

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MONROE COUNTY

and

ROLLING HILLS EMPLOYEES, LOCAL 1947, AFSCME, AFL-CIO

Case 190
No. 66653
MA-13592

Appearances:

Mr. Ken Kittleson, Personnel Director, 14345 County Highway "B", Room 3, Sparta, Wisconsin 54656, appeared on behalf of the County

Mr. Dan Pfeifer, Staff Representative, 18990 Ibsen Road, Sparta, Wisconsin 54656, appeared on behalf of the Union.

ARBITRATION AWARD

On January 24, 2007 Rolling Hills Employees Local 1947, AFSCME, AFL-CIO and Monroe County filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint William C. Houlihan, a member of its staff to hear and decide a grievance pending between the parties. The parties waived a hearing on the matter and on April 30, 2007 submitted a stipulation as to facts. Post-hearing briefs were filed and exchanged by June 5, 2007.

The stipulated issue for decision is:

Did Monroe County violate the collective bargaining agreement between the parties when it did not pay Charles Wilson for his vacation accumulation of 188.30 hours when it terminated Mr. Wilson's employment?

If so, what is the appropriate remedy?

BACKGROUND AND FACTS

As noted, the parties stipulated the record. That stipulation consists of the following:

CHARLES WILSON GRIEVANCE

Stipulation of Fact

1. Charles Wilson was employed at the Monroe County Rolling Hills Health Care Center as a Licensed Practical Nurse (LPN).
2. Monroe County terminated Mr. Wilson's employment on 10/24/06. Mr. Wilson did not file a grievance contesting the termination of his employment.
3. Mr. Wilson's rate of pay, at the time of termination of employment, was \$16.89 per hour. Mr. Wilson's anniversary date was May 28th. He was hired in 1991.
4. At the time of Mr. Wilson's last biweekly payroll period (11/4/06) he had a vacation balance of 188.30 hours. Employees at Rolling Hills accumulate vacation on a pay period basis, i.e. every pay period, employees are credited with a pro-rated amount of their annual vacation entitlement. At the time of his termination of employment, Mr. Wilson was accumulating 6.15 hours of vacation per pay period.
5. Monroe County did not pay/compensate Mr. Wilson for the vacation balance of 188.30 hours. Mr. Wilson was on paid administrative leave for more than 12 weeks while an investigation was being conducted relative to possible criminal charges prior to his termination of employment.
6. Mr. Wilson filed a grievance requesting pay for the vacation balance of 188.30. The grievance was denied at all steps of the grievance procedure and was submitted for arbitration. In lieu of an arbitration hearing the parties agreed to stipulate to the facts and submit written arguments.
7. The grievance is appropriately before the arbitrator with no procedural objections. The parties agree to stipulate to the collective bargaining agreement as joint exhibit 1, personnel policy manual as joint exhibit 2, the grievance as joint exhibit 3 and to exchange any additional exhibits by May 4, 2007, labeling and numbering them as union or employer exhibits. Parties further agree that briefs are to be postmarked by May 31, 2007, and exchanged through the arbitrator."

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 10 – VACATIONS

Section 1. Each full-time employee having a continuous service record of one (1) year or more is entitled to the following vacation with pay, after the first year of employment:

- A. After one (1) year, but less than six (6) years of employment; Two (2) weeks (ten (10) work days).
- B. After six (6) years, but less than fourteen (14) years of employment; Three (3) weeks (fifteen (15) work days).
- C. After fourteen (14) years of employment, but less than twenty-two years: Four (4) weeks (twenty (20) work days).
- D. After twenty-two (22) years of employment: twenty-three (23) work days.

Each full-time employee must take his/her vacation in the year following completion of his/her year of employment or lose his/her vacation rights for the year unless his/her vacation time has been denied by management. Requests for vacation are to be submitted to the employee's department head on prescribed forms by the 15th of the month prior to the month the vacation is desired. This notification may be waived in the case of an emergency, and vacations shall be granted so as not to diminish the efficiency of the departments. In the event the employee wants a partial week vacation such as one-half (1/2) day or one (1) day vacation, he/she must obtain permission on the previous day.

Section 2. All employees shall give a two (2) week notice except for Licensed Practical Nurses who shall give a thirty (30) day notice in writing of their intention to voluntarily sever their employment with the County and upon failure to do so, any accumulation of pay, except for time actually worked or as required by law shall be forfeited. Similarly, the County shall give the employee a two (2) week notice in writing of any layoff.

...

Section 5. Any employee who is entitled to a vacation at the time of terminating services with the County shall be paid with the final paycheck for his/her vacation at the time of severing his/her status as an employee; and if said employee has earned any prorated credit for his/her subsequent vacation, such vacation credit shall be paid with the final paycheck at a proportionate ratio, except as provided in Section 2 of Article 10.

...

ARTICLE 4 – GRIEVANCE PROCEDURE

...

Section 6. The County and Union representatives shall attempt to select a mutually agreeable arbitrator from the Wisconsin Employment Relations Commission (WERC). If a mutually agreed selection cannot be achieved, the WERC shall appoint an arbitrator. The arbitrator shall make his/her findings known in writing simultaneously to the County Personnel Director and the Union, and this decision shall be final and binding on both parties. Disputes or differences regarding bargainable issues are expressly not subject to arbitration of any kind, notwithstanding any other provisions herein contained. The arbitrator shall have no right to amend, nullify, modify, ignore, or add to the provisions of the Agreement. His/her authority shall be limited to the extent that he/she should only consider and decide the particular issue or issues presented to him/her in writing by the Employer or the Union, and his/her interpretation of the meaning or application of the language of the Agreement.

...

ARTICLE 22 – GENERAL PROVISIONS

...

Section 5. The County shall not discipline or discharge an employee except for just cause. Any employee discharged and later through proper hearing is found innocent of the charges, said employee shall return to his/her former job with the County paying said employee all wages and benefits he/she would have earned had he/she been working, less any compensation received from Unemployment Compensation or other sources during the period of discharge.

**RELEVANT PROVISIONS OF THE MONROE COUNTY
PERSONNEL POLICY MANUAL**

4.06 COLLECTIVE BARGAINING AGREEMENTS. This Manual applies to employees not covered by collective bargaining agreements and to employees so covered when specific contracts do not apply to the contrary.

...

4.31 VACATIONS. (1) AUTHORIZED VACATION SCHEDULE.
(a) After one year of continuous employment, a regular full-time employee shall have ten working days of paid vacation (two weeks) accrued.

...

(2) RULES FOR ADMINISTRATION OF VACATION. Vacation with pay shall not be used until earned.

(b) Employees shall use accumulated vacation in the year following accrual or vacation accumulation for the year is lost.

...

4.61 RESIGNATION. (1) WRITTEN NOTICE. An employee wishing to leave County employment shall submit a resignation in writing stating the last working day for Monroe County. This notice shall be given to the employee's department head. It is expected that employees will give as much notice as possible to facilitate the orientation and implementation of new staff members. Paid time off (i.e. vacation, sick leave, floating holiday) may not be used to extend the last day worked. <12/98> Failure to give the required notice of termination shall cause forfeiture of payout of any accumulated benefits, including vacation <6/94>, unless required by law or applicable collective bargaining agreement provisions.

...

(d) Employees failing to give the required advance notification of termination shall not be considered for reemployment except for unusual reasons and with the consent of the Personnel and Bargaining Committee.

...

4.63 DISCIPLINARY ACTION PROCEDURE.

(5) INVOLUNTARY TERMINATION. (a) All involuntary terminations shall be ordered by the department head with notification to the appropriate County Board committee. <6/93> <9/06> As in suspension, above, if there is no governing committee, the Administrative Executive Committee shall serve as the appropriate County Board committee. <12/99>.

(b) All involuntary terminations shall be in writing with a copy for the employee. <9/06>.

(c) All involuntary terminations receive no severance pay apart from that for time already worked. Vacation is forfeited at termination.

...

4.64 SUSPENSION FOR INVESTIGATORY PURPOSES. (1) An employee may be suspended with pay during the investigation of some matter relative to the employment of the individual suspended.

POSITIONS OF THE PARTIES

It is the view of the County that the collective bargaining agreement is silent on the question of vacation payout. As an LPN, the grievant was required to give a 30 days notice of voluntary termination in order to qualify for a vacation payout. It would be absurd to conclude that an LPN who voluntarily quits with 3 weeks notice gets no vacation while one who is terminated does qualify.

It is the view of the County that the Personnel Policy Manual controls the disposition of the dispute. In the absence of contractual language, the County contends that the parties are bound by practice, and that the Policy Manual reflects that practice. Specifically Section 4.63(5)(c), enacted in 1994 directs that vacation is forfeited upon termination.

The County points to Sec. 109.01(3) Wis. Stats. in support of its position.

The County asserts that the grievant was terminated for gross misconduct, denied Unemployment Compensation and health insurance continuation under COBRA. Denial of a County sponsored benefit is consistent with the treatment accorded the grievant by State and Federal law.

The County notes that in dealing with problem employees, it commonly invites a voluntary resignation option, which among other things entitles the employee to certain benefits. If terminated employees are granted vacation benefits, the resignation option becomes a less desirable option.

It is the view of the Union that the reason for the termination is irrelevant. At the time of termination Wilson had 188.3 hours of vacation leave accumulated, for time already worked as an employee of Monroe County.

The Union contends that the County argument that Wilson did not give 30 days notice of his intent to sever his employment is misplaced, in that Wilson did not intend to sever his employment with the County. The County fired him.

The fact that Wilson was on paid administrative leave for 12 weeks was a decision of the County. His accumulated vacation should not be affected by administrative leave.

It is the view of the Union that a grievance is defined as a “dispute concerning the interpretation or application of this Agreement”. It is the view of the Union that neither the County Personnel Policy Manual nor the State Statute are applicable. It is the view of the Union that the contract, Article 10, Sec. 2 is applicable and requires a payout.

DISCUSSION

I agree with the Union's contention that my authority is limited to deciding the issue presented by the parties and the interpretation of the collective bargaining agreement. Article 4, Section 6 sets forth my authority in this proceeding, and limits it to a review of the collective bargaining agreement. The issue stipulated for decision asks whether or not the collective bargaining agreement has been violated. Section 4.06 of the Personnel Policy Manual makes its provisions inapplicable if a matter is covered by a contrary provision of the collective bargaining agreement. I have not been assigned the task of interpreting the County Personnel Policy Manual. Similarly, the interpretation of Wisconsin Statutes is not a matter properly before me.

The County contends that the grievant has forfeited any right to accrued vacation by failing to give the required notice. This particular defense has no merit. The contractual reference to notice, Article 10, Sec. 2, requires a bargaining unit employee who intends to "... voluntarily sever their employment with the County..." to provide the specified notice. The facts before me are that "Monroe County terminated Mr. Wilson's employment...". Nothing in the record indicates this was voluntary or that Mr. Wilson intended to sever his employment. The notice requirement is simply inapplicable.

It is the view of the County that an adverse decision in this proceeding would diminish the value of voluntary resignation as a tool in managing problem employees. Such a policy consideration is a matter left to the parties. The contract directs that I restrict my analysis to the issue presented and the provisions of the agreement. It is not for me to "...amend, nullify, modify, ignore, or to add to the provisions of the Agreement."

That brings the analysis to whether or not a terminated employee receives accrued vacation at the time of discharge. The collective bargaining agreement regulates the vacation benefit for bargaining unit members. Article 10, Sec. 1 creates the vacation benefit and defines the vacation to which employees are entitled. Under Section 1 employees are "entitled" to vacation on a schedule. An employee becomes entitled to vacation by working for the County for a defined period of time. An employee who works the described period of time becomes entitled to the vacation set forth in the contract. The contract contains no other condition or obligation to be satisfied before an employee is "entitled" to vacation.

The term "entitled" is commonly used to convey a right to something. (See *Black's Law Dictionary*, *Webster's Seventh New Collegiate Dictionary*) Here, it is a right to vacation. The schedule begins "After one (1) year..." The system is one in which vacation is generated in one year and used the next. This is the literal reading of the first sentence of the second paragraph of Section 1, and flows logically from the preceding paragraph. It is also consistent with the parallel provision of the County Personnel Policy. The grievant had a vacation balance at the time of his termination. In order to have a balance, he previously worked and accrued the vacation hours. Under the terms of the contract, he was then "entitled" to the vacation.

Section 2 creates a notice requirement. Failure to satisfy the notice requirement may result in a forfeiture. As noted, I do not believe this to be applicable in a termination.

Section 5 addresses vacation payout at termination. It begins "Any employee who is entitled to a vacation..." The expansive reference to "Any" is inclusive. The collective bargaining agreement does not draw a distinction between employees. The County contends that the grievant was discharged for gross misconduct. However, this provision of the collective bargaining agreement draws no distinction between employees based upon the grounds for terminating their services. Section 5 goes on to provide that employees who are entitled to a vacation at the time of terminating services be paid for the vacation. The use of the term entitled is the same term found in the accrual provision of Section 1. In Section 1, an employee becomes entitled to vacation by working. Use of the same term in the same contractual provision regulating the same benefit should have the same meaning. An employee who has become entitled to vacation under Section 1 should be entitled to vacation in Section 5.

There is nothing in the collective bargaining agreement, other than the failure to provide notice under Section 2, that forfeits vacation. Under the terms of this agreement vacation is an earned entitlement. Waiver of such a benefit, which has an economic value, should not be lightly inferred.

The County contends that there is a practice of terminated employees losing the accumulated vacation. There is nothing in the record to support that claim. There is no record evidence as to how other terminated employees have been treated under these circumstances.

AWARD

The grievance is sustained.

REMEDY

Pay the grievant for 188.3 hours at \$16.89 per hour.

Dated at Madison, Wisconsin, this 13th day of July, 2007.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc
7166

