BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MAINTENANCE AND CUSTODIAL DIVISION
LOCAL 1838, AFSCME, AFL-CIO

and

OMRO SCHOOL DISTRICT

Case 44
No. 64109
MA-12809

(Clements Vacation Payout Grievance)

Appearances:

Mary B. Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 1838, AFSCME, AFL-CIO.

Davis & Kuelthau, S.C., by **William G. Bracken**, Labor Relations Specialist, on behalf of the Omro School District.

ARBITRATION AWARD

The Union and the District jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to arbitrate in this dispute. The undersigned was appointed and a hearing was held before him on February 2, 2005 in Omro, Wisconsin. There was no stenographic transcript made of the hearing and the parties presented oral argument at the close of hearing, waiving filing of post-hearing briefs, and requested an expedited Award.

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

ISSUES

The parties could not agree on a statement of the issues, but agreed the undersigned would frame the issues to be decided.

The Union offered the following statement of the issue:

> Did the School District violate the Collective Bargaining Agreement when it did not pay the Grievant for the vacation she had accrued prior to leaving employment with the School District?

The District stated the issues as follows:

> Did the District violate Section XVIII, Vacations, of the 2001-2003 Master Agreement when it denied the Grievant's claim for a payout of additional vacation days since the employee had already used the ten (10) days she was allocated during the 2003-2004 contract year?
>
> If so, what is the remedy?

The undersigned frames the issues as follows:

> Did the District violate Section XVIII, Vacations, of the parties' 2001-2003 Collective Bargaining Agreement, when it refused to pay the Grievant for vacation days she would have earned during the period from July 1, 2003 to her leaving the District's employ on March 26, 2004? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The provisions of the parties' Agreement are cited in relevant part in the parties' arguments and in the discussion section of the Award.

FACTS

The parties stipulated to the following:

1. The grievance is properly before the Arbitrator for his resolution.

2. The Grievant, Vicky Clements, began employment with the School District in the custodian bargaining unit on August 27, 2000. She was employed as a part-time custodian, four (4) hours per day, during 2000-2001 and 2001-2002. In 2002-2003 she was promoted to full-time and scheduled to work eight (8) hours per day, five (5) days per week, twelve (12) months per year.

3. On March 15, 2004, the Grievant submitted a letter of resignation to Randy Johnston, Supervisor Buildings & Grounds.

4. The District accepted her resignation on March 24, 2004.

5. Her last day of employment was March 26, 2004.

6. The Grievant was covered by a Collective Bargaining Agreement between the Omro School District and Omro School Employees (maintenance and custodial division), Local 1838, AFSCME, AFL-CIO. The most recent Collective Bargaining Agreement covers July 1, 2001 through June 30, 2003. Under Section XVIII – Vacations, Vicky is entitled to two (2) weeks (10 work days) paid vacation during the 2003-2004 contract year.

7. During her employment with the District, Vicky used the following vacation days:

a. 2000-2001 0 days (no vacation taken)
b. 2001-2002 – 5 days (4 hour days)
c. 2002-2003 – 10 days (8 hour days)
d. 2003-2004 10 days (8 hour days)

In addition to the above stipulated facts, the testimony established that an employee must complete his/her first full year of service with the District to be entitled to vacation, and that if an employee leaves before completing his/her first year of service, he/she is not entitled to any vacation benefit. Testimony further established that the only record of any vacation payout in this bargaining unit upon an employee's leaving the District's employ occurred several years ago, when a Custodian retired from the District. That individual was paid for the vacation he had earned as of July 1st, 1/ and had not used prior to his retiring on May 30th. He was not paid for vacation he would have earned by working from July 1st to the date of his retirement.

1/ The parties are in agreement that by practice the vacation year begins on July 1st each year. Employees are allocated their vacation on that day and have until the following June 30th to use it.

Union

The Union argues that the Agreement provides a vacation schedule in Section XVIII and that seniority and vacation are earned based upon years of service. Employees are eligible to take the vacation they have earned after July 1st each year; however, the Agreement does not state that an employee forfeits vacation earned in the year he/she quits employment.

As far as the prior instance involving the retirement of a Custodian who was only paid for the vacation he had not used from the amount he was eligible to take as of July 1st, and not for the vacation he had earned up to the time of his retirement, the Union was not aware this occurred, and would have grieved it if they had known. Further, one instance does not constitute a practice.

The Agreement provides that employees earn vacation and that they are eligible to take it in the subsequent year. This does not mean they are not entitled to the vacation they accrue from July 1st to the time they quit employment. The Union requests that the grievance be sustained and that the Grievant be made whole by ordering the District to pay the Grievant for the vacation she had accrued from July 1, 2003, until her leaving on March 26, 2004.

District

The District takes the position that the parties' Agreement does not provide for proration of vacation, nor does it provide for the payout of vacation upon leaving the District's employ. The District cites three provisions of the Agreement as being relevant to this dispute. Section III – Board Functions, B, provides that the Board's powers and rights are limited "only by the specific and express terms of this Agreement." Section XIII – Grievance Procedure, E, provides that "The Arbitrator shall not modify, add to or delete from the express terms of this Agreement." Finally, Section XVIII – Vacations, clearly states that vacation is earned after the requisite years of service and that employees are eligible to use it the following year. In this case, the Grievant had earned ten days of vacation she could take in the period July 1, 2003 to June 30, 2004. The Grievant used those ten days prior to leaving the employ of the District. Therefore, she received all of the vacation she had coming.

The testimony established that an employee who quits during their first year does not get vacation because the Agreement states that an employee is eligible "After one (1) year of service."

July 1st is the defining day. That is the date that an employee is allocated the vacation he/she has earned and is entitled to. There is no language in the Agreement to support the Union's claim that vacation accrues as employees work and that employees are entitled to prorated vacation when they leave the District. Further, the prior instance involving the Custodian who retired supports the District's position, as he was only paid according to the amount he was allocated on the July 1st preceding his retirement and had not used, and was not paid vacation for his work from July 1st to his retirement.

The District also notes that Section XIX – Sick Leave provides that, "Employees shall earn one (1) day of sick leave for each month worked. . ." The vacation provision contains no similar language and only provides that vacation is granted after the employee works the requisite time.

The District concludes that there is no language in the Agreement and no past practice to support the Union's claim. The only practice has been to pay for the vacation time on the books from July 1st and not used. The District requests that the grievance be denied.

DISCUSSION

There is considerable arbitral precedent for finding that vacation is a form of deferred wages that vests in the employee as it is earned, and that employees are entitled to the vacation/wages absent language in an agreement limiting entitlement or imposing requirements that must be met, such as, being on the payroll as of a specified date. See, Elkouri and Elkouri, *How Arbitration Works*, Sixth Edition, pp. 1058-1060, and the cases cited therein. However, it is also noted that in each case, the arbitrator started, as one must, with the wording of the agreement. It is the task of the Arbitrator to first attempt to discern the parties' intent, before resorting to the application of broad principles. The parties' intent is best found in the wording they have used to express their intent, how that wording has been applied in similar past instances, and bargaining history, if any.

In this case, Section XVIII – Vacations, provides:

All employees shall earn vacation in the following manner:

After one (1) year of service – one (1) week paid vacation;
After two (2) years of service – two (2) weeks paid vacation;

. . .

There is no provision in this section, or elsewhere in the parties' Agreement, for prorating vacation 2/ where an employee leaves before completing the year of service, nor is there a provision for paying out vacation upon leaving the District's employ. The lack of such provisions, however, has not precluded many arbitrators from finding employees were entitled to both under the theory that vacation is deferred wages that vests in the employee as it is earned. See Elkouri and Elkouri, cited above. However, for the following reasons, the undersigned concludes that is not the case in this dispute.

2/ While there is a provision in Section XVIII, regarding proration of vacation for employees working less than full-time, neither party argues that it applies to the issue in this case.

The absence of wording in Section XVIII providing for the prorating of vacation, when viewed in conjunction with the wording in Section XIX – Sick Leave, which specifically provides that sick leave is earned "for each month worked", evinces the intent of the parties to not provide for such accrual with regard to vacation for less than a full year of service. It is further noted that while Section XIX expressly provides for the payout of accumulated sick leave upon retirement or death, Section XVIII, contains no similar wording. Again, this would lead to the conclusion that the parties did not intend such a payout with regard to vacation.

In addition to the above, the evidence indicates that while an employee in this bargaining unit received a vacation payout when he retired, there has been no instance of an employee receiving a vacation payout upon voluntarily quitting the District's employ. This again evidences a lack of intent or expectation of such a vacation payout in such circumstances.

Given the foregoing, it is concluded that the parties did not intend to provide for the payout of prorated vacation earned from July 1st to the date the employee quits the District's employ. Therefore, it is concluded that the District did not violate Section XVIII of the Agreement when it did not pay the Grievant prorated vacation for the time she worked from July 1, 2003 until her leaving the District's employ.

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 4th day of February, 2005.

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

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