

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**GREEN LAKE COUNTY HIGHWAY EMPLOYEES  
LOCAL 514, AFSCME, AFL-CIO**

and

**GREEN LAKE COUNTY**

Case 92  
No. 68649  
MA-14297

(Jahn Vacation Grievance)

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**Appearances:**

**Mr. David Dorn**, Staff Representative, AFSCME, Wisconsin Council 40, AFL-CIO, 336 Doty Street, Fond du Lac, Wisconsin, appearing on behalf of Local 514.

**Mr. John Selsing**, Corporation Counsel, Green Lake County, 120 East Huron Street, Berlin, Wisconsin, appearing on behalf of Green Lake County.

**ARBITRATION AWARD**

Green Lake County Highway Employees Local 514 hereinafter "Union," and Green Lake County, hereinafter "County," requested that the Wisconsin Employment Relations Commission provide a list of three arbitrators from which they selected a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on July 22, 2009, in Green Lake, Wisconsin. The hearing was not transcribed. Following the submission of briefs, and the opportunity for a reply brief, the record was closed on October 14, 2009. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**ISSUES**

The County framed the substantive issues as follows:

Whether the Grievant has the right to receive vacation benefits in excess of the amount allowed in the collective bargaining agreement as a result of an accounting error? If so, what is the appropriate remedy?

The Union framed the substantive issues as follows:

Whether the County violated the collective bargaining agreement by depriving the Grievant of rightfully earned vacation time from his vacation balance? If so, what is the appropriate remedy?

Having considered the arguments of the parties and facts, I frame the issues as:

Whether the County violated the collective bargaining agreement when it reduced the Grievant's 2008-2009 anniversary-year vacation leave amount by 28 hours? If so, what is the appropriate remedy?

**REVELANT CONTRACT LANGUAGE**

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**ARTICLE 2 – RECOGNITION**

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- B. The Employer and Green Lake County retain and reserve the sole right to manage its affairs in accordance with all applicable laws, resolutions, ordinances and regulations. Included in this responsibility, but not limited thereto is the right to determine the number and classification of Employees, the services to be performed by them; the right to manage and direct the work force; the right to establish qualifications for hire and to test and judge the right to transfer and assign employees; the right to demote, suspend, discharge for cause or take other disciplinary action subject to the terms of this Agreement and the grievance procedure; the right to release Employees from duties because of lack of work or lack of funds; the right to maintain efficiency of operations by determining the method, means and personnel by which such operations are conducted, including the right to contract out provided that the exercise of this right shall not result in layoff of permanent Employees (employees other than part-time, seasonal or probationary) and provided that in the case of the layoff of non-permanent Employees, that the Employer shall have the burden of proving that the exercise of such right will result in a more economical operation of the department, and to take

whatever actions are reasonable and necessary to carry out the duties and responsibilities of the employer.

In addition to the foregoing, the Employer and Green Lake County reserve the right to make reasonable work rules and regulations relating to personnel policy procedure and practices and matters relating to working conditions giving due regard to the obligations imposed by this Agreement. The Employer shall give reasonable notice of new rules and regulations or changes therein as promulgated by it to the Employees. Any disagreement of the meaning or application of such rules and regulations may be the subject of a grievance. However, the Employer and Green Lake County reserve total discretion with respect to the function or mission of the Highway Department, its budget, organization and the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement.

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#### **ARTICLE 5 – GRIEVANCE PROCEDURE**

A grievance within the meaning of the grievance procedure is hereby defined as to be any dispute or controversy between the Employer and an Employee or between the Employer and the Union about interpretations and application of particular clauses of this Agreement or as to any question relating to the wages, hours and working conditions and about alleged violations of the agreement, but shall not include disputes over contract modifications and renewals. If any questions arise as to whether a particular dispute is or is not a grievance within the meaning of this Article, the question may be taken up through the grievance procedure herein set forth.

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#### **ARTICLE 9 – VACATIONS**

- A. Each full-time Employee shall receive:
1. Five (5) working days of vacation with pay after one (1) continuous year of employment.
  2. Ten (10) working days of vacation with pay after two (2) continuous years of employment.
  3. Fifteen (15) working days of vacation with pay after eight (8) continuous years of employment.

4. Twenty (20) working days of vacation with pay after fifteen (15) continuous years of employment.
5. Thereafter Employees shall receive one (1) additional day of vacation as follows:
  - (a) After twenty (20) years of continuous service, the employee shall receive an annual vacation with as many days as they have years of employment completed with the employer.

For employees who are hired after January 1, 2007, annual vacation accumulations shall be capped at a maximum of twenty (20) days during the course of their employment with the County.

All vacations shall be used up within twelve (12) months of the anniversary year in which earned. Vacations, where possible, shall be taken in periods of no less than one (1) day at a time consistent with the current practice.

- B. Any employee requesting vacation or floating holiday time off shall prepare a slip and submit it to the Highway Commissioner or his/her designee at least fourteen (14) calendar days prior to the start date of the time off. Based upon the notice received the Highway Commissioner or his/her designee, two employees at a time shall be allowed off in the winter months and three employees at a time shall be allowed off in the summer months for vacation, floating holidays, and scheduled sick leaves (such sick leaves must be of a duration of at least one week.)

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### **BACKGROUND AND FACTS**

The Grievant, Robert Jahn, was hired by the County on July 6, 1998 and works in the County Highway Department. The Grievant is President of Local 514.

The County is a municipal employer who provides governmental services to the public of Green County. The County Clerk's office is responsible for employee payroll and leave management. The County computer system does not automatically calculate employee vacation leave. Rather, the Deputy County Clerk monitors employee anniversary dates, calculates the amount of vacation leave an employee is entitled to consistent with the labor agreement, and manually enters a vacation leave total into the computer system. The employee

then has those hours available for usage during the following 365 days. Employees may not carry over vacation leave from one anniversary year to another.

The Grievant's bi-weekly payroll deposit issued immediately following his anniversary date read as follows:

Leaves	Avail	Taken
SICK LEAVE	455.20	.00
PERSONAL DAY -HWY	1.00	1.00
VACATION - 40 HRS	150.00	10.00

This payroll record incorrectly credited the Grievant with 160 hours of vacation time on or about his anniversary date when he should have been credited with 120 hours of vacation.

On or about March 27, 2008, the Grievant received written confirmation of his bi-weekly payroll deposit. The written confirmation included his available leave balance totals. The document indicated his balances as:

Leaves	Avail	Taken
SICK LEAVE	469.70	.00
PERSONAL DAY -HWY	2.00	.00
VACATION - 40 HRS	88.00	32.00

The Grievant reviewed the balance totals and believed that the vacation amount was in error even though the total of the available time and the time taken added up to the amount to which the Grievant would have been entitled for that anniversary year. As a result of the Grievant's belief, he sought out Highway Commissioner, Robert Podgorski, and explained that he thought the vacation amount was incorrect. Podgorski reviewed his own records of the Grievant's vacation leave usage and concluded that the amount included on the payroll deposit were correct.<sup>1</sup> Podgorski advised the Grievant that since the amount on his payroll deposit was the same as the amount contained in Podgorski's records, that he had the hours available for his use.

The Grievant remained suspicious of the accuracy of the vacation leave balance and immediately went to the County Clerk's Office. Upon arrival, the Grievant spoke to Sue Wendt. Wendt is responsible for employee vacation leave. The Grievant informed her that he believed he "had too much vacation". Wendt reviewed the County computer payroll system balances and cross-referenced the leave taken against the amount she had calculated as his total vacation hours he had available that year. Wendt's calculations were consistent with the total contained on his payroll documentation. Wendt told the Grievant that the amount was correct.

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<sup>1</sup> Podgorski testified that he contacted the County Clerk's Office to verify the Grievant's vacation leave balance. Neither Wendt nor Bostelmann testified that Podgorski contacted them.

Shortly after the Grievant's 2008 anniversary date, Wendt calculated his vacation leave benefit and noticed that she had erred the prior year. Specifically, Wendt gave the Grievant four (4) weeks vacation (160 hours) rather than the three (3) weeks (120 hours). Wendt informed her supervisor and County Clerk, Margaret Bostelmann, of her error. Bostelmann wrote the Grievant a letter informing him of the error and she contacted the local AFSCME Representative, Tom Wishman.

Bostelmann and the Grievant met to discuss the error. Bostelmann informed the Grievant that he had taken 28 hours during the prior year which he was not entitled to and offered the Grievant options to repay the County for the hours, including buying back days, switching personal days, and using future overtime hours to cover the time. The Grievant was afforded time to make a decision. Concurrently, Bostelmann was attempting to communicate with Wishman to resolve the matter.

The Grievant did not agree to any of the options offered to him by Bostelmann. As a result, Bostelmann wrote the Grievant a letter dated September 30, 2008 and informed him that the County would be deducting 28 hours from the Grievant's 2008-2009 available vacation time.

The County reduced the Grievant's 2008-2009 vacation leave by 28 hours on October 2, 2008.

On or about October 15, 2008, the Union filed a grievance as follows:

*Statement of Grievance:*

On Oct 2, 2008 Robert Jahn received a letter from Marge Bostelmann stating that because of an error in the Clerk's office that awarded him too much vacation in his most recent anniversary year, the employer is now going to deduct 28 hours of vacation from his allotment for the current year.

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During the previous anniversary year, Jahn became aware of the error and reported it to the Highway Commissioner. He was in essence told to ignore it and to not worry about it. By now taking vacation away from Jahn in light of the direction he recived (sic) from his supervisor, the county is violating Article 9 (vacations) as well as Article 2 (recognition) by not providing him with the vacation he has earned and by applying unreasonable work rules.

The grievance was denied at all steps by the County.

Additional facts, as relevant, are contained in the DISCUSSION section below.

## ARGUMENTS OF THE PARTIES

### Union

The Union maintains that the County has unlawfully deprived the Grievant of his rightfully accrued vacation hours in the 2008-2009 year.

The Union maintains that the concepts of fairness and equity dictate that the County should be estopped from withholding the Grievant's rightfully accrued vacation. The essential elements of an equitable estoppel claim as defined by both the Wisconsin Employment Relations Commission decisions and Wisconsin's common law are present in this case. The Grievant informed the County that he believed an error had occurred. He spoke to not only the Highway Commissioner, but also to Sue Wendt, Deputy County Clerk. Both the Commissioner and Wendt assured him that his vacation time was accurate. That assurance precipitated the Grievant's belief in the accuracy of his vacation balance and the Grievant should not be detrimentally impacted as a result of this reliance.

The Union respectfully requests that the Arbitrator sustain the grievance, and restore the Grievant's available vacation time for the 2008-2009 work year to the 120 hours guaranteed by contract.

### County

The clear and unambiguous language of the collective bargaining agreement supports dismissal of this grievance. The plain language of the parties' contract is clear and direct. It provides for fifteen (15) working days or one hundred twenty (120) hours of vacation for employees with greater than eight years seniority. It is unnecessary to look to parole evidence since the literal meaning of the contract is unambiguous. The Grievant therefore was not entitled to the additional vacation time. The plain language of the contract should be enforced by upholding the repayment, in time or money, of the excess 28 hours.

The County made an honest mistake when calculating the Grievant's vacation time and that of another employee. The other employee immediately brought the error to the attention of the County and his vacation time was corrected. The Grievant never informed the County that an error had been made. Rather, the Grievant only asked the County officials to verify his available vacation balance which is where the manual error existed.

The Grievant knew he was not entitled to greater than three-weeks vacation. The Grievant was a Union official with a good understanding of the terms and conditions of employment as contained in the labor agreement. At no time did the Grievant inform the Highway Commission or the County Clerk that there was an error and that he was supposed to have only three weeks of vacation. Instead, the Grievant just asked the Highway Commission to confirm that the County's paperwork was the same as his paperwork. He also compared and confirmed his paperwork with that of the County Clerk. This was not a unilateral mistake

nor does the doctrine of equitable estoppel apply. The Grievant knowingly and intentionally took 28 hours of vacation time that he was not entitled to take. Interestingly, the Grievant was erroneously given 40 additional hours of vacation time, but he only used 28 of those hours. If the Grievant really believed he had those 40 hours, why would he not use all of the time?

The County asks that the grievance be denied and that the County be made whole for the vacation time taken by the Grievant.

### DISCUSSION

The County reduced the Grievant's 2008-2009 vacation leave by 28 hours. The Union challenges the reduction asserting that it violated both Articles 9 and 2 of the labor agreement.

The parties' collective bargaining agreement does not address the mechanics for the adjustment of errors in the payment of wages.

Looking first to the Vacation Leave section of the labor agreement, it provides that an employee with eight years or more seniority is entitled to 120 hours of vacation. This language is clear and unambiguous. The Grievant had nine years seniority as of his July 2008 anniversary date and therefore was entitled to 120 hours for the 08-09 anniversary year. The County awarded the Grievant 92 hours of vacation leave for the 08-09 anniversary year. The County therefore violated the labor agreement when it did not provide the Grievant 120 hours of vacation leave for anniversary year 08-09.

The County argues that the Grievant unjustly used 28 hours of vacation time in the 07-08 anniversary-year and therefore it had the right to reduce his 08-09 vacation leave to offset the hours he used in 07-08. The County supports its action by referring back to the 07-08 year and concluding that since the plain language of the agreement granted the Grievant only 120 hours of vacation, it had the right to reduce the Grievant's 08-09 vacation leave total.

"Where an employer makes an error in favor of employees, despite full knowledge of the facts, any monies paid out may not be recovered." Elkouri & Elkouri, *How Arbitration Works*, 6<sup>th</sup> Ed. P. 1232 (2006). This follows the general rule that mistakes of fact or mutual mistake may be recovered, but that mistakes of law or judgment may not be recovered. *Id.* See also *ARMOUR FOOD CO.*, 86 LA 1193 (Penfield, 4/86). A mistake of law "happens when a person having full knowledge of all of the facts comes to an erroneous conclusion as to their legal effect." *MILWAUKEE LINEN SUPPLY CO.*, 23 LA 392, 394 (1954).

The record establishes that on or about the Grievant's anniversary date in July of 2007, the County incorrectly calculated his vacation time and recorded 40 additional hours to his available vacation balance for 2007-2008. This incorrect amount was included on his July 2007 bi-weekly payroll record although the Grievant testified that he did not notice the error on that payroll record.



In March of 2008, the Grievant noticed that his vacation leave balance was greater than he thought it should have been and not only informed his supervisor, but also informed the County Clerk's office that he disbelieved the accuracy of the vacation balance as identified on his payroll deposit form. The Commissioner and Deputy Clerk of Court checked the hours, concluded that the amount identified was accurate, and informed the Grievant that the number was accurate. It was at this time that the County had sufficient notice and information available to it to further investigate and determine that the Grievant had indeed been awarded vacation time in excess of that which he was entitled. Rather than verify the Grievant's years of service against the vacation leave he was entitled to pursuant to Article 9 of the labor agreement, both County officials verified the leave taken to date against the incorrect vacation leave total calculated for the Grievant. The County's failure to further investigate and subsequent failure to identify an error resulted in the Grievant relying on their responses and the accuracy of the vacation leave balance. Given these facts, I conclude that the County made a mistake of law and that recoupment is not appropriate.

I am further persuaded by an inconsistency in the County's case. County Deputy Clerk Wendt testified that she manually enters an employee's available vacation at the time of the employee's anniversary date. She did so for the Grievant in July 2007, albeit incorrectly, and the Grievant was credited with 160 hours. Yet by March 2008, the Grievant's time record had been modified such that he no longer had 160 vacation hours, collectively. Instead, the March 2008 payroll record indicated a total of 120 hours, 88 available and 32 taken. If these balances can only be modified by an employee manually, then someone with access and knowledge of the County's computer payroll system made such a modification to the Grievant's balance during or before March, 2008. The County therefore had notice by that date that an error had occurred and had corrected the error. The fact that the County did not inform the Grievant of the error at that time and denied knowledge of the modification when faced with questions from the Grievant regarding that very issue supports my conclusion that the Grievant is more credible.

The County argues that when he received his July 2007 payroll deposit form the Grievant should have noticed that the total hours of vacation leave available to him was incorrect. This may be true, especially since the Grievant was the Union President, but it is also true that the County should have accurately calculated the Grievant's vacation leave. It was not incumbent on the Grievant to identify the nature of the error - he fulfilled his obligation when he brought the issue to the County's attention. Neither his supervisor nor the Clerk's office was able to detect the nature of the error. Regardless of what should have happened, the record shows that once the Grievant became aware, he contacted the County placing it on notice of the issue. Both the Highway Commissioner and the Deputy Clerk were provided an opportunity to correct the County's mistake and they failed to do so. As a result, it would be inequitable to hold the Grievant to a different standard than that of the County.

**AWARD**

1. Yes, the County violated the collective bargaining agreement when it reduced the Grievant's 2008-2009 anniversary year vacation leave balance by 28 hours.

2. The appropriate remedy is for the County to either credit the Grievant's current vacation leave balance by 28 hours to be used by July 2010 or to compensate the Grievant for 28 hours at his 2009 hourly rate, less all applicable taxes and deductions.

Dated at Rhinelander, Wisconsin, this 8th day of January, 2010.

Lauri A. Millot /s/

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Lauri A. Millot, Arbitrator