

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 ONEIDA COUNTY DEPUTY SHERIFFS :
 ASSOCIATION :
 :
 : Case 71
 : No. 44275
 and : MA-6233
 :
 ONEIDA COUNTY :
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Appearances:

Wisconsin Professional Police Association/Law Enforcement Employee Relations Di
 the Union.
Mr. Lawrence R. Heath, Corporation Counsel, appearing on behalf of the County

ARBITRATION AWARD

The Employer and Union above are parties to a 1989 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed by Deputy James Moyer, concerning the County's refusal to allow him to use up his vacation prior to his retirement.

The undersigned was appointed, but the parties stipulated to the facts and no hearing was held. Briefs were filed by both parties, a reply brief was filed by the County, and the record was closed on November 19, 1991.

STIPULATED ISSUES:

1. Did the Employer violate the collective bargaining agreement by denying Deputy James Moyer use of vacation prior to retirement?
2. If so, what should the remedy be?

RELEVANT CONTRACTUAL PROVISIONS:

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ARTICLE II - MANAGEMENT RIGHTS

The County possesses the sole right to operate the County government and all management rights repose in it, but such rights must be exercised consistently within the Rules and Regulations of the County Civil Service Commission and in conjunction with the State laws regulating the operation of the Sheriff's Department under the duly elected Sheriff. These rights which are normally exercised, but are not limited to the following.

1. To direct all operations of the Oneida County Sheriff's Department.
2. To hire, promote, transfer, assign and retain officers in positions with the County and to

suspend, demote, discharge, and take other disciplinary action, provided with just cause, against employees pursuant to the authority and under the rules and regulations of Oneida County (all provisions of Section 2.21(6) of the General Code of Oneida County shall control over provisions of this Agreement whenever a deputy is faced with the possibility of suspension, demotion, or dismissed or other disciplinary action as the result of alleged offenses or misconduct as set forth in said Section 2.21(6) of the General Code of Oneida County).

3. To relieve employees from their duties because of lack of work or for other legitimate reasons.

4. To maintain efficiency of County government operation entrusted to it and to introduce new or improved methods or facilities and to change existing methods or facilities.

5. To contract out for goods or services.

6. To determine the methods, means and personnel by which such operations are to be conducted.

7. To take whatever action which may be necessary to carry out the functions of the County in situations of emergency.

8. To take whatever action is necessary to comply with State or Federal law.

The Association and the employees agree that they will not attempt to abridge these management rights and the County agrees it will not use these management rights to interfere with rights established under this Agreement. The Union does not divest itself or its' rights under Chapter 111 of the Wisconsin Statutes.

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ARTICLE IV - GRIEVANCE PROCEDURE

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Step 3. (b) Arbitration Hearing: The arbitration board so appointed shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitration board shall render a written decision to both the County and the Association, which shall be binding upon both parties.

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(d) Authority of Arbitrator: The decision of the arbitration board shall be limited to the subject matter of the grievance and shall be restricted solely

to the interpretation of the terms of this contract.

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Section 4.04 - Special Notes for New Facts: If the grievance has been processed beyond Section 4.02, Step 1 and the grievant wishes to add new facts or information into the file, he shall immediately transmit notice to the Sheriff and shall indicate in said notice the nature and details of the new facts. When such notice has been transmitted by the grievant, the grievance cannot progress through the arbitration procedures until the Sheriff has had an opportunity to respond. Within five (5) days of receipt of such special notice, the Sheriff shall exercise one of the following options:

(a) He may re-open the proceedings at Section 4.02, Step 1 for the purpose of reconsidering the Step 1 decision.

(b) He may acknowledge receipt of the facts and stipulate that the grievance proceed.

Section 4.05 - Adjustments from Grievance Conferences: Any adjustments resulting from the grievance conference under this provision shall not be inconsistent with the terms of this Agreement.

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ARTICLE VIII - HOURS OF WORK

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Section 8.02 - Shift Schedule: The shifts are to be scheduled in the following manner (excluding day shift sergeant, investigator and clerk/matron):

First shift from 7:00 a.m. to 3:00 p.m.

Second shift from 3:00 p.m. to 11:00 p.m.

Third shift from 11:00 p.m. to 7:00 a.m.

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ARTICLE IX - OVERTIME

Section 9.01 - Overtime Computed: Employees who are required to work in excess of the scheduled work day or work week (excluding the Sheriff and Chief Deputy) shall be paid time and one-half (1 1/2). Any excess time worked over the scheduled work day or work week shall be compensated by either paid time and one half (1 1/2) or compensatory time off at time and one-half (1 1/2) at the employee's discretion. The hourly rate is to be computed by taking twelve (12) times the monthly salary, divided by 2080 (hours per year) rounded off to the nearest \$.01. Time and one-half (1 1/2) payment shall be rendered to the employee no later than the last pay period of the following month.

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Section 9.07 - Compliance with Fair Labor Standards Act: The Association recognizes the County has elected to comply with the Fair Labor Standards Act for hours worked in excess of 171 hours during each 28-day cycle.

ARTICLE X - HOLIDAYS

Section 10.01 - Holidays: Each employee (excluding the Sheriff and Chief Deputy) shall be allowed nine (9) paid holidays as follows: New Year's Day, Easter Sunday, Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas Day, December 24th and Good Friday. In addition to the above scheduled nine (9) holidays, each employee shall receive a floating holiday, to be available after the employee has completed his or her initial probationary period. In the event the employee is required to work on these holidays, he shall be given extra compensation of one (1) days pay, eight (8) hours, plus one (1) day off. For the purpose of this section, if the holiday falls on the employee's regular time off, or during his vacation, the employee shall receive an extra day off. Pay vouchers are to be submitted no later than the end of the month worked, approved by the Sheriff and the Law Enforcement Committee. The holidays shall be considered from 11:00 p.m. of the day before the holiday to 11:00 p.m. of the holiday itself.

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ARTICLE XI - VACATIONS

Section 11.02 - Vacation Week Definition: The vacation period shall be any time during the calendar year and may be staggered to prevent disruption of normal service. A week's vacation shall be considered six (6) working days.

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FACTS:

As noted above, the facts are not disputed (though, for reasons discussed below, they have been subject to some degree of confusion). Deputy Sheriff James Moyer anticipated retirement in October, 1989. On October 4, 1989 he applied for time off, to use up his accumulated time so that he could end his reporting for work on October 11, but remain in pay status through October 30.

On October 6, Moyer was advised by Chief Deputy Jack Bergman that this request was denied. Bergman's note says in relevant part: "Department policy has always been one person off on vacation, etc. at a time, barring some urgency. . . your accumulated hours of C.T. can be paid to you in full"

Moyer took the matter up with the Sheriff, Charles Crofoot, but on October 10 Crofoot confirmed that the County would refuse to allow Moyer to take his compensatory time while still on the payroll. Crofoot stated that Moyer's last day of work was to be October 11, with the compensatory time to be paid out in a lump sum after that, but also offered to let Moyer continue to work until October 30 if he so chose. Moyer continued to work until October 26. A letter from personnel director Carey Jackson confirmed that his

employment would terminate that day and that he would then receive a final check covering payment for wages, unused compensatory time and any unused holiday hours. On December 14, 1989, Moyer was issued a final check for compensatory time, but this did not include any payment for vacation. On December 29, 1989, the Association filed a grievance over the denial of vacation time off. In its brief, however, the Union made plain that it was not seeking any monetary remedy for this grievance, while in its reply brief, the County (without objection from the Union) offered an affidavit from personnel director Carey Jackson to the effect that Moyer had used up all of the vacation and holiday days due him for 1989 prior to the date he announced his retirement.

THE ASSOCIATION'S POSITION:

The Association contends that the contractual language in the 1989 Agreement does not permit management to tell an employe when to use his or her personal time. The Association argues that with respect to vacation time off, the contract merely refers to accumulation of time off, a definition of vacation week and general language concerning cook/clerk/matron. This demonstrates that the chief is acting beyond his authority when he orders that vacation be granted to only one person at a time. As to compensatory time, the contract grants time and half reimbursement for overtime worked, but places no limitation on when an employe chooses to use it. The Association argues that since there is no language denying or limiting the use of earned time off by the employe, the Arbitrator is restricted to interpretation of the terms of the contract, and only such limitations as are dictated by the unusual circumstances of the law enforcement profession are tolerable. The Association notes that the Employer's agents, in their letters denying Moyer's request, did not claim that any unusual circumstance was occurring which would require him not to be granted the time. The Association further argues that the County cannot rely on the management rights clause to buttress an argument of reasonable conduct, because the vacation and compensatory time clauses are specifically geared to the benefits in dispute, and take precedence over the management rights clause to the extent that these clauses could be read to disagree.

The Association, as noted above, does not request a monetary remedy, but requests that the Arbitrator order the County to cease and desist from unnecessarily denying the use of personal time off.

THE COUNTY'S POSITION:

The County argues that on its face Article XI, Section 11.02 provides that the vacation period "shall be any time during the calendar year and may be staggered to prevent disruption of normal service". The Employer contends that this language does not restrict the County from determining that a vacation request needs to be staggered to prevent disruption of normal service. In this instance, the grievant's request for vacation was disapproved based on a standing rule that only one employe be allowed off on vacation, etc. at a time. The County argues that there is no evidence that the County acted in an arbitrary or unreasonable manner, and the grievant was paid in lieu of his vacation pay. In its reply brief the County makes additional arguments. First, as noted above, the County submitted additional evidence to the effect that the grievant had received all of his vacation earlier, such that what was really in dispute was compensatory time rather than vacation or holiday time. In addition, the County clarifies its position as to the past practice in its reply brief by stating that what "one person is allowed off" means is that "not more than one employe in a given classification in a given shift is allowed off at a time". The County argues, in connection with this, that the Association's position, if adopted, would result in the entire 30-plus

complement of employes being able to take vacation on the same day at their option, a clearly absurd result. Finally, the County argues in its reply brief that the grievance is untimely and should be dismissed on that basis, contending that the grievance was originally filed at least 64 days after the employe "was aware of cause for the grievance" within the meaning of Section 4.02 of the Agreement.

The County requests that the grievance be denied.

DISCUSSION:

Initially, I must note that the timeliness argument cannot be properly raised by the County at this stage. While corporation counsel Heath notes in his reply brief that he first identified this as an issue in his grievance denial letter dated March 9, 1990, it is clear that the parties have here stipulated to the issue. That issue was defined in terms of the merits of the grievance only. The Employer having thus abandoned its earlier claim of untimeliness, it is too late in a reply brief to resurrect it.

The presentation of facts in this case has been somewhat out of the ordinary, because of the fact that no hearing was held, the parties agreed that the facts were not in dispute, and the Employer subsequently introduced an affidavit purporting to show that the grievant had in fact received all of the vacation time which the grievance was nominally about, before the grievance even arose. The Union has not objected to this affidavit, and inasmuch as the parties have presented all of the facts in this matter on a basis of mutual agreement, I take it that the affidavit represents a mutually accepted clarification of the situation.

Even without the affidavit, however, the facts as presented in this case would persuade me that the grievance was without merit. The Union's argument that there is no limiting language governing an employe's use of vacation at will is simply wrong. Article 11.02 does, as the Employer argues, allow the Employer to stagger vacations to "prevent disruption of normal service". In a department of 30-some employes, with multiple job classifications and shifts, the Employer's [clarified] position that one employe per shift per job classification may be allowed vacation at a time appears reasonable on its face, and the Union has not offered to prove that more employes per shift per job classification could be let off without disrupting normal service. I note in this context that the salary schedule appended to the 1989 collective bargaining agreement identifies seven different job classifications within this bargaining unit, and that the Sheriff's Department is a round-the-clock operation according to Section 8.02. While a rule of "one employee off at a time" would be highly restrictive in a department this size, the County's rule as clarified would actually allow quite a number of employes to be absent simultaneously.

Accepting the affidavit leads to the same result. The use of compensatory time on a particular date may not be expressly limited by any provision of the Agreement, but neither is it guaranteed by any. In such a situation, the use of such time would normally be expected to fall within items 1 and 4 of the management rights clause, which give management the right to direct operations and to maintain efficiency. An implied limitation often found by arbitrators is that such rights may not be exercised in an arbitrary, capricious or discriminatory manner; but the situation here is far from presenting evidence that management has thus abused its prerogatives. All that is in the record is to the effect that the County treated Moyer's request for this kind of time off in the same way as if it had been vacation. Inasmuch as the same truths continue to apply concerning the size of the department and the distribution of employes among numerous shifts and classifications, the Union's argument amounts again to a claim that employes be allowed to come and go as they please in any numbers. While I can envision a case in which the County might violate the lintent of this language by the restriction it has imposed, there are simply no facts in this record to demonstrate that the "one person per classification per shift" rule was arbitrary, capricious or discriminatory as applied to this instance. Meanwhile, of course, there was relatively little hardship to the grievant, since he was paid the cash equivalent of the time involved.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the County did not violate the collective bargaining agreement by denying Deputy Moyer's request for time off in October, 1989.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 8th day of January, 1992.

By _____
Christopher Honeyman, Arbitrator