

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
SOUTHWEST WISCONSIN TECHNICAL COLLEGE

and

**SOUTHWEST WISCONSIN TECHNICAL COLLEGE PROFESSIONAL STAFF
ASSOCIATION, LOCAL 3670, AFT, AFL-CIO**

Case 27
No. 68357
MA-14207

Appearances:

Steve Kowalsky, Representative, 6602 Normandy Lane, Madison, Wisconsin, appeared on behalf of the Union.

Godfrey & Kahn, S.C., by **Jon E. Anderson**, One East Main Street, Madison, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Southwest Wisconsin Technical College Professional Staff Association, Local 3670, AFT, AFL-CIO, herein "Union" and Southwest Wisconsin Technical College, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Fennimore, Wisconsin, on February 3, 2009. This case was heard on the same day as Case 26 which was finally briefed May 13. Each party filed a post-hearing brief and reply brief, the last of which was received March 12, 2009. The parties waived reply briefs by letter received March 19, 2009.

ISSUES

The parties stipulated to the following statement of the issues in this case:

1. Did the Employer violate the collective bargaining agreement when it did not pay Grievant for floating holidays upon his resignation?
2. If so, what is the appropriate remedy? ¹

FACTS

The Employer is a subdivision of the State of Wisconsin providing technical and vocational education to students in southwestern Wisconsin. The Union represents its support staff. The Union represented Bryan Martens until his resignation.

In negotiations leading to the 1971 collective bargaining agreement, the negotiators agreed to create a new benefit of what is now 4 floating holidays. These were to be taken with the permission of an employee's supervisor generally in the December and spring break periods when the school is normally shut down. The effect of this new benefit, if taken as expressed above, was that employees would be paid for time off during those shut-down periods when they would otherwise be forced to take unpaid time off. The parties expressly agreed that the holidays would not be carried over from school year to school year and must be taken in the year granted. Employees usually schedule the holidays in advance based upon seniority and availability. Employees may take these holidays outside the scheduled period under extenuating circumstances.

Bryan Martin was scheduled to work for the December break. He signed up for taking the four floating holidays for the following spring break. He resigned his employment on January 30, 2008, effective February 13, 2008. He sought pay for the holidays. The Employer denied the holiday pay. The Union filed the instant grievance which was properly processed through the grievance procedure to arbitration.

RELEVANT AGREEMENT PROVISIONS

“ . . .

Section 3.09. Holidays

- (a) All employees except those positions listed in (b) receive ten (10) paid holidays. They are Labor Day, Thanksgiving Day, day after Thanksgiving, Christmas Eve, Christmas Day, New Year's Eve, New Year's Day, Martin Luther King Holiday beginning in 2006, Good Friday, and Memorial Day. All employees scheduled for work through July 4th will receive July 4th as a paid holiday. If any holiday falls on

¹ The parties stipulated that I might reserve jurisdiction over the specification of remedy, including, but not limited to the calculation of back pay if either party requests that I do so in writing, copy to opposing party, within sixty (60) days of the date of the award.

Saturday or Sunday, the employee shall be permitted one compensatory day off.

- (b) Lab assistants, childcare aides, and Student Activities Coordinator, Admission Specialist/High School Relations Specialist, and Career Center Specialist will follow holidays as listed on the academic schedule which are: Labor Day, Thanksgiving, Christmas Day, New Year Day, Martin Luther King, Good Friday, and the floating academic holiday. If scheduled to work the day before and the day after Memorial Day and/or July 4, the above employees will receive Memorial Day and/or July 4th as paid holiday(s).

Section 3.10. Vacations

- (a) A twelve-month employee who has served a full year (12 months) is entitled to vacation as per the following vacation schedule:

Employment	No. days
0-2 years	5 days
3-7 years	10 days
8-14 years	15 days
15 years +	20 days

The above vacation schedule shall become effective July 1, 1990.

- (b) The vacation schedule for employees hired on or before June 30, 1989 remains at 0-5 years. 12 days vacation; 6 years and up. 17 days vacation; except if any employee hired on or before June 30, 1989 would benefit from placement on the new schedule.
- (c) Employees working less than twelve (12) months shall receive prorated vacation days based on the number of hours worked.
 - (1) Vacation can be taken only after completion of six (6) months' employment. All vacation schedules must be approved by the immediate supervisor, with notification to the Director of Human Resources.
 - (2) Vacation time may not accrue for more than two years. Special permission from the immediate supervisor and the Director of

Human Resources must be obtained for taking more than two (2) weeks at one time. Employees may not be employed for regular wages at the College during vacation periods.

- (3) Accrued vacation pay will be paid to all individuals at the end of their employment. Personnel who have not completed six (6) months will receive no vacation pay. If an individual accepts a position at the College with no vacation allowed, accrued vacation will be paid upon completion of his/her original assignment.
- (4) On each time sheet, each employee shall receive an accounting of the total number of vacation days accumulated to that time.
- (5) Lab Assistants do not receive any paid vacation. Their work schedule follows the adopted school calendar.

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Appendix B - Side Letters

Holidays/Floating Holiday

Beginning with the 2005-2006 college year, Support Staff will receive four (4) floating holidays instead of five (5) due to the addition of Martin Luther King's Birthday as an official College holiday. All current practices relating to floating holidays remain in place.

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POSITIONS OF THE PARTIES

Union

The Union's fundamental position is based on the premise that floating holidays are an earned and accrued benefit similar to vacation and therefore should be treated in accordance with the practice and policy of the Employer for vacations. Floating holidays have nothing to do with the fixed holidays which admittedly are not paid out when an employee leaves employment. The following comparisons in the agreement support that view:

	Floating Holidays	Vacations	Holidays
1	Six Month Qualifying Period	Yes	No
2	Scheduled with supervisory app.	Yes	No
3	Provisions which limit carryover	Yes	No
4	Used only when school is open	Yes	No
5	Straight time only	Yes	No
6	earned and accrued	Yes	No

The evidence of past practice is inconclusive. It appears that only two employees were not paid in the past. The Union was not aware of those situations. Accordingly, the Union asks that the Employer be ordered to make the payout.

Employer

The Employer takes the position that it did not violate the side letter creating the four floating holidays at issue because Mr. Martens resigned before the date he designated to take his four allotted floating holidays. The Employer notes that the only reference to floating holidays is the side letter attached to the comprehensive collective bargaining agreement. There are no provisions expressly regulating floating holidays in the agreement itself. The benefit has been in existence over thirty years. The Employer has established written procedures covering the administration of the benefit which procedures have been in existence since 2005. The stated procedure provides that floating holidays not used cannot be carried over in successive years. It does not address what happens to the benefit if they are not used before an employee resigns. It is not unreasonable for the Employer to deny the pay out of floating holidays if they are not used before an employee resigns. The parties have specific provisions for the payout of accrued vacation days, but not holidays. Ms. U'ren has administered the payroll for over twenty-five years. She stated the Employer has never paid out unused floating holidays if an employee resigns. The agreement provides that "current practices" continue. The practice is that the Employer does not pay out unused floating holidays when the employee resigns. The Employer asks that the grievance be denied.

DISCUSSION

The history of the floating holidays supports the Employer's view that these are a limited benefit. First, the parties designated the floating holidays as "holidays" and not as "vacation." Second, the purpose of the floating holidays was to provide employee compensation during the shut down periods when they would not ordinarily be paid. This purpose is more akin to the restricted use of fixed holidays. Third, the parties have agreed that floating holidays, unlike vacation are not to be carried over from year to year. The Employer has argued that there is a past practice of not paying the floating holidays when the employee leaves service. However, the term "past practices" in labor relations requires, in part, that a practice be repeated over such a long period that it is obvious it is an agreement between the parties. This issue has come up rarely and, therefore, there is no established "past practice"

within the meaning of the agreement. The Union has pointed to six “similarities” between vacation and floating holidays. These “similarities” relate more to the fact that the floating holidays are not fixed to specific days and other administrative matters. However, the most persuasive fact involved in this matter is that their purpose is limited and their use is so highly restricted that it is highly unlikely that parties similarly situated would have ever intended that they be paid out when an employee leaves service. Accordingly, the grievance filed herein is denied.

AWARD

The Employer did not violate the agreement when it failed to pay out the floating holidays in issue. Accordingly, the grievance filed herein is denied.

Dated at Madison, Wisconsin, this 19th day of August, 2009.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator