BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SUPERIOR FIRE FIGHTERS, LOCAL #74, IAFF

and

CITY OF SUPERIOR

Case 163
No. 56439
MA-10285

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorney Timothy E. Hawks**, appearing on behalf of the Union.

Ms. Mary Lou Andresen, Human Resources Director, City of Superior, appearing on behalf of the City.

ARBITRATION AWARD

Superior Fire Fighters, Local #74, IAFF, hereinafter referred to as the Union, and the City of Superior, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union 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 terms of the agreement. The undersigned was so designated. Hearing was held in Superior, Wisconsin, on July 21, 1998. The hearing was transcribed and the parties filed post-hearing briefs which were exchanged on September 9, 1998. The parties reserved the right to file reply briefs and each party indicated that it would not file one and the record was closed on October 12, 1998.

BACKGROUND

The grievant was hired as a firefighter on August 26, 1997, and began a twelve (12) month probationary period. The grievant requested to take a day of vacation on January 3, 1998, which request was denied because the grievant had not completed probation. A grievance was filed over the denial of the grievant's vacation request and appealed to the instant arbitration.

ISSUE

The parties were unable to agree on a statement of the issues. The Union states the issue as follows:

> Did the City violate the collective bargaining agreement when it denied Lindzi Campbell the opportunity to take vacation that she had earned during her probationary period?
>
> If so, what is the appropriate remedy?

The City states the issue as follows:

> Did the City violate Article 1, second paragraph of Article 16 as grieved by the firefighters union when they denied Lindzi Campbell use of vacation during her probationary period?
>
> If so, what would the remedy be?

The undersigned frames the issue as follows:

> Did the City violate the parties' collective bargaining agreement when it denied the grievant the opportunity to take vacation during her probationary period?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 6
PREVAILING RIGHTS

a) All rights, privileges, and working conditions enjoyed by the employees at the present time, which have not been included in this Agreement, shall remain in full force, unchanged and unaffected in any way, during the term of this Agreement, unless they are changed in mutual consent.

. . .

c) The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

A. To direct all operations of the Fire Department.

B. To establish work rules and schedules of work.

C. To hire, promote, transfer, schedule and assign employees to positions with the Fire Department.

D. To suspend, demote, discharge and take other disciplinary action against employees.

E. To determine the order of layoff pursuant to 62.13 Wis. Stats. (1979).

F. To maintain efficiency of Fire Department operations.

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

H. To introduce new or improved methods or facilities.

I. To determine the methods, means and personnel by which Fire Department operations are to be conducted.

J. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

ARTICLE 7
RULES AND REGULATIONS

The City retains the right to establish reasonable work rules and rules of conduct. The Union agrees that its members shall comply with all Fire Department rules and regulations including those relating to conduct and work performance. The Employer agrees that departmental rules and regulations which affect working conditions and performance shall be subject to the grievance procedure.

. . .

ARTICLE 16
VACATIONS

Vacation allowances will be computed on a calendar year basis and will be granted to members of the bargaining unit to be picked by seniority as follows:

New employees hired between:

January 1 and March 31 of each calendar year will receive five (5) twenty-four (24) hour periods of vacation with pay.

April 1 and June 30 of each calendar year will receive three (3) twenty-four (24) hour periods of vacation with pay.

July 1 and September 30 of each calendar year will receive two (2) twenty-four (24) hour periods of vacation with pay.

October 1 and November 15 of each calendar year will receive one (1) twenty-four hour period of vacation with pay.

November 16 and December 31 of each calendar year will receive zero (0) periods of vacation with pay.

a) For members working an average fifty-six (56) hour week:

After one (1) full year of service in the Department through the sixth (6^{th}) year – five (5) twenty-four (24) hour periods of vacation with pay.

Beginning with the seventh (7^{th}) year of service with the Department through the fourteenth (14^{th}) year – seven (7) twenty-four (24) hour periods of vacation with pay.

Beginning with the fifteenth (15^{th}) year of service with the Department through the nineteenth (19^{th}) year – ten (10) twenty-four (24) hour periods of vacation with pay.

Beginning with the twentieth (20^{th}) year of service with the Department – twelve (12) twenty-four (24) hours (sic) periods of vacation with pay.

Beginning with the twenty-sixth (26) (sic) year of service with the Department – thirteen (13) twenty-four (24) hour periods of vacation with pay.

. . .

UNION'S POSITION

The Union contends that the City unilaterally changed the Fire Department's practice of allowing probationary employes to take vacation in violation of Article 6 a). It asserts that granting vacation to probationary employes is primarily related to rights, privileges and working conditions. The Union argues that the City's claim that scheduling of training and consistency of vacations policies throughout the City's departments and bargaining units do not outweigh the direct relationship of vacation to an employe's hours and working conditions.

It observes that the City suggests that vacation eligibility is not a right, privilege or condition of employment which is not included in the contract because of Article 16, Vacations, which has been included in the contract. The Union's answer is that Article 16 is silent on the question whether a probationary employe may take vacation during probation, so vacation eligibility has not been included in the contract. It claims that Article 6 a) should not be so narrowly construed so as to exclude any working condition related in any way to matters addressed in the contract. It insists the test is whether a working condition is at variance with an express provision; otherwise, any working condition not addressed in the contract but merely related to matters addressed would consign those working conditions to Article 6 c) and 7 rather than 6 a).

The Union argues that the denial of the grievant's vacation request constituted a change in a right, privilege and working condition. It maintains that the City's claim that there was no change because in the past it only granted vacation requests to probationary employes through oversight and inadvertence is contradicted by the Fire Chief's testimony that there was a practice of granting such requests and this was changed in May, 1997. It points out that this is confirmed by Captain Larson's testimony that the practice since 1977 was to grant vacation to probationary employes.

The Union denies that it ever consented to a change in this practice. It submits that changes in past practice are negotiated after the City notifies the Union of proposed changes as was attempted in the Department Labor-Management Committee in December, 1997, which change was refused by the Union. It contends that the City never gave any notice to the Union about a change in probationary employes' vacation scheduling. The Union maintains that the City's assertion of Union consent at the City-wide labor-management meeting on May 13, 1997, is erroneous as there was no identification that the policy would result in a change in the Fire Department and the Union representatives had no idea that the City was proposing a change in the practice. The Union notes that the proposed policy language is self-contradictory and contained a misprint so it did not make sense. It states that no consent can be construed from a lack of objection by the Union. It concludes that the Department's practice of granting probationary employes vacation during probation is a right, privilege and working condition protected under Article 6 a) of the agreement.

CITY'S POSITION

The City observes that the parties' agreement is silent on the issue of probationary employes taking vacation during their probationary period. It further notes that Article 16, paragraph 1, was first negotiated into the contract in the 1991-92 contract and focused solely on the amount of vacation earned by new employes so as to prevent partial day accumulations. It argues that it does not deal with when a probationary employe can take vacation but only prorated the vacation earned to become available once the employe completed probation.

The City contends that the Union participated in the City-wide Labor-Management Committee meetings where the policy relating to vacation and probationary employes was discussed and this policy was approved by the Committee on May 19, 1997. It notes that the Union never raised an issue with respect to this policy nor requested to bargain over the policy.

The City claims that testimony establishes a practice of not allowing probationers to take vacation until the completion of their probationary period. It states that in the last eight years only two were allowed to take vacation during their probation but this was an error and an error does not constitute a past practice.

It points out that the grievant was required as part of her training to read all City policies including the policy that she could not take vacation during her probationary period, yet she did not grieve it when she received such notice.

The City claims that its policy merely documented its past practice and the two errors did not change its practice.

In conclusion, the City asserts that it bargained the vacation accrual in good faith and documented the vacation practice giving the Union notice and including it in the document of the practice and it relied on the Union to correct any misunderstanding of the practice. It asserts that it did not violate the agreement or past practice in denying the grievant the use of vacation during her probationary period.

DISCUSSION

The first issue to be decided is what is the past practice, if any, with respect to probationers using vacation during their probationary period such that Article 6 a) may apply. The second issue then is whether the City changed it and the third issue is whether the Union consented to the change.

Past practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Elkouri & Elkouri, How Arbitration Works (BNA, 5th Ed., 1997 at p. 632).

The Union argues that there has been a practice of letting probationary employes use vacation during their probationary period and rely on the Chief's admission that this was the practice. The Chief's testimony is somewhat contradictory. He testified that prior to May 19, 1997, probationers were allowed to take vacation they may have accrued (Tr. 66). The Chief testified that when he was hired in 1974, he was not allowed to use vacation while on probation (Tr. 79). The Chief also disputed the testimony that there was a long-standing practice that an employe could take vacation during probation (Tr. 98), and named others who were denied vacation during probation (Tr. 99). Captain Larson who was hired in 1977 testified that he was allowed to take his vacation during his probationary period (Tr. 42). Captain Piper testified that he believed that Captain Larson was allowed to take vacation in his first year of employment. Captain Piper did not know if Larson's was the only such case. The City's records indicate that since 1991, only two firefighters took vacation during their probationary period (Ex. 14). The City argues that these two instances were mistakes. The testimony of the Chief referred to by the Union may be only to the two or three instances where employes on probation were permitted to use vacation. The Union's president was one of those who was allowed to use vacation during his probationary period and he testified that the practice was that employes are able to take earned vacation (Tr. 16). He did not testify the practice was to allow vacation during probation.

The language of the 1991-93 contract stated that vacation will be granted for members working an average fifty-six (56) hour week: "After one (1) full year of service in the Department through the sixth (6^{th}) year – five (5) twenty-four (24) hour periods of vacation with pay" (Ex. 12). The word "after" taken in its normal meaning of "following later" than one year would infer that vacation would not be granted until the completion of one (1) year of service in the Department. The 1994-95 contract contained a new section which prorates 24 hour periods of vacation depending on when an employe is hired (Ex. 1). The testimony established that this was added simply to avoid a vacation amount that was less than 12 hours which could occur when calculations are made on a calendar-year basis as required by the contract. No evidence established that this change in allowances for new hires permitted the employe to take the vacation in the next calendar year before the completion of probation. A review of the record fails to convince the undersigned that these is any clear and readily ascertainable past practice of granting vacations to employes during their probationary period. At best the majority of the past practice with some exceptions is that employes were not granted vacation during their probationary periods. Thus, it is concluded that the right to take vacation during a new hire's probationary period is not a right, privilege or working condition enjoyed by employes and thus there is no violation of Article 6 a).

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

AWARD

The City did not violate the parties' collective bargaining agreement when it denied the grievant the opportunity to take vacation during her probationary period, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 24th day of November, 1998.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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