VanDagens #2

VOLUNTARY LABOR ARBITRATION

Employer **(D-Sick Time payout)**

-and-

Union

SUBJECT

Payout of accrued sick time bank upon retirement.

ISSUE

Did the County violate the collective bargaining agreement when it capped Grievant's "old" sick bank hours for purposes of payout at retirement? If so, what shall the remedy be?

CHRONOLOGY

Grievance Filed: April 6, 2006
Hearing: October 2, 2006
Briefs Received: November 3, 2006
Opinion and Award Issued: December 22, 2006

SUMMARY OF FINDINGS

The grievance is GRANTED. The clear language of the collective bargaining agreement does not cap the payout from the "old" sick bank for employees who voluntarily terminate or retire from employment with the County. Further, the past practice alleged by the County is neither clear nor consistent and as such, cannot override the negotiated language. Grievant must be paid for the hours in excess of 480 he had accumulated in the "old" sick bank.

RELEVANT CONTRACT LANGUAGE

LEAVES OF ABSENCE

Section 8.1: Sick Leave.

D. Payout upon termination or retirement:

1. New Bank: Any remaining hours up to a maximum 160 will be paid at the employee's current hourly rate of pay.

2. Old Bank—Involuntary Termination of Employment: Maximum payout of 480 hours at the employee's 1998 rate regardless of years of service.

3. Old Bank—Voluntary Termination and Retirement:
   Years of Service with the Department:

	Current Rate	1998 Rate
Less then [sic] 10 years service:	0%	100%
10 – 14 years of service:	50%	50%
15 – 19 years of service:	75%	25%
20 + years of service:	100%	0%

* * *

BACKGROUND

There is little or no dispute regarding the facts in this matter. Grievant, Harold Dogwood, was employed by Employer (hereinafter "the County") as a deputy in a bargaining unit represented by the Union (hereinafter "the Union" or "the Union"). The County and the Union are parties to a collective bargaining agreement with effective dates of 2004 to 2006.

Effective January 1, 1999, the County and the Union negotiated a change in the way sick time was earned and accumulated. Sick leave time accumulated prior to January 1, 1999 was placed in each employee's "old" sick leave bank. Sick leave time accumulated after that date, up to a maximum of 320 hours, is placed in each employee's "new" sick leave bank. Under this bifurcated system, 847.5 hours were placed in Grievant's "old" sick leave bank.

Records introduced at the hearing show that since 1998, four bargaining unit members, other than Grievant, have retired with more than 480 hours accumulated in their "old" sick leave bank. When the first three retired, the prior Human Resources Director calculated their payout

for accumulated sick leave. When this person abruptly left the County's employ on July 25, 2003, administrative assistant Dawn Birch took over her duties. Birch represented that the payouts for the employees were as follows:

Retirement date	Accumulated hours in "old" bank	Payout of hours from "old" bank	Payout of hours from "new" bank
Dec. 31, 2001	1,867.75	480	56
May 24, 2002	1,370.25	480	56
Jan. 4, 2003	500.5	480	64
Jan. 2004	959	710.63[1]	236.88[2]

The language added in 1998 remained unchanged through the successive collective bargaining agreements, except that the parties omitted references to 1998 and 1999 as being no longer relevant. The current collective bargaining agreement (2004-06) also contains an additional provision,

> Upon retirement, an employee hired on or after January 1, 1999 may elect, in lieu of payout, to be credited with up to 320 hours as additional service credit for pension purposes. Employees hired prior to January 1, 1999, may elect 480 hours of service credit in lieu of payout.

Grievant intended to retire from the Employer in May, 2006, after 29 years of service. Prior to his retirement, Grievant was told he would be eligible to receive payout of his sick time bank up to a maximum of 480 hours accumulated under the "old" sick leave bank. Disagreeing with this interpretation of the collective bargaining agreement language, he filed a grievance on April 6, 2006, asking, in part, that he be paid "for 100% of the 847.5 hours in his 'old sick bank' at his current rate of pay, per the labor contract." The Step 2 response by Sheriff David Willow states, "I concur with desired settlement & will forward this grievance to the Board of

[1] Ms. Birch was unable to explain how the number of hours was calculated in the January 2004 retirement.
[2] Although Birch represented this as the number of sick leave hours paid from the new bank, notations on the employee's pay stub reveal that the payout was calculated on the assumption that the employee had only 947.5 hours in her "old" bank when she retired with 18 years of service. Therefore, it appears that 710.63 hours (75% of total) were paid at the employee's current pay rate at retirement, and the remaining 236.88 hours (25% of total) were paid at her 1998 pay rate. It is not clear that this employee received any payout for hours accumulated in the "new" bank.

Commissioners per the contract. I also understand this could impact your impending retirement plans & will ask for this grievance to be expedited." As required by the collective bargaining agreement in all matters that have an economic impact on the County, the resolution was not final until approved the Board. The Board denied the grievance on April 12, 2006 and the parties agreed that the grievance could continue after Grievant's retirement, effective May 11, 2006. The grievance was appealed to arbitration and the parties selected Arbitrator Kathryn A. VanDagens to hear the case. A full evidentiary hearing was held on October 2, 2006 in a City, Michigan. Both parties had the full opportunity to present testimonial and documentary evidence, and to examine and cross-examine witnesses and both parties filed post-hearing Briefs.

UNION'S POSITION

The Union contends that the plain language of the collective bargaining agreement supports its position. The language negotiated by the parties does not place any limitation or "cap" upon the number of "old" sick leave bank hours to be paid out when an employee voluntarily leaves or retires from employment with the County. In contrast, the Union contends, the parties did agree to cap the number of hours in the "new" bank that would be paid out and the number of hours an involuntarily terminated employee could be paid from the "old" bank. The Union contends that if the parties had intended to cap the number of hours paid out from the "old" bank when an employee voluntarily terminates or retires, they would have included a similar cap in the paragraph addressing this situation. The Union contends that when the parties separated the provisions regarding payouts in involuntary terminations from payouts in voluntary terminations and retirements, they made clear that the cap does not apply in both situations.

The Union contends that its position is the more reasonable one as it fully rewards an employee who had excellent attendance and leaves the County's employ on good terms while disallowing the reward to an employee who is involuntarily terminated by capping the payout.

The Union contends that the practice of the former payroll employee to not pay for all the hours banked in the "old" bank was in error, and the current payroll person's practice of giving credit for all hours in the "old" bank is in accord with the clear language of the collective bargaining agreement. The Union contends that the Sheriff's answer at Step 2 confirms the parties' intent, as he was a member of the County's bargaining team, and he determined that Grievant should receive payment for all the hours he had banked in the "old" bank.

EMPLOYER'S POSITION

The County contends that the evidence does not support the Union's assertion that the parties intended for retiring employees to be paid for accumulated hours in their "old" sick leave bank without limitation.

The County contends that the 1998-2000 collective bargaining agreement capped the payout at 60 days[3] at the employee's current rate prior to the change to the "new" sick leave bank; any hours in the "old" bank were earned under a scheme whereby the payout was capped at 60 days. The County contends that when the parties negotiated the new language, they capped the payout from the "new" bank at 160 hours, one-third of the previous limit. In exchange, the County agreed to award sick leave in a lump sum at the beginning of the year, rather than by each pay period. The County further contends that the parties agreed to payout "old" bank hours at the 1998 rate for involuntarily terminated employees and at a blended rate for voluntarily terminations and retirements based on years of service.

[3] While the current collective bargaining agreement refers to the number of hours in the bank, the arbitrator notes that sixty days is the approximate equivalent of 480 hours.

The County contends that its interpretation of the collective bargaining agreement is supported by Section 8.1 (D) (5) that allows employees hired before January 1, 1999 to elect to receive 480 hours of service credit for pension purposes in lieu of payout, pointing out that only employees hired before January 1, 1999 earned any "old" bank hours.

The County further contends that the parties' past practice supports its interpretation because since 1999, four employees have retired with more than 480 hours accumulated in their "old" bank and in all but one case, the payout from the "old" bank was limited to 480 hours. The County contends that the only exception occurred through error. Finally, the County points out that no retiree previously filed a grievance protesting its interpretation.

DISCUSSION AND FINDINGS

In any contract interpretation, the arbitrator's primary objective is to discern the intent of the parties when drafting the language in question. Standards of contract interpretation, the concept of past practice, and a rule of reasonableness, or some combination of these are useful tools in determining intent. Where the contract language itself is clear, many arbitrators will not look beyond the "plain meaning" of the words used by the parties.[4] The interpretive rule was described by the authors of "How Arbitration Works" thus: if words "are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used."[5]

In this case, there can be no doubt that the plain language ratified by the parties supports the Union's position. The paragraph addressing voluntary terminations and retirements places no cap on the number of hours for which an employee can receive a payout. Where the parties

[4] *Internal Revenue Service*, 122 LA 1673, 1677 (Abrams, 2006)(quoting from FAA and NATCA, 79 FLRR 2-8038 Madden, 1979)("When there is no ambiguity in the terms of the written contract, the instrument itself affords the only criterion of the intention of the parties.").
[5] Ruben, Alan Miles, ed., Elkouri & Elkouri, How Arbitration Works, 6th ed. (2003) at 434.

included a cap in the paragraph addressing payout of hours for involuntarily terminated employees but included no similar provision in the paragraph addressing payout for employees who voluntarily terminate or retire, the implication is that they did not intend to cap payouts in both situations. The parties included no limitation on the number of hours from the "old" bank an employee leaving voluntarily could be paid for. The County points to other provisions in the collective bargaining agreement as support for its contention that the parties intended to limit sick bank payouts, but the inclusion of a cap in those provisions only confirms that when the parties intended to negotiate a cap, they knew how to write language doing so.

Similarly, the County argues that under the prior sick bank scheme, employees were limited to payout of sixty days upon any separation or termination and that the Union has not pointed to any evidence suggesting the parties intended to remove the cap for one group of employees. However, the clear language of the agreement points to just the opposite conclusion; after the introduction of the new sick bank scheme, the parties agreed to treat employees who voluntarily left employment differently from those who left involuntarily. Not only is the salary base different for the two groups; one group's payout is capped; the other group's is not.

On the other hand, negotiated language standing alone, is rarely, if ever, clear and unambiguous. Under the right circumstances, an established past practice may be better evidence of the parties' true intent. Especially where, as here, one party has presented extrinsic evidence, without objection by the other side, purporting to show the true intent of the parties, the arbitrator would be remiss not to consider such evidence. The weight properly given to such evidence varies greatly depending upon the purpose for which the extrinsic evidence is presented. Where the parties' agreement is silent on an issue, a long-standing past practice

should be upheld as expressing the parties' true intent.[6] However, where the contract addresses the subject matter of the grievance, past practice should be considered an aid in determining the parties' true intent only when the written language is susceptible of more than one interpretation.[7] Finally, although there is a split among arbitrators, the prevailing view is that even a clearly established past practice cannot override clear contract language.[8]

Even if the language of Section 8.1(D) were ambiguous, it is not clear that the County has established the existence of a binding past practice. The County argues that the parties' past practice reinforces its interpretation because since 1999, four employees have retired with more than 480 hours in their "old" bank, but all but one were limited to a payout of 480 hours, and the one was simply an oversight. At the same time, the Union points out that even the Sheriff agreed that Grievant should receive a payout of all the hours in his "old" bank, without limitation.

To be binding, a past practice must be clear and consistent, repeated for a long period of time, accepted by both sides and mutually acknowledged by the parties.[9] The past practice offered by the County falls short in several of these factors. First, it is not clear that representatives of both sides agree that payouts from the "old" bank were intended to be capped under these circumstances; in his Step Two answer, the Sheriff agreed with Grievant. Additionally, the most recent example prior to Grievant's payout supports the Union's

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[6] *City of Auburn* Hills, 122 LA 1761, 1764 (Sugerman, 2006)("When an issue is silent or absent from an Agreement, . . .past practice may be introduced to divine the intent of the parties. The presence of a 'well-established practice, accepted or condoned by both parties, may constitute, in effect, an unwritten principle on how a certain type of situation should be treated.' Texas Utility Generating Division, 92 LA 1308, 1312 (McDermott, 1989).")

[7] *Kohler Co.*, 122 LA 1221, 1236 (Jennings, 2006)(quoting Elkouri: "The custom of past practice of the parties is the most widely used standard to interpret ambiguous and unclear contract language. It is easy to understand why, as the parties' intent is most often manifested in their actions. Accordingly, when faced with ambiguous language, most arbitrators rely exclusively on the parties' manifestation of intent as shown through past practice and custom…")

[8] *BASF Wyandotte Corp.*, 84 LA 1055, 1057-58 (Caraway, 1985)("Where a conflict exists between the clear and unambiguous language of the contract and a long standing past practice, the Arbitrator is required to follow the language of the contract . . . While the Arbitrator recognizes it is difficult to accept the overturn of a fifteen (15) year past practice, the Arbitrator is required to do so in light of the clear and certain language . . .").

[9] Mittenthal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1017 (1961).

interpretation. While it may have, in fact, been a misunderstanding of the County's interpretation, such confusion undermines the assertion that the "practice" was both clear and consistent.

Second, while this is the first grievance filed over the capped payouts, the County has not shown that the Union was aware of its interpretation prior to Grievant's situation and acquiesced in the County's position. There is no evidence that any of the other retirees brought the payout cap to the Union's attention or indeed that they were even aware how their payouts were calculated. In fact, the grievance itself makes clear that the Union was under the impression that other retirees had received payouts for hours substantially in excess of 480 hours.

In sum, the parties' negotiated language clearly and unambiguously does not limit the payout for hours accumulated in the "old" bank for employees who voluntarily terminate or retire. Furthermore, even if the arbitrator were of the mind that clear contract language could be modified by an established past practice, the parties' conduct in this case falls far short of the pattern necessary to create a binding past practice.

The grievance asks that Grievant be paid for 100 percent of the 847.5 hours in his "old sick bank" at his current rate of pay and the County is ordered to do. However, the grievance also asks that the same remedy be granted to "all past and future retirees." Despite the remedial request, the arbitrator notes that the grievance was not filed as a class action grievance, but only on behalf of Grievant. Neither of the parties addressed how the arbitrator's jurisdiction might be extended over grievants who are not before me. It would be an improper extension of my jurisdiction to grant a remedy for employees who neither grieved, nor joined, this grievance.

AWARD

The grievance is GRANTED. The County shall pay Grievant for 100% of the 847.5 hours in his "old" sick bank, less any amounts already paid.

December 22, 2006
Date

Kathryn A. VanDagens, Arbitrator