means that Luther would receive an average of one and eight-tenths additional vacation days per year during this two and one-half year period.

The proper application of the Agreement for employee Luther would be for Luther to receive a prorated vacation increase of one and one-half days for the period of January 1, 2001, to July 2, 2001. Then Luther should receive three additional days on July 2, 2001, and to be used by July 2, 2002. On July 2, 2002, he should also receive three additional days and

to be used by July 2, 2003. Thus, and over the two and one-half year period, Luther would receive seven and one-half days, or an average of three days per year. The County incorrectly asserts that seven and one-half days exceeds the maximum allowable increase of six days over a two year period. In response, the Union asserts that the County is incorrectly equating the term of the contract with the vacation usage period. Luther receives his vacation benefit on his anniversary date. However, that benefit has to last until Luther's next anniversary date. Therefore, it is reasonable to base the proper calculation of vacation for Luther on how much vacation Luther can use until his next anniversary date.

The Union's method of calculation is essentially the same as that method used by the arbitrator in LA CROSSE COUNTY (DEPT. OF SOCIAL SERVICES), WERC, MA-1485 (YAFFE, 10/30/79). In that case, the arbitrator ruled that where there is an increase in vacation effective January 1, it is proper to grant a prorated amount of increased vacation to an employee for the period of the effective date of the contract to the employee's upcoming anniversary date. Compared to the instant case, the County is not granting any additional vacation amount until the employee's subsequent anniversary date. Further, and in the LA CROSSE COUNTY case, the arbitrator ruled that the full compliment of increased vacation should be given on the employees' first anniversary date following the contract's effective date. In this case, the County only granted a prorated amount of additional vacation to be used between the first and second anniversary dates following the effective date of the Agreement.

The Union objects to the County's comparison of vacation benefits with departments other than the Highway Department because the Highway Department is the only department where employees earn and use vacation on an anniversary year basis. Other departments have incremental increases in vacation which is accrued and used on a continuous basis. Further, the other departments receive their vacation increases on each paycheck. Unlike employees in the Highway Department, other employees do not receive their entire allotment of vacation on their anniversary date and are then required to use that allotment by their next anniversary date. The Union also objects to evidence regarding non-bargaining unit employees because they are not covered by a collective bargaining agreement.

Finally, the Union asserts that at the hearing on April 12, 2002, the parties were in agreement that during the course of bargaining leading up to the 2001-2002 Agreement, the implementation of the new vacation schedule was not discussed. Further, it asserts that neither party could point to a past practice involving this issue.

The County

Article 10, Section 1, of the Agreement is clear and unambiguous. It states that "all vacation benefits shall be credited and used based on anniversary of hire date." Therefore, the Grievant accrues any increase in vacation beginning on January 1, 2001, and receives that increase on his anniversary date of December 4, 2001.

The Union's resolution sought by this grievance is contrary to the unambiguous language of Article 10, Section 1, because none of the Highway Department employees have an anniversary date of January 1. By contract, unit members wait until their anniversary date to receive their vacation allotment which will include a prorated portion of their vacation increase and which will be retroactive to the first day of the Agreement. Article 10, Section 1, is not beneficial to the Grievant because his anniversary date is December 4, and because he had to wait until December 4, 2001, to receive the benefit of the additional vacation.

The cast-back method is the proper method for calculating vacation increases. In this method, an employee earns vacation in the prior year and uses it in the coming year. This method is supported by the Grievant's testimony. According to the Grievant, he worked for one year before receiving any vacation because the vacation which he used in his second year of employment was earned during his first year of employment. It is understandable that the Grievant considered vacation to be cast-forward, since he normally receives vacation time on his anniversary date to be used in the coming year. The Grievant testified that the vacation received on December 4, 2002, was for the next contract and would not count for the 2001-2002 Agreement. He also testified, however, that he was not precluded from using vacation in December of each year.

The time frame that vacation can be used should not be confused with the time frame that vacation is earned. For example, and in retirement situations, the County only pays out earned vacation and does not pay out vacation for a future year to someone who has not completed the year in question. This also applies to an employee who is terminating employment.

The Union's position and its method of calculation is unreasonable. If the Union's position is accepted, the Grievant would receive nine additional days of vacation during 2001-2002, and not the six additional days which were negotiated between the parties and as part of their Agreement. This is indicated in the Agreement and in Joint Exhibits 10 and 11.

Joint Exhibit 11 is a summary of mediated settlements for all of the AFSCME units, including for those County employees in the nursing home and the human services departments. This indicates that the highway and nursing home settlements included increased vacation consistent with the human services settlement. This meant that the vacation increases would be implemented consistent with the way that they were implemented in the human services settlement two years previously. Both the nursing home and highway settlements were handled in the same way as the settlement with human services. It is important to note that no unit member from the human services or nursing home departments made any complaints or filed any grievances.

Joint Exhibits 10 and 11 also indicate that all of the settlement agreements with the AFSCME units do not extend prior to January 1, 2001. Therefore, the Union's position that the Grievant should receive additional vacation based upon his anniversary date of December 4, 2000, is untenable.

County Exhibit 1 is an e-mail from union representative Pfeifer to County Personnel Director Kittleson. It indicates that the Union and the County were in agreement over the vacation proration issue. In that e-mail, the Union's example of a proposed calculation is the same as what the County eventually calculated. However, the erroneous cast-forward method was later pursued and grieved by the Union.

The County objects to any reliance upon the case of LA CROSSE COUNTY, SUPRA. It is almost 23 years old and it was a split panel decision. Further, that case is distinguishable for several reasons. First, that case is distinguishable because the employer there asserted that the provision in dispute should be prospective and that it only applies to employees who have reached their seventh year of employment following the effective date of the contract. The County does not make this argument.

Second, the LA CROSSE COUNTY case is distinguishable because the employer there argued that the grievant should receive the full increase in vacation on the grievant's first anniversary date following the effective date of the contract even though the applicable provision became effective after the beginning of that period. The County contends that in this case the Grievant does not get credit for any time prior to the first date of the Agreement.

Third, the LA CROSSE COUNTY case is distinguishable because the arbitrator correctly prorated vacation between the two week provision of the preceding contract and the three week provision of the contract at issue resulting in an extra one-half week on that grievant's anniversary date. This is consistent with the County's implementation in this case. However, the arbitrator in that case also awarded the grievant with an extra week on the grievant's first anniversary date following the effective date of the contract so that the employee receives one and one-half additional weeks instead of the negotiated one week. The County strongly disagrees with this outcome, as apparently did the dissenting panel member in LA CROSSE COUNTY. As noted in the above, however, the employer in LA CROSSE COUNTY agreed with this provision. This is a major difference between the situation in this case and the situation in LA CROSSE COUNTY.

Fourth, the LA CROSSE COUNTY case is distinguishable because the employer's vacation practices in that case are conspicuously absent. That case does not state whether it used a cast-forward method or a cast-back method. The fact that that award allowed three weeks on the anniversary date lends itself to a cast-forward approach, although it mentions vacations from a previous year. It does not state whether there is a carryover period. There are too many unanswered items and dissimilar circumstances to rely on LA CROSSE COUNTY in this case.

The County cites the following from Elkouri and Elkouri, How Arbitration Works, 3rd Edition, p.379 (1976):

> . . . the refusal to apply an award to cases of the same nature is justified where it is shown that any one of the following elements is present: (1) The previous

> decision clearly was an instance of bad judgment; (2) the decision was made without the benefit of some important and relevant facts and considerations; or (3) new conditions have arisen questioning the reasonableness of the continued application of the decision.

Applying the above quote, the decision in the LA CROSSE COUNTY case was an instance of bad judgment in which a split panel awarded vacation benefits that exceeded by 50% the amount that the parties had voluntarily negotiated. Further, that award is not relevant due to the difference in employers and the employers' positions concerning eligibility and practice. Finally, the County reiterates its concern about the age of that award and requests that lesser weight be given to it and greater weight to the internal balance and comparability principles within the six County bargaining units and non-represented employee groups.

DISCUSSION

The stipulated issue is whether the County violated the Agreement by the manner in which it granted vacations to the Highway Department employees. The Union asserts that any negotiated increase in vacation should be implemented upon the effective date of the Agreement, January 1, 2001. The County asserts that employees accrue or earn any increase in vacation beginning January 1, 2001, but that they are not entitled to receive or use it until after an employee's subsequent anniversary date. The parties each point to different provisions within Article 10, Section 1, of the Agreement in support of their respective position. In support of the Union's position, it refers to the term "entitled" within Article 10, Section 1, which states: "Each regular full-time employee . . . is entitled to the following vacation with pay. . ." The County refers to the language: "all vacation benefits shall be credited and used based on anniversary date of hire" in support of its position.

As a general rule, arbitrators seek to interpret collective bargaining agreements to reflect the intent of the parties. Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 479 (1997). The parties' intent is determined from various sources, including the express language of the agreement, statements made at precontract negotiations, bargaining history, and past practice. ID.

I agree with the Union that the term "entitled" is clear. That term, by itself and in its usual and ordinary meaning, indicates that employees receive their vacation upon the effective date of the Agreement. In addition, the plain inference of "entitled" is that any increase in vacation shall also be received upon the effective date of the Agreement. There is no dispute that the effective date of the Agreement is January 1, 2001. Therefore, it appears from the Union's reference to these express terms of Article 10, Section 1, of the Agreement that employees shall receive their vacation amount, including any increase in their vacation amount, effective January 1, 2001.

However, Article 10, Section 1, also states: "all vacation benefits shall be credited and used based on anniversary date of hire." In my opinion, the language "all vacation benefits" is broad and encompasses the subject matter of a negotiated increase in vacation. Therefore, the "entitled" language upon which the Union relies must be interpreted in the context of the language relied upon by the County. That is not to say that the language upon which the County relies is clear and unambiguous. It is not.

The express language relied upon by the County does not make clear when and how vacation benefits are credited and received. The phrase "based on anniversary date of hire" does reference some sort of a system where an employee's anniversary date is taken into account for determining vacation. However, and in my opinion, that phrase does not unambiguously state when an employee is earning vacation and how those earnings are to be implemented. Moreover, this "anniversary date of hire" system is not defined or found elsewhere in the Agreement. The County would have me interpret "all vacation benefits shall be credited and used based on anniversary date of hire" to mean that employees earn and accumulate their vacation during their current anniversary year, but that those employees are not eligible to use their accumulated earnings, and are not credited for those earnings, until their subsequent anniversary year. Such an interpretation injects meaning that is not there. Consequently, the language referenced by the County is not sufficiently clear for me to implant the meaning which the County proposes.

Regarding statements made at precontract negotiations, the parties are in agreement that there were none pertaining to the issue at hand. Further, the only evidence regarding the parties' bargaining history was that the language upon which the parties separately rely did not change from the predecessor agreement to the current Agreement. This lack of change does not shed any interpretative light on the subject. Thus, I turn my attention toward any evidence of the parties' past practice.

Contrary to the Union's assertion, the record does provide evidence of a past practice. County witness Jack Dittmar, Highway Commissioner since joining the Department in 1999, testified that vacation is handled in the Department as "earned and credited on [an employee's] anniversary date." According to Dittmar, an employee has to wait to receive vacation until after his anniversary date "based on work from the prior year." Further, and according to Dittmar, vacation for employees in the Department is for work "earned prior to an anniversary date." In addition, and according to the testimony of Payroll/Clerk Bookkeeper Mary Brieske, vacation for Department employees "accrues" during the year and then "is granted on their anniversary date." Brieske has been in her position since March of 1999. The County's evidence of when employees actually received earned and accumulated vacation was not supported with documentation. Nevertheless, it is evidence of a past practice.

In addition, there was some evidence which was contrary to the County's evidence of a past practice. The Grievant testified that at "the <u>start</u> of my sixteenth year [on December 4, 1993], I got four weeks." (Emphasis added). According to Article 10, Section 1, of the 1999-

2000 agreement, employees with "8 years but less than 15 years of employment" receive three weeks of vacation and employees with "more than 15 years of employment" receive four weeks of vacation. Assuming that the parties had a similar years-of-employment provision in their collective bargaining agreement during 1993, this testimony would indicate that one employee, i.e., the Grievant, was immediately entitled to an increase in vacation at the beginning of his sixteenth year of employment and that he did not have to wait until his subsequent anniversary to receive that increase. This evidence conforms with the Union's position of the immediate entitlement to vacation increases upon the effective date of the Agreement.

Notwithstanding the Grievant's above testimony, this evidence lacks weight without more corroboration or proof. For instance, there was no documentary evidence showing that the Grievant actually received four weeks of vacation from December 4, 1993, through December 3, 1994, nor was there evidence that the parties had a similar years-of-employment provision in their contract during that time period. More importantly, there was no verbal or documentary evidence in the record regarding what other employees received in vacation during the most recently expired contract period. According to Joint Exhibit 9, Department employees LaVawne Mattheisen, Robert Berendes, and Gerald Mashin all would have reached "more than 15 years" of employment under the terms of the 1999-2000 agreement. Thus, and to be consistent with the Grievant's point of view, those three employees would have received an additional week of vacation at the beginning of their sixteenth year of employment on January 23, 1999, January 21, 2000, and November 25, 2000, respectively. Similarly, Joint Exhibit 9 indicates that some employees would have started their second or third or eighth year of employment under the terms of the 1999-2000 agreement. However, there was no evidence that those employees actually received an increase in vacation at the beginning of their second or third or eighth year instead of waiting until their upcoming anniversary to receive it.

On the balance, I am persuaded that it has been the past practice for employees in the County's Highway Department to earn their vacation during their current anniversary year, but that those earnings are not credited and that employees must wait to receive those earnings until the beginning of their subsequent anniversary year. In addition, I find that the language "all vacation benefits" provides a clear inference that vacation increases are to be covered by the same system and are to be treated in the same manner as vacations earned and received. I am also persuaded that the parties' past practice is compatible with the language in Article 10, Section 1, referencing a system of credits and uses of vacation: "all vacation benefits shall be credited and used based on anniversary date of hire." It is in this regard that the parties' past practice acts as a gap filler for the terms of the Agreement.

I agree with the Union that the County's evidence of how other represented units and nonrepresented units in the County receive their vacation is not relevant to the issue before me. Such evidence sheds little or no light on an issue of contract interpretation involving these specific parties.

Applying the parties' past practice, together with the Agreement, the record shows that the County properly computed and implemented the Grievant's vacation increase for the term of the Agreement. The Grievant begins to earn a portion of his additional three days during the period from January 1, 2001, through December 3, 2001. These earnings must be prorated because the period of increased vacation benefits is less than one year. However, the Grievant must wait and is not entitled to receive any of this prorated increase until his subsequent anniversary date beginning December 4, 2001. Additionally, and from December 4, 2001, through December 3, 2002, the Grievant earns an increase in vacation. The amount of that increased earnings is three days. However, the Grievant is not entitled to use any of this increase until his anniversary date beginning December 4, 2002.

With regard to the County's argument that a "cast-back" method is appropriate, and as opposed to a "cast-forward" method, I make no findings regarding either method. The terminology used during the hearing and in the briefs in this regard was confusing and not helpful. Therefore, my decision should not be viewed as adopting or favoring either method.

With regard to LA CROSSE COUNTY (DEPT. OF SOCIAL SERVICES), WERC, MA-1485 (YAFFE, 10/30/79), that case did not include contract language regarding a system of when and how vacation benefits are to be credited and used. Nor did it have evidence of a past practice consistent with such a system. Therefore, it is distinguishable.

The County is incorrect in asserting that the LA CROSSE COUNTY case is distinguishable because of the age of the case and because one of three panel members dissented. In my opinion, old case law, if relevant and pertinent to the issue at hand, can still be good and helpful case law, including those cases where a single member of a tri-partite panel dissents. The County's arguments in this regard were not factors in my decision that the LA CROSSE COUNTY case is distinguishable.

Finally, I did consider the Union's argument that it is unreasonable for the Grievant to earn vacation, including an increase in vacation, during his anniversary year, but not be allowed to receive any of those earnings until his subsequent anniversary year. I would agree with this assertion to the extent that it may be more valuable for the Grievant and other Department employees to receive vacation, including an increase in vacation, as it is earned, or on a continuous basis and on each pay check, so as not to have to wait until their upcoming anniversary date before they can receive it. Without doubt, vacation now is a greater benefit then vacation later. However, there is evidence of a past practice and my findings are based upon the application of that practice, together with the Agreement.

In sum, Article 10, Section 1, of the Agreement is ambiguous with regard to when and how vacation benefits are credited and received. There is little or no evidence regarding precontract negotiations or bargaining history. There is, however, evidence of a past practice whereby Department employees earn their vacation during their current anniversary year, but that their earnings are not credited and that they do not receive any of those earnings until the

beginning of their subsequent anniversary year. Moreover, the parties' past practice is compatible with the language of Article 10, Section 1, that "all vacation benefits shall be credited and used based on anniversary date of hire." Since the County's manner in which it computed and implemented increased vacation for the Grievant was done pursuant to this past practice and consistent with the Agreement, then there has been no violation of the Agreement.

AWARD

Based upon the foregoing and the record as a whole, it is the decision and award of the undersigned Arbitrator that the County did not violate the collective bargaining agreement by the manner in which it granted vacation to the Highway Department employees for the 2001-2002 collective bargaining agreement. Therefore, the grievance is denied.

Dated at Eau Claire, Wisconsin, this 6th day of September, 2002.

Stephen G. Bohrer /s/
Stephen G. Bohrer, Arbitrator

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