

IN RE ARBITRATION BETWEEN:

SEIU HEALTHCARE MINNESOTA

and

METHODIST HOSPITAL

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 080724-58096-3

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IN RE ARBITRATION BETWEEN:

SEIU Healthcare Minnesota,

and

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 080724-58096-3
Vacation accrual grievance

Methodist Hospital.

APPEARANCES:

FOR THE UNION:

Brendan Cummins, Miller, O'Brien & Cummins
Lisa Weed, Business Representative
Dianne Edwards, Business Representative
James Martinez, grievant
Jacqueline Omurwa, grievant

FOR THE EMPLOYER:

James Dawson, Felhaber, Larson, Fenlon & Vogt
Mark Nordby, Employee & Labor Relations Manager
Amanda Thate, Director of Benefits, Compensation
Payroll & HRIS,

PRELIMINARY STATEMENT

The hearing in the above matter was held on November 25, 2008 at the Federal Mediation and Conciliation Service in Minneapolis, Minnesota. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on January 9, 2009. After a post-hearing phone conference held on January 20, 2009, the Union was given the opportunity to submit a Brief in response to the question of procedural arbitrability and timeliness raised in the Employer's Brief and filed that on January 27, 2009. The Employer was then given the opportunity to submit a reply to that on January 30, 2009.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated August 23, 2006 through February 28, 2009. The grievance procedure is contained at Article 7. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES

The Union stated the issues as follows:

1. Did the Employer violate the substantive entitlements to vacation days and the procedural requirements for awarding vacation days as specified in Article VII Section A and Article VII Section B of the collective bargaining agreement?

2. Did the Employer violate Article VII Section A and Article VII Section B of the collective bargaining agreement by implementing an “accrue as you use and as you go” policy on vacation instead of granting all vacation days for the year as of the employee’s anniversary date?

3. Did the Employer violate Article VII Section A and Article VII Section B of the collective bargaining agreement by calculating accrued vacation without regard to the number of hours worked in the prior year?

4. If so what shall the remedy be?

The Employer stated the issues as follows:

1. Did the Hospital use an incorrect accrual rate in violation of Article VII Sections A and B?

2. Did the Hospital violate Article VII Section A by using a present accrual for vacation versus requiring employees to receive their vacation in one annual vacation dump?

3. If so what shall the remedy be?

After review of the evidence and argument of the parties the issues are determined to be as follows:

1. Did the Employer violate Article VII Section A and Article VII Section B of the collective bargaining agreement by pro-rating vacation for part-time employees?

2. Did the Employer violate Article VII of the collective bargaining agreement by implementing an “accrue as you use and as you go” policy on vacation instead of granting all vacation days for the year as of the employee’s anniversary date?

3. If so, what shall the remedy be?

UNION'S POSITION

The Union took the position that the Employer violated the contract when it pro-rated vacation accruals for employees working between 1600 and 2080 compensated hours in the year prior to the employee's anniversary date by using the multipliers set forth in Article VII A, it further alleged that the Employer violated the contract when it failed to dump the accrued vacation into the employees' accounts as the language requires and finally, that the Employer has violated Section B by accruing the improper amounts of vacation pursuant to that language. In support of this position the Union made the following contentions:

1. The Union pointed to the provisions of Article VII Sections A and B, which provide in relevant part as follows:

A. Each employee who has been in the employ of the Hospital for one (1) year or more and has accrued 1600 or more compensated hours in the year prior to the employee's anniversary date of hire shall receive the following vacation:

(1) After one (1) year of employment, two (2) weeks (10 days) vacation with full pay. This calculates out to .0385 vacation hours for all compensated hours.

(2) After five (5) years of employment, three (3) weeks (15 days) vacation with full pay. This calculates out to .0577 vacation hours for all compensated hours.

(3) After ten (10) years of employment, four (4) weeks (20 days) vacation with full pay. This calculates out to .0770 vacation hours for all compensated hours.

After March 1, 1999, any employee with fifteen (15) years or more of service shall receive the following vacation:

(4) After fifteen (15) years of employment, twenty-one (21 days) vacation with full pay. This calculates out to .0808 vacation hours for all compensated hours.

(5) After sixteen (16) years of employment, twenty-two days (22 days) vacation with full pay. This calculates out to .08468 vacation hours for all compensated hours.

(6) After seventeen (17) years of employment, twenty-three days (23 days) vacation with full pay. This calculates out to .0885 vacation hours for all compensated hours.

(7) After eighteen (18) years of employment, twenty-four days (24 days) vacation with full pay. This calculates out to .0923 vacation hours for all compensated hours.

(8) After nineteen (19) years of employment, twenty-five days (25 days) vacation with full pay. This calculates out to .0962 vacation hours for all compensated hours.

B. Each employee who is not eligible for vacation under paragraph (A) and has accrued not less than 800 compensated hours in the year prior to the employee's anniversary date of hire shall receive one (1) week (5 days) of vacation for the first 800 compensated hours, plus one (1) day of vacation for each additional 173.3 compensated hours, up to a maximum of two (2) weeks (10 days) vacation.

2. The Union noted that there is no distinction made in Section A between part time and full time employees. The Union argued that the plain language must therefore mean that if any employee works more than 1600 hours as the language provides they are entitled to the vacation accrual set forth in the Article. Pursuant to this principle, if a term is used in one part of the contract it will likely be given the same meaning throughout the contract. Conversely, if a different term is used, the implication is that the parties intended a different meaning. Here the parties clearly used a different term in Article VI thus supporting the argument that a different meaning, i.e. that all employees are entitled to the full accrual of vacation; not just the full time employees as argued by the Employer.

3. The Union further argued that the contract does make that distinction in other Sections. As an example, the Union pointed to Article VI, providing for sick leaves and leaves of absence. There the language specifically talks about full time and part time employees. Contractual interpretation principles dictate that where language is used in one Section that is different from language in another.

4. On the issue of the accrual rate, the Union argued that the contract language is clear and requires that an employee with 1600 compensated hours or more in the year prior to the employee's anniversary date is to get their hours pursuant to the formula set forth in Section A. In other words, if the employee has one year or more of employment, and otherwise qualifies under Section A, that employee is to get 10 days of accrued vacation. If the employee has more than 5 years of employment that employee is to get 15 days and so forth through the various steps.

5. The Union cited numerous awards and arbitral commentators for the proposition that clear contract language cannot be ignored or amended by the arbitrator. Here the language of Article VII creates a mandatory entitlement to vacation and uses the words “Shall receive” at the beginning of each subparagraph.

6. Further the contract defines “days” as 8 hours and countered the Employer’s claim that the number of vacation days listed in the contract is merely a cap. The Union asserted that the number of days is a mandatory entitlement. The Union further asserted that there is simply no basis for the accrual of 80 hours for some employees and a lesser number, such as 61.6 hours, as asserted by the Employer, for others similarly situated.

7. The Union further argued that the parties discussed the vacation accrual issue at labor management meetings as far back as 1999. The Union witnesses argued that the intent of the relevant language was to “get to two weeks” as required by the contract and to correct the error that had been in place previously that had resulted in overages in vacation accrual. The Union argued that there was never any intent to pro-rate vacation for part-time employees or to limit in any way the vacation accrual from what the strict language of the contract provides for.

8. The Union pointed out that there are other clauses in the contract that specifically call for proration of certain accrual of benefits. Article VI calls for prorated sick leave. Accordingly, the parties could certainly have provided for the proration of vacation but did not. The Union pointed to contract interpretation principles and argued that where one Section of the contract is different from another it implies a different intended meaning. Here that translates to a different meaning than asserted by the Employer and must therefore mean that the parties did not intend for pro-rating vacation accrual.

9. The Union also pointed to the negotiation history of this clause and argued that the bargaining history showed that the intent of the multiplier in the subparagraphs in Article VII was simply to clarify and memorialize the current practice, not to change years of past practice within the unit. The multipliers were first mentioned in 1999 but were not placed in the contract at that time. The Union asserted that the multipliers were only included to insure that the multipliers were accurate and were not inserted to change the existing accrual rates.

10. The Union also asserted that the arbitral principle applicable here is that where a mandatory phrase conflicts with an explanatory phrase the mandatory phrase takes precedence. Here the phrase “shall receive” is mandatory. The multipliers are at best explanatory and do not alter the mandatory nature of the first clause in the subparagraphs of Article VII.

11. Further, the Union asserted that the written language essentially trumps any past practice. Thus the fact that the Employer has been violating the contract for several years does not negate the clear contract language.

12. The Union argued that the Hospital had used the correct multiplier prior to 1999. For employees working between 1 and 4 years the Employer used a multiplier of .05 hours for the first 10 months or 1600 compensated hours. That resulted in 10 days of vacation pay and the Union argued that remains the contractual standard for vacation accrual.

13. The Union acknowledged that the second clause of each of the numbered paragraphs of Section A sets forth a decimal number and that those numbers are really only accurate as applied to a full time 1.0 FTE employee. They will not be accurate when applied to a number of hours between 1600 and 2080 but the Union argued that these figures are explanatory tool for full time employees only and do not alter the clear contractual guarantee of the vacation hours set forth in those paragraphs.

14. The Union argued that if the Employer’s position is adopted it would render meaningless the second clause of each of the numbered paragraphs in Section A and Section B in its entirety. See Union Exhibit 1.

15. The Union noted that for the employees with between 800 and 1600 compensated hours who are covered by Article VII Section B set forth above, the Employer has in some cases been paying more than the contractually guaranteed amount because it has been applying the decimal percentages set forth in Section A rather than what Section B requires. Union Exhibit 3.

16. With regard to the next issue, i.e. the issue of when the vacation is to be granted, the Union argued that there should be a “vacation dump” into the employee’s vacation account at the applicable rate on that employee’s anniversary date. The Union noted that the contract requires that the vacation amount is to be credited to the employee on their anniversary date and asserted that the Employer has been accruing vacation on an “accrue and use as you go basis.”

17. The Union further asserted that the contract requires that the vacation be accrued as “days” not “hours” yet the Employer is accruing the accrued vacation time as hours. See e.g. Union Exhibit Tab 12, showing the vacation accrual for one of the grievants in terms of hours.

18. The Union argued that the language requires a “dump” of vacation into the employee’s vacation account on the employee’s anniversary date. The Hospital has been accruing it over time and the Union claimed that this is contrary to the clear contract language. The Union introduced a witness who testified that up until the late 1990’s the Employer in fact did it that way until some undetermined date when the Hospital went to the “accrue and use as you go” basis.

19. The Union further pointed to the language requiring that the Employer must grant the vacation to the employee based on the employee’s “compensated hours in the year prior to the employee’s anniversary date.” Thus the anniversary date is the trigger and the only reasonable interpretation of this is that the total amount of vacation must be placed into the employee’s vacation account on their anniversary date of hire based on the total number of compensated hours in the prior year. Since it describes discrete blocks of time in Article VII this too can only mean that the intent is that the total amount of vacation must be placed in all a once. Otherwise the contract would not specifically describe those blocks of time and would rather, have only the accrual rate.

20. The Union further argued with regard to the issue of when the vacation is to be accrued, that the negotiations team was aware of this issue and rectified it with the language that was negotiated into the contract in 2000. The Union further pointed to the minutes of the February 9, 2000 negotiation session where there was discussion of a letter of understanding regarding vacation accrual. Union Tab 9. This led to the Letter of Understanding, Union tab 10, which is attached to the contract at page 34, requiring the Employer to provide a letter to each employee reporting the current vacation and sick hours beginning March 1, 2000 and every year thereafter. This was to go until the Hospital was able to provide the information through an employee self-service information system. The Union argued that these negotiations did not alter the clear contractual requirement that the vacation be dumped in full into the employee's account on their anniversary date each year in whatever amount that employee qualified for pursuant to Article VII. The Union asserted that this is not being done and that the arbitrator must now require it.

21. The Union witnesses denied agreeing to the accrual rates set forth in Employer's Exhibit 2, which had the accrual ration formulas and the maximum accrual per pay cycle set forth in it. The Union steadfastly maintained that the contract requires all of the vacation to be credited to the employee as of their anniversary date despite any practice of not doing so in the past.

22. The Union countered the Employer's claim that the matter was untimely on two bases: first that the issue of timeliness was not brought up at the hearing nor in any of the grievance steps prior to the arbitration hearing and cannot therefore be brought up now. The Union referred to the arbitrator's inquiry at the outset of the hearing as to whether there were any procedural arbitrability issues and the Employer's response at that time that there were not. The Union argued most vehemently that this issue cannot be brought forth now.

23. Second, on the question of timeliness, the Union argued that this grievance would certainly be covered by the notion of a continuing grievance and argued that since the Employer is miscalculating the vacation accrual, there is a new, continuing violation of the contract with each passing pay period. This, the Union asserted, is an almost classic case of a continuing grievance. The Union further argued that the great weight of arbitral authority allows continuing grievances to go forward but limit the remedy to the contractual time frame for filing grievances. Thus, on at least an ongoing basis, the Employer should be ordered to reimburse any employee after the filing of this grievance for any lost vacation pay as the result of the Employer's contractual violation here. The grievance in this matter was filed May 20, 2008, Joint Exhibit 2.

The Union seeks an award of the arbitrator sustaining the grievance, making all affected employees whole for any vacation either lost or not properly credited to their vacation accounts and for an order directing the Employer to credit all contractually guaranteed vacation time into the affected employees' accounts as of the employee's anniversary date and to otherwise follow the contractual requirements for accrual and crediting of vacation set forth in Article VII of the labor agreement. The Union further requested that, in the interests of fairness, each affected employees continue to accrue vacation on the accrue and use as you go basis until their next respective anniversary date at which time the appropriate amount of vacation be placed into their accounts based on the number of years of employment and hours worked in the previous year.

EMPLOYER'S POSITION:

The Employer took the position that there was no contract violation here and that the language of Article VII allows for the pro-rating of vacation accrual for part time employees and allows for the accrue and use as you go pay system that has been in place for years at the Hospital without objection by the Union. In support of this the Employer made the following contentions:

1. The Employer pointed to the same provisions of Article VII but presented a very different interpretation of what the language meant. With regard to the issue of pro-ration of vacation, the Employer argued that the formula presented in Article VII, Section A is not to be read in isolation and is in fact intended to show how part time employees are to accrue vacation.

2. The Employer noted that for an indeterminate period of time prior to January 1, 1999 the Hospital allowed all employees who worked 1600 hours in a year to accrue the full amount of vacation provided for in each step of Article VII (A) set forth above.

3. The Employer also noted that for some time until the early 1990's the vacation was dumped into the employee's accounts but that this practice was stopped in the 1990's some time. Even the Union witnesses acknowledged this. Since going to the present system, i.e. after 1999, the Hospital has used a 26-week pay period, which starts in the first pay period after the anniversary date of the employee.

4. After January 1, 1999, the Hospital went to a new payroll system and that since then the vacation accrual has been done on the basis of the compensated hours with the maximum accrual reached when the employee reaches 2080 hours in a 26-pay period. This was different from the "old" system, which apparently allowed for the maximum accrual to be reached upon the employee reaching 1600 compensated hours. For a short period the old system was kept in place but changed sometime in early 1999 when the error was discovered.

5. The Union was well aware of this change and the employee's pay stubs actually now show the amount of accrued vacation, which changes with each pay period. Moreover, there was a meeting of the labor management committee in May 1999 where representatives of Union and management discussed this change. No grievance was ever filed, until now, over this change even though the minutes of the May 1999 meeting reflect knowledge by the Union of the change and of the accrual rates.

6. The Employer noted that the change in accrual rates was in direct relation to the change in the contract. The Employer further argued that the formula was added in the 2000-2003 contract and has been used consistently since that time to pro-rate vacation for part time employees. Further, Union witnesses conceded that the change in rates was discussed and pointed to a Union Exhibit 8, which reads as follows: “Discussion on vacation correction letters, used to accrue at accelerated rate – thru labor mngt. decided to accrue at all year. Accelerated rate was not decreased. Vacation – lang. will reflect at what rate accrued.” The Union witnesses conceded that this was in reference to the letters set forth in Hospital Exhibit 1. Those letter specifically advised employees of the errors in vacation accruals and advised them that adjustments to the vacation accrual would be made. Indeed they were and have been the same ever since. The Employer argued that the change in the contract was made to reflect the changes implemented in 1999 to the vacation accrual rates and that the negotiation teams on both sides were well aware of the intent of the change in language.

7. The Employer summed up the understandings of the parties at the end of 1999. The vacation dump practice had been discontinued, and remained discontinued until the present time. The Union was well aware of this practice and acquiesced to it for nearly 10 years. At the very least, the Employer asserts, this is the basis for a past practice argument in the Employer’s favor.

8. The Hospital had long abandoned the practice of allowing employees with only 1600 compensated hours to accrue the full complement of vacation hours. This too was done by the end of 1999. The accrual rates were reduced at each vacation step and the maximum accrual possible was capped at 2080 hours.

9. Further, with respect to Article VII B there were some employees who were accruing at rates actually somewhat higher than that called for in the contract. The Hospital even used .05 as the calculator for all accrued hours under Section B for all employees irrespective of whether the employee worked more than or fewer than 800 compensated hours in a year.

10. By 1996 the Hospital had also been using hours rather than some other measure to calculate vacation and the Union was well aware of this practice as well. The Employer argued that all of these facts and the Union's acquiescence in them for years demonstrated a waiver of the right to grieve these changes in the vacation accrual rates.

11. The Employer argued that the language must mean something. If the Union is correct there would in fact be no need for the language at all. If one does the math, it is apparent that the only way the fractional formulae can work out is for full time employees. Thus for example, in Section A1, if one multiplies .0385 times 2080 hours the result is ten days of vacation. If the Union is correct the fractional number in the agreement is simply wrong.

12. The Employer further argued that it is not only absurd but contrary to the stated intent of the language to grant the same amount of vacation pay to a 1.0 FTE employee as someone working only 1600 hours per year. The Employer asserted that to read the language in the manner argued by the Union is to read the second sentence of the numbered paragraphs of Section A out of the contract.

13. Moreover, the language of Article VII, Section A repeatedly uses the term "compensated hours" again conveying very strongly an intent that the vacation accrue on the compensated hours of the employees. The Employer asserted that its practice of pro-rating vacation pay is consistent with this language by granting a pro-rated accrual of vacation on the actual compensated hours of the employees. Thus, if an employee works less than full time they are entitled to a pro-rated vacation accrual at the decimal formula set forth in the various paragraphs of Section A.

14. The Employer further argued that the language does not require a vacation dump into the employees' accounts on their anniversary date. The Employer argued that the anniversary date is meant as the benchmark for determining the number of compensated hours for purposes of determining whether the employee qualifies for vacation accrual under Section A or under Section B. It does not require that the employees get the entire year's vacation credited to their vacation accounts for the coming year on their anniversary date.

15. Moreover, the Employer argued that the longstanding, clear and mutually accepted practice has been to accrue vacation on an “as you go basis, which is just the opposite of what the Union is now claiming. The Union and all affected employees are well aware of this and this practice is now an inexorable part of the contract.

16. The Employer also raised the issue of procedural timeliness of this grievance and argued that whether the Union should have filed a grievance over the change in accrual rates in 1999 is now academic. Article II, the grievance procedure, requires that the grievance must be filed within 20 days of the occurrence of the grievance. The Union clearly knew of the change in 1999 and should have filed any challenge to it then. The Employer argued that these grievances are now clearly time barred and should be dismissed.

17. The Employer further argued that even if this is determined to be a so-called continuing grievance, the Union cannot be allowed to sit on its rights forever. Here, the Union not only knew about the practice but also negotiated the language into the contract it now feels is the basis for their claim. This despite the fact that the clear practice was contrary to what the Union wants now – the Hospital has been pro-rating vacation accrual rates for years and has not used a “dump” of vacation days into the employees’ accounts for 10 years or more. There is no question that the Union has simply waived its rights to grieve this now.

18. With regard to Article VII Section B, the Employer noted that in some instances, it has actually been paying more vacation than would be called for under the contract yet the Union did not object to that windfall to the employees. The Employer further noted that the letter of understanding attached to the contract supports the present accrual system. Each employee got a letter showing the amount accrued but since July 2006, when the Hospital went to a different payroll system, each employee now gets a paycheck showing exactly how much vacation they have accrued in that payroll cycle. Even the Union’s Exhibits show this and reflect the vacation amounts earned in that period and how much they have left. The employees and the Union have been aware of this for years.

19. The Employer countered the Union's claim that other Sections of the contract use the term "pro-rated" and that the absence of this term in Article VII must therefore mean that the parties intended not to pro-rate vacation accrual rates. The Employer pointed to the 2000-20003 contract, Employer Exhibit 6, and noted that Article VI in that contract does not use the term "pro-rated."

20. The Employer compared the 2000-2003 contract to the current agreement running from 2006 to 2009, and argued that all that was done was to simply combine the first and third paragraphs of Article VI in the 2000-2003 contract into one paragraph, now found at Article VI A at the first paragraph. Because of this change the negotiators would have had to pro-rate the sick leave since it now dealt with both part-time and full time employees.

21. The Employer asserted that the change in Article VII occurred in 2000 and was, as noted above, to reflect the change in practice that went into effect in 1999. The Employer argued that simply using the term-pro-rated in one Section of the contract is not determinative here since it was already clear that the parties intended the vacation to be pro-rated as they have for nearly 9 years. The pro-ration is clearly set forth in the multipliers already in the language.

22. The Employer argued that the parties' long, consistent and mutually accepted practice has now arisen to the level of a binding past practice even if the arbitrator does not find the language clear and unambiguous. All of the elements of past practice are present. Accordingly, the Union's acquiescence and acceptance of this practice now binds these parties to that course of conduct. If the Union wishes to alter this now it must do so at the bargaining table not in arbitration.

23. The essence of the Employer's case is that the clear contract language provides for pro-ration of vacation. Further, both the language and the clear past practice of the parties supports the Hospital's resent system of accrual and does now support the sort of vacation dump system advocated by the Union here.

The Employer seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

BACKGROUND

The Hospital is a large health care facility located in St. Louis Park, Minnesota. The Union represents certain service and maintenance employee groups within the facility.

The evidence showed that prior to 1999 the Hospital allowed all employees who worked more than 1600 compensated hours to accrue the full amount of vacation provided for at the various steps set forth in Article VII as if they worked a full time, 2080, hour schedule. In 1999 the Hospital adopted a new payroll software system that made it impractical to limit vacation accrual to a 10 month, or 1600-hour period. At that time the employees were allowed to accrue vacation during the course of the year as opposed to receiving a dump of vacation on their respective anniversary dates. The Union witnesses confirmed that for some period of time well into the 1990's they got a dump of vacation but that this practice was discontinued in 1996. The employee's checks now reflect an accrual of vacation. Accordingly, it is clear that the affected employees have long understood that their vacation was accrued on an "as you go" basis, and for at least 10 years or more, it has not been on the old, vacation dump basis.

Apparently, even after the new payroll system was implemented the Hospital continued to accrue vacation at the rates in place prior to 1999. This practice continued for a few months but was addressed at a labor management meeting in May 1999 when the Union and management representative discussed the incorrect accrual rates. At that time the Hospital notified the employees who had accrued vacation at the old rates that they would have that vacation subtracted from their accrued levels. The Hospital sent a letter to the affected employees in 1999 advising them of the Employer's action. See Employer Exhibit 1.

The Union did not grieve this action and the evidence established that the Union was aware of the change and saw the letters referenced at Employer Exhibit 1. The Hospital sent out literally hundreds of such letters at the time including many to Union stewards who also worked in the unit. The evidence showed that the accrual rates and methodology of accruing vacation has remained essentially unchanged since 1999. Neither has the Union grieved the vacation accrual system, in place since 1996, whereby there is no longer a vacation dump into the employees' accounts.

Significantly, the multiplier language, i.e. the second sentence of Article VII A (1) through (8), was placed in the contract in 2000. See Employer Exhibit 5 and 6. While it was disputed as to why this language went into the contract, the evidence showed that it was placed there to reflect the change in the vacation accrual system that occurred in 1999, as discussed above and was intended to conform the contract to the 1999 practice of pro-rating vacation based on 2080 compensated hours and the multipliers to reflect that for lower numbers of compensated hours.

The minutes of the negotiation session leading to the 2000-2003 contract showed that the parties discussed this and understood the import of the change in language. See Hospital Exhibit 7, Union Exhibit 8. Hospital Exhibit 7 reflects the jointly approved minutes of a February 2000 negotiation session in which an example of how the new rates would work was discussed. It specifically uses an example of a part-time employee and shows that her accrual rate based on a 0.8 FTE is not the same as for a 1.0 FTE employee.

It is against this backdrop that the instant grievance, over both the accrual rates and the accrual methodology, proceeds. As noted above, one issue arose post-hearing as to the procedural arbitrability of the grievance based on timeliness.

TIMELINESS

The Employer raised the issue of procedural arbitrability in its Brief in the matter. This was based on the facts that the vacation dump was eliminated in 1996 and the vacation accrual rates were changed in 1999 both with the full knowledge of the Union. The Employer raised a number of issues based on these facts. Along with a waiver argument and past practice, the Employer also raised the scepter that the matter was time barred as the facts giving rise to the grievance occurred many years ago and the time limits set forth in Article II require that the grievance be filed within 20 days of such occurrence. The issues of past practice and waiver arguments will be discussed below. At this point, the question of whether the matter can even be heard now due a fatal procedural defect must be addressed.

The Union objected to the procedural arbitrability/timeliness issue on multiple grounds. First, the Union asserted that this issue was not brought up even at the hearing or at any point along the way in the grievance steps. In fact the evidence showed that the arbitrator asked at the hearing if there were any procedural arbitrability issues and was told no by the Employer. Moreover, no such argument was raised at the hearing through the introduction of evidence or Exhibits and the first time the Union saw this was in the post hearing brief.

Second, the Union argued that even if the issue can be brought up at this late hour, the time honored concept of a continuing grievance would allow this to go forward on the merits. Here, the Union asserted, the grievance due to its nature is of a continuing nature. Obviously, if the accrual rates are being incorrectly calculated in violation of the contract, the grievance renews with each passing paycheck the employees receive. Moreover, if they are to get a dump of vacation, each paycheck in which that does not occur again creates a new cause of action under the contract.

A review of the recording made at the hearing reveals that indeed the Employer did indicate that there were no procedural arbitrability issues and that the parties agreed that the matter was properly before the arbitrator. This acknowledgement is contrary to any assertion that the matter is procedurally untimely and therefore not properly before the arbitrator. It was also shown that the issue was brought forth formally for the first time in the Employer's post-hearing Brief.

Moreover, the Union's assertion on continuing grievance has merit. Without making any determination on the merits at this point, it is clear that if the Union's argument is correct, this matter would constitute an almost classic case of a continuing grievance. Elkouri, recognizes that concept as follows: "Many arbitrators have held that 'continuing' violation of the agreement (as opposed to a single transaction) give rise to 'continuing' grievances in the sense that that the act complained of may be said to be repeated from day to day – each day there is a new 'occurrence'; these arbitrators have permitted the filing of such grievances at any time, this not being deemed a violation of the specific time limits stated in the agreement (although any back pay ordinarily runs only from the date of filing." Elkouri and Elkouri, *How Arbitration Works*, 5th Ed, at 281-282.

Here for the reasons set forth above the grievance is determined to be properly filed. Certainly there was a delay in filing this grievance from 1996 or 1999 as the case may be until May 2008 when this formal grievance was filed. These facts as they relate to waiver, or what might be termed as common law "laches," or a binding past practice. On the threshold question of whether the matter can proceed to a hearing and discussion on the merits however, this is clearly a continuing grievance claim and will be determined on the merits. As Elkouri notes though, any back pay or adjustment of the vacation accrual, if any, is limited to the date of filing of the grievance herein.

VACATION ACCRUAL RATES – ARTICLE VII (A)

As with any contractual interpretation dispute the first place to look for guidance is the contract. The contract provides at Article VII A as follows: “Each employee who has been in the employ of the Hospital for one (1) year or more and has accrued 1600 or more compensated hours in the year prior to the employee’s anniversary date of hire shall receive the following vacation.” The contract then sets forth a number of subparagraphs calling for differing amounts of vacation accruals depending on the number of years of service. The evidence showed that until 2000 this was the sole provision in Article VII. See Hospital Exhibit 5, the March 1, 1996 through February 29, 2000 contract.

In the 2000 negotiations for the 2000-20003 contract, the parties included the multiplier language found in the second sentence of each subparagraph of Article VII A. The parties differed as to why this was inserted but the preponderance of the evidence showed that it was inserted to reflect the then current practice, which has changed, as noted above, for accrual of vacation.

It is also clear that when one “does the math” the multiplier numbers set forth in the second sentence of each repetitive subparagraph only work out if one uses full time, 2080 hours of employment. For example, if one multiplies .0385 times 2080 hours, the result is almost exactly 80 hours, or 10 days just as subparagraph 1 calls for. The rest of the subparagraphs yield similar results. The evidence showed that prior to 1999 the parties had used .05 multiplier in this instance, which would have yielded 80 hours of vacation for only 1600 hours. That of course was changed in the 2000 contract and remains in the contract to this day.

The only way the multipliers result in the vacation called for in the subparagraphs is to multiply the rate times full time employment. They frankly do not work if one uses a number of hours between 1600 and 2080.

The essence of the Union's claim is that the language of Article VII A is clear and calls for every employee who works 1600 or more compensated hours in the year prior to the affected employee's anniversary date *shall* receive the amount of vacation specifically set forth in the subparagraphs. (Emphasis added). The Union asserted that the use of the word "shall" clearly is mandatory and requires that the employees must receive the specified amount of vacation called for in whatever subparagraph fits that employee's number of years of service. The Union further asserted that there is no language requiring pro-ration of the amounts. For example, the Union claimed that anyone with one year of employment and who has worked 1600 hours in a given year is entitled to the full complement of 10 days vacation, irrespective of the multiplier language. The Union argued that the multiplier was merely to clarify or explain the calculation for the full time employees but did not result in a cap to limitation of vacation for the employees working between 1600 hours and full time employment. The Union further argued that the parties could have used different language, as they did in the sick leave article which does provide for pro-rating of the leave, could have used other language to make it clear that the multipliers were intended to limit vacation for part-time employees. They did not and the Union asserted that the failure to use that language can only mean that the parties intended the mandatory language to control this result.

On these facts the language and the history of bargaining and of the application of this article over time does not support the Union's assertions. As noted above, the evidence showed that the practice changed in 1999 and that the Union and the affected employees were all well aware of the change. In fact they discussed it specifically with the Hospital and were aware of the change in the accrual rates and of the change in policy not to dump vacation into the account all at once, as will be discussed more below. No grievance was filed over this for years; not until May 2008.

The Employer argued that the language was clearly intended to clarify the meaning but of course argued that it clarified it in just the opposite way. The Employer argued that the clarifying language can only be logically read in one way: that the multiplier was intended to show what happens to part-time employees who work more than 1600 hours in a year. Both sides relied upon contract interpretation principles in support of their positions.

Ironically, both argued that the other's position would result in "nonsensical" interpretations. The evidence here however supported the Employer's position. It would in fact be far more absurd to assert that full time employees working 2080 hours get the same vacation amount as a person working 1600 hours. Moreover, that is the way the Hospital has been applying this language for several years and, more significantly, at least one other contract negotiation period, without objection or grievance from the Union or its members.

There was also some merit to the Employer's argument that if the Union's position really were correct and every employee working over 1600 hours were in fact entitled to the full measure of vacation, then there would be no reason to have the multiplier language there at all. They would just get the full vacation and the question of multiplying their hours by some pre-arranged numerical figure would be moot. That appears to be true; yet the language is in the contract and has been applied to mean exactly what the Employer asserted it should.

Both sides argued that contract language must mean something. This is also true enough. It is axiomatic that contractual language is inserted into the contract for a purpose and must generally be interpreted to mean something. As noted above, the language can only logically mean that the parties intended that the multipliers would apply to the number of hours between 1600 and full time. Otherwise there is no purpose for that language; it would not, as asserted by the Union clarify anything and would be completely redundant.

Moreover, the evidence in this case showed that the change in contract language was made at almost the same time as the change in the payroll system in 1999. The totality of the evidence supports the Employer's claims that the multiplier language was inserted to reflect what the then current practice was.

The Union further asserted that the language could have been clearer and could certainly provide that the multipliers applied to part-time employees or that it would apply to the employees working less than 2080 hours but more than 1600 or the like. Certainly this is true; the language could be clearer and perhaps the parties can fix this in future bargaining but the issue now is what the parties intended by inserting this language into the contract in the form they did, at the time they did, and under the circumstances they did. As always, the job of the grievance arbitrator is to determine the intent from the language itself, the bargaining history and such other facts as may be relevant in aiding in that task.

Here, while the language is certainly amendable to differing interpretations the totality of the evidence supports the Employer's view that the multiplier language applies to pro-rate the vacation for employees working less than full time but more than 1600 compensated hours in the prior year.

The Union further asserted that the clear written contract language trumps any past practice and that the language here clearly provides for the full vacation accrual without pro-rating for part-time ours. As noted above, this contract language is frankly not all that clear and is undeniably amenable to at least two different yet rational explanations. Under those circumstances both bargaining history and past practice are exactly what is needed to interpret contractual intent of the parties.

Here, while this issue is not decided under a strict past practice analysis, the way in which a contractual provision is applied is very strong evidence of what the parties thought it meant, especially, as here, where the practice went on in an open, well known and apparently mutually accepted way for 9 years and through two contract negotiation periods. Thus, while an exhaustive past practice analysis could well have been used to decide this issue in the favor the Hospital on these facts, the contract language itself, and what it must logically mean in order to make any sense, is the determinative factor.

The Union also raised the notion that the past practice if any, was based on a mutual mistake in that the multipliers only work for full time employees. This of course would be true unless the parties had in fact intended that the multipliers did in fact apply to the part time employees. On these facts it is clear that they did. Not only does the language strongly imply this but also their clear and consistent practice over time indicates that they intended it to apply to the part-time employees – mostly because it did and nobody ever objected to it until May 2008. These facts undercut the idea that this was somehow all a big mistake and that the parties have been lumbering along with some mistaken notions here as to the import of the multipliers. In fact the parties appear to have been quite clear on what those multipliers meant and applied it precisely that way for years.

The Union raised the issue that the parties used specific pro-ration language in another Section of the contract and therefore could have used it here had they intended pro-ration to be applied here. See Article VI of the CBA. That is certainly a factor to be considered but such is not the sole factor upon which the ultimate determination of contractual intent can be drawn. Here again, the parties could well have drafted this in a clearer way but the mere fact that one other Section of the contract issues specific language calling for the pro-rating of sick leave did not carry the day for the Union. The logical meaning of the language coupled with the clear application of the language over time provides far more support for the Employer's position on this question. Accordingly, on the question of the vacation accrual rates under Article VII Section A the grievance must be denied.

VACATION DUMP ISSUES

The next issue raised by the Union deals with the way in which vacation is actually accrued. As noted above, the evidence showed that the employees' paychecks demonstrate that they are accruing vacation on an "as you go basis." The evidence further showed that this practice has been in place for more than 10 years, possibly dating back as far as 1996.

The Union asserted that the language found in both Article VII, Sections A and B providing for payment of vacation pay based on the number of "compensated hours in the year prior to the employee's anniversary date of hire" confirms that the employees are entitled to a dump of vacation pay into their accounts in the pay period following their anniversary date of hire. The Union asserted that the trigger is the anniversary date. Moreover, the union asserted, the language providing that payment of vacation pay "after" a certain number of years of employment again supports their position that the full entitlement of vacation is to be dumped into that employee's account at once and not accrued on an as you go basis.

Moreover the Union claimed that the contract uses discrete blocks of time as set forth in the subparagraphs of Article VII (A) and would not if the parties had intended an accrue as you go system. Instead, the Union claimed, the language used implies that the whole entitlement must be placed into the affected employee's account all at once, on their anniversary date.

The Union again pointed to the language of the sick leave article and noted that it has an accrue and use as you go system built into it. The language of Article VI does not, which implies that the parties did not intend for such a system for vacation pay.

This is a somewhat closer issue but the parties' practices provide ample support for the notion that this is not in fact what the parties intended since they have not been using a vacation dump accrual system since 1996. As noted above, while contract language is in most cases the best indicator of contractual intent, the way in which a clause has been applied is often times at least as good or even better measure of what the parties intended when they placed certain language in a contract.

Here the language has been in place for several contract periods and again has not been applied as the Union seeks to have it apply for more than 12 years. No grievance has ever been filed over this and the evidence showed that the union and the affected employees were well aware of this practice. Indeed, their paychecks reflect an accrue as you go system so it strains credibility to assume they were not aware of the way in which their vacation was being accrued.

As noted above in the procedural arbitrability issue, the Employer raised a waiver argument as well. Waivers are not favored in labor relations and such arguments by one party should be granted only where a waiver is very clearly supported. Here no such facts were present so it cannot be said that the Union knowingly or voluntarily waived its right to grieve the vacation accrual.

Here the language does not on its face call specifically for a dump of vacation. Arguably, the reference to “anniversary date” is to provide a reference point for when the calculation is to begin. And to provide clarity for when the calculation of whether the employee has worked the requisite number of hours. The calculation of the number of compensated hours must begin at some point and the evidence showed that the parties selected the individual employee’s anniversary date as the point from which that calculation would occur. Certainly, the remainder of the language of both Section A and B discuss the accrual rates but in each there are threshold amounts of compensated hours that then govern the amount of vacation to which the employee is entitled. In Article A the threshold is 1600 compensated hours while in Section B the threshold is 800 hours.

Article VII B will be discussed below in more detail, but it is clear that in order to accrue any vacation at all under this language the employee must work at least 800 compensated hours in the year prior to the anniversary date. All that language appears to do is to provide a reference point for that calculation.

Accordingly, the language itself is ambiguous as it relates to the question of a dump of vacation into the employee's accounts. What becomes necessary at that point is a review of the past practice as it relates to the vacation dump issue. Past practice has been defined as a 'prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.' See Richard Mitterthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961). A past practice is thus nothing more, or less, than a custom or an accepted way of doing things as between two parties to a labor agreement that can provide either assistance in interpreting contract language where that language is ambiguous or to actually provide a binding set of terms for matters not included in the labor agreement.

A past practice has been further defined as follows: "past practice has been defined as a 'prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.' Certain qualities distinguish a binding past practice from a course of conduct that has no particular evidentiary significance: (1) clarity and consistency; (2) longevity and repetition; (3) acceptability; (4) a consideration of the underlying circumstances; (5) mutuality. See, Richard Mitterthal, *Past Practice and the Administration of Collective Bargaining Agreements*, in *Arbitration and Public Policy* 30 (S. Pollard ed. 1961). See also, *Ramsey County v AFSCME*, 309 N.W.2d 785, 788, fn 1 (Minn. 1981).

Elkouri states it in slightly different terms as follows: In the absence of a written agreement, 'past practice,' to be binding 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." Elkouri and Elkouri, *How Arbitration Works*, 6th Ed at 632 citing *Celanese Corp. of America*, 24 LA 168 (Justin 1954).

These elements are present here. The practice of “accrue as you go” has been longstanding, well known and apparently accepted by both parties for years. The evidence showed that it has been consistent and has been in place despite several negotiations for new collective bargaining agreements. The operative language of Article VII has not changed since the 2000-2003 contract.

Accordingly, based on the parties’ longstanding and consistent practice of accrue as you go, the grievance regarding the dump of vacation pay must be denied.

ARTICLE VII (B) ISSUE

The final issue raised by the Union is the improper calculation of vacation accruals pursuant to Article VII (B). The Union asserted that Section B has no multiplier language as does Section A yet the Hospital has been arbitrarily using a .05 multiplier to calculate the vacation accrual rates for employees who work between 800 and 1600 hours.

The evidence showed that in some cases the vacation accrual applied under Section B has actually resulted in “too much” vacation being applied to certain employees. The hospital is now trying to take steps to rectify this but the evidence was not entirely clear whether this has been done. The Union asserted that even if that were the case it is imperative that the Employer be directed to follow the language of the contract.

The language of Section B is somewhat different than that used in Section A. Initially, it is clear that employees who do not work at least 800 compensated hours in the year prior to their anniversary date are not eligible for vacation at all. There was no evidence that this has been misapplied but to the extent that employees who do not meet that threshold figure of 800 compensated hours the Employer will be directed to stop accruing vacation for those employees.

The remainder of Section B calls for employees who work not less than 800 compensated hours to accrue 5 days of vacation plus “one (1) day of vacation for each additional 173.3 compensated hours, up to a maximum of two (2) weeks (10 days) vacation.” To that extent there is “pro-ration” of vacation pursuant to this language. The evidence showed that what it was intended to provide is that employees who work not less than 800 compensated hours are to receive 5 days of vacation. The clear import of the language though is that it grants one additional day for each 173.3 compensated hours. Thus, as an example, if an employee works 973.3 or more compensated hours or more during the year prior to that employee’s anniversary date, that employee is granted 6 days of vacation under that clear language. There is of course a maximum accrual rate set forth in that language of a maximum of two weeks or 10 days vacation and that too is to be followed as well.

The language does not call for the use of the multipliers or accrual rates called for in Section A. Indeed, the language of Section B specifically sets itself apart from the language of Section A. There is therefore no provision allowing of the pro-rating of vacation between those amounts.

The Employer again asserted that there has been a practice here as well but the evidence showed that there is a difference. To the extent that the Employer has been using accrual rates following along the lines of Section A there has been a mutual mistake. It was clear that the Employer was not aware of the mistake in vacation accruals until this grievance arose. Why this was the case was not fully explained at the hearing but appeared to be the result of a glitch in the payroll system being used that simply applied a .05 multiplier even to those employees who were not entitled to vacation under the clear terms of Section B.

This diverts the analysis somewhat away from a straight past practice analysis and demonstrates that there is no true mutuality in that practice. Accordingly, the use of the accrual rates pursuant to Article B did not arise to the level of a binding past practice and the Employer will be directed to follow the letter of the contract language as set forth herein.

Accordingly, the grievance regarding the interpretation of Article VII Section B is sustained and the Employer is directed to follow the contract language of Article VII Section B. Thus, employees who work fewer than 800 compensated hours in the year prior to the employee's anniversary date are not entitled to vacation accrual under the terms of Section B. Employees who work 800 hours shall receive one week, 5 days, of vacation accrual plus one (1) day of vacation for each additional 173.3 compensated hours, up to a maximum of two (2) weeks (10 days) vacation. There is no pro-rating allowable under the clear terms of the language of Section B. As noted above however, since the nature of this grievance is of a continuing nature any remedy will be limited to the date of the filing of the grievance in this matter.

AWARD

The grievance is **SUSTAINED IN PART AND DENIED IN PART** as follows:

1. The grievance pertaining to the multiplier language contained in Article VII Section A is **DENIED**.
2. The grievance regarding the vacation dump issue pursuant to Article VII Sections A and B are also hereby **DENIED**.
3. The grievance pertaining to the accrual rates found in Article VII B is **SUSTAINED** as set forth above. The Employer is directed to follow the contract language of Article VII Section B and make any appropriate adjustments to affected employees' vacation accounts from the date of the filing of the grievance.

Dated: February 17, 2009

Jeffrey W. Jacobs, arbitrator