

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**BURNETT COUNTY GOVERNMENT CENTER
NON-PROFESSIONAL EMPLOYEES, LOCAL 279-A, OF THE
AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

BURNETT COUNTY, WISCONSIN

Case 102
No. 69228
MA-14536

Appearances:

Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSMCE, AFL-CIO, P.O. Box 364, Menomonie, Wisconsin 54751, for Burnett County Government Center Non-Professional Employees, Local 279-A, of the American Federation of State, County and Municipal Employees, AFL-CIO, which is referred to below as the Union.

Mindy K. Dale, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, for Burnett County, Wisconsin, which is referred to below as the County, or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as an Arbitrator to resolve a grievance filed on behalf of Marleen Seul, who is referred to below as the Grievant. Hearing on the matter was held on January 12, 2010, in Siren, Wisconsin. No transcript of the hearing was prepared. The parties filed briefs and reply briefs by April 5, 2010.

ISSUES

The parties stipulated the following issue for decision:

Did the County violate Article 11 of the collective bargaining agreement when it prorated vacations based on number of hours worked?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – RECOGNITION

Section 2.01 The Employer recognizes the Union as the exclusive bargaining agent for all regular full time and all regular part-time non-professional employees in the Burnett County Courthouse, Department of Health and Human Services and Forestry and Parks Workers in the Forestry Department . . .

ARTICLE 3 – MANAGEMENT RIGHTS

Section 3.01 The Union recognizes and agrees that certain rights related to the management of the work force covered by this Agreement are the sole responsibility of the Employer. These include, but are not limited to the right to establish procedures The Employer agrees that such authority shall not be exercised in a manner which violates the provisions of this Agreement. The parties agree that all past practices in effect that are mandatory subjects of bargaining under Wisconsin law, but not specifically referred to in this Agreement shall continue to remain in full force and effect. . . .

ARTICLE 10 – SICK LEAVE

Section 10.01 . . .

- A. Employees shall earn sick leave at the rate of seven and one-half (7 ½) hours each month of employment (eight (8) hours for employees working eight hour shifts) up to ninety (90) hours each year (ninety-six (96) hours each year for employees working eight hours per day); part-time employees shall earn sick leave on a pro-rated basis. . . .

Section 10.02 In computing a month of employment for the purpose of earning sick leave, the employee must be in “pay status”. Pay status is defined as, a) being on sick leave, b) being on vacation, c) receiving Worker’s Compensation temporary total disability benefits, or d) having worked for the Employer at least eleven (11) days during any particular month. . . .

ARTICLE 11 - VACATIONS

Section 11.01 Beginning with their starting date of employment, employees covered under the terms of this Agreement shall earn vacation with pay, on an anniversary year basis, but will be taken on the calendar year basis, according to the following schedule:

- A. On (1) day for each month of service up to a maximum of twelve (12) days of vacation with pay;
- B. After seven (7) years of service, employees shall begin to accrue fifteen (15) days of vacation with pay;
- C. After fourteen (14) years of service, employees shall begin to accrue twenty (20) days of vacation with pay;
- D. After nineteen (19) years of service, employees shall begin to accrue twenty-two (22) days of vacation with pay;
- E. After twenty-two (22) years of service, employees shall begin to accrue twenty-three (23) days of vacation with pay.

Due to the transition of changing the current union employees vacation accrual system to be taken on the calendar year. As of December 31, 2008 any vacation accruals already accumulated under the previous vacation system will be protected in a separate account for an indefinite period of time and drawn down only after current year accrued time has been exhausted, and in compliance with the vacation policy, until all the protected vacation accrual is used and the balance on the account is zero, at which time the account will be closed out. No additional accruals will be added to this protected account balance. . . .

Probationary employees shall be allowed to take vacation after they complete their first six months of service. However, the employee will be required to reimburse the employer for any vacation time taken if their probationary period is not satisfactorily completed. . . .

Section 11.07 On retirement, disability or layoff, employees will be paid their earned vacation benefits on a prorated basis. Employees who quit, provided that they have given the Employer two (2) weeks notice thereof, shall also be paid their earned vacation benefits on a prorated basis.

BACKGROUND

The grievance form, dated February 15, 2008 (references to dates are to 2008, unless otherwise noted), states the factual background thus: "On the paycheck received 2/15/08 the employer negatively prorated vacation time accrual because the employee had taken off time without pay." The form requests that the County "Immediately reimburse the employee for the reduction in vacation time accrual, including time unjustly reduced in calendar year 2007."

The agreement provisions set forth above come from the parties' 2008-10 labor agreement, which is effective, by its terms, January 1, but was executed by the parties on March 20, 2009. There is no dispute that the Grievant used unpaid leave during the payroll period ending February 8, and no dispute that the County, based on her use of unpaid leave, prorated her vacation accrual for that payroll period.

Broadly speaking, the parties' dispute focuses on evidence of past practice and of bargaining history, which is tied to the processing of the grievance. The background starts with the asserted practice.

Evidence on the asserted practice starts with Marcy Thalacker, a Human Resources Generalist, who has worked for the County since April of 1979. She assumed payroll duties in April of 1986, while the County transitioned from an outside contractor to in-house payroll processing. When she began processing payroll records, the system rested on paper copies of individual employee work calendars. In the early 1990's the County transitioned to a digital payroll system. Under the digital system, Thalacker would separately determine a fraction, the numerator of which was the hours actually worked (including hours in pay status) and the denominator of which was the total scheduled hours for the position. To determine total vacation accrual, Thalacker would apply this fraction to the individual employee's vacation entitlement based on years of service. On the employee's anniversary date of employment, Thalacker would "dump" the result onto the employee's check. The employee was then expected to "use or lose" the total accrual within the guidelines of the governing labor agreement or County policy. This proration system dates at least from the onset of the digital system. Thalacker implemented this system under the direction of the then-incumbent County Administrator, Myron Schuster. The Union was not involved in the implementation of this system, nor could Thalacker recall informing the Union "directly" of its implementation. Thalacker used this system for all full-time and all part-time employees, whether represented or not. The proration was not a secret, according to Thalacker. In January of 1995, she mailed a letter to unit employees that expressly noted "what pro-rated vacation credits you will have earned . . ." She did not know if she sent a copy of this letter to the Union.

Thalacker used a number of digital payroll systems, including the PMSC System, which was replaced in October of 2001 by an upgrade to the Information Design, Inc., (IDI) system. In 2006, the County migrated to the New World System (NWS). This was the first system that automatically computed vacation and sick leave accrual by payroll period, thus eliminating the need for Thalacker to annually input the necessary data and run the necessary calculations to reflect changing accrual and usage of paid leave. Thalacker's use of each of the digitally based systems continued the proration calculation summarized above. During the implementation of NWS, the County and the Professional Unit, which is also AFSCME-represented, had a dispute which prompted the negotiation of a Memorandum of Agreement, executed on October 7, which states:

Effective January 1, 2006, the County changed its payroll software program from IDI . . . to NWS . . . As a result of the change the system was not

of accruing the vacation-earning schedule on a payroll basis, tied to the employee's anniversary date. Previously vacation was manually credited in one lump sum, on an annual basis, on the employee's anniversary date. . . .

The parties had a good faith dispute as to the meaning of . . . the contract as it applied to cusp years. . . .

In order to resolve this dispute, the parties agree to back up the vacation accrual by one (1) year on all cusp years to ensure the higher level of vacation credits are available at the employee's 8th, 15th, 20th, and 23rd anniversary dates.

To match the accrual system to the lump sum credit, the County and the Union reviewed each union employee's vacation balance to determine the amount of vacation credit due each employee during the cusp years, since January 1, 2006.

The attached report lists the employees and the amount of vacation adjustment that will be credited to them, and signifies that the union employees are in agreement of and acceptance with this vacation credit. . . .

Thalacker reviewed the "attached report" with the employees. Ann Lane's signature appears on the Memorandum. The amounts listed and affirmed by each unit employee reflected County proration methodology.

Thalacker reviewed payroll records prior to her testimony to highlight the duration and extent of her proration calculations. The Grievant, for example, received the full accrual of vacation hours in 1997-98; 1998-99; 1999-00; 2000-01; 2001-02; and 2005-06. In 2002-03, she received a prorated benefit of 111 hours out of a maximum of 112.50. In 2003-04, she received a prorated benefit of 112.25 out of a maximum of 141.50. In 2004-05, she received a prorated benefit of 145.25 out of a maximum of 150. In 2006-07, she received a prorated benefit of 148.8454 out of a maximum of 150. In 2007-08, she received a prorated benefit of 146.8835 out of a maximum of 150. Linda Anderson, a member of the Nonprofessional unit, has served as a Union officer. Thalacker's records show that Anderson received the full, or essentially full, accrual of vacation hours in 1997-98; 1998-99; 1999-00; 2003-04; 2005-2006; and 2006-07. In 2000-01, she received a prorated benefit of 170 out of a maximum of 172.50. In 2001-02, she received a prorated benefit of 167.75 out of a maximum of 172.50. Thalacker noted that some employees, including Anderson and the Grievant, questioned her on the difference between the amount she credited them and the total available. In each case, Thalacker explained the payroll system in detail. No employee objected to the system after her explanation, prior to the filing of the grievance. Thalacker's search of records generated eight other examples of bargaining unit members who had received a prorated amount of vacation, dating back to 1998. Thalacker also supplied documentation of sixteen employees from other bargaining units who received a prorated vacation benefit over that time span.

In the negotiation for the 2008-10 labor agreement, the County proposed to change from an anniversary based system of vacation usage to a calendar year system. Bargaining on vacation is difficult to reconstruct precisely, but was contentious, beginning in November of 2007 and ending with the execution date noted above. The parties ultimately agreed to switch to a calendar year system of usage and to modifications in the vacation rights of probationary employees. Both parties made proposals to alter Article 11. The Union proposed to add a twenty-five day step for employees after twenty-five years of service. The County made a series of proposals which included language linking accrual to “each month of service in which the employee is actively employed and in pay status” and to “hours worked”.

The grievance’s filing came during the bargaining process and the impact of the filing on the bargaining process is best set forth as an overview of witness testimony.

Ann Lane

Lane is the Union’s President. Her notes indicate that on March 3, the parties met regarding the grievance. The County agreed at that meeting to stop prorating sick leave accrual based on the language of Article 10. Her notes state that, “County advised union that the vacation issue would be dealt with during bargaining.” Lane testified that there was no discussion of prorating vacation during the collective bargaining process outside of the processing of the grievance. Her notes regarding the processing of the grievance show no discussion between March and May, 14, 2009, when

We met regarding a different grievance and I resurfaced this one stating that it is still not settled. Candace did not remember at first, but then said she would have to review it and get back to me.

She added that her investigation of the grievance was the first time she became aware of the alleged practice regarding the proration of sick leave and vacation.

Marcy Thalacker

Thalacker played a limited role in the processing of the grievance, but did attend meetings. She noted that during those meetings the Grievant and Lane acknowledged that they knew that the County had prorated the vacation benefit in the past.

Candace Fitzgerald

Fitzgerald has served as County Administrator/Human Resources Director since 2002. She served as the County’s spokesperson for the bargaining for a 2008-10 labor agreement. The grievance arose several months after bargaining had started. During the processing of the grievance, Fitzgerald and Thalacker informed the Union of the long history of prorating vacation. Lane and the Grievant acknowledged that they were aware of the history and that the Grievant had

Fitzgerald could not recall telling the Union that the County would address the proration grievance during collective bargaining. She believed she met with the County Board on March 20, which she understood to be the date Lane's notes detail a statement by her that the County would discuss proration of vacation during collective bargaining. Bargaining for vacations proved so contentious that, to Fitzgerald, the issue often seemed to drive the bargaining. In her mind, neither party wanted to complicate the vacation negotiations by a discussion of prorating vacation benefits. The parties never discussed the point.

Steve Hartmann

Hartmann was aware of the grievance throughout the collective bargaining process that occurred after its filing. He viewed every proposal from the County in light of the grievance and consciously bargained in a fashion that would not lend the Union's position in bargaining to compromise its position on the grievance. The Union made no proposal in bargaining to resolve the grievance and avoided any response that could have an adverse effect on it. The Union has never acknowledged agreement with the asserted practice.

Further facts may be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

The Union notes that the Grievant "had to take some short term unpaid time off to care for her custodial grandson" and that the County "pro-rated the grievant's vacation allocation." The grievance was filed "under the language of the 2005-07 CBA". Article 11 of that agreement clearly authorizes "days" of vacation to be based on "years" of service, "not hours worked." Nor is there any language to permit proration. Section 11.07 permits proration in specified circumstances, none of which are relevant here. At best, this section shows that the parties "have expressed those cases where pro-rationing of vacation is appropriate." The interpretation of Article 11 advocated by the County thus stands as nothing more than unilateral action, and a violation of "one of the basic precepts of contract interpretation", which is "to express one thing is to exclude all others."

The grievance was filed "while the parties were engaged in bargaining for the current (2008-10) agreement". During that bargaining, the County sought unsuccessfully to modify Article 11 to include language that "would change vacation accrual to a system based on hours worked". The Union "understood the meaning and application of this language and rejected it."

Nor will the evidence support the assertion that past practice supports the County. The asserted long-term practice rests on unilateral County action. At best, three unit employees have had their vacation benefit prorated. There is no evidence that the County ever communicated its administrative practice to the Union. With "the Union having no knowledge of the practice the

lack of mutuality should be fatal to the County's defense." To further underscore this,

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Section 7.02 of the County Human Resources Manual "has vacations for full time employees based on their work schedule (37.5 or 40 hour/week) while part-time employees vacation is based on 'monthly hours worked.'" The alleged practice was thus "a practice made up by the former Administrator and continued by the current one without telling the Union *or their own Administrative Committee.*"

Against this background, the grievance should be granted, and, "the remedy for the County's violative actions should be to make the grievant and all similarly situated employees whole for all loss of vacation and order the County to cease and desist from pro-rating the vacation of full-time employees."

The County's Brief

Noting that the parties' dispute spans two labor agreements, the County states that it "does not view any of the Section 11.01 language changes as material to the grievance". Rather, the determinative background is the silence of the parties' agreements "on the issue of vacation pro-ration"; the absence of express bargaining on the point and the consistency of County payroll calculation of vacations "based on hours worked" for all part-time and full-time County employees, whether represented or not.

Thalacker's testimony establishes the governing factual background and underscores that from 1997 through 2009 every County employee had their vacation accrual calculated on the basis of hours worked. Over the transition from a paper system to a computerized payroll system, the County developed a practice which consisted of: 1) a determination of hours worked in the previous year; 2) a determination of the vacation accrual based on years of service; 3) proration of the accrual for any period in the previous year the employee did not work full-time; and 4) "dumping" the prorated accrual into the payroll system on the employee's anniversary date. This labor intensive effort was not done for County convenience and was not a "closely guarded secret." The Grievant's payroll records "dating from 1998 show numerous occasions when her vacation accrual was reduced from the full-time level based on hours worked." Beyond this, the evidence shows a Union officer also had her vacation accrual similarly reduced. County payroll records show fifteen such reductions for eight employees of this bargaining unit and nine more such reductions for five members of the Professional bargaining unit.

The Grievant also grieved the County's proration methodology for sick leave as well as vacation. The methodology was consistent for both, but due to the presence of a contractual reference to "pay status" regarding sick leave, the County settled the former grievance. The silence of the contract regarding the latter provoked the arbitration of the vacation grievance.

It is unclear when the parties adopted the current language governing vacation accrual, but the language dates back at least twenty years. The evidence meets the most stringent arbitral standard concerning the binding force of past practice. Consistent County issuance of

was long-standing. It is, in any event, “hard to believe that nobody noticed the practice of vacation pro-ration over such a long period of time.” It is more reasonable to expect employee vigilance on the point, particularly in a “use it or lose it” system, where some reductions were noteworthy and where at least one Union office was affected.

Employee pay stubs have used “Vacation Used” and “Vacation Available” entries over a considerable period, making the practice “readily ascertainable” and “known to both management and employees.” The evidence also demonstrates mutuality. AFSCME represents three County bargaining units. The Professional unit “actually has specific vacation pro-ration language, covering part-time employees”. It defies logic to believe AFSCME never “examined consistency across units in bargaining”. It is more probable that the proration was so well established that it had become unremarkable. A 1995 County mailing to Health Department employees refers to “hours of work” to determine accrual as well as to “pro-rated vacation credits.” A 2008 side letter with the Professional unit resulted in employees reviewing their prorated vacation accrual with Union officials and Thalacker.

Section 3.01 authorizes the County to establish procedures to implement policy. Even if proration was not the only procedure to implement vacation accrual, it “met the needs of the County and employees, without a grievance, for somewhere in the vicinity of twenty (20) years.” Section 3.01 also continues past practices “in full force and effect.” This provision makes it impossible to view the practice as based on no more than unilateral action.

Nor will the evidence support an assertion that the County seeks to establish a benefit in arbitration that it failed to achieve in bargaining. Proration of vacation has never been expressly addressed in bargaining, including that which produced the 2008-10 agreement. Even if the Union viewed the grievance’s filing as a repudiation of the practice, the evidence shows no mutuality of understanding on the point.

A detailed review of documents purporting to establish bargaining history establishes that the parties never attempted to address the proration issue. Rather, the parties addressed in considerable detail, a change to a calendar year system of vacation usage; a “paragraph to protect an employee’s transitional balance from the ‘use it or lose it’ provisions of Section 11.05”; and “the use of vacation by probationary employees.” Nor is it apparent that vacation accrual practices can be repudiated without altering the language of the agreement. It is, in any event, not evident that the silence of the contract somehow argues against proration. Rather, the plausibility of the conflicting views of vacation accrual demands the use of past practice as a guide.

Against this background, the County concludes that the grievance should be denied. In the alternative, the County:

suggests a “from this point forward” remedy instead of recalculating vacation for the grievant from 2007 (as requested in the Grievance). The “remedy” should not penalize the County for a long-standing practice that was not deemed

The Union's Reply Brief

The Union contends that in CLARK COUNTY, DEC. NO. 7520 (Burns, 12/09), the County's advocate persuaded the arbitrator that "a 40 year past practice of paying wages on a one week lag was not binding absent further evidence of mutuality." That line of argument is irreconcilable to that advanced in this case. The contract is not silent regarding the proration of vacation. Section 11.07 precludes that conclusion. Thus, the citation of Section 3.01 is of no benefit to the analysis of the agreement. The parties chose not to prorate vacation outside of the contingencies noted in Section 11.07. The bargaining for a 2008-10 agreement establishes that the County seeks in arbitration a result the Union expressly rejected in bargaining.

The County's Reply Brief

The Union fails to address the impact of Section 3.01, which demands that past practice be enforced. The Union's footnote to the effect that the grievance does not address other than full-time employees complicates its contractual analysis, since the agreement is silent on all employees. The assertion that the interpretive guide that "to express one thing is to exclude all others" governs this grievance produces an absurd result, since the Union "is clearly not contesting the County's right to pro-rate vacation for employees who are not regularly scheduled to work full-time hours." Accepting the Union's chain of logic rewrites Article 11 and, "Contract provisions get re-written in negotiations and not at arbitration hearings." Beyond this, it is unclear whether the Union is contending that an employee on an unpaid leave of absence is entitled to "full vacation accrual."

The assertion that the County somehow has cheated employees of a benefit ignores that, "The amount of time that went into the meticulous implementation of the hours worked accrual system is arguably far greater than any amount of money 'saved' in terms of employee payroll." Union use of the Human Resources Manual has no evident bearing on the grievance. The issue remains whether the accrual of a vacation "day", whether based on a "month" or a "year" of service, connotes full-time service. The Union also ignores that the Grievant was well aware of County pro-ration, having received checks with "hours adjustments on four occasions" within the six-month period preceding the grievance. The Union's case misplaces a bargaining issue in grievance arbitration.

DISCUSSION

The stipulated issue focuses on Article 11, but resolution of the grievance turns on its relationship to other agreement provisions as well as to past administration of the benefit. The role of other agreement provisions as well as past practice presumes the ambiguity of Article 11.

The language of Article 11 is ambiguous. Union recourse to the interpretive maxim

reference, but the recourse is simply arguing in the alternative. Section 11.01 accrues “day(s)” of vacation for “each month” or “years” of employment. As the Union asserts, these references afford little basis to justify proration. The “each month” or “years” are, however, tied to “of service”, and that reference is ambiguous. Footnote 3/ of the Union’s brief attempts to cut off the ambiguity by asserting, “This case is about the rights of full-time employees and is unrelated to any issues involving employees regularly scheduled for less than full time hours.” As the County’s reply brief highlights, the governing terms are not so easily restricted. Assertion that “of service” can mean “hours worked” or “time in pay status” is plausible. Section 11.01 can be read to offer the same vacation accrual to an employee whose “service” is four hours per week as to an employee whose “service” is forty. For that matter, it is not clear if an employee, while on unpaid leave of absence, is entitled to accrue vacation at the same rate as while working. The employee on unpaid leave is “of service” if that reference connotes “occupying an authorized position.” If, however, “of service” connotes actively offering labor for pay, then the employee on unpaid leave is not “of service”. This is not to say the language requires any of these results. Rather, the point is that each result is plausible, which makes it impossible to say the language can only be read to support a single outcome.

Even though the governing terms are ambiguous, a normal reading of them supports the Union. The references to “day(s)” or “years of service”, standing alone, afford little support for proration, particularly if restricted to full-time employment. The “of service” reference can be read to imply a proration if there is a wide variance in hours worked, particularly regarding the relationship of part-time to full-time employment. However, the strain is evident. The County acknowledges that the result of Thalacker’s pre-NWS proration calculations was arguably not worth the time involved regarding unpaid time usage by full-time or part-time employees as compared to similarly scheduled co-employees.

The use of the interpretive maxim “to express one thing is to exclude all others” affords little support for the Union’s view beyond the normal meaning of the governing terms. Whether Section 11.07 can be read to support that view is troublesome standing alone. The proration Section 11.07 calls for affirms that an employee’s vacation accrual is limited to active County service. Viewed in this light, the proration supports the reasonableness of reading “of service” as “time worked.” Beyond this, as with most maxims of contract interpretation, one maxim runs headlong into another. The grievance equates vacation accrual under Article 11 with sick leave accrual under Article 10, denying County ability to prorate either. This equates the silence of Article 11 to the terms of Section 10.02. This runs headlong into the maxim that a contract must be read as a whole, giving effect to all of its terms, see, for example, *Elkouri & Elkouri, How Arbitration Works*, (5th ed., BNA, 1985) at 493 (6th ed., BNA, 2003) at 463-464).

If the terms of Section 11.01 stood alone, the Union’s view of that section is preferable to the County’s. The strength of the County’s case is rooted in past practice and more significantly in the operation of Section 3.01.

The persuasive force of past practice turns on the agreement manifested by the parties’

conduct. Here, the necessary preface to past practice evidence is to determine what type of

practice is in dispute. The significance of this point is best stated by Arbitrator Richard Mittenthal's analysis of the use and the implications of the use of past practice. In *The Proceedings of the 14th Annual Meeting of National Academy of Arbitrators*, at 30-58 (BNA Books, 1961), Mittenthal put the point thus:

Once the parties become bound by a practice, they may wonder how long it will be binding and how it can be terminated.

Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For . . . if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.

Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of the provision. As such it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.

It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supersede the practice, by eliminating the provision entirely, etc.

The County argues that the evidence supports a binding past practice of either type.

In my view, the evidence is insufficient to clarify the operation of Section 11.01. At best, the evidence establishes a consistent administrative policy that can claim no greater force than that granted by Section 3.01. In support of its view, the County cites the three criteria of

In the absence of a written agreement, “past practice”, to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.

As the County asserts, the evidence supports the first two criteria. However, the evidence fails to establish the third. The County notes that a Union officer was aware of the proration. Even ignoring the ambiguity on whether Anderson was a Union officer when she was made aware of the proration, the evidence affords no support for concluding Anderson acted as a representative of the Union. Thalacker acknowledged she advanced vacation to Anderson without consulting the Union or the labor agreement. This demonstrates the difficulty of concluding the Union accepted the practice as a party. Nothing in the development of the practice includes County notice to the Union or Union participation in the process. The Anderson example highlights that administration of the vacation benefit involved one-on-one contact involving individual accommodation. Whether or how this came to the Union’s attention is problematic. That Thalacker explained the proration to individual employees is evident, but this appears to have involved no more than individual questioning of whether the accrual had been accurately calculated. There is no evidence either Thalacker or the affected employees ever questioned anything beyond whether an individual calculation was consistent and accurate. Prior to the grievance’s filing, there is no persuasive indication anyone questioned whether the calculation was rooted in the contract. Rather than Union acceptance of Thalacker’s explanation, the evidence shows individual employee acceptance of the persuasiveness of her explanation.

The County has advanced a series of considerations to warrant the inference of Union acceptance. The considerations have force, but fall short of establishing mutual acceptance. The difference in hours between Thalacker’s proration and the contractual benefit was often negligible. There are instances of noticeable differences. On balance, however, this evidence establishes individual acquiescence in the administration of the benefits over time. It falls short of establishing an “established practice accepted by both parties.” This means the evidence of practice falls short of clarifying the ambiguity of Section 11.01.

The agreement is not, however, silent regarding past practice, and the analysis must turn to Section 3.01. That provision does not cover “a well-established practice which serves to clarify some ambiguity in the agreement” under the Mittenthal analysis. Rather, it covers, by its terms, those practices “not specifically referred to in this Agreement”, which are the first type of practice discussed by Mittenthal. Under the Mittenthal analysis, this type of practice turns “largely on the parties’ acquiescence”. More specifically applied here, the purpose of Section 3.01 is to preserve, during the term of the agreement, those practices which are an accepted part of the relationship which have not, or have not yet, risen to the attention of the parties in collective bargaining. Its effect is to retain historically established conditions of employment during a contract, to permit their ultimate resolution in collective bargaining. The alternative is to invite unilateral, and potentially disruptive, unilateral action on understood

While the County's proof fails to establish the mutual agreement that makes practice constitute a binding clarification of the agreement, it does establish long-term acquiescence by employees regarding the County's consistent application of vacation proration. That acquiescence includes a Union officer as well as the Grievant. While there is less than definitive proof of Union acceptance of the binding force of the practice, the proof is sufficient to establish the practice was known to employees and their representatives. The County was authorized, under Section 3.01, to develop a procedure implementing Articles 10 and 11. The County's implementation of the benefit was consistent throughout the County for many years, was clear and was widely understood. This may fall short of establishing a binding practice clarifying Section 11.01, but it does establish an understood way of doing business sufficient to establish a practice under Section 3.01, which must be preserved during the agreement's term.

That the grievance arose prior to the execution of the 2008-10 agreement poses no interpretive issue. That agreement is effective, by its terms, on January 1. Even if the grievance is considered to have arisen under the predecessor agreement, the Union did not repudiate the practice. Rather, it took the position that Section 11.01 will not permit proration. This position dictated the Union's stance that it would initiate no bargaining on proration for fear the bargaining might compromise its position that the contract already addressed the dispute. If Section 11.01 stood alone, this argument could be persuasive. It does not, and the terms of Section 3.01 must be considered. In my view, that section demands that the proration practice continue while the labor agreement is in effect. Even if the practice is repudiated by the Union, the ambiguity of Section 11.01 poses an issue for bargaining. I do not believe the language of Section 11.01 is sufficiently clear standing alone to invalidate the County's consistent, broadly known, and long-term administration of the benefit. Thus, the grievance has been denied.

It is appropriate to clarify this conclusion by tying it more closely to the parties' arguments. The County contends that its authority to develop procedures under Section 3.01 permitted it to establish the proration of vacation accrual under Section 11.01, and over the course of time, the procedure became a practice that cannot be repudiated. As noted above, the difficulty with this line of argument is that in the absence of evidence establishing mutual agreement, past practice does not codify agreement, but unilateral action. The evidence falls short of establishing Union acceptance of proration as a binding clarification of Section 11.01. Nor can practice, under Section 3.01, clarify a "procedure" authorized under Section 3.01. If, for example, the parties had conflicting departmental practices on accruing vacation, Section 3.01 affords no basis for the County to make any one of a conflicting number of departmental practices a uniform procedure. Rather, it would hold the conflicting practices in effect during the agreement, until the conflict could be addressed in bargaining. Put more simply, the practices preserved under Section 3.01 can not clarify contract language because they are "not specifically referred to in this Agreement". This underscores that the purpose of Section 3.01 is to preserve understood conditions of employment which are mandatory subjects of bargaining, pending their resolution during bargaining.

County evidence regarding practice in units other than the Non-Professional unit has

at issue here, extra-unit practices afford no persuasive basis to interpret Section 11.01. It has some bearing on a Section 3.01 practice. That section has less to do with mutual understanding than with acquiescence in an established course of conduct. "Practice" in the Section 3.01 sense is less permanent, to reflect that the established course of conduct is to be continued under the labor agreement until parties can bargain the point. That the County's proration was consistent across all units has some bearing on proving an established course of conduct. For similar reasons, County practice with non-represented employees has some bearing on the case. The Union's assertion that the policy governing non-represented employees has a bearing on the grievance has some persuasive force. The strain between the governing language and the proration practice is evident regarding the policy, but that strain does not establish clear language pointing to a single interpretation on what "of service" means. This restates, rather than resolves, the interpretive issue posed by the grievance.

Bargaining history affords limited guidance. Whether or not Fitzgerald stated the County would address vacation accrual in bargaining, the fundamental ambiguity of Section 11.01 and the role of practice under Section 3.01 remained unresolved. The Union's decision to avoid bargaining on the point to preserve its position under Section 11.01 is understandable, but did nothing to resolve the ambiguity posed. If the agreement did not include Section 3.01 and if the agreement addressed vacation accrual for part-time employees, the Union's reading of Section 11.01 is persuasive. However, the long-standing practice of proration cannot be ignored under Section 3.01 and the ambiguity posed by Section 11.01 regarding other than full-time employees pose too substantial a problem to be resolved by inferring that the normal meaning of the terms of Section 11.01 supports the Union's view over the County's. The County's view of a binding practice enshrines unilateral action, and the Union's view of Section 11.01 ignores a long-standing and known means of doing business. Both seek an interpretation of Section 11.01 through arbitration that has yet to be secured in bargaining. The application of Section 3.01 cannot reach the interpretive issue posed by Section 11.01 on the evidence posed, but its application preserves an understood procedure pending the collective bargaining necessary to resolve the problem.

AWARD

The County did not violate Article 11 of the collective bargaining agreement when it prorated vacations based on number of hours worked, because Section 3.01 preserves the effect of its past administrative practice of proration during the term of the labor agreement.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 29th day of June, 2010.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator
RBM/gjc

