

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BROWN COUNTY SHERIFF'S DEPARTMENT
NON-SUPERVISORY EMPLOYEES

and

BROWN COUNTY

Case 567
No. 52381
MA-8942

Appearances:

Mr. Frederick J. Mohr, Attorney-at-Law, 414 East Walnut Street, Suite 261, P.O. Box 1015, Green Bay, Wisconsin 54305-1015, for the Association.
Godfrey & Kahn, S.C., 333 Main Street, Suite 6000, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, by Mr. Dennis W. Rader, for the County.

ARBITRATION AWARD

Brown County Sheriff's Department, Non-Supervisory Employees (the Association), and Brown County (the County), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Green Bay, Wisconsin on June 15, 1995. A transcript was taken and received on June 21, 1995. The parties filed briefs, and reply briefs, the last of which was received August 16, 1995.

ISSUE

The parties were unable to stipulate to an issue.

The Association stated the issue as follows:

May the County change the method of how vacation time is credited without first negotiating the change? 1/

1/ The Association offered this statement of the issue in its reply brief. It varies in words but not in substance from the statement it offered at the hearing: Is the County's professed intention of ceasing providing the Brown County Sheriff's Department non-supervisory officers with their vacation time at the start of each calendar year in violation of Article 33 of the labor agreement?

The County stated the issue as follows:

May the County discontinue the practice of paying out vacation to retiring or resigning employees upon the expiration of the hiatus period, if notice of such discontinuance is given to the Association during the negotiation of a successor contract?

Since the parties were unable to stipulate to a statement of the issues, the Arbitrator states the issues as follows:

1. During bargaining for a successor contract, can the County effectively repudiate the practice of providing employees with their vacation time at the start of the calendar year?

2. During the bargaining for a successor contract, can the County effectively repudiate the practice of paying out the vacation pay to retiring or resigning employees?

BACKGROUND

During the years in which the parties have been bargaining partners, the method of calculating and granting vacation has changed. Prior to 1979, vacation was calculated on the employee's date-of-hire anniversary and vacation was earned in one year to be used in the next. Beginning with the 1979 contract, the pertinent language provided:

ARTICLE 30. VACATIONS

Vacations shall be computed on January 1st of each year based upon the length of service involved. Employees with less than a full year of service at the time of computation shall have their vacation prorated with respect to the amount of time of service as of January 1st.

Less than one full year of service:	Prorated on six days per year
1-6 years of service:	12 working days
7-12 years of service:	18 working days
13-14 years of service:	24 working days
15-16 years of service:	25 working days
17 years of service:	26 working days
18 years of service:	27 working days

19 years of service:

28 working days

The days listed are the actual number of days to be taken off during the year of service indicated....[Thereafter follow provisions for the selection and taking of vacations.]

After this revised language was included in the contract, vacation for an employee's first year of employment was prorated, and thereafter, vacation was calculated as of January 1 of each year. Additionally, vacation was available to be used in the year in which it was earned.

In the spring of 1994, a dispute arose as to the vacation entitlement of an officer who retired in mid-year. The County had prorated the vacation payout for the retiring employee whereas the Association asserted he was entitled to vacation as if he had worked the entire year. The County argued that even if there had been a past practice supporting the Association's position in the dispute, that past practice had been effectively repudiated during the prior round of bargaining. The dispute was submitted for resolution to this Arbitrator who ruled that the practice of paying out vacation benefits for the entire year had been grounded in the contract and therefore was not susceptible to repudiation at the bargaining table. According to that award, if the County wished to discontinue the practice, it would have to bargain an appropriate language change.

After receiving the arbitration award, on February 14, 1995, the County wrote to the Association, stating, in pertinent part, the following:

Therefore, please accept this letter as official notification that effective at the end of the current contract hiatus, Brown County will cease paying Non Supervisory Association individuals, upon retirement from the Brown County Sheriff's Department, for any unearned vacation leave or personal leave. To accomplish this, Brown County will be ceasing the practice at the conclusion of the current contract hiatus of providing all Non Supervisory Association Officers in the Brown County Sheriff's Department with their vacation leave at the beginning of each calendar year. This has been a practice; however, it is not stated in the contract.

The County further elaborated its position in a March 3, 1995 memo to the Association which stated, in pertinent part:

All officers in the Brown County Sheriff's Non Supervisory Association will be provided their vacation time as they earn it, however, it will still be provided during the year in which they earn it. The result of the County ceasing this past practice of "forward funding" vacation days to all its officers will be, as an example, that an officer who normally would receive twenty-four (24) days of

vacation in a calendar year instead of receiving 192 hours at the beginning of each calendar year to use throughout that year, will instead receive sixteen (16) hours per month after they have worked the month.

POSITIONS OF THE PARTIES

The Association

The Association argues that the contract language clearly and unambiguously grants vacation entitlement to an employe as of January 1 of each year. Alternatively, if the Arbitrator finds the language to be ambiguous, the Association's interpretation is supported by testimony regarding the bargaining for the language. The Association further supports its position by pointing to Article 28, Clothing Allowance which explicitly provides for proration during the last year of employment, proving that when the parties intended proration they could clearly provide for it.

In its reply brief, the Association points out that the earlier arbitration award held that the only proration provided for by the contract was for those in their first year of employment. Consequently, the contract language addressed the issue of the vacation entitlement and the practice could not be effectively repudiated.

The County

The County acknowledges that it cannot implement any change in the paying out of vacation benefits until after the end of the contract hiatus. The County maintains that the practice of paying out vacation benefits to retiring employes upon their termination is not grounded in the contract and therefore could be effectively repudiated during bargaining for a successor contract. It asserts the earlier award implied that although the County could not prorate the vacation payout, it could abolish the practice altogether. Allegedly, the testimony of Mike Schroll indicates that the vacation language of the contract was not intended to address the vacation payout in dispute here. The contract language addressing January 1 was intended solely for ease in calculating vacation entitlements for continuing employes and there was no contractual grounds for paying out vacation to retiring employes. It discounts any argument that Article 28, providing for proration of that clothing allowance, has any relevance for this dispute. It asserts that the language should be construed against the drafter, here the Association. Finally, the County argues that a ruling in its favor would have the effect of forcing the parties to negotiate the matter, and would be in the interest of equity, a reasonable outcome.

In its reply brief, the County argues that the word "compute" in the Article 33 has a different meaning from the words the Association uses in its brief: "credit," "earn" and "grant." It asserts January 1 was the date on which the vacation was calculated. It disputes the Association's

assertion that County Witnesses Wayne Pankratz and Gary Pieschek acknowledged that the practice of crediting vacation was based on the contract. As to retirees, the County does not find the payment of the full vacation pay to be clear in the contract nor does it agree that the clothing allowance language is "omnibus" language that holds implications for interpreting the vacation provision. The January 1 date was placed in the contract to simplify administration of vacation benefits for continuing employees, not to create a windfall for retiring or resigning employees.

ADDITIONAL FACTS AND DISCUSSION

The Framing of the Issue

At hearing, the Association's statement of the issue involved was broader than the County's statement. A review of the correspondence between the parties indicates that the County, through Human Resources Director Wayne Pankratz clearly intended to repudiate not only the paying out of vacation pay to retirees, but in addition, the practice of crediting employees with their vacation entitlement as of January 1. Association Attorney Fred Mohr clearly intended to grieve both issues as demonstrated by his March 6, 1995 letter to Mr. Pankratz in which he stated that he was initiating a grievance to address the matter as to continuing officers vacation as well as seek a clarification of this arbitrator's January 31, 1995 award, referred to herein as "Bongers." Given these facts, the undersigned frames the issue to include both the matter of vacation for continuing officers as well as the retirement vacation payout.

Attempted Repudiation of Providing Vacation at the Beginning of the Calendar Year.

In actions leading to the Bongers award, the County had announced prior to bargaining that it was abolishing the practice of paying a full year's vacation to a retiring employee and if the Association wanted to perpetuate the practice, it would have to achieve appropriate language during bargaining. This arbitrator ruled that the practice could not be effectively repudiated in that manner. That conclusion flowed from the rationale that the practice was grounded in the contract and therefore could only be changed by a negotiated modification of the contract.

As stated by the undersigned at page 5 of "Bongers,"

". . . a party can effectively repudiate certain kinds of past practices for a successor contract if it announces that repudiation during bargaining for the successor contract. However, that general rule also holds that only certain kinds of past practices are susceptible to this rule: only those past practices which are not based in the contract. If, on the other hand, the past practice has some basis in the contract language, even though it may be ambiguous language, an attempt to unilaterally terminate a practice cannot be effective and the practice can only be terminated by a change in the contract

language. . ."

Subsequent to the issuance of that award, the County then stated that it was repudiating the practice of paying retiring employees any "unearned" vacation or personal leave. The County's theory was that this change would be the result of a simultaneous cessation of the practice of providing continuing employees their vacation leave at the beginning of each calendar year.

Since the County acknowledges that the provision of vacation leave as of the first of January is the current practice, the evaluation of the County's success in repudiation the practice rests upon whether the practice was grounded in the contract or not.

Here, the practice involves making vacation available for usage of the first of the year. As the County points out, the contractual term, "computed," is not an exact synonym for "granted," and therefore there is ambiguity as to when the vacation entitlement is accrued. In the parties' relationship, this ambiguity has been resolved by their acknowledged practice of granting vacation as of the first of the year.

It must be understood that a practice can be grounded in a labor agreement even though it is not explicitly stated in that contract. This is true because a labor agreement cannot possibly provide every detail of the parties' working relationship, and many gaps in those details are filled in by the parties' practices. Nevertheless a practice that is an integral part of a contract provision is considered to be based in the contract notwithstanding any lack of explicit recital of the practice in the agreement.

It is self-evident that this practice has a basis in the written agreement, 2/ for the vacation benefit conferred by Article 33 must be accrued at some point in time. As a matter of logic, if a vacation benefit did not accrue it would not exist. Therefore, a practice that indicates when the benefit accrues is inextricably linked to that clause of the contract that grants the benefit.

Being so grounded in the contract, the practice regarding vacation accrual cannot be effectively repudiated during bargaining. Rather, it has to be modified by negotiation. If the parties do not reach agreement on a modification of the contract in this respect, the current practice remains in effect.

Attempted Repudiation of Vacation Payout for Retiring or Resigning Employees.

2/ For a discussion of this principle, see also City of Stevens Point, Dec. 21646-A (Rubin, 1/85), aff'd as to conclusions of law, Dec. No. 21646-B (WERC, 8/85)

The County posited its repudiation of a full year's vacation payout for retiring employees upon a repudiation of its practice of providing vacation at the beginning of the year to all continuing employees. Consequently, the above discussion concluding that such a repudiation is ineffective simultaneously answers the question as regards retiring employees.

The undersigned also notes that the County has quoted her Bongers award at p.3.:

Turning to the contractual language, the undersigned notes that no provision explicitly describes the retirement payout which the County has been paying to retiring employees.

The County misconstrues that sentence to mean that the vacation payout to retiring employees is not itself based in the contract. Although the language did not explicitly mention the retirees, the vacation benefit for retiring employees is nevertheless contract-based. The contract does not offer any exclusions to the vacation benefit, and there is no basis for inferring that retiring employees do not partake of the same vacation benefit as do other employees.

Summary

Having concluded in Bongers that the practice of paying out a full year's vacation to retiring employees is based in the contract and having determined in the discussion above that the practice of providing continuing employees with their vacation leave at the beginning of the year is likewise contract-based, the undersigned concludes that the County cannot repudiate or cease those practices at the end of the hiatus period. Any changes in those practices must result from a negotiated modification of the contract.

AWARD

1. During bargaining for a successor contract, the County cannot effectively repudiate the practice of providing employees with their vacation time at the start of the calendar year.
2. During the bargaining for a successor contract, the County cannot effectively repudiate the practice of paying out the vacation pay to retiring or resigning employees.

Dated at Madison, Wisconsin, this 13th day of December, 1995.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator