BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 875 and CITY OF ASHLAND	Case 62 No. 48624 MA-7658

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Appearances:

Mr. James Morzenti, Union Steward, 990 West Third Street, Ashland, Wisconsin, appearing on behalf of the Association.

Mr. Scott W. Clark, Clark & Clark, 214 West Main Street, Ashland, Wisconsin, appearing on behalf of the City.

ARBITRATION AWARD

International Association of Fire Fighters Local 875, "the Association," and the City of Ashland, "the City," are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance concerning the accumulation and accounting of sick leave. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Ashland, Wisconsin, on April 29, 1993. The parties waived their right to file written briefs.

ISSUE

> Did the City violate Section 13.04 of the collective bargaining agreement when it denied authorization for an additional day of accumulated sick leave for Capt. Nick Rouskey for the month of September, 1992?
>
> If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE XIII -- SICK LEAVE

. . .

13.04 Employees shall be entitled to one (1) day per month, accumulative to seventy-five (75) days starting with the first day of employment, for sick leave with pay. Up to an additional thirty (30) days may be given at one-half (1/2) of present rate of pay with the approval of the Common Council. The City may require a doctor's certificate for a claimed illness after the third consecutive work day.

13.05 For those who have reached a maximum accumulation of sick leave, an additional day of leave will be granted per year and may be taken at the employee's discretion, provided, however, that the Chief is given forty-eight (48) hours advanced notice.

. . .

BACKGROUND

Prior to August, 1992, the City implemented Section 13.04 by first deducting from an employe's bank any sick leave used that month, then adding the additional one day. In August, 1992, Chief Keith Tveit reversed the process, changing the accounting system so that employes were first credited with their additional day (if they were eligible under the cap), and then were docked days used. This resulted in employes who began a month at 75 accumulated days (the accumulation maximum) not being credited with an additional day, regardless of the number of days utilized that month. Throughout this period, the City administered Section 13.05 by granting one additional day of leave for employes who were at the 75-day cap as of December 31.

Capt. Nick Rouskey called in sick on September 13, 1992, at a time when he had 75 days of accumulated sick leave. According to the sick leave roster published on October 5, 1992, Rouskey was credited with 74 days accumulated sick leave as of October 1, 1992.

POSITIONS OF THE PARTIES

The Association asserts that established practice supports its interpretation of Sec. 13.04 as providing for an employe who is at the 75-day cap to receive, but not accumulate, sick leave each month. It adds that the City's action unfairly deprived Rouskey of a day of accumulated leave, which it should restore by placing him at 75 days accumulated leave as of October 1, 1992.

The City asserts that there is nothing in the text of Sec. 13.04 to indicate that an employe would continue to earn sick leave once reaching the 75-day cap. The City also asserts that

Sec. 13.05 was part of a quid pro quo, under which the City provided for the new floating day for employes who ended the year at the maximum, while the Association accepted new language in Sec. 13.04 which would prevent those at the cap from both using and accruing an added day each month.

DISCUSSION

The language of Section 13.04, while apparently straight-forward, is open to interpretation as to its administration. To the extent that there is a past practice, such experience can shed light on the proper application of this provision,

For close to 40 years, the accepted understanding in American labor arbitration has been that, for a past practice to be binding on the parties, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time. Justin, Celanese Corporation of America, 24 LA 168, 172.

Those terms are here met. The Fire Chief's testimony that he "made a change in the accounting system" in August, 1992, is tantamount to a declaration that the prior system was as the Association described it. Under that system, again as testified to by the Chief, the first accounting was to deduct sick leave utilized, and then credit an eligible employe's account with the added day earned. This meant that employes who began the prior month at the 75 day cap could still receive another day for the ensuring month, if they had used a day in the interval. The system imposed by the Chief in August, 1992 reversed this process, and began with the credit for those eligible, and only then deducted used time. Thus, employes who began the prior month at the cap could not receive further credit, even if they used sick leave in the interval, for at least another month.

The City contends that this interpretation brings Sec. 13.04 into line with the provisions of Sec. 13.05, which provides a day's floating holiday for those who finish the year at the cap. The City also states that its new interpretation of Sec. 13.04 is needed to avoid sick leave abuse.

It is clear that Sec. 13.05 provides a benefit for those employes who finish the calendar year at the 75-day cap. What is not clear is the bargaining history; the hearing record falls short of supporting the assertion that there was a specific quid pro quo involving these two provisions.

I also reject the notion that sustaining this grievance will lead to sick leave abuse. The employes should, and I assume do, know that sick leave abuse is a serious matter, one which raises

the prospect of meaningful discipline. If the employer believes

that its employes are claiming sick leave at times they are not legitimately entitled to do so, it already has the means to address such concerns.

Further, a clear and timely renunciation of a past practice may terminate that practice. As one respected authority has written, "(i)n the face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding." Mittenthal, "Past Practice and the Administration of Collective Binding Agreements," Proceedings of the 14th Annual Meeting of NAA, 30, 56 (BNA Books, 1961). Without prejudging future controversies that may or may not arise, I note that the City, through its Fire Chief, informed the Association in October, 1992, of its new interpretation of the language at issue.

Accordingly, on the basis of the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is sustained. The City shall restore to Capt. Nick Rouskey one day of sick leave for September, 1992.

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

By Stuart Levitan /s/
Stuart Levitan, Arbitrator

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