BEFORE THE ARBITRATOR

In the Matter
of the

Arbitration of a Dispute Between

WAUPACA CITY LAW ENFORCEMENT ASSOCIATION

and

CITY OF WAUPACA

Case 21
No. 55315
MA-9981

Appearances:

Mr. John Williamson, Jr., Attorney at Law, appearing on behalf of the Association.

Mr. Howard Healy, Attorney at Law, appearing on behalf of the City.

ARBITRATION AWARD

The Association and the City were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on September 25, 1997 in Waupaca, Wisconsin. After the hearing the parties filed briefs, whereupon the record was closed on November 18, 1997. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. Having reviewed the record and arguments in this case, the undersigned finds the following issue appropriate for purposes of deciding this dispute:

Does SOP 97-02 (Vacation Selection) violate the collective bargaining agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1995-96 collective bargaining agreement contained the following pertinent provisions:

ARTICLE 4 - Grievance Procedure

Only matters involving the interpretation, application or enforcement of this Agreement which may arise between the Employer and the association shall constitute a grievance and shall be processed in the following manner by the Employee or the Association Grievance Committee. Association grievances shall specify the names of the employee or employees affected.

. . .

ARTICLE 17 - Vacations

A.   All regular, full-time employees are eligible for paid vacations as follows:

After 12 months of service	12 working days
After 8 years of service	18 working days
After 13 years of service	24 working days
After 18 years of service	30 working days

B.   Vacations for an employee shall not be cumulative from year to year. The Chief of Police shall determine vacation schedules provided, however, that in setting vacations he will consider requests from employees which are received at least three (3) weeks prior to the beginning of the requested vacation. Should two or more employees within the same job classification request the same vacation period within the time set by the preceding sentence, the senior employee will be given first consideration. No more than two (2) consecutive weeks of vacation may be taken at a time unless with prior approval of the Personnel Committee.

. . .

ARTICLE 22 - Maintenance of Standards

Except as modified by the express terms of the Bargaining Agreement, the Employer agrees to maintain in substantially the same manner the present terms and conditions of employment as are in effect prior to the effective date of this Agreement.

FACTS

Standard Operating Procedures (hereinafter SOPs) deal with the Police Department's day-to-day operations. An example of an existing SOP is one dealing with shift selection. Departmental policies are more formal than departmental procedures. Departmental policies specify how police officers are to handle a particular situation while working in the field. Examples of policies are a use of force policy and a high-speed chase policy. Policies have to be approved by the City's Police and Fire Commission (PFC). Procedures are not approved by the PFC; instead, the Police Chief simply issues them on his own volition.

A new police chief, Bud O'Neill, started with the City in January, 1997. After reviewing the way vacations were selected, he decided that the Department's existing vacation selection process was problematic, and that it was necessary to plan vacations better. To accomplish this, he issued a SOP dealing with vacation selection. This SOP, numbered 97-02, provides as follows:

WAUPACA POLICE DEPARTMENT
STANDARD OPERATING PROCEDURE
97-02

VACATION SELECTION

PURPOSE:

> To establish a procedure for the scheduling of vacation time off. The Department wishes to ensure that all staff are afforded an equal opportunity to schedule time off. To meet community demands and ensure that adequate staff are available to work, the department is required to establish scheduling standards

PROCESS:

> After annual shift selection process is completed in December, the vacation time off scheduling process will begin. Based on seniority the following will be performed.

> 1. First selection will be for full week(s). Maximum is two consecutive weeks unless employee makes a request to the Personnel Committee and receives their approval.

2.   Selection will commence with the most senior employee and proceed to the least senior.

3.   The full week selection process will repeat until all full week selections are completed.

4.   The selection of less than a full work week(s) of vacation will be subject to the following process:

   A.   Based on seniority the process starts with the most senior employee and proceeds to the least.

   B.   Employee may select up to six (6) days of vacation/personal days throughout the year picking up to six (6) different non-consecutive single days.

5.   Employees may keep up to six (6) days (TOTAL) vacation days unscheduled at the end of the above two selection processes.

   A.   Employees may use these days during the year as needed subject to the current contract language (three week notice) and no doubling of staff off on the same day.

   B.   All days must be requested to be scheduled no later than September 1 each year.

EXCEPTIONS:

Department administrators will consider requests that may have two employees on vacation at the same time or a request to schedule/cancel with less than three week notice on a case by case basis. These exceptions will not be precedent setting, or subject to the grievance procedure. No overtime will be authorized to meet staffing needs if two employees request the same day off which would create a shortage of necessary staff to meet department needs.

EFFECTIVE DATE:

April 21, 1997

APPROVED BY:

  April 21, 1997   H. Bud O'Neill /s/
DATE   CHIEF OF POLICE

The Union grieved the issuance of SOP 97-02. After the grievance was filed, the City delayed implementing the new SOP until the grievance was resolved. Thus, SOP 97-02 has not yet been implemented.

Insofar as the record shows, this is the first SOP which has been grieved. No SOP previously existed for vacation selection.

The Association contends that a past practice exists concerning vacation selection. The City disputes the existence of same. Additional facts concerning the alleged practice will be set forth in the **DISCUSSION** section.

POSITIONS OF THE PARTIES

The Association contends that the vacation selection SOP violates the contract. It makes the following arguments to support this contention. To begin with, the Association sees this case, in part, as a past practice case. Consequently, it makes the arguments traditionally made in such cases, namely that a past practice exists which the Employer unilaterally changed. According to the Association, the practice was that if an employe requested a vacation three weeks prior to the date in question, the vacation request was granted. The Association argues that the vacation selection SOP changed this practice because it imposed restrictions on the taking of vacations which had not previously existed. The Association avers that if the City wants to change the existing practice, it must do more than issue a SOP; specifically, it must raise the subject in bargaining. Next, the Association contends the SOP violates two provisions of the contract. First, the Association argues the SOP conflicts with Article 17, B of the vacation provision in that it changes times when officers may choose their vacations, limits the number of non-consecutive single days of vacation they can take, and creates a system which lessens the value of seniority because junior employes could conceivably be given first consideration for vacation picks rather than senior employes. Second, the Association contends the SOP violates the Maintenance of Standards clause (Article 22). In the Association's view, the SOP substantially affects "the terms and conditions of employment" of bargaining unit employes, so it should have been "maintained in substantially the same manner" as previously existed. In sum then, the Association submits the SOP is violative of both parties' past practice and the contract. In order to remedy this alleged contractual breach, the Association asks that I sustain the grievance and rescind the SOP in its entirety. As part of the remedy, the Association also asks that the arbitrator order the Employer to "continue their current practice of scheduling vacations."

The Employer contends that the vacation selection SOP does not violate the contract. It makes the following arguments to support this contention. First, responding to the Association's past practice contention, the City disputes the Association's assertion that a binding past practice exists. As the Employer sees it, there simply is no such past practice. Next, the City contends the SOP does not violate Article 17, B. The City notes at the outset that Article 17, B specifically gives the Police Chief the right to determine vacation schedules. The

Employer submits that the SOP which the Chief issued governing vacation selection was both reasonable and consistent with Article 17, B. In its view, the contents of the SOP are simply "an expansion of the current language". The City disputes the Association's contention that the SOP takes away an officer's right to take vacation on short notice. To support this premise, the City calls attention to the "Exceptions" paragraph in the SOP wherein it provides that "department administrators will consider requests . . .to schedule/cancel with less than three weeks notice on a case by case basis." Finally, with regard to the Association's contention that it violated the Maintenance of Standards clause, the Employer argues that clause does not apply to the scheduling of vacations because vacation scheduling is specifically reserved to the Police Chief. The City therefore asks that the grievance be denied. In the event however that the arbitrator finds part(s) of the SOP to be violative of the contract, the Employer asks the arbitrator to make whatever changes are necessary for it (i.e. the SOP) to pass contractual muster.

DISCUSSION

At issue here is whether SOP 97-02 (Vacation Selection) violates the contract. The Association contends that it does while the City disputes that contention.

In contract interpretation cases such as this, I normally focus attention first on the contract language and then, if necessary, on the evidence external to the agreement such as an alleged past practice. In this case though, I have decided to structure the discussion so that this normal order is reversed. Thus, I will address the alleged past practice before looking at the contract language. My reason for doing so is this: if I address the contract language first and find it to be clear and unambiguous, there would be no need to look at any evidence external to the agreement (i.e. an alleged past practice) for guidance in resolving this contract dispute. Were this to happen, the case could be decided without any reference whatsoever to the alleged past practice. The problem with this approach is that the Association sees this case, in part, as a past practice case. Thus, if I were to decide this case without reviewing the alleged past practice, I would not have addressed one of the Association's main contentions. I have therefore decided to use this unique structural format and review the Association's past practice contention in order to complete the record.

Past practice is a form of evidence commonly used or applied to clarify ambiguous contract language. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given to the contract. Said another way, the actual practice under an agreement may yield reliable evidence of what a particular provision means. In order to be binding on both sides, an alleged past practice must be the mutually understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future.

That said, the focus turns to whether the Association established the existence of a practice governing vacation selection. To support its contention that a practice exists, the Association relies on the testimony of its sole witness, Jeff Johnson. He testified it was his understanding that if an employe asked for vacation three weeks in advance, the employe got the time off. The Association contends this action established a binding past practice which the Employer unilaterally changed when it issued the SOP in question.

Before deciding whether a practice exists, the following is noted about Johnson's testimony. In testifying about his view of the past practice, Johnson cited no specific instances as examples. Instead, he simply made the blanket assertion just noted. As a result, the record does not contain any evidence whatsoever concerning the underlying circumstances where previous vacation requests were granted.

Based on the following rationale, I find that even if past Police Chiefs granted vacation requests which were made three weeks in advance, that does not make it a past practice which is entitled to contractual enforcement. The Association's underlying premise that this is a past practice case overlooks the fact that not every pattern of conduct amounts to a binding past practice. Such is the case here. Although the contract language at issue has yet to be reviewed, suffice it to say here that the Police Chief is empowered to determine vacation schedules. By this I mean the Chief can grant or deny an employe's vacation request. The Chief does not have to grant all employe vacation requests, even those made three weeks in advance. That said, it appears from Johnson's testimony that Chief O'Neill's predecessor(s) normally granted employe vacation requests if they were made three weeks in advance. Thus, employes were normally allowed to take the time off which they requested. In my view, the key word in the previous sentence is "allowed". When someone "allows" something to happen, they obviously control whether it will or will not happen. I am convinced that is what previously happened with regard to past vacation requests. Insofar as the record shows, no employe ever took vacation without the Chief's approval. Instead, employes requested and obtained permission from the Chief to take specific dates off. If that had not been the case, and employes had simply taken vacation without the Chief's approval, then there would be an enforceable practice that employes (as opposed to the Chief) controlled vacation use because the Employer would have surrendered its right to control same. Here, though, the Employer never surrendered its right to control vacation use even though previous Chiefs normally granted employe vacation requests. Just because previous Chiefs granted vacation requests which they thought were consistent with department staffing does not give employes a right to control their vacation selection in all circumstances. As a result, I find that no enforceable past practice concern vacation selection exists.

Having so found, attention is turned to the pertinent contract language. Both sides agree that the contract language applicable here is Article 17, B. That section is part of the vacation provision. Section B provides as follows:

Vacations for an employee shall not be cumulative from year to year. The Chief of Police shall determine vacation schedules provided, however, that in setting vacations he will consider requests from employees which are received at least three (3) weeks prior to the beginning of the requested vacation. Should two or more employees within the same job classification request the same vacation period within the time set by the preceding sentence, the senior employee will be given first consideration. No more than two (2) consecutive weeks of vacation may be taken at a time unless with prior approval of the Personnel Committee.

My analysis of this language and its application herein follows. The first sentence provides that vacations are not cumulative. This sentence is inapplicable here. The second sentence consists of two parts. The first part specifies in plain terms that the Police Chief determines vacation schedules. Since it is the Chief who determines vacation schedules, employes cannot just take the vacation dates they want without the Chief's approval. The Chief still needs to approve the vacation dates which they select. The second part of the sentence goes on to provide that "in setting vacations he will consider requests from employees which are received at least three (3) weeks prior to the beginning of the requested vacation." Thus, in determining vacation schedules, the Chief has to "consider" vacation requests which are made within a certain time frame (i.e. three weeks prior to the requested time off). Although this sentence does not say so explicitly, I believe it is nonetheless implicit that in "considering" these vacation requests, the Chief cannot deny them (i.e. the vacation requests) for unreasonable, arbitrary or capricious reasons. The third sentence uses seniority as a tie breaker in the event of competing vacation requests; the specific language which is used is "the senior employe will be given first consideration." Finally, the fourth sentence provides that employes may not take more than two consecutive weeks of vacation absent prior approval by the Personnel Committee.

Having just reviewed the pertinent contractual vacation language, the focus turns to the SOP which the Chief issued governing vacation selection. After comparing the two (i.e. the SOP with Article 17, B), I find that the SOP conflicts with the contract language in the following respects. First, 5B of the SOP specifies that "all days must be requested to be scheduled no later than September 1 each year." The problem with this requirement is that there is nothing in Article 17, B that says employes have to choose all their vacation dates for the entire year by September 1. That being so, the inference is that employes can take their vacation days at any time of the year. The only requirement specified in Article 17, B for taking vacation is that employes submit their vacation request three weeks in advance. It is therefore held that 5B of the SOP conflicts with the contract language and cannot be harmonized with same. Second, 4B of the SOP limits the number of non-consecutive single days of vacation that an employe can take. Specifically, it limits employes to just six non-consecutive days per year. The problem with this restriction is that there is nothing in Article 17, B that says employes can take just six non-consecutive days of vacation per year. That being so, the inference is that employes can take all of their vacation in non-consecutive days if they want. It is therefore held that 4B of

the SOP conflicts with the contract language and cannot be harmonized with same. Third, the SOP creates a vacation selection process whereby full weeks of vacation are blocked off before non-consecutive days of vacation. For example, if an employe selected the entire third week in July for vacation, another employe could apparently not select a single day in that same week. In this scenario, if the employe who selects the full week was the senior employe, this would be consistent with the third sentence of Article 17, B which provides that if "two or more employes. . . request the same vacation period. . . the senior employe will be given first consideration." However, if in the scenario just noted the employe who selected the full week was the junior employe, this result would be inconsistent with the contract language just noted because the junior employe, rather than the senior employe, would be getting "first consideration". Finally, in the "Exceptions" paragraph of the SOP, it provides that "these exceptions will not be . . .subject to the grievance procedure." The problem with this restriction is that there is nothing in Article 4 (the grievance procedure) that specifically excludes vacation denials from being grieved. That being so, the inference is that vacation denials can be grieved.

It is therefore held that this sentence in the "Exceptions" paragraph conflicts with the contract language and cannot be harmonized with same.

Having just identified four conflicts between the contract language and the language in the SOP, the next question is what action should be taken to rectify same. The Employer essentially asks that I "blue-pencil" those portions of the SOP which do not pass contractual muster and leave the remainder of the procedure intact. I decline to do so. In my view, my responsibility in this matter is not to rewrite the SOP, but rather to decide whether the SOP does or does not pass contractual muster. I find it does not pass contractual muster as currently written. 1/ As a result, it is ordered that SOP 97-02 be rescinded in its entirety.

As part of the remedy, the Association asks that I also order the Employer to "continue their current practice of scheduling vacations." I am not ordering the City to do so because, as was noted previously, no enforceable past practice was found to exist.

Based on the foregoing and the record as a whole, the undersigned issues the following

AWARD

That SOP 97-02 (Vacation Selection) violates the collective bargaining agreement. In order to remedy this contractual breach, the City is directed to rescind SOP 97-02.

Dated at Madison, Wisconsin, this 13th day of February, 1998.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

ENDNOTES

1/ In light of this finding, it is unnecessary to address the Association's contention that the SOP also violates the Maintenance of Standards clause. As a result, no comment is made concerning same.

REJ/gjc
5627.WP1