BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA EDUCATION ASSOCIATION

and

KENOSHA SCHOOL DISTRICT

Case 168
No. 61036
MA-11782

(William Lodginski Grievance)

Appearances:

Mr. Robert Baxter, Executive Director, Kenosha Education Association, on behalf of the Association.

Mr. Clifford Buelow, Attorney, Davis & Kuelthau, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and District respectively, are parties to a collective bargaining agreement which provides 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 transcribed, was held on December 10, 2002 in Kenosha, Wisconsin. Afterwards, the parties filed briefs, whereupon the record was closed on February 4, 2003. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the follow substantive issue:

Whether the District violated Section 5.01 of the collective bargaining agreement? If so, what is the remedy?

In addition to the substantive issue just noted, the District also raised the follow procedural arbitrability issue:

Whether the grievance was timely filed?

PERTINENT CONTRACT PROVISIONS

The parties' 2000-2003 collective bargaining agreement contains the following pertinent provisions:

. . .

Article V – Vacations.

5.01 - Employees covered by the Agreement shall receive paid vacation for the months worked each year, based on the number of completed years of continuous service as of July 1 of each year, in accordance with the following schedule:

a. 6 months to 1 year service – 5 days
b. After 1 year of service – 10 days
c. After 5 years of service – 15 days
d. After 10 years of service – 19 days
e. After 15 years of service – 20 days
f. After 20 years of service – 23 days
g. After 25 years of service – 25 days

The dates of each employee's vacation shall be approved by the Department Head in advance.

. . .

Article XIII – Grievance Procedure.

13.01 Purpose

The purpose of this grievance procedure is to provide a method for determination of every question of interpretation and application of the provisions of the agreement, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions.

. . .

13.04 Steps of the Grievance Procedure

Grievances shall be processed as follows:

(a) Step One A grievance shall be presented in writing to the Department Head within ten (10) work days after the grievant knew or should have known of the condition upon which the grievance is based, in an attempt to resolve the dispute.

. . .

FACTS

The District operates a public school system in Kenosha, Wisconsin. The Association is the exclusive collective bargaining representative for the District's painters and carpenters. Until his retirement, William Lodginski was a carpenter for the District and thus was in the bargaining unit represented by the Association. His date of hire was March 27, 1989 and his date of retirement was April 24, 2001.

On March 21, 2001, in anticipation of his retirement, Lodginski completed a District vacation request form. He indicated on that form that he thought he had 21 days of vacation available to use, and requested vacation for the following 21 days: March 30, April 2, 3, 4, 5, 6, 9, 10, 11, 12, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27 and 30, 2001.

Following the submission of that vacation request form, the District allowed Lodginski to take 20 of the 21 days he requested. Of these 20 days, 16 days were vacation days for 2001 and four were vacation days he had carried over to 2001 from 2000.

In early April, 2001, Bob Baxter, the Association's Executive Director, called Helen Packman, the District's Payroll Supervisor, to ask what the vacation payout would be for a hypothetical member of the painters and carpenters bargaining unit who would be retiring in late April with more than 10 years of District service. Packman, knowing that a painter/carpenter with over 10 years of service would be entitled to 19 days of vacation prorated for 10 months through April, told Baxter the hypothetical painter/carpenter would receive a vacation payout of 16 days.

On April 12, 2001, Lodginski filed a class action grievance on behalf of all carpenters and painters. In it, he wrote the following: "The Association believes that carpenters and painters have not accrued vacation in a proper manner over the past several years." He

described the date on which the grievance occurred as "ongoing". As a remedy, he sought "all lost vacation benefits for all affected employees." As the grievance was processed through the grievance procedure, it was delayed several times. These delays were by mutual agreement. The grievance was denied at each step of the grievance procedure. When the Board of Education denied the grievance on March 7, 2002, its stated reason for doing so was that "there has been no violation of the collective bargaining agreement and because the grievance was untimely." The grievance was subsequently appealed to arbitration.

At the hearing, the parties' witnesses testified as follows.

The sole Association witness was Lodginski. He testified that it was his opinion that painters and carpenters earn vacation on a fiscal year basis, but use it the calendar year following completion of the fiscal year (rather than the calendar year following the start of the fiscal year). Notwithstanding his claim that painters and carpenters were not able to use vacation until the calendar year following completion of the fiscal year, Lodginski twice testified that he took his first vacation with the District during 1990 – the first calendar year after the start of his first fiscal year in the District.

The Association offered no other evidence to support its claim of a contract violation.

The District's two witnesses were Steve Mastronardi and Helen Packman.

Mastronardi, the District's Operations Supervisor since 1998, a member of the carpenters and painters union from 1985 through 1998, and a member of its bargaining committee from 1992 through 1998, testified painters and carpenters have always "earned" vacation on a fiscal year basis and "burned" it beginning the calendar year following the start of the fiscal year.

Packman, the District's Payroll Supervisor for four years until her retirement in October, 2002, and a member of the Secretaries Union, the Secretaries' bargaining committee and a former Secretaries Union president, similarly testified that painters and carpenters have always "earned" vacation on a fiscal year basis and "burned" it beginning the calendar year following the start of the fiscal year. As Payroll Supervisor, and previously as Senior Fiscal Clerk for 16 years, Packman was responsible for reviewing vacation payouts for compliance with the District's collective bargaining agreements. Packman testified that payouts for the painters and carpenters are handled the same as for all other bargaining units. Packman also testified that Lodginski's vacation payout was handled in the same manner as the vacation payouts of Alex Ciotti and Franklin Flinn. Both were carpenters who retired from the District. Ciotti retired in 1986 and Flinn retired in 1989. When they retired, no grievance was filed challenging the District's methodology for accruing and paying out vacation. When Ciotti retired, he was the president of the painters and carpenters union.

POSITIONS OF THE PARTIES

Association

The Association initially argues that the District's timeliness contention is without merit. In the Association's view, the grievance was filed and processed in accordance with the timelines contained in the contractual grievance procedure. It acknowledges that there were delays in between various steps of the grievance procedure, but it avers that those delays were due to the fact that the Association was waiting for information from the District. It specifically notes that the District agreed to those time extensions. The Association asserts that it should not be penalized because it was waiting for information from the District. In sum, the Association believes it complied with all the contractual timelines, so therefore the grievance is properly before the arbitrator for a decision on the merits.

With regard to the merits, the Association implies that the District's existing method of accruing and paying out vacation is wrong and violates the collective bargaining agreement. It makes the following arguments to support that contention.

First, the Association relies on the language contained in Article V of the collective bargaining agreement. In the Association's view, that provision is clear and unambiguous and warrants sustaining the grievance. According to the Association, that language establishes that the grievant is entitled to 19 more vacation days.

Second, building on the premise that the contract language is clear and unambiguous, the Association believes that the arbitrator need not look at any alleged past practice. If the arbitrator does look at the District's practice though, the Association argues that the evidence supplied by the District does not meet the three-pronged test used by arbitrators to determine a past practice: long standing, consistently applied and mutually-accepted by the parties. With regard to the first prong (i.e. long-standing duration), the Association contends that while the District presented evidence at the hearing showing how vacation was paid out to two previous carpenters who retired, the Association avers that it saw that evidence for the first time at the hearing. It cites Arbitrator Joe Kerkman's award in CITY OF MADISON for the proposition that evidence which is not supplied to the Association prior to the hearing is inappropriate. With regard to the second prong (i.e. consistently applied), the Association avers that "there is no evidence to support the District's contention that Article 5 of the collective bargaining agreement has been consistently applied." Finally, with regard to the third prong (i.e. mutuality), the Association argues that if there was mutuality here, "the matter would not be before the arbitrator." Based on the foregoing, the District believes that the three prongs that arbitrators rely on to determine if a past practice exists are not present here.

In sum, the Association's position is that the contract language is clear and unambiguous, so it should be applied here; not any alleged past practice. The Association therefore asks that the grievance be sustained and the grievant paid for 19 vacation days.

District

The District initially argues that it is unnecessary for the arbitrator to address the merits of the grievance because it (i.e. the grievance) was untimely filed. Before this contention is reviewed, the District puts it in the following context. The District frames this dispute as follows: it maintains that the painters and carpenters earn vacation on a fiscal year basis, and "burn" vacation beginning the calendar year which follow the start of the fiscal year, while the Association maintains that painters and carpenters earn vacation on a fiscal year basis, and "burn" vacation beginning the calendar year which follows the conclusion of the fiscal year. Having framed the instant dispute thus, the District avers that the essence of the grievance is that the District's method for accruing and paying out vacation is wrong and has been wrong since Day One. Building on that premise, the District's first defense is this: if the District's methodology has been wrong since Day One, then the Union should have filed a grievance on Day 11 (or long ago). It notes that Article 13.04(a) requires that grievances be filed within 10 work days after the grievant "knew or should have known of the condition upon which the grievance is based. . ." The District asserts that its methodology for accruing and paying out vacation has been known to all bargaining unit members for years. In support thereof, it notes that both Alex Ciotti and Franklin Flinn were paid out according to the same methodology as the grievant was. It further notes that neither Ciotti nor Flinn, who were represented by the KEA, filed grievances challenging the District's methodology for accruing and paying out vacation. The District argues that if the Association believed the District's methodology violated the collective bargaining agreement, the Association should have filed a grievance long ago. It did not. The District therefore asserts that the grievance should be dismissed as untimely filed.

If the arbitrator decides to address the merits of the grievance, the District asserts at the outset that the Association, as the grieving party, bears the burden of proving its claim (i.e. that the grievant is entitled to an additional year of vacation because painters and carpenters earn vacation on a fiscal year basis and "burn" it the calendar year following completion of the fiscal year). According to the District, the Association has failed to meet its burden of proof. It elaborates as follows.

First, it contends that the Association offered no probative evidence to support its position that the District's actions violated the contract. To support this premise, it notes that the Association offered only testimony of the grievant who, in essence, said nothing more than that in his opinion during his employment the District had not allowed painters and carpenters to use vacation until the calendar year after the end of the fiscal year. That was it. The

District points out that the Association offered absolutely no evidence to support this claim. Specifically, there was no reliable testimony, no substantive exhibits, no bargaining history, no examples to support a claim of a practice, and maybe most important, no evidence of the grievant's vacation history, including days earned and days taken. Additionally, the District also calls the arbitrator's attention to the fact that at the hearing, the grievant twice unwittingly admitted he had taken his first vacation with the District during 1990, the first calendar year after the start of his first fiscal year in the District. The District also asserts that the grievant also admitted, when he requested his vacation payout shortly before his retirement, that he asked for only 21 days of vacation (he was allowed to take 20 vacation days), and not 21 vacation days plus the extra year's worth of vacation to which he now claims he is entitled. Given the dearth of evidence produced by the Association, and the grievant's admission against interest with regard to the timing of his first vacation, albeit unwitting and possibly erroneous, and the grievant's admission shortly before his retirement that he was entitled to only 21 vacation days, it is the District's position that this grievance should be dismissed solely because the Association has failed to satisfy its burden of proof.

Second, the District avers that in contrast to the Association's lack of proof, it (i.e. the District) proffered overwhelming proof in support of its position that the District's practice for many years has been for painters and carpenters to earn vacation on a fiscal year basis and "burn" it the calendar year following the start of the fiscal year. According to the District, its two witnesses, Matronardi and Packman, credibly testified that the painters and carpenters have always earned vacation on a fiscal year basis and "burned" it the calendar year following the start of the fiscal year. The District emphasizes their credentials as it pertains to this case: Mastronardi is a former member of the painters and carpenters union and a former member of its bargaining committee, and Packman is a former long time member of the secretaries' union who has reviewed vacation payouts to retiring District employees for 20 years. The District characterizes her as may be the most knowledgeable person with regard to the District's vacation payout practices. The District maintains that both Mastronardi and Packman testified without any attempted contradiction that, as long as they have been with the District, painters and carpenters have "burned" vacation the calendar year following the start of the fiscal year. To support her testimony, Packman cited the retirements of Alex Ciotti, the former president of the painters and carpenters union, and Franklin Flinn, and averred that both had their retirement vacation payouts calculated in the same manner as Lodginski. The District notes that neither Ciotti nor Flinn, although represented by the KEA, grieved or otherwise challenged the calculation of their vacation payout. As additional support for her testimony, Packman averred that all bargaining units in the District have their vacation payouts calculated in the same manner as that used for the painters and carpenters.

In sum, the District believes that the Association has not established a contract violation. It therefore asks that the grievance be denied.

DISCUSSION

Timeliness

Since the District contends the grievance was untimely filed, it follows that this is the threshold issue. Accordingly, attention is focused first on the question of whether the grievance was timely filed.

I find that it was timely filed. My rationale follows.

Like most grievance procedures, the instant grievance procedure contains timelines for filing and processing grievances. The timeline for filing a grievance is found in Step 1, and the timelines for processing grievances are found in Steps 2 through 4.

In their brief, the Association addresses the fact that there were delays between Steps 2 through 4, and attempts to explain why those delays occurred. However, the undersigned need not address those defenses or even comment on the delays which occurred between Steps 2 through 4, because the District's timeliness contention does not involve Steps 2 through 4. Instead, the District's timeliness contention only deals with Step 1 (i.e. when the grievance was originally filed). Accordingly, the only procedural arbitrability call which needs to be made here is whether the grievance was timely filed. The focus now turns to making that call.

The first step of the grievance procedure says that grievances are to be filed within ten work days after the grievant "knew or should have known of the conditions upon which the grievance is based. . ." This means that grievances are to be filed within ten work days after they become known; if they are filed after that, they are untimely. That language will now be applied to the record facts.

Oftentimes when a grievance is filed, there is no question about the date on which it arose. Here, though, the date the grievance arose is problematic. Here's why. No specific date is listed on the grievance form as the date the grievance occurred. Instead, the grievant characterized the date on which the grievance occurred as "ongoing." In labor relations circles, that term is used to describe situations which are recurring or continuing. In such circumstances, arbitrators have often times applied what has become known as the continuing violation theory. Under this concept, the limitation period recommences each day; hence, the time for filing the grievance is extended. The continuing violation theory therefore construes time limits so as to permit the filing of what would otherwise be an untimely grievance.

I find that the continuing violation theory applies here. On its face, the grievance alleges that the District's method for accruing and paying out vacation is wrong, and has been wrong for the last several years. That is just the type of factual situation where the continuing

violation theory can be applied. Application of that theory here means that the grievance is timely, even though it challenges something that, according to the grievance document itself, goes back years.

In so finding, it is specifically noted that I am not commenting, at this point, on the District's defense that its methodology for accruing and paying out vacation is of long duration, has not changed over the years, and was known to the Association. That contention will be dealt with later.

Also, in so finding, I am aware of the District's point that if its methodology for accruing and paying out vacation is wrong, and violates the collective bargaining agreement, then it has been wrong all along, and the Association should have filed a grievance over it long ago. However, just because the Association did not file grievances when Ciotti and Flinn retired in 1986 and 1989, respectively, challenging the District's methodology for accruing and paying out vacation, does not mean that the Association lost the right to do so here. To the contrary, it had the right to grieve the instant matter when Lodginski retired. His retirement was a separate and distinct transaction from what preceded it (i.e. the retirements of Ciotti and Flinn).

Even if I am wrong to apply the continuing violation theory here, I believe that another good reason exists for finding this grievance timely. It is this: this grievance was filed before Lodginski retired. Specifically, it was filed on April 12, 2001, and he retired on April 24, 2001. It would be one thing if the grievance had been filed after he retired. However, it was not. Under these circumstances, I am unwilling to find the instant grievance untimely. It is therefore held that the grievance was timely filed.

Merits

Attention is now turned to the substantive merits of the grievance. As previously noted, the essence of the grievance is this: does the District's existing method for accruing and paying out vacation violate the collective bargaining agreement? The Association implies that it does, while the District disputes that contention. Based on the rationale which follows, I find that the District's existing method for accruing and paying out vacation does not violate the collective bargaining agreement.

My analysis begins with a preview of how this discussion is structured. In their briefs, the parties analyzed this case from different perspectives. The Association focused on the contract language, and then addressed whether a practice exists which was applicable. In contrast, the District focused on the burden of proof. Both of these approaches are incorporated into the discussion which follows.

I begin by reviewing the applicable contract language. The only contract provision which is arguably applicable here is the vacation provision. It provides thus:

> 5.01 - Employees covered by the Agreement shall receive paid vacation for the months worked each year, based on the number of completed years of continuous service as of July 1 of each year, in accordance with the following schedule:
>
> a. 6 months to 1 year service – 5 days
> b. After 1 year of service – 10 days
> c. After 5 years of service – 15 days
> d. After 10 years of service – 19 days
> e. After 15 years of service – 20 days
> f. After 20 years of service – 23 days
> g. After 25 years of service – 25 days
>
> The dates of each employee's vacation shall be approved by the Department Head in advance.

My first interpretive task is to decide whether the meaning of this provision is clear and unambiguous, or whether it is ambiguous. Language is considered clear and unambiguous when it is susceptible to but one plausible interpretation/meaning. Conversely, language is considered ambiguous when it is capable of being understood in two or more different senses, or where plausible arguments can be made for competing interpretations. If the language is found to be clear and unambiguous, my job is to apply its plain meaning to the facts. If the language is found to be ambiguous though, my job is to then interpret it to discern what the parties intended it to mean, and then to apply that meaning to the facts. Attention is now turned to making that call.

Section 5.01 specifies that employees will receive a defined amount of vacation each year. Under this language, it is clear that painters and carpenters earn vacation on a fiscal year basis beginning July 1. Then, they can use (i.e. "burn") the vacation they have earned beginning the calendar year (i.e. January 1) which follows. However, which calendar year are we talking about: is it the calendar year which follows the start of the fiscal year or the calendar year which follows the conclusion of the fiscal year? The language does not say. Since it does not say, I find the language of Section 5.01 to be ambiguous on that point.

Having found that Section 5.01 cannot be termed clear and unambiguous on whether employees "burn" vacation the calendar year which follows the start or the conclusion of the fiscal year, it is necessary for the undersigned to look beyond the words used in Section 5.01 to determine what the parties intended it to mean.

The District relied on an alleged past practice. Past practice is a form of evidence which arbitrators commonly use to help them interpret ambiguous contract language. The rationale underlying its use is that it can yield reliable evidence of what an ambiguous provision means. Thus, the manner in which the parties have carried out the terms of their agreement in the past provides reliable evidence of its meaning.

The focus now turns to the alleged past practice. As previously noted, evidence of past practice is used to give meaning to ambiguous contract language. It is generally accepted by arbitrators that for a practice to be considered indicative of the parties' mutual intent and be binding, the conduct must be clear and consistent, of long duration and accepted by both sides. The District, contrary to the Association, asserts that the record evidence meets all of these criteria and, thus, is entitled to be given effect herein.

Until her recent retirement, Helen Packman was the District's Payroll Supervisor. In both that job and her previous job as a Senior Fiscal Clerk, she was responsible for reviewing vacation payouts to retiring District employees for compliance with the District's collective bargaining agreements. She did this for 20 years. In their brief, the District characterized her as "may be the most knowledgeable person with regard to the District's vacation payout practices." She certainly was the most knowledgeable person who testified at the hearing regarding the District's vacation payout practices.

The procedure described by Packman is this: painters and carpenters have always "earned" vacation on a fiscal year basis and "burned" it the calendar year following the start of the fiscal year. To support her testimony, Packman cited the retirements of Alex Ciotti and Franklin Flinn. Both were carpenters who had their retirement vacation payouts calculated in this manner. Neither Ciotti nor Flinn grieved or otherwise challenged the calculation of their vacation payout. Ciotti was the president of the painters and carpenters union at the time he retired. Packman also testified without any attempted contradiction that all District bargaining units have their vacation payouts calculated in the same manner as that used for the painters and carpenters. The record evidence does not show otherwise.

The only witness who had a different view of the way vacation is accrued and paid out in the District was Lodginski. He testified that, in his opinion, the District had not allowed painters and carpenters to use vacation until the calendar year after the end of the fiscal year.

Obviously, these two views of how the District currently accrues and pays out vacation conflict and cannot be reconciled. I credit Packman's view over Lodginski's for the following reasons. First, as was already noted, it was Packman's job for over 20 years to review vacation payouts to retiring District employees. In contrast, that was not Lodginski's job. Second, while the District offered several examples that supported Packman's view, the Association offered no examples that supported Lodginski's view. Third, despite his claim that painters and carpenters were not able to use vacation until the calendar year following

completion of the fiscal year, Lodginski twice testified he took his first vacation with the District during 1990, the first calendar year after the start of his first fiscal year in the District. At a minimum, this admission was contrary to the grievant's theory. Given the foregoing, I find that vacation has historically been accrued and paid out as described by Packman (i.e. that painters and carpenters "earn" vacation on a fiscal year basis and "burn" it the calendar year following the start of the fiscal year).

I further find that notwithstanding the Association's contention to the contrary, the method of accruing and paying out vacation described by Packman was clear and consistent, of long duration and accepted by both sides. Additionally, I am not persuaded by the Association argument that I should ignore the evidence of how vacation was paid out to Ciotti and Flinn because it was not supplied to the Association prior to the hearing. Accordingly, the procedure described by Packman qualifies as a past practice. That practice gives meaning to the part of Section 5.01 that is silent on the question of which calendar year employees can use (i.e. "burn") the vacation they earn: specifically, is it the calendar year which follows the start of the fiscal year or the calendar year which follows the conclusion of the fiscal year. It is the former (i.e. the start of the fiscal year), and not the latter (i.e. the conclusion of the fiscal year).

When the grievant retired, he was paid for his vacation pursuant to this practice. His vacation payout was calculated the same as Ciotti's and Flinn's. That being so, he is not entitled to the additional year of vacation (i.e. 19 more days) that he sought via this grievance because he had already been paid the vacation that he was contractually entitled to at retirement. The Association has not proved a contract violation.

In light of the above, it is my

AWARD

1. That the grievance was timely filed; and

2. That the District did not violate Section 5.01 of the collective bargaining agreement by its actions here. The grievance is therefore denied.

Dated at Madison, Wisconsin, this 18th day of April, 2003.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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