BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PORTAGE COUNTY COURTHOUSE, HEALTH CARE CENTER, DEPARTMENT OF HEALTH AND HUMAN SERVICES AND LIBRARY SYSTEM EMPLOYEES LOCAL 348, AFSCME, AFL-CIO

and

PORTAGE COUNTY

Case 179
No. 62713
MA-12418

Appearances:

Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 35, Plover, Wisconsin 54467-0035, appearing on behalf of the Union.

J. Blair Ward, Assistant Corporation Counsel, Portage County, County-City Building, 1516 Church Street, Stevens Point, Wisconsin 54481, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which provides for final and binding arbitration. Pursuant thereto, the parties jointly requested that the Wisconsin Employment Relations Commission provide a panel of Commission-employed arbitrators from which the parties selected Coleen A. Burns as arbitrator of the grievance discussed below. A hearing was held in Stevens Point, Wisconsin February 10, 2004. The hearing was transcribed. The record was closed on May 20, 2004, upon receipt of each party's briefs. Having considered the entire record, the undersigned issues the following decision and Award.

STIPULATED ISSUES

1. Did the Employer violate the Collective Bargaining Agreement by its not paying out vacation credits to Collene Ottum upon her separation from employment?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 12-VACATION

. . .

D) Severance Benefit: Accumulated vacation or earned vacation shall be prorated to the credit of the employee or the employee's family upon retirement, death or termination by the employee. Accrued vacation shall be determined by giving the employee credit for one-twelfth (1/12) of their annual vacation allowance for each full month they were employed after their anniversary date. If the employee leaves or is terminated after the 15th of the month, he/she shall be given credit for working the full month. If he/she leaves or is terminated before the 15th of the month he/she shall receive no credit for the month. However, if an employee resigns without giving two (2) weeks written notice, they shall forfeit all unused vacation.

. . .

DISCUSSION

On March 13, 2003, the County discharged Collene Ottum, hereafter the Grievant, from her County employment. At the time of this discharge, the Grievant received pay for available vacation, but did not receive pay for accrued vacation, which vacation would have been available for use on May 26, 2003, her anniversary date. (T. at 12) The parties agree that this accrued vacation amount is 126 hours. (T. at 8)

On or about March 27, 2003, the Union filed a grievance alleging that the County had violated "Article 12 D and all other relevant parts of the collective bargaining agreement" by not paying out prorated vacation. The grievance was denied at all steps and, thereafter, submitted to grievance arbitration.

The County argues that the first sentence of Article 12(D) limits the payout of accrued vacation to three instances, *i.e.*, retirement, death or termination of employment by the

employee. The County further argues that, inasmuch as there has not been a retirement, death or termination of employment by the employee, but rather, there has been a termination by the employer, under the plain language of Article 12(D), the Grievant is not entitled to the vacation payout provided in Article 12(D).

The County's argument is supported by the contract construction principle of "*Expressio Unius Est Exclusio Alterius.*" Application of this principle gives rise to the inference that the identification of three instances of entitlement, *i.e.*, retirement, death or termination by the employee, means that there are no other instances of entitlement.

The Union responds that the third and fourth sentences of Article 12(D) require that credit be given for accrued vacation "if an employee leaves or is terminated." The Union further responds that the phrase "is terminated" is applicable to terminations by the employer and, thus, is applicable to the Grievant.

The County counters that such a construction would nullify the first sentence of Article 12(D) by expanding eligibility for vacation payout beyond the three specified instances of retirement, death or termination of employment by the employee. The County argues that it is not reasonable to construe sentences that describe how an eligible employee's pro-rated vacation will be determined to alter previously established eligibility requirements. The County concludes, therefore, that the words "is terminated" must be construed to be a short-hand reference to the three categories of eligibility set forth in the first sentence.

It is well-established that words should be given their plain and ordinary meaning. The use of the phrase "if an employee leaves" is consistent with and sufficient to include the separations from employment referenced in the first sentence, *i.e.*, retirement, death or termination by an employee. Thus, addition of the words "or is terminated," in general, indicates intent to include other types of separations from employment and, in particular, indicates intent to include separations from employment that are imposed upon the employee, such as discharge by the employer.

In summary, the parties have offered inconsistent constructions of Article 12(D) that find support in the language of that provision. Thus, the language of this paragraph is not clear and unambiguous. It is reasonable, therefore, to consider extrinsic evidence for assistance in ascertaining the parties' mutual intent.

Each party rightly argues that the collective bargaining agreement should be construed as a whole. The Union relies upon Article 12(B), which states as follows:

> Vacation Accrual: The date of hire, as adjusted by approved leaves of absence, shall be the vacation anniversary date for all employees. All employees shall receive prorated vacation on the basis of one-twelfth 1/12 of an annual benefit

> for each month worked from their anniversary date. Any employee hired on or before the 15th of the month shall be given credit for working the full month. If the employee is hired after the 15th of the month, he/she shall receive no credit for that month.

As the Union argues, this language indicates that accrued vacation is earned vacation. Construing Article 12(D) in a manner that is consistent with Article 12(B) reasonably supports the inference that the Grievant has an entitlement to receive accrued vacation.

The County relies upon Article 17(B), which states as follows:

> Termination. Employees terminating employment and employees whose service is terminated by discharge, death or retirement, shall receive their earned longevity at the time of termination or shortly thereafter, to end of the month preceding the date of termination when the employee terminates on or before the 15th of the month. When the termination occurs after the 15th, the longevity shall be computed to the end of the month the termination occurs. (Example: An employee whose employment is terminated on June 30 shall receive 6/12 earned longevity for the current year)

Specifically, the County argues that a review of the above language establishes that the word "termination" is not limited to involuntary terminations; that there is a pattern of initially specifying the specific type of termination to which a subsection applies and then using the word "termination" to refer back to these initially specified types of termination; and that when the parties intend benefits to be paid to employees whose termination is due to discharge, then they expressly state such intention. The County's argument is reasonable. Thus, construing Article 12(D) in a manner that is consistent with Article 17(B) reasonably supports the inference that the parties intended to limit the payout of accrued vacation to the three instances of retirement, death or termination of employment by the employee that are specified in the first sentence; that the parties do not intend a benefit to be payable upon discharge because they did not expressly so state; and that the parties use the phrase "is terminated" to refer to deaths and retirement. Thus, the language of Article 17(B) supports the inference that, when the parties used the phrase "leaves or is terminated" in Article 12(D), they intended the word "leaves" to refer back to termination by the employee and they intended "is terminated" to refer back to retirement and death.

As the County further argues, its construction of Article 12(D) is consistent with Portage County Personnel Policy 9.05, which states as follows:

> Employees who have satisfactorily completed their probationary period and whose employment subsequently terminates for reasons other than unsatisfactory performance shall receive prorated payment for accrued vacation time.

Given the fact that Article 3, Management Rights, expressly recognizes that reserved rights are subject to limitation by the provisions of the agreement, consistency with the Portage County Personnel Policy or any other County generated document, such as the Portage County Termination Notice, is not a compelling argument, *per se*. However, as the County argues, the testimony of Union witness Tank indicates that, when there are questions that are not answered by the contract, the Union will refer back to the Personnel Policy for guidance. (T. at 35)

The undersigned turns to the evidence of past practice and bargaining history, which may be examined for the purpose of resolving the ambiguity that is created by the contract language. In the parties' 1998-1999 contract, and for many years prior to that contract, the language of Article 12(D) was as follows:

> D) Severance Benefit: Accumulated vacation or earned vacation shall be prorated to the credit of the employee or the employee's family upon retirement, death or termination by the employee. However, if an employee resigns without giving two (2) weeks written notice, they shall forfeit all unused vacation.

During the time that this language was in effect, there were instances in which employees terminated by the County had received prorated vacation payout and there were instances in which employees terminated by the County had not received prorated vacation payout. (County Ex. #3; T. at 25; 46-47) This is not evidence of practices under the current language. It indicates, however, that a mixed practice existed when the first sentence of Article 12(D), which is the sentence the County asserts so clearly establishes eligibility for the vacation payout, was in effect. Notwithstanding the County's argument to the contrary, the Grievant's testimony on Page 26 of the transcript is irrelevant to any past practice argument because it addresses bargaining history, rather than past practice.

Although Personnel Director Belanger has the opinion that the "past practice' instances in which the terminated employees received a prorated vacation payout were errors, she was not employed by the County at that time of these payouts. (T. at 77) Thus, her opinion is speculation and does not provide evidence of any mutual understanding of the parties. Inasmuch as the denial of payout to Norma Trinidad occurred after this grievance was filed, it does not provide evidence of any practice that is relevant to the disposition of this case.

When the parties met to negotiate their 2000-2002 contract, the County initially proposed the following:

> D) Severance Benefit: Accumulated vacation or earned vacation shall be prorated to the credit of the employee or the employee's family upon retirement, death or termination by the employee for each month that they have actually been present and performed work through the 15th of the month. However, if

> an employee resigns without giving two (2) weeks written notice, they shall forfeit all unused vacation.

This proposal is consistent with Belanger's testimony that she requested that the County change Article 12(D) to clarify how the prorated vacation benefit provided for in Article 12(D) would be calculated. (T. at 53)

Subsequently, however, on March 24, 2000, Therese Freiberg, who was then the County's Personnel Director, submitted a County preliminary final offer that contained the following Article 12(D) language:

> D) Severance Benefit: Accumulated vacation or earned vacation shall be prorated to the credit of the employee or the employee's family upon retirement, death or termination by the employee. Accrued vacation shall be determined by giving the employee credit for one-twelfth of their annual vacation allowance for each full month they were employed after their anniversary date. If the employee leaves or is terminated after the 15th of the month, he/she shall be given credit for working the full month. If he/she leaves or is terminated before the 15th of the month, he/she shall receive no credit for the month. However, if an employee resigns without giving two (2) weeks written notice or is terminated for cause, they shall forfeit all unused vacation.

By adding the phrase "or is terminated for cause" to the last sentence, Freiberg expanded the County's proposed change from computation of the provided benefit to eligibility for the provided benefit. Subsequently, in an updated final offer of September 29, 2000, Freiberg proposed the following language:

> D) Severance Benefit: Accumulated vacation or earned vacation shall be prorated to the credit of the employee or the employee's family upon retirement, death or termination by the employee. Accrued vacation shall be determined by giving the employee credit for one-twelfth of their annual vacation allowance for each full month they were employed after their anniversary date. If the employee leaves or is terminated after the 15th of the month, he/she shall be given credit for working the full month. If he/she leaves or is terminated before the 15th of the month, he/she shall receive no credit for the month. However, if an employee resigns without giving two (2) weeks written notice they shall forfeit all unused vacation.

This language, which omitted the phrase "or is terminated for cause", was agreed to by the Union and incorporated into the parties' 2000-2002 contract.

The Grievant, who was a member of the Union's bargaining team, testified as follows:

> It was the Union's belief during negotiation that to add language denying terminated employees vacation payout would be a reduction in benefits. The former personnel director, Therese Freiberg, agreed when they dropped that language from their proposal. The only reason given in this paragraph for denying vacation to an employee who separates from employment is if they resign without giving two weeks' written notice. (T. at 22)

Union Business Agent Jerry Ugland, who was present at the bargaining table when the parties negotiated their 2000-2002 contract, recalls that he objected to the County's inclusion of the words "or is terminated for cause" every time the issue was raised; that "with that objection on that language, they subsequently removed that reference;" and that, on October 18th in a face to face bargaining session, the parties agreed to the proposal that was incorporated into the 2000-2002 contract, which proposal did not include the phrase "or is terminated for cause." (T. at 43-44)

Freiberg did not testify at hearing. Although Belanger testified at hearing, it is not evident that she was present when the County and the Union bargaining representatives discussed the County's Article 12(D) proposals.

The County argues that the County's intent in including the phrase "or is terminated for cause" was to clarify the parties' understanding of Article 12(D), *i.e.*, that employees who are terminated for cause are not entitled to the Article 12(D) vacation payout; to correct previous errors in administration of this Article 12(D); and to avoid further disputes as to the meaning of the first sentence. As the Union argues, however, the record fails to establish that any County bargaining representative ever stated that this was the County's intent, or, indeed, made any statement explaining either its intent in proposing the phrase "or is terminated for cause" or its intent in subsequently withdrawing this phrase. The County's intent, therefore, must be gleaned from the County's conduct in proposing to include the phrase "or is terminated for cause" in Article 12(D) and then removing this phrase after the Union objected to the inclusion of this phrase. This conduct reasonably leads to the conclusion that the County agreed that employees who are terminated for cause do not forfeit all unused vacation.

Additionally, the ambiguity found in the third and fourth sentences, *i.e.*, the phrase "if the employee leaves or is terminated" was created by the County. Under the well established principle of "contra proferentem," if language supplied by one party is susceptible to two interpretations, then the one that is less favorable to the party that supplied the language is preferred. Notwithstanding the County's argument to the contrary, it is reasonable to construe an ambiguity against the party who proposed the language and to conclude that the phrase "is terminated" includes employees who have been terminated by the County.

Notwithstanding the County's argument to the contrary, the Union is not arguing that the entire meaning of Article 12(D) was changed simply by the addition of the new language. Rather, the Union is arguing that the addition of the new language, as well as the County's conduct in proposing and then withdrawing the phrase "or is terminated for cause" gives meaning to Article 12(D).

In summary, the plain language of Article 12(D) is ambiguous with respect to the County's obligation to pay accrued vacation to the Grievant. Extrinsic evidence provides support for each party's inconsistent interpretations of Article 12(D). The undersigned, however, finds the evidence of bargaining history to be the most compelling evidence of the parties' mutual intent. Construing Article 12(D) in a manner that is consistent with the evidence of bargaining history leads the undersigned to conclude that the County has agreed that termination for cause does not result in the forfeiture of the vacation payout provided in Article 12(D).

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Employer violated the Collective Bargaining Agreement by not paying out vacation credits to Collene Ottum upon her separation from employment.

2. The Employer is to make Collene Ottum whole by immediately paying her for 126 hours of vacation at the hourly rate agreed upon by the parties at Page 9 of the transcript, *i.e.*, 103% of $13.66.

Dated at Madison, Wisconsin, this 11th day of November, 2004.

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

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