BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION	Case 50 No. 47969 MA-7451
and	
CITY OF DEPERE	

Appearances:

Mr. Edward F. VanderBloomen, Jr., Business Agent, appearing on behalf of the WPPA/LEER Division.

Mr. James M. Kalny, City Attorney, City of DePere, appearing on behalf of the City of DePere.

ARBITRATION AWARD

The Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereinafter referred to as the Association, and the City of DePere, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Association made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the parties' agreement. The undersigned was so designated. Hearing was held in DePere, Wisconsin on October 21, 1992. The hearing was not transcribed and the parties submitted post-hearing briefs on November 25, 1992. The parties retained the right to file reply briefs within 10 days of their briefs. The City submitted a reply brief on December 7, 1992, and the record was then closed.

BACKGROUND

The basic facts underlying the instant grievance are not in dispute. On June 18, 1992, Debbie Zierson, a Police Department Telecommunicator, submitted a vacation request seeking to take vacation from 1:00 p.m. to 3:00 p.m. on June 20, 1992. Her supervisor, Captain Peters, denied the vacation request citing the reason for the denial: "Needs of the Department." On June 25, 1992, a grievance was filed over the denial of the vacation request and processed to the instant arbitration.

ISSUE:

Did the City violate the terms and conditions of the Agreement when it denied the grievant's request for vacation time off? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 3

Management Rights

The Association recognizes that, except as otherwise provided in this Agreement or as may affect the wages, hours, and working conditions of the members of the Association, the management of the City and its business and the direction of its work force is vested exclusively in the Employer in that all powers, rights, authority, duties, and responsibilities which the City had prior to the execution of this Agreement customarily executed by management or conferred upon and vested in it by applicable rules, regulations and laws, and not the subject of collective bargaining under Wisconsin law, are hereby retained. Such rights include, but are not limited to, the following:

a. To direct and supervise the work of its employees;

b. To hire, promote, and transfer employees;

c. To lay off employees for lack of funds or other legitimate reasons;

d. To discipline or discharge employees for just cause;

e. To plan, direct, and control operations;

f. To determine the amount and quality of work needed;

g. To determine to what extent any process, service or activity shall be added, modified or eliminated;

h. To introduce new or improved methods or facilities;

i. To schedule the hours of work;

j. To assign duties;

k. To issue and amend reasonable work rules;

l. To require the working of overtime hours when necessary in the performance of City business.

. . .

ARTICLE 23

Vacations

Employees earning wages for hours actually worked or receiving wages for approved leave for no less than 80 hours during any calendar month shall earn vacation with pay according to the following schedule.

January 1st is to be used as the anniversary date in determining vacation benefits. Employees hired during mid-year shall accrue a proportional part of vacation benefits during the second year for each month of employment up to January 1st of the subsequent year. If the hiral date of the new employee was on, or prior to the 15th day of the month, a full month benefit will be granted, and if the hiral date was after the 15th of the month, the benefits will accrue beginning with the 1st day of the following month. In determining vacation benefits after two (2) full years of employment, January 1st of the hiral year will be used for those employees with a hiral date occurring during the first six (6) months of a calendar year, and January 1st of the subsequent year for those employees with a hiral date during the last six (6) months.

(a) One (1) workweek (5 days) (6 days for employees on a 6-on 3-off schedule) after one (1) year of employment.

(b) Two (2) workweeks (10 days) (12 days for employees on a 6-on 3-off schedule) after two (2) years of employment.

(c) Three (3) workweeks (15 days) (18 days for employees on a 6-on 3-off schedule) after seven (7) years of employment.

(d) Four (4) workweeks (20 days) (24 days for employees on a 6-on 3-off schedule) after sixteen (16) years of employment.

(e) Five (5) workweeks (25 days) (30 days for employees on a 6-on 3-off schedule) after twenty-five (25) years of employment.

Personnal (sic) desiring vacation shall submit requests for leave to the Division Head or Supervisor, who, in turn, shall forward such request to the Payroll Department for proper record keeping. The Division Head or Supervisor shall schedule vacations, giving due consideration to seniority rights, the needs of the service, and the remaining staff to perform the necessary duties of the Division. A vacation schedule shall be posted at each Division quarters on or before the 15th day of May. An employee on scheduled vacation leave is nonetheless eligible for call-in procedures.

Vacation leave shall not be accumulative. The Division Head or Supervisor, with approval of the City Administrator, may allow earned vacation to accumulate when it is for the best interests of the Employer. Only upon approval of the Division Head or Supervisor and the City Administrator will employees be permitted to be absent from duty due to vacation for any one period which would exceed the amount of vacation time earned during the prior year.

Absence on account of sickness, injury or disability in excess of that hereinafter authorized for such purposes may, at the request of the employee and within the discretion of the Division Head or Supervisor, be charged against vacation leave.

Police Department telecommunicators shall schedule all vacation in increments of one (1) week, except employees who are entitled to more than one (1) week of vacation may take one of those weeks in increments of less than an entire workweek.

ASSOCIATION'S POSITION

The Association contends that the instant grievance involves an interpretation of the language of the contract in addition to a long standing past practice with respect to requests for vacation time off. It points out that telecommunicators entitled to more than one week of vacation can take off one week in increments of less than a week. It submits that Zierson desires to continue the practice of having vacation requests reasonably approved as has occurred in the past. The Association notes that Captain Peters' predecessor, Lieutenant Suttner, routinely approved vacation requests similar to Zierson's whether it involved paying overtime to another regular telecommunicator or not. It submits that Captain Peters denied Zierson's vacation request based on the "needs of the department," but the sole reason was that the City would have had to pay another full-time telecommunicator overtime because no part-time telecommunicators were available. The Association asserts that the consistent past practice over a long period of time has been to approve such requests. It refers to Shelly Nackers' testimony that her vacation requests were routinely approved since 1984 and Linda Gamerdinger's testimony that her requests were approved even where overtime liability for the City was generated. The Association claims that it is not seeking to encumber the City from exercising its right to manage the department but that does not require the employes to waive their rights under the collective bargaining agreement. It maintains that the denial of Zierson's vacation request went beyond the "needs of the department" because it was solely to avoid overtime liability and this was contrary to the well established past practice of granting requests even if it meant paying overtime. It submits that the evidence established that although no part-time telecommunicators were available, qualified full-time employes were available, so the "needs of the department" was not a valid basis to deny the vacation request. With respect to remedy, the Association asks for a cease and desist order and that the City be directed to follow the past practice of allowing time off when qualified replacements are available.

CITY'S POSITION

The City contends that the collective bargaining agreement as well as

supporting documents clearly demonstrate that discretion is vested in the City in regard to vacation scheduling. It points to Article 3 of the Agreement as reserving to the City the right to control operations and schedule hours of work. It refers to an August 4, 1987 letter/agreement between the parties wherein it is stated, in part, "that not every request for vacation leave in increments of less than one full workweek is guaranteed to be approved by the employer and that affected employees recognize the discretionary aspect of granting such requests."

The City relies on work rules enacted in November, 1988, particularly, paragraph 6, Sections E and F and paragraph 7. Sections E and F of paragraph 6 provide:

> E) At least 48 hours notice must be given when vacation dates are to be moved when it involved (sic) other people.
>
> F) When changing vacation days they will be considered as overtime off requests and will carry no weight over other off time requested submitted earlier.

It submits that the Association recognized these requirements as Nackers testified she was denied vacation requests that she submitted with less than 48 hours notice as evidenced by Exhibits 7 and 8. It further argues that under paragraph F. overtime off requests are generally denied if the request results in overtime, which is the factual basis for the instant grievance.

The City also cites Section 7, which states:

> 7. All vacation vouchers will be approved by the Chief of Police or his designee after giving due consideration to the needs of the department.

The City maintains that the Association has the burden of demonstrating that the provisions of Exhibit 6 should be ignored and that the City has agreed to relinquish its discretion in regard to short term vacation scheduling.

The City submits that where the contractual language is clear, custom and practice cannot be used to amend the clear language. The City submits that paragraph 6(F) and paragraph 7 are clear, and past practice cannot be used to deter the City's rights to use those provisions in the future. It argues that the Association's evidence of past practice precedes Exhibits 6 and 15 and the other documents show that more than five days notice was given and so they prove nothing. It insists that no established policy has been shown to exist with respect to short term vacation requests but everyone was aware of the City's concern with overtime and its role in the hiring of two part-time employes. The City argues that in 1990, the parties signed a tentative agreement requiring five-days notice to change vacation schedules, so the 48 hour notice was not a clearly established procedure.

The City insists that it has not given up any managerial discretion through past practice because all that has been shown is how Lieutenant Suttner exercised his discretion and there is no contractual provision changing the City's right to exercise its discretion, and without such a provision, there is no waiver of the exercise of the City's discretion. The City states this in a different way by arguing that the past practice of not exercising a managerial prerogative cannot be viewed as limiting the exercise of it in the future.

The City argues that past practice cannot alter clear contract language

and the exercise of management discretion over a long period of time is always subject to change in the absence of a mutual understanding between the parties. It submits that these two rationales favor the City's position.

In reply, the City submits that the Union's assertion that the City's sole reason for denying Zierson's vacation request was to avoid overtime has not been shown to be the sole reason and the City's principal argument is that it was simply acting in accordance with the procedures agreed upon by the parties. It claims that scheduling procedures agreed upon by the parties and the contractual language are ignored in arguments by the Association. The City also takes issue with the Association's assertion that the City has routinely granted vacation where the exhibits of requests granted show a minimum of four days notice and do not support any expectation of vacation approval on two days notice. The City also contends that "needs of the department" should be broadly read because 48 hours is a short time to notify a part-time employe to change his/her schedule and reduction of overtime is also an important consideration. It maintains that where the City has provided a sound and just rationale for the exercise of its discretion and there is no clear divesture of that discretion, the City's decision should not be overturned.

DISCUSSION

Article 23 of the parties' agreement provides, in part, that telecommunicators who are entitled to more than one (1) week of vacation may take one of those weeks in increments of less than an entire workweek. Article 23 also provides that the Division head or Supervisor shall schedule vacations, giving due consideration to seniority rights, the needs of the service, and the remaining staff to perform the necessary duties of the Division. As Article 23 must be read as a whole, it follows that the City retained discretion to schedule all vacation including increments of less than one week. It is additionally noted that Article 23 states that only one (1) week may be taken in less than one (1) week increments, yet the parties agreed to modify this by a letter dated August 24, 1987 which allowed more than the one (1) week of vacation to be taken in smaller increments with the following reservation stated by the City representative and agreed to by the Association representative:

> I assume that it is recognized and acknowledged that not every request for vacation leave in increments of less than one full workweek is guaranteed to be approved by the employer and that the affected employes recognize the discretionary aspect of granting such requests as detailed above. 1/

Additionally, the City reserved the right to schedule the hours of work under Article 3 of the collective bargaining agreement.

The Association argues that there is a past practice of never denying vacation even if it meant paying overtime and the grievant's request in this case was denied solely because it involved overtime and this was contrary to the past practice and thus violated the agreement as modified by this past practice.

There are a number of problems with the Union's argument. First, past practice cannot be used to vary the express terms of the collective bargaining

1/ Ex-4.

agreement. 2/ Past practice may be used to clarify ambiguous language. The collective bargaining agreement is not ambiguous but reserves to the City the right to deny vacations.

Secondly, a past practice is not established by the exercise of a management right in a certain way. In City of Gainesville, Florida, 3/ the arbitrator, addressing the approval of short term vacations, stated the following:

> "Whether or not the 'past practice' (of not depriving unit employes of short-term vacations) should be shown by parol (extrinsic) evidence to vary the contract's language remains to be decided. In short, has this agreement been amended or vitiated by the Chief's never before depriving an employe of a short-term vacation.
>
> Restated, has the Chief 'waived' his right to not approve that vacation? To answer that he is estopped from exerting that right would be akin to saying no authority figure could enforce a law strictly after being lax for a period of time. This negative inference raised in the union's argument is interesting, but not persuasive."
>
> . . .
>
> "Any other conclusion based upon the Union's ingenious argument, would encourage all sorts of grievances whenever the City might choose to more strictly apply its reserved management rights after a period of laxity or paternalistic leniency."

Likewise in the instant case, a past practice of leniency or laxity with respect to allowing short-term vacation does not become a binding past practice on the City's retained right to exercise its discretion.

Thirdly, in 1989, the City changed the staffing of the Communication Center from five full-time telecommunicators to four full-time and two part-time telecommunicators. 4/ The reason for this was to reduce overtime costs and to relieve the stress on staff members who had to work more than a regular work day/week. With five full-time telecommunicators, it is very likely that vacation increments of less than one week would result in overtime. Thus, the past practice of approving vacation with resulting overtime was the result of a different staffing pattern and may not be a practice at all. Since the new staffing pattern came into existence, the old "practice" if there was one, no longer exists because the conditions giving rise to the old "practice" no longer exist. Arbitrators have held that once the conditions upon which a past practice have been based no longer exist, the practice may no longer be given effect. 5/

2/ Elkouri & Elkouri, How Arbitration Works (4th Ed., 1985) at 454-455.

3/ 82 LA 825 (Hall, 1984).

4/ Ex-13.

5/ Elkouri & Elkouri How Arbitration Works (4th Ed., 1985) at 447.

Based on the above discussion, the undersigned is not persuaded that there was a binding past practice that the City violated by not approving the grievant's vacation. The alleged past practice contradicts contract language rather than clarifies ambiguous language, it appears to be the result of the past exercise of management discretion in a certain way which could be changed at its discretion and the conditions underlying it no longer exist. Therefore, the City did not violate the agreement by denying the grievant's request for vacation time off on June 20, 1992.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievance is denied in all respects.

Dated at Madison, Wisconsin this 20th day of January, 1993.

By _____
Lionel L. Crowley, Arbitrator