

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MILWAUKEE POLICE ASSOCIATION,	:	
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Complainant,	:	Case 387
	:	No. 47297 MP-2585
vs.	:	Decision No. 27316-A
	:	
CITY OF MILWAUKEE, PHILIP ARREOLA	:	
and THOMAS HARKER,	:	
Respondents.	:	
	:	

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Appearances:

Adelman, Adelman & Murray, S.C., Attorneys at Law, by Mr. Kenneth J. Murray and Ms. Laurie A. Eggert, 1840 North Farwell Avenue, Suite 403, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Police Wells

Mr. Thomas C. Goeldner, Assistant City Attorney, 800 City Hall, 200 East

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

On April 10, 1992, Milwaukee Police Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Milwaukee, Police Chief Philip Arreola and Police Inspector Thomas Harker had committed prohibited practices within the meaning of Secs. 111.70(3)(a) 1 and 4 of the Municipal Employment Relations Act. On July 1, 1992, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on September 15, 1992 in Milwaukee, Wisconsin. The parties filed briefs which were exchanged on November 11, 1993. The Examiner, having considered the evidence and arguments of Counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Milwaukee Police Association, hereinafter referred to as the MPA, is a labor organization, and its principal offices are located at 1840 North Farwell Avenue, Suite 400, Milwaukee, Wisconsin 53202.

2. City of Milwaukee, hereinafter referred to as the City, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its principal offices are located at 200 East Wells Street, Milwaukee, Wisconsin. Philip Arreola is the City's Chief of Police and Thomas Harker is an Inspector of Police for the City and Arreola and Harker have acted on behalf of the City.

3. The MPA and the City were parties to a collective bargaining agreement for 1991-1992 which contained the following provisions:

ARTICLE 5

MANAGEMENT RIGHTS

. . .

2. The City has the exclusive right and authority to schedule overtime work as required in the manner most advantageous to the City. The City shall have the sole right to authorize tradeoffs or work assignments.

. . .

5. The City shall determine work schedules and establish methods and processes by which such work is performed.

. . .

ARTICLE 28

VACATIONS

. . .

11. The assignment and scheduling of vacations with pay shall be controlled by the Chief of Police.

. . .

ARTICLE 60

AID TO CONSTRUCTION OF PROVISIONS OF AGREEMENT

. . .

4. The provisions of this Agreement are binding upon the parties for the term thereof. The Association having had an opportunity to raise all matters in connection with the negotiations and proceedings resulting in this Agreement is precluded from initiating any further negotiations for the term thereof relative to matters under the control of the Common Council, the Chief of Police or the Board of Fire and Police Commissioners, including rules and regulations established by the Board of Fire and Police Commissioners and the Chief of Police.

5. During the term of this Agreement prior to the establishment of new rules or regulations, or

changes in existing rules or regulations that do not fall within the City's unfettered management functions, the Association shall be afforded the opportunity to negotiate with the Chief of Police as follows:

Whenever the Chief of Police proposes to establish a new rule, or make a change in an existing rule, if such proposal in its operation will affect wages, hours and conditions of employment of members of the bargaining unit represented by the Milwaukee Police Association, hereinafter referred to as "Association," he shall present his written proposal to the President of the Association. At a mutually agreed to time, not more than 30 days following such presentment, the Chief of Police shall meet in good faith with the representative of the Association with the intent to reach an agreement consistent with the Chief of Police's powers, duties, functions, and responsibilities under law. If no agreement is reached between the Chief of Police and the Association within 30 days of such initial meeting, the Chief of Police may establish the proposed new rule or the proposed change in an existing rule unilaterally, subject to the prior approval to the Board of the Fire and Police Commissioners.

In case of emergency, the emergency to be determined by the Chief of Police, the Chief shall have the right to establish or modify a rule or rules unilaterally and such rule or rules shall become effective immediately. The Chief shall immediately inform the Board of Fire and Police Commissioners, in writing, of the rule change and the reason therefor and said rule shall remain effective until the next meeting of the Board.

6. Any rules or regulations of the Milwaukee Police Department affecting wages, hours, or conditions of employment promulgated by the Chief of Police after negotiation but without agreement may be tested relative to whether they violate the specific provisions of this Agreement as well as the propriety of their application in accordance with the provisions of this Agreement pertaining to grievances and arbitration.

4. The City has a Standard Operating Procedure (SOP) manual which provides procedures by which bargaining unit members select vacation days. Sec. 6 of the SOP provides for vacation selection limitation during the summer and Sec. 8 provides that selection had to be finalized by March 15.

5. Pursuant to paragraph 5 of Article 60 of the parties' contract, Police Chief Philip Arreola on June 10, 1991, gave notice to Bradley DeBraska, president of the MPA, of proposed changes to Sections 6 and 8 of the SOP related to vacation selection and sought a meeting to negotiate these proposed changes. The first change provided for a two-round vacation selection process and the second provided for the finalization of vacation selection by December 31 of the prior year rather than March 15 of the current year.

6. On June 27, 1991, Chief Arreola withdrew the two-round selection proposal and asked to negotiate over the December 31 finalization of vacation selection. The parties met in negotiations on July 15, 1991, and no agreement was reached. On September 11, 1991, Chief Arreola indicated that it appeared the parties were at impasse over the issue. On October 11, 1991, Chief Arreola took the proposal on the finalization of vacation selection to the Fire and Police Commission. The Fire and Police Commission laid the matter over to December 19, 1991, and thereafter the Fire and Police Commission held the matter in abeyance while the parties discussed a compromise proposal that March 15 start the annual vacation period. On January 6, 1992, Police Chief Arreola deferred comment on this proposal until it was reviewed by Mr. Goeldner.

7. On January 11, 1991, Deputy Dispatcher Thomas E. Harker issued the following memo on the 1991 vacation selection process to all District Commanders:

The 1991 vacation selection process shall be conducted pursuant to the guidelines established by the Chief's Committee on Personnel Scheduling/Allocation.

In selecting vacations, District Commanders shall ensure that;

- 1) the attached Standard Operating Procedures are followed;
- 2) there shall be no moving of a member's regular off days as defined by their off group except for an authorized body-for-body trade that covers the time period affected by the move;
- 3) there shall be a limit on the number of personnel that may be off at any one time on vacation or compensatory time off. The 1991 goals are:
  - a) A total of 12% off on the day shift.
  - b) A total of 10% off on the early shift.
  - c) A total of 10% off on the power shift.
  - d) A total of 9% off on the late shift.

On January 10, 1992, Inspector Harker sent the following memo for the 1992 vacation selection process to all District Commanders:

The 1992 vacation selection process shall be conducted pursuant to the following guidelines.

In selecting vacations, District Commanders shall ensure that;

- 1) the Standard Operating Procedures are followed;
- 2) there shall be no moving of a member's regular off days as defined by their off group except for an authorized body-for-body trade that covers the time period affected by the move;

- 3) there shall be a limit on the number of personnel that may be off at any one time on vacation or compensatory off. The 1992 goals are:
- a) a total of 11% off on the day shift;
  - b) a total of 9% off on the early shift;
  - c) a total of 9% off on the power shift;
  - d) a total of 8% off on the late shift.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

The City of Milwaukee, its officers and agents, had no duty to bargain within the meaning of Sec. 111.70(1)(a), Stats., with respect to the vacation selection memos issued by Inspector Harker in 1991 and 1992 because provisions relating to vacations are included in the collective bargaining agreement between the parties which constitutes a waiver of bargaining, and therefore, the City, Chief Arreola and Inspector Harker did not commit prohibited practices in violation of Secs. 111.70(3)(a)1 and 4, Stats.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER 1/

The Milwaukee Police Association's complaint of prohibited practices be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 30th day of November, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/  
Lionel L. Crowley, Examiner

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1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of

the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

**This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).**  
CITY OF MILWAUKEE (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

In its complaint initiating these proceedings, the MPA alleged that the City, Chief Arreola and Inspector Harker violated Secs. 111.70(3)(a)1 and 4, Stats., by establishing the number of personnel that could be off at any one time on vacation or compensatory time without bargaining this aspect of vacation selection with the MPA. The Respondents answered the complaint denying that it had committed any prohibited practices.

MPA's Position

The MPA contends that reducing the number of employees permitted to take vacation or compensatory time is a mandatory subject of bargaining, not waived by the contract. The MPA argues that the number of employees permitted to take such time off is primarily related to wages, hours and conditions of employment rather than the establishment of law enforcement policy. It submits the City's alleged need for more employees during the summer can be accomplished by overtime or other incentives rather than limiting vacation and compensatory time. It claims that limiting the number of employees off at the same time on vacation or compensatory time directly affects those employees' vacation plans and summer vacations which are most desirable might be lost by certain employees. It concludes that the limitations on percentages is a mandatory subject of bargaining.

The MPA maintains it did not waive its right to bargain over the vacation changes. It cites the Cerull award by arbitrator Kerkman that although the contract gives the Chief the authority to assign and schedule vacation, it is appropriate to consider past practice in defining that authority. It argues that the Chief had developed a past practice to define his authority and assign and schedule vacation and this practice limited his authority to modify it without bargaining. It notes that Article 15 defines the procedure for taking compensatory time and the Chief's attempt to limit it may conflict with the Fair Labor Standards Act. It asserts that the definition of "in accordance with the needs of the service" has been provided by the practice before Harker's memos and cannot be modified without bargaining.

The MPA contends that prohibiting an employee from moving his off day except for a body-for-body trade is a mandatory subject of bargaining not waived by the contract. The MPA argues that the question of when days off are taken is primarily related to hours and conditions of employment. It further claims that the practice of police officers being able to move off-days, provided a definition of the Chief's authority to schedule and assign vacation and this cannot be changed without bargaining.

The MPA requests a cease and desist order from implementing the vacation selection memos until bargaining has been completed.

### City's Position

The City contends that the Police Chief has the unfettered management right to assign and schedule vacations. It points out that Section 11 of Article 28 is clear and unambiguous, providing as follows:

"The assignment and scheduling of vacations with pay shall be controlled by the Chief of Police (Emphasis added)."

It submits that Harker's memos are the exercise of the Chief's authority and control vested in him by the contract. It asserts that the exercise of authority granted by the contract is not a prohibited practice.

The City argues that a change in the vacation selection finalization date would require an amendment to Section 8 of the SOP's related to absence and the parties negotiated under the contract but no change was made, ergo, no prohibited practice. Additionally, the City points out this matter was referred to the FPC where it is still languishing.

The City claims that personnel staffing levels are a permissive subject of bargaining. It notes the memos provide that vacation shall be preceded by regular off days which is the rule but the rule was not being followed, resulting in short staffing because of the overlap of vacations. The City insists that summertime staffing levels and the level of service to be provided remains within the total purview of the City and is a permissive subject of bargaining. The City requests that the complaint be dismissed.

### DISCUSSION

Vacations and vacation scheduling primarily relate to wages, hours and conditions of employment and are mandatory subjects of bargaining. Additionally, hours of work is a mandatory subject of bargaining. A municipal employer has a duty to bargain collectively with the representative of its employees with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or where bargaining on such matters has been clearly and unmistakably waived. 2/ Where a collective bargaining agreement exists which expressly addresses a subject, it determines the rights of the parties' and consequences of certain actions, 3/ but determinations as to whether or not a waiver exists are made on a case-by-case basis. 4/

Article 28, Section 11 provides that the assignment and scheduling of vacations with pay shall be controlled by the Chief of Police. 5/ The memos by Inspector Harker come within the ambit of this provision with respect to the

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2/ City of Richland Center, Dec. Nos. 22912-A, B (Schiavoni, 1/86) (WERC, 8/86).

3/ Racine Unified School District, Dec. No. 18848-A (WERC, 6/82); Janesville School District, Dec. No. 15590-A (Davis, 1/78); and City of Richland Center, supra.

4/ Racine Unified School District, Dec. No. 13957-C (WERC, 1/83); City of Richland Center, supra.

5/ Ex. 1.

number of individuals that can be on vacation at the same time. 6/ It must be concluded that Article 28, Section 11 operates as a contractual waiver of the MPA's right to bargain over the scheduling of vacation and the City need not bargain on vacations during the term of the contract. The MPA's argument that the Chief's past action under Article 28, Section 11 creates a past practice and any change in it requires bargain is misplaced. The evidence failed to establish any past practice. Additionally, the language of Article 28, Section 11 is clear that the assignment and scheduling of vacation is controlled by the Chief. How the City exercises this control does not create a binding past practice. A binding past practice must be the result of an agreement or mutual understanding. A non-binding past practice is merely the unilateral decision by the Chief to exercise his rights in a certain way over a long period of time but this is always subject to unilateral change by the Chief. This principle was stated quite succinctly by Umpire Shulman in Ford Motor Co. 7/ as follows:

A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. . . .A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.

But there are other practices which are not the result of joint determination at all. They may be . . .choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. . . . Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.

Therefore, the Chief's past actions did not bind him and he was free to change them in the future without creating any obligation to bargain because the MPA had waived its right to bargain by the terms of the contract.

The MPA's reliance on the Cerull 8/ case is misplaced. In that case, the arbitrator recognized that the Chief had the authority to determine how vacations shall be assigned and scheduled. The issue in Cerull was how seniority was interpreted under the Chief's rules and the arbitrator resorted to past practice to give meaning to this ambiguous term. This is different in determining that past practice limited the Chief's contractual authority such that bargaining a change in past practice was required. Also, the instant case involves mid-term bargaining over a matter covered by the contract as opposed to an arbitrator determining the meaning of the terms of the contract.

Article 5, Section 5 provides that the City shall determine work schedules and Section 2 provides it has the sole right to authorize tradeoffs of work assignments. Clearly, the MPA has waived bargaining of the requirement that off days preceding a vacation must be regular off days except for an authorized body-for-body trade. The above language in the contract clearly

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6/ Ex. 16-17.

7/ 19 LA 237, 241 (1952).

8/ Ex. 18.

applies to off days and body-for-body trades and the same rationale with respect to MPA's past practice arguments are applicable to this language.

In short, the MPA has waived bargaining over this subject by the express language of the contract. Any alleged violation of the contract must be pursued through the contractual grievance procedure. Similarly, any alleged violation of the Fair Labor Standards Act with respect to compensatory time must be pursued through the appropriate federal agency.

Although there was testimony and exhibits with respect to the Chief's request to change the vacation finalization date and a proposal for a two-tier vacation selection process, the evidence indicates that no action has been taken on these issues and no change has been made. MPA argued that the Chief accomplished the same result by the Harker memos, and even if that is true, the action taken by the Chief via Harker's memos was in accord with the contract and it cannot be concluded that action permitted under the contract is improper merely because the alleged result reached by other means might be a prohibited practice. Although the result in this case parallels the result which might occur under other circumstances, such a result did not create a prohibited practice in this case.

The Chief, by Inspector Harker's memos, had no obligation to bargain with the MPA as the memos were in accord with the language embodied in the party's

agreement and the MPA waived bargaining by this express language. Therefore, no violation of Secs. 111.70(3)(a) 1 and 4, Stats., occurred when the memos were issued without any bargaining with the MPA.

Dated at Madison, Wisconsin this 30th day of November, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/  
Lionel L. Crowley, Examiner