BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF FITCHBURG

and

DANE COUNTY, WISCONSIN MUNICIPAL EMPLOYEES LOCAL 60 AFSCME, AFL-CIO

Case 39
No. 65359
MA-13201

Appearances:

Laurence S. Rodenstein, Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

Michael J. Westcott, Axley Brynelson, LLP, Attorneys-at-Law, 2 East Mifflin Street, P.O. Box 1767, Madison, Wisconsin 53701-1767, appearing on behalf of the City.

ARBITRATION AWARD

Dane County Wisconsin Municipal Employees Local 60, AFSCME, AFL-CIO, hereafter Union, and City of Fitchburg, hereafter Employer or City, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a WERC Commissioner or Staff member as Arbitrator to hear and decide the instant grievance. Staff member Coleen A. Burns was so appointed on January 3, 2006. A hearing was held in Fitchburg, Wisconsin on February 8, 2006. The hearing was not transcribed. The record was closed on April 4, 2006, upon receipt of post-hearing written argument.

ISSUE

The Union frames the issues as follows:

> Did the Employer violate the collective bargaining agreement by unilaterally altering the manner in which it calculated vacation entitlement?

If so, what is the appropriate remedy?

The Employer frames the issue as follows:

Whether the Employer violated Article XX, Sec. 20.1, of the collective bargaining agreement when it denied the Grievant four (4) weeks of vacation pay effective March 12, 2005?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE XX
VACATIONS

20.01 **Accrual of Vacation:** Regular full-time employees shall be granted vacation with pay each year as follows based on continuous employment. Six (6) years or less – two (2) weeks; seven (7) through thirteen (13) years – three (3) weeks; fourteen (14) to twenty (20) years – four (4) weeks; twenty-one (21) years and greater – five (5) weeks and one (1) day. Vacation accrues monthly but may not be taken prior to completion of any probation. Vacation for any calendar year may be anticipated and used in advance with the approval of the department head and notification to the Administrator. Vacation for part-time employees shall be pro-rated based on percentage of appointment, with semi-annual adjustments based on the hours worked, provided such adjustments shall only be made where such part-time employees accumulate at least sixty-five (65) hours beyond their appointment hours in the previous semi-annual period. Vacation credits are not earned during periods of unpaid leaves of absence.

20.02 **Effect of Termination and Commencement of Employment:** Vacations shall accumulate on a calendar year basis commencing January 1 and terminating on December 31 of each year. When employment commences or terminates during the course of a calendar year, the vacation time to which an employee is entitled shall be determined by multiplying the vacation period to which the employee would have been entitled for a full year's service by a fraction, the numerator of which shall be the number of weeks worked during that calendar year and the denominator of which shall be 52. Earned but unused vacation will be paid on the final check. Used but unearned vacation will be deducted from the final check.

. . .

BACKGROUND

For nearly twenty years prior to 2005, AFSCME bargaining unit employee Mary Traino had calculated the vacation entitlements of all City employees. Prior to leaving City employment, she trained Susan Jordan on how to calculate vacation entitlements.

After Traino's departure, Jordan prepared the Paid Leave Log (PLL) for 2005 and submitted the PLLs to Finance Director Nancy Solberg. Upon review, Solberg voided a number of the submitted PLLs and advised Jordan that these had been calculated incorrectly. Solberg further advised Jordan that Jordan had been pro-rating the vacation transition period one year too early.

Among the voided PLLs was the PLL for Jordan, in which Jordan had pro-rated her vacation as follows:

120 ÷ 52 x 10 wks = 23
160 ÷ 52 x 42 wks = 129.25

Solberg advised Jordan that, under the terms of the AFSCME collective bargaining agreement, Jordan was only entitled to three weeks of vacation. Jordan has a hire date of March 12, 1992.

By letter dated October 7, 2005, Jordan advised City Administrator Anthony Roach of the following:

> I, Susan Jordan reached fourteen (14) years of service with the City of Fitchburg on March 12, 2005, and in accordance with Article 20 Section 20.01 of the AFSCME Union Contract, I am entitled to four (4) weeks of vacation commencing with the fourteenth (14th) year. My Supervisor, Nancy Solberg denied me.
>
> Past experience has followed a clear pattern of prorating an additional week in an employee's hire level. Indeed, I had my 3rd week of vacation prorated when I commenced my seventh (7th) year. This action, denying me the prorated week, violates Article 20 Section 20.01 of the AFSCME Union Contract and all other sections which may apply.
>
> As the remedy, I ask that the City prorate the additional week of vacation in the manner it has been done historically.

In a letter dated November 11, 2005 and addressed to AFSCME Union Representative Larry Rodenstein, the City Administrator states, in relevant part:

. . .

Section 20.01 of the AFSCME contract clearly states that ". . . employees shall be granted vacation with pay each year as follows based on *continuous employment (emphasis added)*. The contract specifies vacation accrual of 4 weeks for "fourteen (14) through twenty (20) years."

Since Susan will not have 14 years of continuous employment until March 12, 2006, she is not entitled to additional vacation in 2005, therefore the grievance is hereby denied.

. . .

POSITIONS OF THE PARTIES

Union

For ten years or more, the City and its agents have followed a consistent methodology for determining vacation entitlement. Whenever an employee completed six (6) years of continuous employment (120 hours) or, respectively, thirteen (13) years of continuous employment during the course of a calendar year, their vacation entitlement would be pro-rated based upon the proportion of the calendar year which fell at the commencement of their 7th or 14th year, and the proportion of their anniversary year prior thereto. Finance Director Nancy Solberg provided sufficient oversight to demonstrate that the City and its agents acted consistently for many years in applying this methodology.

In 2005, in applying a new, but flawed calculation methodology, the Grievant's supervisor denied Susan Jordan her pro-ration of 160 hours per annum at the commencement of her second transition year (14th). This supervisor's calculation was based solely upon her opinion that the term "continuous" requires employees to work through their transition year before becoming eligible for additional vacation.

The Union's interpretation of the contract language is grounded in the principles of established contract construction. The term "continuous" used by the Employer to justify altering the vacation eligibility date by one year is misplaced. Continuous only refers to the employment status up to the point of eligibility, whatever that point may be. The term "continuous," in no way, connotes the meaning that the 7th or 14th year must be completed prior to eligibility. In order to reach such a conclusion, additional wording must be added into the Agreement itself, such as appears in other of the City's bargaining unit agreements.

The vacation entitlement method, calculated each year by bargaining unit member Mary Traino and approved by Finance Director Solberg since sometime in the 1990's, is consonant with the terms of Sec. 20.01 of the AFSCME agreement. By implicitly adding foreign words to the agreement and by ignoring the plain meaning of the provision, the integrity of the Union's collective bargaining agreement has been compromised.

Assuming *arguendo*, that the language of the provision is ambiguous, the historic administration of the vacation entitlement procedure satisfies all the necessary elements to prove the existence of a past practice. This type of past practice is contract-based and can only be terminated by mutual agreement of the parties to rewrite the ambiguous provision to clearly eliminate the practice or ambiguous contract language.

The members of the collective bargaining unit have come to rely upon the notion that, during a transition year, they would enjoy a prorated portion of the higher vacation entitlement based upon their employment date and its position in the calendar year. Without notice to or consultation with the Union, the Finance Director unilaterally discontinued the historic method of calculating vacation entitlement; thereby violating the provisions of the collective bargaining agreement.

As remedy for this contract violation, the Union requests that the Arbitrator make Grievant Jordan whole by providing her with prorated vacation entitlement in 2005, as well as making whole any other member of the Local 60 bargaining unit similarly situated. The Union further requests that the Arbitrator direct the City to make whole any bargaining unit employee in 2006 who was denied additional pro-rated vacation based on the historic vacation entitlement administration.

City

The method of calculating vacation is intended to be uniform across the entire City, including represented and unrepresented employees. In the year when the affected employee reaches the length of seniority when the increase occurs, it is pro-rated. For example, if on April 1, 2006, an employee increases from 80 to 120 hours of vacation pay, he/she would effectively receive three-twelfths (or the weekly equivalent) of 80 hours and nine-twelfths (or the weekly equivalent) of 120 hours. When Finance Director Solberg reviewed the PLLs for 2005, she immediately advised Susan Jordan that she had erred by calculating the vacation entitlement as of the beginning of the break point year rather than upon conclusion of that year.

The language of Sec. 20.01 is clear and unambiguous. When someone has seven through thirteen years of continuous employment with the City, they receive three weeks of vacation pay. The Grievant did not have fourteen years of continuous employment until March 12, 2006.

The Union's argument that there is a controlling past practice that provides the Grievant with the right to receive her requested additional vacation must fail for several reasons. First, it is not appropriate to consider a past practice where, as here, the contract language is plain and clear and conveys a distinct idea. Additionally, there has not been knowledge or acquiescence by the City in the alleged "past practice" relied upon by the Union.

No records could be found for 2000, 2001, 2002 or 2003. Records for 1999, 2004, and 2005 were found. These records demonstrate that, in fact, there was a very mixed practice

with respect to the calculation of vacation entitlement for City employees. An asserted past practice provides no guidance to interpreting ambiguous contract language where the evidence regarding its nature and duration is not uniform or consistent.

The Grievant has failed to meet her burden to establish a violation of the collective bargaining agreement. The grievance should be denied and dismissed.

DISCUSSION

Issues

The parties stipulated that there are no issues of procedural arbitrability. The parties were not able to stipulate to the issue to be decided by the Arbitrator.

The grievance filed by Susan Jordan asserts that she reached "fourteen years of service with the City of Fitchburg on March 12, 2005" and "is "entitled to four (4) weeks of vacation commencing with the fourteenth (14^{th}) year." This grievance further alleges that the City's action in denying her a pro-rated fourth week of vacation violates "Article 20 Section 20.01 of the AFSCME Union Contract and all other sections which may apply."

The undersigned is persuaded that the issues presented in the grievance are most appropriately stated as follows:

Did the Employer violate Article XX, Sec. 20.1, or other applicable provision of the collective bargaining agreement, when the Employer denied Susan Jordan's request for a pro-rated fourth week of vacation in 2005?

If so, what is the appropriate remedy?

Vacation Entitlement Claim

Neither party disputes that, in a vacation transition year, the AFSCME bargaining unit employees vacation should be pro-rated using the pro-ration formula historically applied by Account Clerk Mary Traino. In dispute is when that transition year occurs. The Union maintains that the transition year occurs in the calendar year in which the employee completes his/her sixth, thirteenth and twentieth year of employment. The City maintains that the transition year occurs in the calendar year in which the employee completes his/her seventh, fourteenth and twenty-first year of continuous employment.

Each party relies upon the following provision:

> **20.01 Accrual of Vacation:** Regular full-time employees shall be granted vacation with pay each year as follows based on continuous employment. Six (6) years or less – two (2) weeks; seven (7) through thirteen (13) years – three

> (3) weeks; fourteen (14) to twenty (20) years – four (4) weeks; twenty-one (21) years and greater – five (5) weeks and one (1) day. Vacation accrues monthly but may not be taken prior to completion of any probation. Vacation for any calendar year may be anticipated and used in advance with the approval of the department head and notification to the Administrator. Vacation for part-time employees shall be pro-rated based on percentage of appointment, with semi-annual adjustments based on the hours worked, provided such adjustments shall only be made where such part-time employees accumulate at least sixty-five (65) hours beyond their appointment hours in the previous semi-annual period. Vacation credits are not earned during periods of unpaid leaves of absence.

The only reasonable interpretation of the above language is that regular full-time employees, such as the Grievant, must have six years or less of continuous employment to be granted two weeks of vacation; seven through thirteen years of continuous employment to be granted three weeks of vacation; fourteen to twenty-one years of continuous employment to be granted four weeks of vacation; and twenty-one or greater years of continuous employment to be granted five weeks and one day of vacation. It follows, therefore, that the monthly accrual for the third week of vacation begins upon completion of the Grievant's seventh year of continuous employment; that the monthly accrual for the fourth week of vacation begins upon completion of the Grievant's fourteenth year of continuous employment and the monthly accrual for the five weeks and one-day begins upon completion of the Grievant's twenty-first year of continuous employment.

With respect to the issue in dispute, the contract language is neither unclear nor ambiguous. Under the plain language of Sec. 20.01, the vacation transition year occurs in the calendar year in which the employee completes his/her seventh, fourteenth and twenty-first year of continuous employment.

Traino was a member of the Union committee that bargained the initial AFSCME contract in the early 90's. Traino recalls that, at that time, the Union always went over the language to see if the City's attorney read it the same way that the Union did and that the City's attorney agreed that pro-ration of vacation pay would occur at the beginning of the seventh year.

Traino confirms that the vacation provision that was the subject of the initial bargain was subsequently changed. The record does not identify the original vacation language or the change that was made to this vacation language. Given the unidentified change in the vacation language, it would not be reasonable to conclude that discussions that occurred during the initial bargain reflect the parties' mutual understanding with respect to the current contract language. As the City argues, the evidence of bargaining history is not relevant to the disposition of this dispute.

For at least thirteen years, the vacation entitlement of AFSCME bargaining unit employees has been calculated such that the vacation transition year occurs in the calendar year in which the employee completes his/her sixth, thirteenth and twentieth year of employment. Prior to the time that the results of these vacation calculations were placed into the City's payroll system, the Account Clerks submitted the Paid Leave Logs (PLLs) containing these calculations to their supervisor for review and approval.

The information contained on the PLLs was sufficient to alert the supervisor to the fact that the vacation transition year for AFSCME employees was occurring in the calendar year in which the employee completed his/her sixth, thirteenth and twentieth year of employment. No supervisor ever questioned this vacation transition calculation until Finance Director Solberg rejected Susan Jordan's calculations for 2005.

Solberg, who supervised the Account Clerk responsible for the vacation calculations since the mid-90's, states that she did not verify Traino's methodology regarding the vacation transition year because Traino had been performing this work for many years. Solberg states that she verified Jordan's work because 2005 was the first year in which Jordan had responsibility for performing this work. Solberg's testimony that she was unaware of the practice until she verified Jordan's work is credible.

The evidence of the AFSCME bargaining unit vacation practices does not provide convincing proof that the practice reflects a mutual agreement to amend the clear contract language. Under the clear contract language, the Grievant's transition year for pro-ration of the fourth week of vacation is 2006 and not 2005.

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

AWARD

1. The Employer did not violate Article XX, Sec. 20.1, or other applicable provision of the collective bargaining agreement, when the Employer denied Susan Jordan's request for a pro-rated fourth week of vacation in 2005.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 28th day of June, 2006.

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

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