BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**PINE VALLEY MANOR EMPLOYEES UNION,
LOCAL 3363, AFSCME, AFL-CIO**

and

RICHLAND COUNTY (PINE VALLEY MANOR)

Case 148
No. 61952
MA-12113

(Hansen Vacation Grievance)

Appearances:

Jennifer Hall and **David White**, Staff Representatives, Wisconsin Council 40, AFSCME, on behalf of Pine Valley Manor Employees Union, Local 3363, AFSCME, AFL-CIO.

LaFollette, Godfrey & Kahn, S.C., Attorneys at Law, by **Jon E. Anderson**, on behalf of Richland County.

ARBITRATION AWARD

Pine Valley Manor Employees Union, Local 3363, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Richland County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on March 26, 2003 in Richland Center, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter. The briefing schedule was completed by November 7, 2003. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award

ISSUES

The parties stipulated that the grievance is properly before the Arbitrator and to the following statement of the issues:

> Did the County violate the terms of the 2000-01 collective bargaining agreement in the manner in which it calculated the 2002 vacation entitlement of Ms. Elaine Hansen?
>
> If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions are cited, in relevant part:

Article 1 – Recognition and Unit of Representation

1.01 The Employer recognizes the Union as the exclusive collective bargaining representative of all regular full-time and regular part-time employees in the employ of Richland County at its Pine Valley Healthcare and Rehabilitation Center, but excluding the administrator, managerial employees, supervisors, registered nurses, and all other professional employees, confidential employees, craft employees, temporary employees, seasonal and casual unscheduled employees, and all other employees of Richland County for the purpose of collective bargaining with the above-named municipal Employer, or its lawfully authorized representatives, on questions of wages, hours and conditions of employment, pursuant to a certification by the Wisconsin Employment Relations Commission, Case XXXVII, No. 33057, ME-2235, Decision No. 21601, dated May 31, 1984. This provision only describes the bargaining representative and the bargaining unit covered by the terms of this collective bargaining agreement and is not to be interpreted for any other purpose.

. . .

1.03 Definitions:

A) Employees who are regularly scheduled to work nine (9) or more days in a fourteen (14) day period and sixty nine and three-quarters (69¾) or more hours during said period, are full-time for benefit purposes. Positions treated as full-time for benefit purposes as of April 1, 1986 are full-time for

benefit purposes even if the position work cycle contains less than 69¾ hours and 9 days in some 14 day periods. 1/

1/ The last sentence of this provision is not in issue in this case, as it applies to kitchen positions whose schedules have eight work days in one pay period and ten work days in the next pay period.

B) Employees who are regularly scheduled to work five (5) or more days in a fourteen (14) day period and thirty eight and three-quarters (38¾) or more hours during said period, are part-time for benefit purposes.

C) Other unit employees are call-in for benefit purposes. Call-in employees are entitled to the following benefits:

1. Health insurance: available, but paid by the employee;

2. Sick leave: one day (7¾ hours) for each 167.92 hours worked;

3. Vacation: one day (7¾ hours) at the one week level for every 403 hours worked (comparable for other levels);

4. Personal holiday: two (2) days at 3 7/8 hours per day paid leave if the employee works 806 hours in a calendar year;

5. Holidays: no benefit except 19 3/8 hours pay per 7¾ hours of work (total pay, including pay for work) if the employee works on a holiday.

6. Jury Duty and Funeral Leave: Call-in employees are eligible if they are scheduled to work on a date(s) that either situation were to arise.

7. State Life Fund and Wisconsin Retirement Fund: State Life Fund – pursuant to current practice; Wisconsin Retirement Fund – pursuant to law; Employer pays the same portion of employee's share of Wisconsin Retirement Fund which it pays for other unit employees.

D) All paid time shall be considered time worked for the benefit purposes.

. . .

Article 11 – Vacation

11.01 Employees shall receive vacations with pay based on calendar length of service with the County in accordance with the following schedule:

	Full-Time	Part-Time
1 year of service	5 days of vacation	2.5 days of vacation
2 years of service	10 days of vacation	5.0 days of vacation
6 years of service	15 days of vacation	7.5 days of vacation
12 years of service	20 days of vacation	10.0 days of vacation
23 years of service	25 days of vacation	12.5 days of vacation

11.02 Vacations shall be earned based on the employee's anniversary date of employment with Richland County. Earned vacation must be taken within one year after becoming eligible.

11.03 Employees who terminate their employment or who are laid off will be paid for vacation previously earned and not received for the current year up to the date of termination, on a prorated basis.

. . .

Article 16 – Leaves of Absence

16.01 A leave of absence may be granted by the Employer at its discretion to an employee without loss of seniority for reasons of illness and recuperation therefrom, and for any other reasons deemed proper, except that if employee exhausts his/her sick leave accumulation, he/she will be granted leave not to exceed six (6) months; the Employer may grant an extension under appropriate circumstances. Any leave of absence granted by the Employer shall not be considered an interruption of the employee's seniority rights.

. . .

BACKGROUND

The Grievant, Elaine Hansen, has been employed as a CNA at Pine Valley Manor on a "full-time" basis since February 7, 1994, i.e., she is regularly scheduled to work 9 days in a 14 day pay period, working 7¾ hours per day.

Vacation is earned based upon the employee's anniversary date. Therefore, for 2002, the Grievant's vacation was earned during the period from February 7, 2001 to February 7, 2002. During that period, the Grievant was on unpaid leave for 22 days, 2¾ hours, after using her paid leave, due to having surgery and her spouse being hospitalized. Due to taking unpaid leave, the Grievant had no paid hours for the September 9-22, 2001 pay period and had less than 69¾ paid hours in eight other pay periods. Based on this, the Grievant was calculated to have worked 8¾ months as a "full-time" employee, plus 484½ hours. As the Grievant would earn 15 days of vacation for the year as a full-time employee, or 1¼ days per month, the County calculated her vacation as follows:

8¾ months x 15/12 = 10.94 days
+ 484½ hours divided by 403 hours = 1.2 days

Total 12.14 days (or 12 days, 2 hours)

In 1997, the Grievant would have earned 10 days of vacation as a full-time employee. The Grievant received 10 days of vacation even though she was on unpaid leave during the year, such that under the County's method of computation she would have only earned 8½ days of vacation.

The individual in the Manor's business office who is responsible for doing payroll and calculating vacation entitlement, Therese Deckert, testified that she started in that job in October of 1997 and was trained by Carol Welsh, who had held that job from 1975 until she became an Administrative Assistant in late 1997. According to Deckert, she made an error in calculating the Grievant's vacation in 1997, as she had been trained by Welsh to prorate an employee's vacation, if they have taken unpaid leave, in the same manner the Grievant's vacation was calculated in this case. Welsh testified that this was the manner vacation was calculated as long as she was in the job and is the way she trained Deckert to do it. Deckert testified that this is the manner in which she has continued to calculate vacation.

A grievance was filed regarding the manner in which the Grievant's vacation for 2002 was calculated. The parties were unable to resolve their dispute and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union first asserts that the contract language at issue is clear and unambiguous. As such, arbitrators will not give such language a meaning other than that expressed. Article 11,

Section 11.01, of the Agreement, sets forth the vacation entitlement due to full-time and part-time employees based on years of service. Such employees with the Grievant's years of service are to receive 15 days of vacation if they are full-time, and 7½ days of vacation if they are part-time. There is no provision in Article 11 for proration of vacation for full-time or part-time employees under any circumstances.

Section 1.03, A, of the Agreement provides that employees who "are regularly scheduled to work nine (9) or more days in a fourteen (14) day period and sixty nine and three-quarters (69¾) or more hours during said period, are full-time for benefit purposes." Section 1.03, C, of the Agreement, provides a formula for prorating benefits for "call-in" employees. Call-in employees are those who qualify neither as full-time or part-time. These employees receive 7¾ hours of vacation "for every 403 hours worked (comparable for other levels)."

During her entire tenure, the Grievant has been regularly scheduled to work the requisite number of days and hours per pay period to qualify as a full-time employee. On February 7, 2002, the Grievant completed eight years of service and therefore was entitled to 15 days of paid vacation. While there is a proration formula in the Agreement at Section 1.03, C, it applies to "call-in" employees, and therefore cannot apply to full-time employees. Thus, there is no doubt that the Grievant was entitled to 15 days of vacation, as of February 7, 2002.

The County mistakenly relies on a past practice of prorating vacation benefits based on hours worked in the previous anniversary year. According to the County's witness, Therese Deckert, she uses a two-part calculation, one of which is the "403 hour" formula in Section 1.03, C. There is absolutely no contractual basis for prorating vacation benefits for full-time employees. The contractual reference to the "403 hour" formula is for call-in employees only. While arbitrators will consider past practice in the interpretation of ambiguous contract provisions, they refuse to do so where, as here, the language at issue is clear.

The Union asserts that even assuming *arguendo* that the contract language is not clear, the evidence does not support the County's claim of a binding past practice. To be binding, practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as an established practice accepted by both parties. Here, the purported practice fails each of those criterion. Most notably, the asserted practice has not been mutually acceptable, as the Union is not advised of what vacation employees receive on their anniversary dates, and therefore is not in a position to object to the amount provided. As to the unequivocal nature of the practice, that is far from established, since the previous time the Grievant had considerable time off without pay in 1997, she received her full contractual vacation entitlement on her anniversary date in 1998. While the County dismissed this as a "mistake", the practice is hardly unequivocal if all the exceptions are dismissed as "mistakes".

The Union concludes that the contract language in dispute is clear and that it is not reasonably susceptible to alternative interpretations. Therefore, its terms should be enforced as written. The County would have the arbitrator read into the contract a vacation proration formula that is simply not there. By prorating the Grievant's vacation, the County violated the Agreement. Therefore, the Union asks that the grievance be granted and the County ordered to make the Grievant whole for all losses she suffered as a result of the County's violation of the Agreement.

County

The County first asserts that the Union's argument that the Grievant is "regularly scheduled to work nine days in a 14 day period", and therefore is full-time and entitled to 15 days of vacation, must fail based on the undisputed circumstances involving the Grievant. The evidence shows that during the 2001-2002 benefit year, the Grievant missed 22 full work days and 2¾ additional hours during the year ending February 7, 2002. The Grievant testified that a portion of the time she was out was on unpaid time and attendance records reveal that she missed more than nine days in a 14 day period, thus missing a complete pay period in the benefit year. During the period of time the Grievant was on leave, she was not "regularly scheduled to work", and consequently for a period of time within the benefit year, she was not full-time.

Section 1.03, D, specifies that all paid time shall be considered time worked for benefit purposes. The logical corollary to this is that unpaid time should not be considered time worked for benefit purposes. Thus, the 22 days, 2¾ hours that the Grievant did not work and which was not covered by benefit time, is not counted for benefit purposes. This language clearly means that the Grievant's vacation entitlement, based on the definition urged by the Union, is not a full allotment.

Next, the County asserts that the contract is ambiguous, and that the County's past practice is compelling and warrants denial of the grievance. Both the County and the Union assert that the contract language is clear in support of their respective positions. Assuming *arguendo*, that both arguments are plausible, it tends to show that the contract language itself is ambiguous when considered as a whole. In such cases, resort to past practice is necessary and appropriate. In this regard, the County asserts that there is a direct conflict between the words "scheduled to work" in Section 1.03, A, and the exclusion of time that is "unpaid" in Section 1.03, D. Moreover, the wording of Article 11, spelling out maximum vacation entitlements, is premised on years of service, suggesting something more than simply being "scheduled to work." The Agreement also speaks in terms of "earning vacation". Seemingly, one does not "earn" vacation by being "scheduled to work", but rather by working. This is consistent with the terms of the Manor's personnel policies.

The nature of the ambiguity in the Agreement is further heightened when one takes into account the Management Rights clause allowing management to regulate those terms and conditions of employment which are not addressed specifically by the contract. As the Agreement does not specifically address the issue of how vacation is to be calculated in light of the discrepancy between "scheduled to work" and only counting paid time for benefit purposes, the Agreement is ambiguous, and the County's past practice comes right to the center in justifying the County's actions in this case. This practice, which is uncontroverted in the record, fills in the gap and provides the clarity necessary to resolve any conflict within the Agreement. The practice has been consistently applied over 28 years and all employees know what their vacation entitlements are. The Union must also be charged with the knowledge of how the County has calculated vacation benefits for 28 years.

County witnesses Deckert and Welsh testified as to the long-standing manner in which the Manor has calculated vacation for members of the bargaining unit. Deckert testified as to how the 2002 benefit was calculated for the Grievant, based on absences that occurred within the period between February 7, 2001 and February 7, 2002. While the Grievant testified that this was the first time that her absences had negatively impacted on her vacation accrual, testifying that unpaid absences occurring in 1997 resulted in her still receiving a full allotment of vacation for 1998, that period of time was a period of transition when Welsh left the job of fiscal clerk and Deckert assumed the position. Both Deckert and Welsh testified that an error was made in computing the Grievant's vacation entitlement. According to a notation on the employee attendance record, the Grievant should have received 8½ days in vacation in 1998 instead of the 10 days she was granted. Deckert testified that she has been calculating vacation on the same basis since she assumed her position in late 1997, and Welsh testified that she trained Deckert in how to calculate vacation, based on the method she had used for the previous 22 years. Deckert testified as to examples pulled from official business records of the Manor. Thus, the uncontroverted record evidence clearly supports a finding of a binding past practice spanning to a time prior to the existence of the labor agreement. Failure to object over 25 years clearly shows that the Union acquiesced in the practice. The practice gives meaning to the Agreement, and must be considered a part of it.

Even assuming *arguendo* that the contract language is as clear as the Union asserts, this does not mean that past practice should not be considered. Past practice may be used to show that contract language has been amended. GIBSON REFRIGERATION CO., 17 LA 313, 318 (1951). That argument is compelling in this case. The uncontroverted evidence is that the method the County used to calculate the Grievant's vacation entitlement for 2002 has been consistently employed, at least since 1975. In light of the duration of the practice, and the public nature of vacation calculations made available to each employee, the labor agreement has been amended to include this practice. The County asserts that the practice not only serves to prorate vacation benefits for people falling below full-time, but as testified to by Deckert,

serves as a basis for enhancing vacation benefits for certain part-time employees. The consistently-applied practice must be considered a part of the Agreement, and as such, is subject only to change through the collective bargaining process.

The County requests that the grievance be denied.

DISCUSSION

This dispute involves a number of provisions of the parties' Agreement, Section 1.03, which provides definitions for benefit purposes, and Section 11.01, which sets forth the vacation entitlement for "full-time" and "part-time" employees. The analysis must begin with Section 1.03, as this provision defines how one is entitled to the vacation benefits set forth in Section 11.01. The Union essentially argues that the Grievant met the definition of a "full-time" employee under Section 1.03, A, for the year in question, and therefore is entitled to the vacation set forth in Section 11.01 for a full-time employee. According to the Union, as long as the Grievant was "regularly scheduled to work" nine days in a 14 day period and 69¾ or more hours in that period, she met the definition, regardless of whether she actually worked less days or hours than that due to being off work on unpaid leave. Said another way, if not for having excused absences, the Grievant was to have been working a full-time schedule. The Union's interpretation is not unreasonable. The County essentially argues that an employee has to meet the standard in Section 1.03, A, either by working or being on paid leave, in order to earn the full-time vacation benefit set forth in Section 11.01. The County's interpretation is also plausible.

Perhaps if there were no other contractual provision to take into account, one could find the Union's interpretation of Section 1.03, A, more persuasive than the County's; however, that is not the case. Section 1.03 must be read as a whole. Section 1.03, D, provides that "All paid time shall be considered time worked for the benefit purposes." This provides that paid time off counts as time worked for purposes of meeting the days/hours per pay period requirements to be considered as "full-time" under Section 1.03, A, or part-time under Section 1.03, B. As the County asserts, it logically follows from this that the parties intended that unpaid time off is not to be considered time worked for this purpose. If this is the case, taking unpaid time off necessarily has a consequence. While the Agreement expressly provides for proration of benefits for "call-in" employees under Section 1.03, C, it is silent as to the manner of accounting for full-time or part-time employees taking unpaid time off for purposes of calculating their vacation entitlement. This adds to the ambiguity of Section 1.03. However, the evidence establishes that there is a long-standing practice in this regard.

The evidence indicates that since a time predating the parties' bargaining relationship, the practice has been to prorate an otherwise "full-time" employee's vacation benefit for the anniversary year in which the employee had taken unpaid time off, utilizing the amount of

vacation set forth in Section 11.01 as the base from which to calculate the amount of vacation earned for that year. While the Union correctly points out that this did not occur when the Grievant was off work on unpaid leave for a significant period of time in 1997, the County was able to adequately explain this exception. Both Deckert and Welsh credibly testified that this occurred not long after Deckert had started in her job and after Welsh had been promoted, and that Deckert had made an error. Further, given the duration and consistency of the practice, this one instance is not a sufficient basis for concluding a practice does not exist. For those same reasons, the Union's claim that it was unaware of the practice, and therefore cannot be deemed to have mutually accepted it, is not persuasive. Where, as here, the practice predates the parties' bargaining relationship and has continued over the entire span of that relationship and the parties' collective bargaining agreements, involves a significant benefit, and is known to the affected employees, the Union's knowledge may be implied. For these reasons, the practice is considered to be binding upon the parties.

It appears from the evidence that the Grievant's vacation benefit for 2002 was calculated consistent with the parties' practice. Therefore, it is concluded that the County did not violate the terms of the parties' 2000-01 collective bargaining agreement by the manner in which it calculated the Grievant's 2002 vacation entitlement.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 18th day of March, 2004.

David E. Shaw /s/
David E. Shaw, Arbitrator

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