BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BROWN COUNTY HUMAN SERVICES PROFESSIONAL EMPLOYEES ASSOCIATION

and

BROWN COUNTY

Case 675
No. 61856
MA-12084

(Personal Day Grievance)

Appearances:

Mr. Fred Mohr, Attorney, on behalf of the Association.

Mr. John Jacques, Interim Corporation Counsel, Brown County, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and County 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 March 20, 2003, in Green Bay, Wisconsin. Afterwards, the parties filed briefs and reply briefs, whereupon the record was closed on May 14, 2003. Based on the entire record, the undersigned issues the following Award

ISSUE

The parties stipulated to the following issue:

What is the effective date of the additional personal day negotiated in the 2002-2003 contract?

PERTINENT CONTRACT PROVISIONS

The parties' 2002-2003 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 24. PERSONAL TIME OFF

Each employee who has been employed for a period of at least 6 months shall be entitled to three (3) personal days off with pay. The days to be taken shall be selected by the employee with the approval of the employee's supervisor. Personal time off will be prorated for part-time employees.

. . .

ARTICLE 33. DURATION OF AGREEMENT

This Agreement shall become effective as of January 1, 2002 and shall remain in force and effect to and including December 31, 2003 and shall renew itself for additional one (1) year periods until and unless either party, prior to June 1, before the expiration of this Agreement and the expiration of any of its renewal dates, notifies the other party in writing that it desires to alter or amend the same at the end of the Agreement.

It is understood and agreed that if any article or portion of this Agreement is in conflict with the statutes of the State of Wisconsin governing municipalities, such article or portion shall be declared invalid and negotiations shall be instituted to adjust such article or portion.

. . .

MEMORANDUM OF UNDERSTANDING

VEBA Account

The following agreement has been reached between Brown County and the Human Services Professional Employees Association, represented by Frederick J. Mohr.

> The employer will create a VEBA plan and will administer the contribution of a percentage of casual time remaining at the end of this year into this account on behalf of each employee, the uniform percentage to be determined by the union. Employees will pay all requisite administration fees. Employees will also be allowed to place any sick leave balances (as determined by the contract) remaining at the time of retirement in the fund at a uniform percentage to be determined by the employees retiring that year. This plan shall be put in place January 1, 2003 or as soon thereafter as the County is able to administer and provide training for it.

FOR BROWN COUNTY:		FOR THE ASSOCIATION:	
Kathryn Koehler /s/		Frederick J. Mohr /s/	2/10/03
Kathryn Koehler	Date	Frederick J. Mohr	Date
Interim Human Resources Director			

. . .

MEMORANDUM OF UNDERSTANDING

ARTICLE 23. Personal Time Off – Additional Personal Day

The following agreement has been reached between Brown County and the Human Services Professional Employees Association, represented by Frederick J. Mohr.

> The County and the Union agree that when the issue of the effective date of the additional Personal Day is resolved, the 2002-2003 contract will be updated accordingly.

FOR BROWN COUNTY: FOR THE ASSOCIATION:

Kathryn Koehler /s/		Frederick J. Mohr /s/	2/10/03
Kathryn Koehler	Date	Frederick J. Mohr	Date
Interim Human Resources Director			

NOTE: The reference in the above Memorandum of Understanding to "Article 23" is an error. It should refer to "Article 24" rather than "Article 23".

FACTS

This dispute involves the effective date of the additional personal leave day which was included in the parties' 2002-2003 collective bargaining agreement.

The following bargaining history is pertinent to this case. In November, 2001, the parties commenced negotiations for a successor labor agreement to replace their 1999-2001 collective bargaining agreement. The County's initial proposal requested significant concessions from the Association on insurance issues. To get those concessions, the County offered to fund a VEBA plan. These County proposals did not indicate when they were to become effective. Over the next several months, the parties had several bargaining sessions wherein they discussed the proposed insurance concessions and the VEBA plan.

On March 4, 2002, the County submitted a revised bargaining proposal to the Association. This proposal indicated, in pertinent part, that the insurance changes it sought were to become effective "12/31/02".

On May 8, 2002, the County submitted a revised bargaining proposal to the Association. This proposal indicated, in pertinent part, that some of the insurance changes it sought were to become effective "1/1/03".

On May 22, 2002, the County submitted a revised bargaining proposal to the Association. This proposal indicated, in pertinent part, that some of the insurance changes it sought were to become effective "1/1/03". This proposal also indicated, in pertinent part, that the County was proposing to "add an additional personal day." This proposal did not indicate when it was to become effective. This was the first time during these negotiations that the County offered an additional personal day. The parties' 1999-2001 collective bargaining agreement provided that employees got three personal days per year, so the County's proposal was to add one more to that. When the County's proposal on the additional personal day was

discussed at the May 22nd bargaining session, the County's lead negotiator, Jim Kalny, told Association bargainers that the County was linking an additional personal day with the changes it was seeking on health insurance; if the Association agreed to accept the proposed health insurance changes, the County would give employees an additional personal day. Kalny testified he described it thus: the additional personal day was a *quid pro quo* for the insurance changes. In the County's view, the value of those two items was about the same, so this is why the County linked them together.

Insofar as the record shows, the effective date for the additional personal day was not discussed at any bargaining session.

The parties were unable to resolve their contractual differences, so they proceeded to mediation. Prior to the mediation session, the Association submitted a summary of the issues to the mediator. That document provided in pertinent part:

> 5. **Holidays.** The parties tentatively have agreed to the addition of an additional personal day. However, the Association continues its request that the additional day be used to make Christmas Eve and New Year's Eve full day holidays (presently each are half day holidays).
>
> 6. **Insurance.** The insurance issue has been the stumbling block during negotiations. The County presently offers 3 plans to its employees, i.e., the Basic Plan, the Preferred Provider Plan and the HSP Plan.
>
> *Basic Plan*. The parties tentatively have agreed to eliminate the Basic Health Plan effective at the end of the year.
>
> *Preferred Provider Plan*. Presently the County pays 95 percent of the premium for a family plan and 100 percent of the premium for a single plan. The County has proposed the payment of 95 percent of the premium for both plans. The Association does not oppose this proposal subject to acceptance of other Association requests.
>
> *HSP Plan*. The County presently pays 100 percent of the premium under the HSP plan. The County proposes to reduce its contribution to 95 percent on each of the family and single plans. The Association is not opposed to this request subject to the acceptance of other Association requests.
>
> There has been some disagreement regarding the coverage of the plans. The County has requested certain cost cutting alterations of the plan which include the following:

a) $25.00 non-emergency penalty.
b) Eliminate the out-of-pocket maximum on drugs.
c) Implement a drug formulary of $20/$20/$20+15%
d) Modify the policy regarding prior authorizations after 10 visits for physical therapy.

The Association will consider a portion of these modifications subject to acceptance of other Association requests.

The Association vehemently has requested that a $500.00 maximum drug out-of-pocket limit be continued. We have also requested enhanced nervous and mental coverage under the HSP Plan; in increase in the lifetime maximum to $2 million; an increase in the dental plan at 25/75 with a $1,500.00 annual maximum; and to provide equivalent coverage for chiropractic care under the PPO as exists under the HSP.

7. **VEBA Account**. The Association has requested that the County adopt a post-employment health plan (I.R.C. § 501(c)(9) VEBA). The County originally suggested the plan in return for health insurance concessions. The County's original offer provided funding for the plan. The Association's last position requested that the County adopt the plan and allow employees to fund it with the conversion of unused casual days, banked sick leave and vacation days in the last years before retirement. The County has rejected this request.

On August 6, 2002, the parties had a mediation session. At that mediation session, the County gave the Association a preliminary final offer. That document provided in pertinent part:

1. ARTICLE 11 INSURANCE

The Basic Plan shall be eliminated effective 1/1/03; all language referencing the Basic Plan shall be removed from the contract, substitute reference in contract to PPO.

Effective 1/1/03, amend the premium contributions to 5% on all plans.

The HSP Plan shall be amended effective 1/1/03 in the following manner:

Nervous and Mental coverage shall be upgraded to that of the PPO.

Effective 1/1/03 the requirement for pre-certification for the first ten out patient therapies shall be eliminated in all plans
$25.00 penalty for non-emergency use of the emergency room
3 tier formulary for RX (20%, 20%, 20%+$15.00)

2. ARTICLE 23 - HOLIDAYS

Add an additional personal day.

. . .

PROPOSED MEMORANDUM

VEBA Account

The employer will create a VEBA plan and will administer the contribution of a percentage of casual time remaining at the end of this year into this account on behalf of each employee, the uniform percentage to be determined by the union. Employees will pay all requisite administration fees. Employees will also be allowed to place any sick leave balances (as determined by the contract) remaining at the time of retirement in the fund at a uniform percentage to be determined by the employees retiring that year. This plan shall be put in place 1/1/02 or as soon thereafter as the County is able to administer and provide training for it.

At the mediation session, the parties reached a tentative agreement on a new two-year collective bargaining agreement which would run from January 1, 2002 through December 31, 2003. Insofar as the record shows, the effective date for the additional personal day was not discussed in the mediation session.

The next day, August 7, 2002, the County's lead negotiator and Human Resources Director, Jim Kalny, prepared and sent Association representative Fred Mohr a written version of the parties' tentative agreement. That document provided in pertinent part:

1. ARTICLE 11 INSURANCE

The Basic Plan shall be eliminated effective 1/1/03; all language referencing the Basic Plan shall be removed from the contract, substitute reference in contract to PPO.

Effective 1/1/03, amend the premium contributions to 5% on all plans.

The HSP Plan shall be amended effective 1/1/03 in the following manner:

Nervous and Mental coverage shall be upgraded to that of the PPO.

Effective 1/1/03 the requirement for pre-certification for first ten out patient therapies shall be eliminated in all plans.
$25.00 penalty for non-emergency use of the emergency room
3 tier formulary for RX (20%, 20%, 20% + $15.00)

2. ARTICLE 23 HOLIDAYS

Add an additional personal day

3. ARTICLE 33. DURATION OF AGREEMENT

Amend the dates referenced in lines 702 and 703 to read as follows:

This agreement shall become effective January 1, 2002, and shall remain in force and effect up to and including December 31, 2003.

. . .

NEW MEMORANDUM

VEBA Account

The employer will create a VEBA plan and will administer the contribution of a percentage of casual time remaining at the end of this year into this account on behalf of each employee, the uniform percentage to be determined by the union. Employees will pay all requisite administration fees. Employees will also be allowed to place any sick leave balances (as determined by the contract) remaining at the

> time of retirement in the fund at a uniform percentage to be determined by the employees retiring that year. This plan shall be put in place 1/1/03 or as soon thereafter as the County is able to administer and provide training for it.

The last line of this document provided thus:

> Please contact me if any portions of this proposal do not accurately reflect what had been agreed to.

(NOTE: The language just quoted is found in Joint Exhibit 13).

Although the last sentence of the above-quoted language dealing with the VEBA account references an effective date of January 1, 2003, Mohr received a copy of that document that contained a different effective date (namely, January 1, 2002) because he wrote Kalny a letter bringing the matter to his attention. Specifically, Mohr told Kalny that his (Kalny's) document contained the wrong effective date for the VEBA plan, and that the effective date that the parties had agreed on for the new VEBA plan was January 1, 2003. Kalny responded in a letter dated August 15, 2002 that "You are correct that we agreed to put it in place 1/1/03. Thank you for calling this to my attention." Enclosed with this letter was a substitute corrected page which indicated that the VEBA plan was to be "put in place 1/1/03. . ."

After this mistake about the effective date for the new VEBA plan was discovered, Kalny directed his staff to make sure that all effective dates were included in the tentative agreement. On August 26, 2002, Kalny sent Mohr a final draft of the tentative agreement. That document was identical to what had been exchanged previously. It indicated that the effective date for the new VEBA plan was January 1, 2003. However, it was still silent on the effective date for the additional personal day. Kalny testified it was an oversight on his part not to include the effective date of January 1, 2003 for the additional personal day on the tentative agreement.

On August 29, 2002, the Association held a ratification vote on the tentative agreement. When Mohr was giving a presentation to the membership on the terms of the tentative agreement, a member questioned whether the additional personal day would be effective in 2002. Mohr replied in the affirmative. The Association's membership ratified the tentative agreement at that meeting.

Sometime in early September, 2002, Kalny briefed the County's Executive Committee about the tentative agreement with the Association. He testified that he told the Committee that the additional personal day would go into effect on January 1, 2003 because it was linked to the insurance changes.

On September 18, 2002, the County Board ratified the tentative agreement with the Association. When it was voted on, there were no questions from board members about the effective date of the additional personal day.

In October, 2002, an Association member attempted to use the additional personal leave day which was included in the parties' new 2002-2003 collective bargaining agreement, but the request was denied. The reason it was denied was this: it was the County's position that the additional personal leave day was effective January 1, 2003. Mohr then contacted Kalny and Kathy Koehler, the then-acting County personnel director, regarding the matter. In their discussions, it became apparent that the parties had a disagreement over the effective date of the additional personal leave day: the Association thought it was effective January 1, 2002 while the County thought it was effective January 1, 2003.

A grievance was filed concerning same which was appealed to arbitration.

At the hearing, Association bargainers testified that they assumed the additional personal day became effective January 1, 2002. County bargainers testified that they assumed the additional personal day became effective January 1, 2003 because that is when the insurance changes went into effect.

POSITIONS OF THE PARTIES

Association

The Association's position is that the additional personal day became effective January 1, 2002. It makes the following arguments to support that contention.

It notes at the outset that the tentative agreement document, which included the additional personal day, did not specify an effective date for the additional personal day. Additionally, the Association avers that in bargaining, the County's bargainers never specified that the additional personal day was going to be effective on January 1, 2003 or was going to have a delayed starting date. The Association believes that under these circumstances, it was reasonable for it to assume that the personal day would be effective in the first year of the contract (i.e. 2002). From its perspective, it had no reason to think otherwise.

The Association contends that the arbitrator should not accept the County's *quid pro quo* argument because it is not supported by either the written tentative agreement itself, or generally accepted rules of contract construction and interpretation.

With regard to the former (i.e. the tentative agreement itself), the Association asserts that a review of that document does not indicate that the commencement of the additional

personal day and instituting the new insurance program would be on the same date. In its view, it simply does not say that.

With regard to the latter (i.e. generally accepted rules of contract construction), the Association believes the following four principles are applicable here. First, it relies on the principle that the meaning of a particular contract provision is to be ascertained by looking at the contract as a whole. According to the Association, when that rule of interpretation is applied here, it results in the effective date for the personal day being January 1, 2002. In support thereof, it notes that when the tentative agreement is reviewed, it is apparent that when the parties mutually intended for an item to have an effective date other than January 1, 2002, the delayed commencement date was clearly denoted on the tentative agreement document. It asserts that the inference from this is that a contract provision is retroactive to the start of the contract's terms (i.e. January 1, 2002) unless it is specifically denoted otherwise. In this case, the tentative agreement did not denote a delayed implementation date for the additional personal day.

The second rule of contract construction which the Association relies on is the notion that when a contract's terms are plain and unambiguous, the arbitrator's task is to simply apply those terms to the facts even if the results are harsh or contrary to the original expectations of one of the parties. The Association contends that while the parties disagree as to the meaning of the personal day language which was contained in the tentative agreement, that disagreement does not make the language ambiguous. According to the Association, that language is clear and unambiguous in that it does not contain a delayed implementation or starting date. The Association argues that since no delayed starting date was expressed in that language, it would be inappropriate for the arbitrator to find that the additional personal day was not effective until January 1, 2003 because if he so found, he would be rewriting the tentative agreement and inserting something (i.e. a delayed effective date) that was not there.

The third rule of contract interpretation which the Association relies on is the principle that a specific mention in a contract of one matter is considered to exclude other matters of the same nature which are not mentioned. The Association avers that since Kalny inserted effective dates in some provisions, but did not do so in the personal leave day provision, this mandates adoption of the Association's position.

The fourth rule of contract construction which the Association relies on is the principle that any contract ambiguity is construed against the drafting party. The Association notes in this regard that it was Kalny that drafted the language of the tentative agreement. The Association further notes that it was Mohr who discovered an error on the date that the new VEBA plan was to be implemented and brought this to Kalny's attention. The Association calls specific attention to the fact that even after that mistake was brought to Kalny's attention, and Kalny then directed his staff to make sure that all the effective dates were in the tentative

agreement, there still was no effective date placed in the tentative agreement for the additional personal day. The Association believes it should not be held responsible for the County's failure to follow through on Kalny's directive.

In sum, the Association asks the arbitrator to find in its favor that the additional personal day became effective January 1, 2002.

County

The County's position is that the additional personal day became effective January 1, 2003. It makes the following arguments to support that contention.

The County's main argument is that there was a *quid pro quo* between the parties on the additional personal day and the insurance changes. The County avers that the *quid pro quo* was this: the County gave bargaining unit employees an additional personal day in return for the employees paying a new insurance premium. According to the County, this *quid pro quo* was known by both sides. Building on that premise, the County argues that since the insurance changes were effective January 1, 2003, that was also the effective date for the additional personal day. In its view, the existence of this *quid pro quo* is supported by the parties' bargaining history.

With regard to the bargaining history, the County first notes that Kalny developed a document, which was provided to Association bargainers, which showed the costing of the insurance changes and the additional personal day. The County asserts that document showed there was an equal dollar value between the two items, so the *quid pro quo* was for two items of equal value. The County intended the granting of the additional personal day to be a trade in return for changes in insurance. Second, the County notes that in bargaining, the parties agreed that the insurance changes would be implemented in the second year of the contract, specifically January 1, 2003. The County reasons that since the additional personal day was tied to the insurance changes, and the insurance changes were implemented January 1, 2003, it should have been apparent to the Association's bargaining team that the effective date for the additional personal day was January 1, 2003 as well.

The County makes the following arguments about the tentative agreement document. It acknowledges that the tentative agreement document does not contain a date of January 1, 2003 for the additional personal day. It calls that "a good faith omission." As the County sees it, it should have nonetheless been clear to the Association that the additional personal day was not retroactive to January 1, 2002, but rather became effective on January 1, 2003 – the same date that the insurance changes became effective.

The County argues that if there was an ambiguity in the tentative agreement about the

effective date of the additional personal day, the ambiguity should be resolved in the County's favor. The basis for this contention is as follows. The County asserts that the County Board was informed that there was a *quid pro quo* between the additional personal day and the insurance changes that was of equal value. The County avers that the County Board would not have approved the tentative agreement if it had known of the Association's interpretation of the tentative agreement (i.e. that the additional personal day was effective January 1, 2002 while the insurance changes became effective January 1, 2003).

Aside from the foregoing, the County also contends that while the parties certainly had a meeting of the minds on the effective date for the insurance changes, they did not have a meeting of the minds on the effective date of the additional personal day. As the County sees it, there was a misunderstanding between the parties on that point. The County claims this misunderstanding came to light when the Association voted on the tentative agreement and a bargaining unit employee raised a question about when the additional personal day became effective. The County implies that this question should have put the Association on notice that an ambiguity existed about the effective date of the additional personal day. According to the County, once this understanding became apparent, "a cautious and prudent approach" would have been for the Association to confirm the intent of the tentative agreement with County negotiators before the County Board met to ratify. Unfortunately, that did not happen, so the ambiguity was not clarified. The County avers that under Wisconsin law, "terms outside the contemplation of either party do not constitute a contractual obligation."

In sum, the County asks the arbitrator to find in its favor that the additional personal day became effective January 1, 2003. The County asserts that if the arbitrator holds to the contrary, and finds the additional personal day to be effective January 1, 2002, this will result in an unreasonable windfall to the Association because it will double the value of the negotiated benefit.

DISCUSSION

At issue here is the effective date for the additional personal day which the parties included in their 2002-2003 collective bargaining agreement. Simply put, was it effective in 2002 or 2003? Based on the rationale which follows, I find it was effective in 2002.

My analysis begins with a review of the language involved. Normally, in a contract interpretation case such as this, the arbitrator interprets language found in the parties' collective bargaining agreement. Here, though, that is not the case. In this case, the language which needs to be interpreted is found in the tentative agreement document which both sides ratified. Thus, in this case, the disputed language is found in the tentative agreement document, not the collective bargaining agreement. Accordingly, I will be interpreting the language in the tentative agreement document. The portion of that document which is at issue here is the part dealing with the additional personal day.

All that language says is "add an additional personal day." That's it.

In this case, the question is not what this phrase means. Instead, it is when the additional personal day became effective. The parties' tentative agreement covered the two year period of 2002 and 2003, so the question is whether the additional personal day became effective in the first year of the contract or the second year. The Association argues the former; the County argues the latter.

This dispute arose because the provision does not contain an effective date. No date is mentioned.

Since the provision in question is silent on an effective date, my initial inference is that the additional personal day is retroactive to the start of the contract (i.e. January 1, 2002) by means of the contract's duration clause. Here's why.

That inference is supported by the following rules of contract interpretation. First, when the tentative agreement document is reviewed as a whole, what is noteworthy about it, in the context of this case, is that the parties specifically agreed that several provisions had an effective date other than the start of the contract. Specifically, both the insurance provisions and the VEBA provision specified that they were effective January 1, 2003 (i.e. in the second year of the contract). Thus, the delayed commencement date for these provisions was clearly denoted in the tentative agreement document. In contrast, no delayed commencement date was denoted for the additional personal day. Second, another rule of contract construction applicable here is that a specific mention of one matter in a contract is considered to exclude other matters of the same nature which are not mentioned. As was just noted, the parties inserted several delayed effective dates in that document. Specifically, they inserted them into the provisions covering the insurance changes and the VEBA plan, but not for the additional personal day. This rule of contract construction likewise supports the inference that the additional personal day was retroactive to 2002. Third, another rule of contract construction applicable here is that a contract ambiguity is construed against the drafting party. In this case, it was the County's representatives that drafted the language of the tentative agreement. After it was drafted, the Association's representative, Mohr, discovered an error on the start date for the new VEBA plan and brought it to Kalny's attention. In bargaining, the parties had agreed that the new VEBA plan would start January 1, 2003 (i.e. in the second year of the contract), while the tentative agreement document Mohr received had a start date of January 1, 2002. Kalny agreed that the date of January 1, 2002 was an error. After this incorrect date was brought to his attention, Kalny directed his staff to make sure all the dates in the tentative agreement document were correct. The only change which was subsequently made in the document was to change the effective date of the VEBA plan from January 1, 2002 to January 1, 2003. Nothing was changed concerning the additional personal day. Specifically, no effective date was placed in the tentative agreement document for the additional personal

day. Since the County drafted the tentative agreement document, it bears responsibility for the absence therein (i.e. the omission) of an effective date for the additional personal day.

That said, the real question in this case is whether the inference just noted (i.e. that the additional personal day is retroactive to 2002) is overcome by the parties' bargaining history. Bargaining history is a form of evidence commonly used by arbitrators to help them fill in the gaps in contract language.

The focus now turns to the parties' bargaining history. The record indicates that when the County first offered the additional personal day to the Association, it certainly tied it to the insurance changes it was seeking. In the County's view, it was a trade of two items of equal value. Kalny specifically called it a *quid pro quo*: the County would give employees an additional personal day in exchange for the employees making insurance changes. The County assumed that since these two items were tied together (i.e. the additional personal day and the insurance changes), and the parties subsequently agreed on a delayed implementation date of January 1, 2003 for the insurance changes, then it should have been obvious to the Association's negotiators that the additional personal day was to be delayed to that same date (i.e. January 1, 2003) as well.

If the record evidence showed that the County's negotiators specifically and clearly put the Association's negotiators on notice that the County considered the additional personal day to have an effective date of January 1, 2003, then it would certainly be a circumvention of the bargaining process to now apply the contractual duration clause to the additional personal day. However, the evidence does not show that. What the evidence shows is that the County's negotiators never told the Association's negotiators, in either a bargaining session or the mediation session, that the County intended the additional personal day to have an effective date of January 1, 2003 (i.e. in the second year of the contract). Since the County's negotiators never told the Association's negotiators that the additional personal day was not retroactive to the first year of the contract, the Association's negotiators assumed that the additional personal day was retroactive to January 1, 2002. That assumption, of course, was different from what the County intended, and explains how the misunderstanding arose that is at the core of this dispute. Obviously, the parties had differing assumptions about when the additional day was to be effective; the County thought it was 2003, while the Association thought it was 2002.

One of the County's arguments is that the parties did not have a meeting of the minds on this one particular part of their tentative agreement. I agree; they did not. However, that finding does little to resolve this dispute. Here's why.

Oftentimes when a decision maker finds that the parties did not have a meeting of the minds, the remedy which is ordered is to declare the parties' tentative agreement null and void.

This remedy essentially sends the parties back to the bargaining table for further negotiations. The undersigned considered doing that here but rejected it for the following reasons. First, the parties themselves decided how they wanted to resolve this dispute and they decided to resolve it via grievance arbitration instead of via further negotiations. That was their call to make. Second, at the hearing, the parties stipulated to an issue which precludes the arbitrator from sending the parties back to the bargaining table. They did this by agreeing to an issue which essentially asks the arbitrator to simply pick a year – 2002 or 2003 – as the effective date for the additional personal day. Given the foregoing, that is what I will do here.

As was noted at the outset of this discussion, when I looked at the provision in question, my initial inference concerning same was that the additional personal day was retroactive to the start of the contract (i.e. January 1, 2002) by means of the contract's duration clause. I noted that this inference was supported by several traditional rules of contract interpretation. Retroactivity is also the norm in bargaining. By that, I mean that the presumption in bargaining is that a contract provision is retroactive to the start of the contract unless the parties specifically agree otherwise. In this case, the County tried to prove, via bargaining history evidence, that the presumption just noted does not apply to the additional personal day. The County did not prove that. Since they did not, my initial inference that the additional personal day is retroactive to the start of the contract (i.e. January 1, 2002) by means of the contract's duration clause stands because it has not been refuted by the parties bargaining history.

The County's final argument is that the Association should have raised the "ambiguity" about the effective date of the additional personal day with County negotiators before the County Board ratified the tentative agreement. It would be one thing if the Association knew about the "ambiguity" and said nothing about it to the County's negotiators before the County Board ratified the tentative agreement. However, the record evidence is to the contrary. The record shows that when the Association voted on the tentative agreement, a member of the bargaining unit questioned whether the additional personal day would be effective in 2002. According to the County, this question should have put the Association on notice that the parties had a misunderstanding about when the additional personal day became effective. I disagree. When Mohr responded to the aforementioned question in the affirmative at the ratification meeting, he had no reason to believe there was any misunderstanding concerning the effective date for the additional personal day. The misunderstanding over the effective date of the additional personal day only came to light after both sides had ratified the tentative agreement.

Given the foregoing, it is held that the effective date for the additional personal day is January 1, 2002. In so finding, I am well aware that the County feels that this retroactivity constitutes an unreasonable windfall to the Association because the County now has to pay more than it intended for what it got at the bargaining table. Be that as it may, that is the price

of the County's failure to list an effective date in the tentative agreement document for the additional personal day.

In light of the above, it is my

AWARD

That the effective date of the additional personal day negotiated in the 2002-03 contract is January 1, 2002.

Dated at Madison, Wisconsin, this 15th day of July, 2003.

Raleigh Jones, Arbitrator

REJ/gjc
6543