

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 360, AFSCME, AFL-CIO

and

SAUK COUNTY (HIGHWAY DEPARTMENT)

Case 117
No. 52369
MA-8939

Case 118
No. 52370
MA-8940

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Todd J. Liebman, Corporation Counsel, Sauk County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear grievances involving vacation benefits. A hearing was held in Baraboo, Wisconsin, on May 4, 1994, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs and the record was closed by July 20, 1995.

ISSUES:

The parties state the issue in essentially the same manner, but the Union frames it as this:

What is the appropriate seniority and benefit dates for the Grievants?

And the County states the issue as this:

What is the appropriate seniority and benefit accrual anniversary dates for the Grievants, what is the appropriate vacation accrual, and what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE IV - PROBATIONARY PERIOD

4.01 New employees shall serve a probationary period of six (6) months duration to determine whether the employee is suited and qualified for the position. During said period, the employee may be discharged for good cause, without recourse, through the Union.

ARTICLE V - SENIORITY RIGHTS

...

5.02 Seniority shall be based upon the actual length of service for which payment has been received by the employee. There shall be posted a seniority roster by the Employer, which shall show the name, classification and date of hire of all employees of the bargaining unit. Such roster shall be corrected and reposted in July of each year.

...

ARTICLE X - VACATIONS

10.01 Each full-time employee shall receive one (1) week, five (5) days of vacation with pay after six (6) months of employment; and two (2) weeks, ten (10) days vacation with pay per year after eighteen (18) months of employment; and three (3) weeks, fifteen (15) days vacation with pay per year after eight (8) years of employment; thereafter, each employee shall receive one (1) additional day of vacation with pay for each additional year of work, but not to exceed a total of twenty (20) days of vacation per year. After twenty-two (22) years, twenty-four (24) days of vacation with pay per year.

...

BACKGROUND:

This is a dispute over interpretation of the contract language for vacation accrual purposes. The County bases the vacation earned on the anniversary of full-time permanent employment, while the Union bases it on the anniversary of employment, whether that employee be employed as seasonal, part-time, or limited term employee.

The County does not provide benefits for seasonal, temporary or limited term employees. The Grievants are Richard Herritz and Richard LeMoine. Both of them were hired by the County as seasonal employees before becoming permanent employees.

Herritz was originally hired as a seasonal employee and started working on April 24, 1986. He has worked continuously since then, with no break of employment, and has always worked full-time or 40 hours a week. He is a skilled operator in the Highway Department. He received his annual vacation based on his April hiring date until 1995.

LeMoine is a patrolman in the Highway Department, and he first began working for the County on June 23, 1986. He started as a seasonal employee and has been continuously employed full-time, 40 hours a week. Like Herritz, he always got his vacation allotment based on his original hire date in June until 1995.

Both Herritz and LeMoine were offered positions of patrolman helper, which were permanent positions, and they started either October 19 or 20, 1986, in those positions. They were offered those positions by the former Highway Commissioner, John Geoghegan. They served a six-month probationary period after being hired for permanent positions, and started paying Union dues through payroll deductions after finishing the probationary period.

Rebecca DeMars is a payroll accounting technician in the County Clerk's office. She was working with a new computer and putting balances of employees' hours into the system when she noticed a discrepancy between what the Clerk's office used for anniversary dates for Herritz and LeMoine and what the Highway Department used as anniversary dates. She asked the Highway Department to give her all dates of employees' anniversaries in order to compare them with records in the Clerk's office.

The Highway Department sent DeMars a list of all of its employees, and listed Herritz' anniversary date as April 24, 1986. and listed LeMoine's anniversary date as June 23, 1986. The Highway Department also sent DeMars a two page document which showed that Herritz had a hire date of April 24, 1986, but the second page showed a hire date of October 20, 1986. On the first page, with the April hire date, there is a handwritten notation that Herritz is not eligible for any insurance. A seniority roster at the Highway Department lists both Herritz and LeMoine's seniority date as October 19, 1986.

DeMars cited examples of other employees who were not given credit for previous service with the County. Robert Bonham started as a limited term employee on May 22, 1989. He became a full-time patrolman helper on January 22, 1990. The Highway Department used January 22, 1990, as his anniversary date to determine when he gets vacation. James Kast was either a seasonal employee or a limited term employee -- the County's Exhibit #23 shows it both ways -- who started work on April 20, 1992 and took a full-time posting for patrolman helper on

May 18, 1992. His anniversary date is listed by the Highway Department as May 18, 1992. Gary Kelley was a limited term employee who started work on November 23, 1992, and accepted a full-time position of patrolman helper on December 28, 1992, the date used as his anniversary date.

The current Highway Commissioner is Stephen Muchow. He was not aware of any errors in the use of anniversary dates until this matter came up. He knew that seasonal employees did not get benefits. The County used to let seasonal employees post into jobs if no one from the Union wanted the job, but now they have to go through full interviews just like outside applicants. The Highway Department has usually hired college students as seasonal employees and give them the chance to come back so that the Department does not have to retrain them. Muchow knew of two seasonals that were not rehired due to poor performance in a prior year. While Union members are guaranteed 40 hours of work a week, seasonals have no such guarantee. Their rates of pay are negotiated by the Union and appear in the labor contract.

The County's Human Resources Director, Michael Wolfe, was notified by DeMars about errors of anniversary dates for Highway Department employees. He got payroll documentation, and noted several dates which appeared to be in error, but some were probably transcribed incorrectly. On November 1, 1994, Wolfe sent letters to Commissioner Muchow regarding the anniversary dates. The letter for Herritz follows:

I am writing to notify you that the employee listed below has an incorrect anniversary date listed in the payroll records. Per Union Contract (Highway - Local 360) and the Personnel Ordinance, this employee should have received an adjustments on his anniversary date for the reason indicated. I have discussed this matter with Payroll and we have made the following adjustment.

The distinction for the adjustment is the issue of - was the employee eligible for benefits accrual while off work? If the answer is no, it requires an adjustment to the anniversary date. If the answer is yes, no adjustment is required. In the case of this employee, an adjustment is required due to the reason indicated.

Richard Herritz - original date of hire as a seasonal employee was 4/24/86. Seasonal employees do not receive benefits. He became full-time and eligible for benefits on 10/20/86.

ADJUSTMENT: 10/20/86 is his anniversary date for benefit accrual.

Please inform this employee of the adjustment and have him contact me with specific questions and/or concerns.

Wolfe wrote the same letter to Muchow regarding LeMoine, only with a different date of original hire as a seasonal employee, the date of 6/23/86. Wolfe sent Muchow the following adjustment notice for employee Alan Schwartz:

**Alan Schwartz - original hire date was 7/8/74.
Terminated on 11/14/74. Rehired on 7/9/75.**

ADJUSTMENT: The original hire date of 7/8/74 remains for seniority and longevity purposes, however the latest rehire date of 7/9/75 is the anniversary date for benefit accrual.

Also, an adjustment for Kevin Thomas:

**Kevin Thomas - original hire date was 10/8/90.
For some reason, the Highway Department records reflect 10/8/91 as his date of hire.**

ADJUSTMENT: Date of hire is 10/8/90.

Another adjustment - for Kenneth Radke:

**Kenneth Radke - original date of hire was 5/9/66.
He took a military leave of absence for six months and as a result his anniversary date was adjusted to 11/3/66. For some reason, the Highway Department records reflect 11/3/69 as his adjusted anniversary.**

ADJUSTMENT: His original hire date of 5/9/66 remains for seniority and longevity purposes. 11/3/66 is his anniversary date for benefit accrual.

And one for Ronald Radke:

**Ronald Radke - original hire date was 5/25/70.
Terminated on 3/9/72. Rehired on 5/26/72.**

ADJUSTMENT: The original hire date of 5/26/72 remains for seniority and longevity purposes, however the latest rehire date of

5/26/72 is the anniversary date for benefit accrual.

Wolfe noted that there is one labor contract in which limited term employment counts toward benefits, the contract with District 1199W, United Professionals for Quality Health Care. The other labor contracts use the full-time job status as the day that benefits start.

On November 14, 1994, the Grievants Herritz and LeMoine filed a grievance, alleging the date of the infraction as November 1, 1994, the date of Wolfe's letter regarding the adjustment. They are grieving not being credited with the total period of employment for vacation entitlement, and possibly other benefits.

On December 8, 1994, Muchow posted the following notice:

Vacation time is earned on your anniversary date of full-time employment. Only earned vacation can be used. The amount of earned vacation and sick leave are listed on payroll check stubs.

If you have any questions on this subject please contact the office.

The Union filed a grievance over this notice on December 20, 1994, alleging a violation of the contract, specifically Article X.

THE PARTIES' POSITIONS:

The Union:

The Union contends that Herritz has a seniority date of April 24, 1986, and that his annual vacation allotment is available to him based on that date. His service as a seasonal employee constitutes "employment" for the purposes of Section 10.01. LeMoine's seniority date is June 23, 1986, and his vacation allotment is available to him based on that date.

Herritz has worked without interruption in service since April of 1986. He has always worked 40 hours per week, and he had always received vacation in April of each year. LeMoine has also worked continuously since he was hired in June of 1986. He always worked 40 hours per week and always received his annual vacation allotment on his June anniversary date with the County. The County admits that it uses the April and June dates for their seniority. There is no dispute that the seniority dates of the Grievants are as the Union has contended.

The Union notes that the County Personnel Ordinance defines "anniversary date" as the original hiring date, and that vacation eligibility is determined on the basis of length of continuous service of each employee as of the anniversary date.

The contract language in Section 10.01 is clear and unambiguous, the Union asserts. The vacation benefit is available to full-time employees only, but it is based on length of employment, regardless of status. The County is trying to limit the length of employment to the length of employment as a full-time employee. The County is trying to add words to the contract.

In a similar case before Arbitrator Houlihan, City of Mauston, Case 9, MA-5398, the employer believed that when a part-time employee became a full-time employee, the part-time service should be pro-rated in order to calculate how much service the employee got for vacation purposes. The employer further argued that part-time employees were not entitled to credit for time spent as part-time when computing longevity pay once they became full-time employees. The arbitrator found the vacation benefit available to full-time employees, just as in the instant case. And the arbitrator noted that the schedule calls for an increasing allotment of vacation following designated years of continuous employment, but there was distinction drawn between full-time and part-time continuous employment. The longevity benefit was available only upon attaining full-time status, but the benefit was measured by service with the City, without regard to full-time or part-time status. The contract provided for consideration of all service. The same analysis holds here, the Union states.

The contract calls for seniority based on actual length of service for which payment has been received by the employee. The County agreed at hearing that the seniority dates for Herritz and LeMoine are April and June, respectively, of 1986. The contract also provides for an increasing vacation allotment based upon designated periods of employment, without regard to the employee's status as a bargaining unit, non-bargaining unit, other bargaining unit, full-time, part-time, elected official, seasonal or limited term employee. The Employer's position would have the Arbitrator re-write the labor agreement by inserting words that are not there, and such arbitral reformation of the agreement is not appropriate. Herritz and LeMoine have always received vacation allotments just as the Union believes the contract requires.

The County:

The County argues that its clear past practice has been to credit employees for vacation accrual for their time as permanent employees only. No employee has received credit for casual, temporary, limited term or seasonal employment with the exception of the Grievants, due to an error. The County Clerk has always maintained the Grievant's anniversary date as October 20, 1986, thereby indicating that the Highway Department records were in error. The County took steps to correct the error as soon as it was discovered. The County asserts that crediting seasonal employees retroactively for their period of seasonal employment is unsupported by the contract.

The County states that it has been a consistent past practice that seasonal employees do not receive or accrue benefits including credit for vacation. The testimony of DeMars shows that no other Highway Department employees got credit for seasonal time the way that Herritz and LeMoine did. Bonham and Harrison were seasonal employees who became permanent employees but were treated as new employees when they became permanent employees. The County contends that the Union acquiesced to the status quo where no other seasonal employee except

Herritz and LeMoine received credit to their original date of hire for vacation.

Seasonal employees have no expectation of returning season after season, which makes them the equivalent of casual, temporary or limited term employees, and that is how the County has always treated seasonal laborers. No one in those categories gets any benefits, and seasonals must file a new application each year. The Highway Commissioner does not always hire the same seasonal employee back the following year. No seasonals are to be hired for 1995. Seasonal employees pay no Union dues, and the Grievants did not have dues deducted until April of 1987, after they completed the six-month probationary period following their October hire date as permanent employees. The County points out that the WERC ruled in City of Edgerton, Dec. No. 11340 (WERC, 10/72), that absent a reasonable expectation of returning to employment in the following season, seasonal employees are considered casual employees or temporary employees.

The County believes that if an employee is ineligible for benefits, it stands to reason that he/she cannot be retroactively credited for benefits, citing In re Town of East Haven, 97 LA 108 (Orlando, 1991). The County has never provided any benefits to seasonal laborers, and to grant them credit for benefits in this case would provide the Union with a benefit it has not bargained for, and would violate the past practice. Both Grievants testified that they had no expectation of benefits when hired as seasonals. Neither challenged their October seniority date for purposes of posting, and Herritz did in fact post for another position after becoming a permanent employee. Moreover, the Union never challenged this October seniority day or the anniversary dates of numerous other employees who had been seasonal and became full-time contiguously with their seasonal employment. The Union's argument should be barred based on the equitable doctrine of laches.

The County further asserts that the contract language supports its position by limiting the vacation benefit to full-time employees. The Grievants were treated as "new" employees when they were hired permanently in October of 1986. Seniority is based upon the date of full-time permanent hiring. Sick leave is accrued upon becoming a permanent, full-time employee. Extending other benefits to all employees with seasonal time, including those with a break in service, is unsupported by the contract and would constitute an absurd result.

The County Clerk's records should be entitled to greater weight than the Highway Department's records, since the Clerk has the statutory responsibility for record keeping. Of the seven employees in the Highway Department whose anniversary dates were adjusted, all were due to errors in the Highway Department's records, not the Clerk's records.

The County believes that granting these Grievants credit for their seasonal time would set a damaging and unwarranted precedent. There are other employees who could try to claim retroactive credit for seasonal time. If the Union wants that benefit, it should bargain for it, but such a benefit should not be unfairly gained due to a clerical error in the Highway Department. These Grievants enjoyed an unearned anomaly which no other employee had received.

In Reply:

The Union says that the issue is not whether seasonal employees receive or accrue benefits, but whether full-time employees are credited with their full length of employment (including their seasonal work) for determining when and how much vacation time is available. The case of East Haven cited by the County is different, in that the Union there asserted that seasonal employees were entitled to insurance benefits while they were seasonals. The Union recognizes that the County's claim of past practice might have some merit but for the fact that

the practice is not unequivocal, because the Grievants received credit for their seasonal employment while others did not. While Bonham, Kast, Kelley and Smith were not given credit for their service as seasonal employees, it is not clear whether or not there was a break in service with those employees, and if there was no break, they would also be entitled to credit for seasonal service for seniority and vacation.

DISCUSSION:

Before one looks to a past practice, it is necessary to determine whether the language in question is ambiguous. If the language is clear enough on its face, the past practice is irrelevant, because the past practice should not stand and prevail over clear contract language. The language in Article X states that: "Each full-time employee shall receive one (1) week, five (5) days of vacation with pay after six (6) months of employment . . ." The language, cited earlier, continues to refer to months of employment, and then years of employment. This language seems clear enough on its face, because the parties only need to calculate the months and years of employment to determine the amount of vacation an employee gets, assuming that the employee is also a full-time employee as stated in the first phrase of Article X, Section 10.01. However, the parties disagree about when "employment" begins.

In Article V, the language for purposes of seniority says: "Seniority shall be based upon the actual length of service for which payment has been received by the employee." There is no dispute between the parties over the seniority dates, because they use the date that employees began receiving payments, whether as seasonal or permanent full-time employees, on which to base seniority dates.

The question is whether there is any substantive difference between Article X's language of "months or years of employment" and Article V's language of "actual length of service for which payment has been received." It is possible that the parties meant different things, or they could have used the same language in both places. Article V has a little more precision than Article X to define a time period. Article X's use of the term "employment" certainly could mean the same as "actual length of service for which payment has been received," but could it mean something

other than that? Would the parties use the term "employment" to mean something other than work for which one is paid?

The County's position adds words to Article X, because the County really wants the language to read "permanent employment" or "upon being employed as a full-time permanent employee," as opposed to "employment." Grievants Herritz and LeMoine have met the first contingency of Article X, that they are full-time employees, and the County only disputes their employment status as seasonals and argues that the vacation allotment does not revert back to the time when they were seasonals and not entitled to benefits such as paid vacations. However, the language does not support the County's position, because there is no other way to read Article X's language regarding "employment" without adding something to it in order to sustain

the County's position. Herritz and LeMoine were clearly employed as of April 24, 1986 and June 23, 1986. They worked for the County, they received money for that work, and their employment is therefore to be counted toward vacation accrual.

The County says that it only stands to reason that if an employee is not eligible for benefits, that employee cannot be retroactively credited for benefits. Why so? Or, rather, why not? There is no particular reason why the County, or its agent through the Highway Department, could not credit an employee for benefits retroactively once that employee became eligible for benefits. It is done all the time following probationary periods, and it is the proper thing to do under a common sense reading of Article X. If the County meant to restrict vacation allotments to start accruing only upon attainment of permanent employment status, it needs to bargain with the Union to add such language. Otherwise, it must give credit to Herritz and LeMoine for their time employed with the County. The County got the benefit of the bargain -- Herritz and LeMoine have worked full-time for the required amount of time to have earned vacation credits.

Even if one were to find an ambiguity within Article X, Section 10.01, and look at the County's past practice, it would not be of much help. A past practice must be clear and unequivocal, and the eight years that Herritz and LeMoine got their vacation based on their seasonal start dates while others were not treated similarly show the lack of an unequivocal practice. The County believes that the situation with the Grievants was a mistake. But this was more than a mere clerical mistake -- this was a benefit given for eight years, probably upon the interpretation of the contract by a former Highway Commissioner, Geoghegan. Herritz recalled that Geoghegan told him that he would get vacation from the first day, once he was hired on permanently. There may be discrepancies between the way the Highway Department and the Clerk's Office kept records, but the Highway Department would have the authority to administrate the labor contract between the Union and the Department. In this case, the way things were done in the County is of little help in interpreting the contract.

If the parties had intended that vacation accrual not start until an employee takes a permanent position, they could have clarified that in the contract negotiations previously. They were aware that employees came to work in all types of capacities -- as seasonals, part-timers, limited terms, or regular full-time permanent employees. However, there is no clear evidence as to their intent and the language is clear enough on its face to hold otherwise.

Herritz became employed and started working for the County on April 24, 1986, and that is the appropriate date for his anniversary for purposes of vacation accrual. LeMoine became employed and started working for the County on June 23, 1986, and that is the appropriate date for his anniversary for purposes of vacation accrual. The County already uses those dates for seniority purposes, so that does not need to be addressed here. However, the County needs to credit vacation time to Herritz and LeMoine based on their respective April and June dates of employment, rather than the October date the County used. The notice regarding vacation time dated December 8, 1994, signed by Muchow, is to be rescinded.

AWARD

The grievances are sustained. The County is ordered to use the date of April 24, 1986, for calculating the vacation allotment of Richard Herritz and credit him for any time for which he has not been credited when the County used the October 20, 1986 anniversary date. The County is ordered to use the date of June 23, 1986, for calculating the vacation allotment of Richard LeMoine and credit him for any time for which he has not been credited when the County used the October 20, 1986 anniversary date. The County is further ordered to rescind the December 8, 1994, notice posted by Stephen Muchow regarding vacation time.

Dated at Elkhorn, Wisconsin this 22nd day of August, 1995.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator