BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

JUNEAU COUNTY

and

AFSCME, LOCAL #1312-A

Case 157
No. 70681
MA-15022

(Vacation Pay Grievance)

Appearances:

David E. Lasker, Corporation Counsel, Courthouse Annex-Suite 16, 220 East La Crosse Street, Mauston, WI 53948, appearing on behalf of Juneau County.

Neil Rainford, Counsel 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903, appearing on behalf of AFSCME, Local #1312-A.

ARBITRATION AWARD

According to the terms of the 2008-2010 Collective Bargaining Agreement between Juneau County (County) and Local 1312-A, Professional Employees, Council 40, AFSCME, AFL-CIO (Union), the parties selected the undersigned from a panel of Wisconsin Employment Relations Commission staff members/commissioners to hear and resolve a dispute regarding the interpretation and application of certain provisions of the Agreement as they pertain to the vacation pay of B. W. (Grievant).

A hearing in the matter took place on June 9, in the County Board Room, 220 E. State Street, Mauston, Wisconsin. The hearing was transcribed by Sarah Finley Pelletter, RPR. The parties presented oral arguments at the close of the hearing, which were also transcribed.

ISSUE

At the outset of the hearing, the parties stipulated to the following issue: Whether the [B.W.] matter was handled by the County in a manner consistent with the Collective Bargaining Agreement/Personnel Policy of Juneau County.

RELEVANT CONTRACT LANGUAGE

* * *

ARTICLE 14 – VACATION LEAVE

14.01 All employees must be employed for one (1) year before they can use vacation time. Employees advance to the next vacation increment at the beginning of the seventh, fifteenth, twenty, twenty-third years of service. Employees shall have the following paid vacation time:

. . .

From the hiring day to the following January 1 – one (1) day of vacation;

Upon one (1) to seven (7) years of service – twelve (12) days of vacation;

. . .

14.02 After one (1) year of employment, vacation with pay may be taken once it is earned; vacation with pay cannot be granted until earned.

14.03 Upon completion of the second year of employment, and for all employment years thereafter, any accumulated vacation time in excess of five (5) days shall be forfeited by the employee by the end of December 31.

. . .

14.11 Employees who leave the employ of Juneau County shall be paid for accumulated vacation time earned up to the date of termination. In the event of the death of an employee, the employee's beneficiary shall receive the payment.

* * *

FACTS

The Grievant was employed by the County as a social worker/Community Health Educator and a member of the professional employees' bargaining unit from January 29, 2010 until December 15, 2010, at which time she voluntarily resigned. Pursuant to the above-stated contractual vacation time provisions, she had accumulated 10 days of vacation at the time she left her job. She did not use or take any vacation during the time she was employed. Citing contractual Section 14.02, above, the County declined to pay her for any of her accumulated vacation when she left employment, on the ground that she had been employed for less than one year.

Barbara Hoile has been employed as the County's Human Resources Director since approximately 1997. She is primarily responsible on behalf of the County for interpreting and applying the collective bargaining agreement and County personnel policies. The relevant provisions of the contract and personnel policies have not changed during Ms. Hoile's tenure. She estimated that during her tenure there were some, but fewer than 10, employees who left County employment before they had completed a year of service, but she had no specific memory of this occurring. She is certain that she never authorized a vacation payout for anyone leaving employment before completing a year of service. The Union does not know whether or not any bargaining unit member left employment before completing a year of service, prior to the instant situation involving the Grievant, and therefore does not know whether vacation was paid out in that situation, if any such occurred.

Since approximately 2003, the County has employed Deanna Rose as HR Assistant. Ms. Hoile has generally authorized Ms. Rose to assist department heads in calculating various separation benefits for employees who leave or are terminated from employment. Ms. Hoile would expect Ms. Rose to seek advice if she encounters unusual situations. On two occasions, Ms. Rose, without Ms. Hoile's knowledge, approved vacation payouts for employees who resigned from employment before completing a year of service. One incident occurred in September 2010 and involved a Child Support Specialist; the other occurred in September 2009 and involved a deputy sheriff. Neither of those employees was a member of the instant bargaining unit. The record does not reflect whether, in the past eight years, there were any employees who left before completing a year of service and did not receive a vacation payout. When Ms. Hoile learned that Ms. Rose had authorized vacation payouts in such circumstances, Hoile directed Rose to cease doing so.

On December 15, 2010, the Grievant filed a timely grievance challenging the County's decision that she was not entitled to receive a vacation payout. Her grievance stated as follows:

> I feel that article 14.01 and 14.11 of the professional union contract have been misinterpreted, resulting in the inability for myself to be paid for vacation time accumulated during my time at Juneau County. Within our contract, employees are always accumulating vacation leave for the following year. According to section 14.01, new employees are not allowed to use this accumulated vacation time until they have been with the county for one full year, it does not state that vacation time isn't accumulated during the first year. Section 14.11 then states that upon resignation, employees shall be paid for accumulated vacation time. It is my interpretation that although I cannot use my vacation time, it has been accumulated during my first 10.5 months of employment, therefore should be paid out upon resignation. Also, the union contract does not specifically state that employees leaving before one year shall not be paid for accumulated vacation time.

POSITIONS OF THE PARTIES

The Union relies primarily upon the contract language of Section 14.11, which, according to the Union, plainly requires the County to pay the Grievant for the vacation time she "accumulated" prior to leaving the County's employment. The Union contends that Section 14.01 also clearly provides that the Grievant earned one day of vacation for each of the 10 months she worked for the County. Section 14.11 requires a payout to all terminated employees and contains no exception for any category of employee, even someone who leaves before completing a year of service. Unlike 14.03, which specifically calls for a forfeiture of certain unused vacation days, 14.11 does not call for any kind of forfeiture of earned vacation pay. Section 14.02 implicitly provides that an employee may not "take" earned vacation time until a the employee has completed a year of employment, but the right to "take" or "use" vacation time is not the same thing as the right to receive a payout for accumulated vacation time. The Union contends that past practice also supports its position here, pointing out that the only evidence of record regarding County employees who have departed before completing a year shows that they were granted the vacation payout. In both situations, the department heads as well as the HR Assistant apparently interpreted the contract language in accordance with the Union's view and contrary to that of the HR Director.

The County also relies upon the clear language of the collective bargaining agreement, specifically the provision in Section 14.02 requiring an employee to work for at least a year before receiving vacation pay. The County contends that there is no reasonable distinction between "taking" earned vacation and receiving a vacation payout: neither is permitted until the employee has completed a year. The County acknowledges the two prior incidents in which accumulated vacation was paid out in circumstances similar to the instant case, but, relying on the testimony of its long time HR Director, contends that these were erroneous, unauthorized, and inconsistent with the way in which the HR Director had consistently applied the relevant provisions.

DISCUSSION

It is well settled that vacation time and/or pay is a form of additional compensation that employees earn and accumulate for work performed, subject to specifications in the collective bargaining agreement. VALEO V. J. I. CASE, 18 WIS.2D 578 (1963); LABOR AND EMPLOYMENT ARBITRATION (BORNSTEIN & GOSLINE, ED.), § 31.01. Arbitrators generally will not infer limitations, requirements, or forfeitures of vacation pay that are not specifically set forth in contract language. "Where eligibility for some payment has been attained a forfeiture of such accrued vacation benefits must rest upon clear contractual language." GOLAY & CO., 59 LA 1245 (VOLZ, 1972). On the other hand:

> [A]s in the case of any other monetary claim, the employee must fulfill the conditions stipulated in the contract for [vacation] payment. … [An employee] enjoys contractual freedom to quit, but in doing so he may forfeit rights which require for their vesting continued employment for a further period or to a prescribed date. However, in order to result in a forfeiture, the contract provision must be free from doubt.

DOVER CORP., 48 LA 965 (VOLZ, 1966).

There is no question here that the Grievant accumulated 10 days of vacation. There is also no dispute that employees whose employment terminates after one year are entitled to vacation pay for all accumulated vacation time, including any time accumulated in the year of termination. The question here is whether Section 14.01 imposes a condition upon the Grievant's entitlement to the vacation pay she had accumulated because she left before completing a year of work.

As noted above, vacation eligibility is often predicated upon satisfying certain contractual conditions. One of the most common of those conditions is a "minimum-service" requirement – a "provision [that] requires a specified length of service before any vacation is received." LABOR AND EMPLOYMENT ARBITRATION, § 31.02[1]. Minimum service requirements are often viewed as additional steps in order to "fully earn" or become fully "vested" in the allotted vacation entitlement. SEE, E.G., DOVER CORP., SUPRA.

The Union acknowledges that Section 14.01 establishes a minimum service requirement for *using* accumulated vacation time, but contends that a *payout* for accumulated time is materially different from the use of such time. The Union points to the clear language of 14.11 for the proposition that every employee who leaves employment, for any reason and without any exception, "shall be paid for accumulated vacation time earned up to the date of termination." According to the Union, the Grievant had "earned" 10 days of vacation time prior to termination and was entitled to receive that deferred compensation when she left, even though she could not "take" or "use" the vacation she had earned until a year had passed. The Union also notes that, in the only two situations that the parties could specifically recall – neither involving employees within the instant bargaining unit – the County had in fact provided a vacation payout to employees who left employment before completing a year.[1]

In my view, the contract language is not perfectly clear and leaves room for interpretation: Section 14.01 could be interpreted to preclude a payout while Section 14.11 could be interpreted to require a payout. Neither provision explicitly refers to the specific issue here (payouts in the first year). Past practice evidence therefore could be very helpful in determining the parties' intent, if it reliably indicated a mutual understanding on the subject.

In this case, however, the past practice evidence is not persuasive. The problem is not the small number of specific prior incidents (the record showed that employees, especially in this bargaining unit, rarely leave in less than a year), but the fact that they were handled inconsistently with the County's HR Director's interpretation and prior application of the provision. There is no question that HR Director Hoile is primarily responsible for implementing the collective bargaining agreement on behalf of the County. Hoile testified credibly, if non-specifically, that, during the years when she directly approved the employment termination paper work, she consistently withheld a vacation payout for employees leaving in less than a year. For the past several years, Hoile has delegated this task (approving the paper work) to her assistant and was not aware that Rose had approved two prior payouts for

[1] The parties seem to agree that these two employees were covered by contract language as to vacation pay that was similar to the instant contract provisions.

employees in the Grievant's situation. When Hoile discovered, while handling the Grievant's termination, that Rose had made these prior approvals, Hoile promptly and firmly corrected Rose. Under these circumstances, Hoile and the County are not bound by Rose's conduct. "…[S]everal arbitrators have noted that errors committed by lower ranked administrative employees, even when intentionally done, do not alter an established practice or create a new one." ELKOURI & ELKOURI, HOW ARBITRATION WORKS (6TH ED. 2003) at 626 (footnotes omitted). For this reason, the two instances in which the County paid accumulated vacation time to employees in the Grievant's situation are not helpful in interpreting the collective bargaining agreement.

Since the language carries some ambiguity and the past practice evidence is not helpful, I must interpret the contract language by examining its likely purpose and its internal logic. At first blush, the Union's argument is appealing. It is consistent with the strong prevailing view that vacation pay is deferred compensation and the fact that Section 14.11 does not explicitly exempt employees, like the Grievant, who have worked less than a year.

Upon careful consideration, however, there simply is no meaningful distinction between "taking" vacation and receiving vacation "pay." The traditionally recognized purpose of a minimum service requirement is to encourage employee longevity; it is difficult to imagine another purpose for such a provision and none has been suggested. This purpose would be utterly thwarted if the employee were entitled to a full payout at the time of termination. Indeed, allowing the Grievant a payout upon termination is the functional equivalent of giving her 10 days of paid vacation time at the conclusion of her employment. The Union acknowledges that the Grievant would not be entitled to the paid vacation days at that point in her employment. It would not be rational to conclude that she is entitled nonetheless to the financial equivalent of that paid time off.

Accordingly, while the contract does not expressly spell out that employees in their first year of employment are not entitled to vacation payouts, I conclude that Section l4.01, which precluded the Grievant from taking vacation before she had completed a year of employment, must also be interpreted to preclude a vacation payout, because that is the functional equivalent of taking or using accrued vacation.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 8th day of September, 2011.

Judith Neumann /s/
Judith Neumann, Arbitrator

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